NCACC 50th Annual Meeting & Conference - Detroit, MI

July 30 - August 3, 2023

Allyship in the Workplace
Dr. Jay B. Marks

Avoiding Decisional Delay in the Appellate Courts
Colette M. Bruggman, Oona Mallett, and John Doerner

Moving Forward with Optimism and Resilience
Jean Steel (OPPERMAN SPEAKER)

Survey of Key Employment Laws, Regulations, and Practices
Edward Zobeck

Data Analytics in Litigation
Mike Bird

Courthouse Security Training
Nick P. Barsetti

Access to Justice: Generative AI and the Courthouse of the Future
Hon. Bridget Mary McCormack

Expanding Access to Justice with Prisoner E-Filing
Colette M. Bruggman, Jamie Kambich, Erin Lennon, Theresa McCarthy, Larry Royster, and Tristen Worthen

Plain Language in Court Documents
Julie Clement

Embracing Well-Being in Law
Chief Justice Beth Walker

Connections, Development, and Teambuilding
Angelia Meaux Caron

Technology & Legal Ethics
Professor Gary Marchant

What's Bugging You?
Polly Brock and Laura Roy

July 30- August 3, 2023

Saturday, July 29, 2023

	9:00 a.m. – 12:00 p.m.	**Executive Committee Meeting & Breakfast**	
	2:00 p.m. – 5:00 p.m.	**Registration**	Pontchartrain Room

Sunday, July 30, 2023

	9:30 a.m. – 2:00 p.m.	**Registration**	Pontchartrain Room
	1:45 p.m. – 2:15 p.m.	**New Members and First Time Attendees Orientation**	Summit A
	1:45 p.m. – 2:15 p.m.	**Family and Guest Orientation**	Summit C
	2:30 p.m. – 4:15 p.m.	**Roll Call of the States and Business Meeting** (Session I) **(MEMBERS ONLY)**	Windsor Rooms A & B
	BREAK: 15 MINUTES		
60	4:30 p.m. – 5:30 p.m.	**50th Anniversary and History of NCACC (Guests welcome)**	Windsor Rooms A & B
	BREAK: 15 MINUTES		
	5:45 p.m. – 7:30 p.m.	**Reception**	Grand Ballroom A
	7:30 p.m. – 9:00 p.m.	**Education Fund Auction & Morgan Thomas Slideshow**	Grand Ballroom A
	9:00 p.m. – 12:00 a.m.	**Hospitality Room Opening Night – Wear Your State Night/Group Karaoke**	TBD

Monday, July 31, 2023

	7:00 a.m. – 8:30 a.m.	**Breakfast (MEMBERS ONLY)**	Top of the Pontch
	8:20 a.m. – 8:30 a.m.	**Morning Announcements**	Windsor Rooms A & B
90	8:30 a.m. – 10:00 a.m.	**Allyship in the Workplace** Dr. Jay B. Marks	Windsor Rooms A & B
	BREAK: 15 MINUTES		
90	10:15 a.m. – 11:45 a.m.	**Avoiding Decisional Delay in the Appellate Courts** Colette M. Bruggman – Clerk/Executive Officer, California Court of Appeal, Third Appellate District Oona Mallett – Managing Attorney, California Court of Appeal, Third Appellate District John Doerner – National Center for State Courts	Windsor Rooms A & B
	LUNCH ON YOUR OWN:	1 HOUR, 30 MINUTES	
90	1:15 p.m. – 2:45 p.m.	**Moving Forward with Optimism and Resilience** ***OPPERMAN SPEAKER*** Jean Steel	Windsor Rooms A & B

Educational Session | Business Session | Vendor Show | Vendor Supported or Sponsored

	BREAK: 15 MINUTES		
60	3:00 p.m. – 4:00 p.m.	**Survey of Key Employment Laws, Regulations, and Practices: Compliance, Leader Education, and Culture** Edward Zobeck – HR Consultant, National Center for State Courts	Windsor Rooms A & B
60	4:00 p.m. – 5:00 p.m.	**Data Analytics in Litigation** Mike Bird – Librarian, University of Detroit Mercy Law School	Windsor Rooms A & B
	6:00 p.m. – 10:30 p.m.	**Henry Ford Museum of American Innovation** Hosted by Thomson Reuters (First bus load in front of hotel at 5:45)	
	9:00 p.m. – 12:00 a.m.	**Hospitality Room – Motown Music Night**	TBD

Tuesday, August 1, 2023

	7:00 a.m. – 8:30 a.m.	**Breakfast (MEMBERS ONLY)**	Top of the Pontch
	7:00 a.m. – 8:30 a.m.	**Past President's Breakfast**	Crowne Room
	8:20 a.m. – 8:30 a.m.	**Morning Announcements**	Windsor Rooms A & B
90	8:30 a.m. – 10:00 a.m.	**Courthouse Security Training** Nick P. Barsetti – Court Security Division, Office of Court Administration, Texas	Windsor Rooms A & B
	10:00 a.m. – 10:15 a.m.	**Vendor Introductions & Opening of Vendor Show**	Windsor Room C
	BREAK: 15 MINUTES		
	10:30 a.m. – 11:00 a.m.	**Vendor Showcase I** Thomson Reuters – C-Track LexisNexis Mission Critical Partners	 Summit A Summit B Summit C
	11:00 a.m. – 11:30 a.m.	**Vendor Showcase II** Thomson Reuters – Case Center Extract Systems I3 Verticals (ImageSoft)	 Summit A Summit B Summit C
	11:30 a.m. – 12:00 p.m.	**Vendor Showcase III** Thomson Reuters – Westlaw Precision LexisNexis File and ServeXpress	 Summit A Summit B Summit C
	12:00 p.m. – 12:50 p.m.	**Vendor Box Lunch**	Top of the Pontch
	12:30 p.m. – 1:20 p.m.	C-Track Users Group Meeting	Summit A
	12:50 p.m. – 1:20 p.m.	**Vendor Showcase IV** Clearbrief Bloomberg Law	 Summit B Summit C
	BREAK: 10 MINUTES		
60	1:30 p.m. – 2:30 p.m.	**Access to Justice: Generative AI and the Courthouse of the Future** Hon. Bridget Mary McCormack – President and Chief Executive Officer, American Arbitration Association, and Strategic Advisor to the Future of the Profession Initiative, University of Pennsylvania Carey Law School	Windsor Rooms A & B

Educational Session | Business Session | Vendor Show | Vendor Supported or Sponsored

	BREAK: 5 MINUTES		
80	2:35 p.m. – 3:55 p.m.	**Expanding Access to Justice with Prisoner E-Filing** Colette M. Bruggman – Clerk/Executive Officer, California Court of Appeal, Third Appellate District Jamie Kambich – Washington AOC IT Erin Lennon – Clerk, Washington Supreme Court Theresa McCarthy – Deputy Clerk, Louisiana Supreme Court Larry Royster – Clerk, Michigan Supreme Court Tristen Worthen – Clerk, Washington Court of Appeals: Division III	Windsor Rooms A & B
35	3:55 p.m. – 4:30 p.m.	**Apply Education – What have we learned? (MEMBERS ONLY)**	Windsor Rooms A & B
	4:30 p.m. – 5:30 p.m.	**Vendor Happy Hour**	Top of the Pontch
	6:00 p.m. – 10:00 p.m.	**Detroit Princess Riverboat** Hosted by LexisNexis	
	9:00 p.m. – 12:00 a.m.	**Hospitality Room – Hawaiian Luau Night**	TBD

Wednesday, August 2, 2023

	6:30 a.m. – 7:30 a.m.	**Fun Run/Walk**	
	7:00 a.m. – 8:30 a.m.	**Breakfast (MEMBERS ONLY)**	Top of the Pontch
	8:20 a.m. – 8:30 a.m.	**Morning Announcements**	Windsor Rooms A & B
60	8:30 a.m. – 9:30 a.m.	**Plain Language in Court Documents** Julie Clement – Deputy Clerk, Michigan Supreme Court	Windsor Rooms A & B
60	9:30 a.m. – 10:30 a.m.	**Embracing Well-Being in Law** Chief Justice Beth Walker – Supreme Court of Appeals of West Virginia	Windsor Rooms A & B
	BREAK: 15 MINUTES		
75	10:45 a.m. – 12:00 p.m.	**Connections, Development, and Teambuilding (Part I)** Angelia Meaux Caron – Leadership Development Administrator, Colorado Judicial Branch	Windsor Rooms A & B
	LUNCH ON YOUR OWN:	1 HOUR, 30 MINUTES	
90	1:30 p.m. – 3:00 p.m.	**Connections, Development, and Teambuilding (Part I)** Angelia Meaux Caron – Leadership Development Administrator, Colorado Judicial Branch	Windsor Rooms A & B
	3:00 p.m. – 5:00 p.m.	**Optional Architectural Walking Tour (Limited spots available)**	
	3:00 p.m. – 7:00 p.m.	**Joseph Lane Memorial Golf Tournament**	
	9:00 p.m. – 12:00 a.m.	**Hospitality Room – Sports Team Gear Night**	TBD

Thursday, August 3, 2023

	7:30 a.m. – 8:30 a.m.	**Breakfast (MEMBERS ONLY)**	Top of the Pontch
	8:20 a.m. – 8:30 a.m.	**Morning Announcements**	Windsor Rooms A & B
60	8:30 a.m. – 9:30 a.m.	**Technology & Legal Ethics** Professor Gary Marchant – Regents Professor of Law and Director of the Center for Law, Science and Innovation, Arizona State University	Windsor Rooms A & B

Educational Session | Business Session | Vendor Show | Vendor Supported or Sponsored

	BREAK: 5 MINUTES		
60	9:35 a.m. – 10:35 a.m.	**What's Bugging You? (MEMBERS ONLY)** Polly Brock – Clerk, Court of Appeals, Colorado Laura Roy – Clerk, Missouri Court of Appeals, Eastern District	Windsor Rooms A & B
45	10:35 a.m. – 11:15 a.m.	**Applying Education – What We've Learned (MEMBERS ONLY)**	Windsor Rooms A & B
	BREAK: 10 MINUTES		
	11:25 a.m. – 12:30 p.m.	**Business Meeting** (Session II) **(MEMBERS ONLY)**	Windsor Rooms
	12:30 p.m. – 2:00 p.m.	**Awards Luncheon**	Top of the Pontch
	2:15 p.m. – 3:15 p.m.	**Critique Session**	Top of the Pontch
	9:00 p.m. – 12:30 a.m.	**Hospitality Room**	TBD

The NCACC annual conference is paid for with NCACC funds, most of which are derived from non-vendor sources, such as dues, registration fees and member contributions to the Education Fund. All the educational sessions are supported entirely by non-vendor funds. Some conference events, particularly social activities, are paid for, directly or indirectly, by vendors who do business with courts. Programs and events that are supported, in whole or in part, with vendor funds are clearly identified on the conference schedule.

Members are urged to review the ethics rules of their jurisdictions to determine whether they may participate in the events supported by vendors. An advisory opinion prepared by the Judicial Conference of the United States Committee on Codes of Conduct, Advisory Opinion No. 91, Solicitation and Acceptance of Funds from Persons Doing Business with the Courts, June 2009, discusses some of the issues related to the use of vendor funds for conferences involving federal court personnel.

A "buy-out" option has been implemented which may enable members who would otherwise be ethically unable to participate in a vendor-sponsored event to do so. Members have the option of paying for a vendor-supported activity themselves. Members who wish to exercise this option should contact the conference host about the cost of the event and the procedure for payment.

Educational Session Business Session Vendor Show Vendor Supported or Sponsored

ALLYSHIP IN THE WORKPLACE

Dr. Jay B. Marks

Dr. Jay Marks worked as a Diversity & Equity Consultant with the Intermediate School District in Oakland County, Michigan, serving and supporting the diversity, equity, and inclusion needs of the 28 school districts. Currently, Dr. Marks is an independent consultant in the area of diversity, equity, inclusion, and justice on the local and national level.

His academic credentials include a B.S. degree from Western Michigan University (1990), M.A. degree from University of Detroit Mercy (1995), and an Education Specialist Certificate (1997) and Ph.D. (2005) in Curriculum and Instruction, both from Wayne State University.

ALLYSHIP IN THE WORKPLACE RESOURCES

Compiled by Jay B. Marks and Associates Educational Consulting Services

- Toolkit: Guide to Allyship
- Report: The State of Allyship Report
- Articles:
  - Allyship - The Key To Unlocking The Power Of Diversity
  - Allyship in the Workplace
  - Why Allyship Is Good For Business
  - Be a Better Ally

The Guide to Allyship is an open-source starter guide to help you become a more thoughtful and effective ally.

Want to use or feature this guide? **Check the license.**

Found the guide useful? **Buy me a cup of tea.**

To be an ally is to...

1. Take on the struggle as your own.
2. Transfer the benefits of your privilege to those who lack it.
3. Amplify voices of the oppressed before your own.
4. Acknowledge that even though you feel pain, the conversation is not about you.
5. Stand up, even when you feel scared.
6. Own your mistakes and de-center yourself.
7. Understand that your education is up to you and no one else.

 So you want to be an ally...

Welcome to the *Guide to Allyship.*

Think of this guide as one of many starting points in your journey to become a better ally. This guide isn't meant to be comprehensive nor is it perfect. There are people far more versed than I, who have dedicated their life's work to this sort of education.

In light of recent events and tragedies, I've been hearing the word "ally" a lot. Many people want to be an "ally", and even more people are unable to fulfill the duties allyship requires.

I use the word "ally" loosely because I find it overused and often abused by those who label themselves "allies." Despite its current misuse, using a different word would only cause confusion. As you read through this guide, be aware that your definition of "ally" may not be the same as the definition I'll introduce you to.

What's so special about this guide?

There are many great guides out there, and I acknowledge their existence. What's different about this guide is that it's open source (any one can contribute to it) and it doesn't get into specifics: racism, transphobia, gender discrimination, etc. and that's by design.

This guide can't and shouldn't be everything to you. At some point, you need to take responsibility and further your education. When you're done with the guide, please find ways to learn more.

Finally, this is a resource to help anyone considering allyship better understand the pros and cons of what being an ally entails. Allies understand their role in collaboration with people whose lives are affected daily by systemic oppression.

Don't take the responsibility of being an ally lightly.

This Guide covers the following...

📖 How the Guide came to be

In the summer of 2016, someone I considered an ally stood by and watched as I, a Black person, was berated by a racist. To make matters worse, I had a conversation with this person earlier in the day about the power allies can wield in situations of discrimination. But when the time came for them to take action, they were more interested in protecting their comfort.

Upset, I couldn't understand what happened. Did the conversation we had not get through? What didn't they step up? Then it dawned on me:

Saying you're an ally is much easier than actually being an ally. Saying you're an ally looks good on paper, especially if you're never questioned about your inaction.

Many self-defined "allies" wear the phrase and ideology like an article of clothing, easily discarded when it's no longer fashionable to wear.

If only those from marginalized and underinvested communities could cast away the identities marking them as targets with such ease.

🤔 What is an ally?

I noted before that I used the word "ally" loosely. In fact, I personally no longer use the word. However, I *do* think it's a good starting place for those learning to be better allies. I also believe there's an opportunity to explore a better definition of the word. The best definition of "ally" (that I've found) comes from author Roxane Gay in her article for *Marie Claire*, **"On Making Black Lives Matter."** In it, she notes:

> *Black people do not need allies. We need people to stand up and take on the problems borne of oppression as their own, without remove or distance.*
>
> *We need people to do this even if they cannot fully understand what it's like to be oppressed for their race or ethnicity, gender, sexuality, ability, class, religion, or other marker of identity.*
>
> *We need people to use common sense to figure out how to participate in social justice.*

To recap: Being an ally doesn't necessarily mean you fully understand what it feels like to be oppressed. It means you're taking on the struggle as your own.

An individual from an underinvested community cannot easily cast away the weight of their identity (or identities) shaped through oppression on a whim. They carry that weight every single day, for better or for worse. An ally understands that this is a weight that they, too, must be willing to carry and never put down.

Why allies are necessary

Anyone has the potential to be an ally. Allies recognize that though they're not a member of the underinvested and oppressed communities they support, they make a concerted effort to better understand the struggle, every single day.

Because an ally might have more privilege and recognizes said privilege, they are powerful voices *alongside* oppressed ones.

✊🏿 The work of allyship

Being an ally is hard work.

Many would-be allies fear making mistakes that could have them labeled as "-ist" or "-ic" (racist, sexist, transphobic, homophobic, etc). But as an ally, you're also affected by a system of oppression. This means that as an ally, there is much to unlearn and learn—mistakes are expected. You need to

own this as fact and should be willing to embrace the daily work of doing better.

> **As an ally, you need to own your mistakes and be proactive in your education, every day.**

If you refuse to acknowledge that your words and actions are inherently shaped and influenced by **systemic oppression**, you're setting up yourself to fail.

Lack of self-awareness is not a trait of an ally. You'll be complicit in the oppression of those you intend to help. If you choose not to understand this, but label yourself an "ally", you're essentially a wolf in sheep's clothing. You'll find ways to infiltrate vulnerable communities and wield far more power than someone who is outwardly "-ist" or "-ic" because you're "trusted."

Just as society will not change overnight, neither will you. Here are some important do's and don'ts to consider as you learn, grow, and step into the role of an ally.

The Dos

- **Do** be open to listening
- **Do** be aware of your implicit biases
- **Do** your research to learn more about the history of the struggle in which you are participating
- **Do** the inner work to figure out a way to acknowledge how you participate in oppressive systems
- **Do** the outer work and figure out how to change the oppressive systems
- **Do** use your privilege to amplify (digitally and in-person) historically suppressed voices
- **Do** learn how to *listen* and accept criticism with grace, even if it's uncomfortable
- **Do** the work every day to learn how to be a better ally

The Don'ts

- **Do not** expect to be taught or shown. Take it upon yourself to use the tools around you to learn and answer your questions
- **Do not** participate for the gold medal in the "Oppression Olympics" (you don't need to compare how your struggle is "just as bad as" a marginalized person's)
- **Do not** behave as though you know best
- **Do not** take credit for the labor of those who are marginalized and did the work before you stepped into the picture
- **Do not** assume that every member of an underinvested community feels oppressed

👢 Boots & Sandals: How to handle mistakes

Contributed by Presley Pizzo. Please credit Presley when referencing this section.

While mistakes are to be expected, what's the best way to go about resolving them?

Note: Parts of this section were originally based on **Kayla Reed's (@iKaylaReed)** tweet sharing her definition of what it means to be an ally. It's another great definition that'll help you follow along with this section!

Imagine your privilege is a heavy boot that keeps you from feeling when you're stepping on someone's feet or they're stepping on yours, while oppressed people have only sandals. If someone says, "ouch! You're stepping on my toes," how do you react?

Because we can think more clearly about stepping on someone's literal toes than we usually do when it comes to oppression, the problems with many common responses are obvious:

- **Centering yourself:** "I can't believe you think I'm a toe-stepper! I'm a good person!"
- **Denial that others' experiences are different from your own:** "I don't mind when people step on my toes."
- **Derailing:** "Some people don't even have toes, why aren't we talking about them instead?"
- **Refusal to center the impacted:** "All toes matter!"
- **Tone policing:** "I'd move my foot if you'd ask me more nicely."
- **Denial that the problem is fixable:** "Toes getting stepped on is a fact of life. You'll be better off when you accept that."
- **Victim blaming:** "You shouldn't have been walking around people with boots!"
- **Withdrawing:** "I thought you wanted my help, but I guess not. I'll just go home."

In reality, most of us naturally know the right way to react when we step on someone's toes, and we can use that to help us learn how to react when we commit microaggressions.

- **Center the impacted**: "Are you okay?"
- **Listen to their response and learn.**
- **Apologize for the impact, even though you didn't intend it:** "I'm sorry!"
- **Stop the instance:** move your foot
- **Stop the pattern:** be careful where you step in the future. When it comes to oppression, we want to actually change the "footwear" to get rid of privilege and oppression (sneakers for all!), but metaphors can only stretch so far!

Reacting in a fair and equitable way isn't about learning arbitrary rules or being a doormat. Rather, it's about restoring and maintaining dignity and respect for everyone involved - both the person who is hurt, and you. Still, it's hard to remember in the moment, because these issues are so charged in our society. As such, it may be helpful to reframe the situation so that you don't feel defensive.

You may have noticed it's easier to handle being corrected about something you didn't know if you're grateful for and even open to the opportunity to learn rather than embarrassed to have been wrong. Being able to let go of your ego is an incredibly important skill to develop.

Try starting with "Thanks for letting me know" to put yourself in a better frame of mind. If after you say that, you need to take some time to think about the situation, that's fine, too. Just remember that this isn't about changing the other person's frame of mind. They're allowed to be upset about being oppressed.

💬 How to apologize

You've made a mistake and you want to apologize. Where do you begin?

What is an apology?

Before you can apologize, you need to know what an apology is.

Apologies are social contracts that hold you accountable. They tell others that you are taking responsibility, are open to the consequences of your actions, and plan to do better in the future.

Bad apologies are performances meant to protect pride and ego. They exist to make the apologizer feel and look good, while defending their intent.

Good apologies are heartfelt acts that let go of pride and ego. They center the pain of the impacted, regardless of the apologizer's intent.

Think of pain as a gradient—it doesn't have to be extreme to have a significant impact. Accidentally misgendering someone can cause them pain. Stepping on someone' toes can cause them pain.

Attributes of a good apology

Apologies aren't a magic fix and won't solve mistakes of the past, but there are a few attributes that make for a good apology.

- **Timely**
  Delivered at the right moment in the right place and time.

  Consider the context in which you want to apologize and how that might affect not only you but also the person receiving your apology.

  Context can include your current mental state (are you feeling defensive? Upset? Nervous? Calm?), the physical space you're in (private

or public area), or the apology's medium (phone, online, text message, in person).

- **Respects boundaries**
  Given when the person receiving the apology consents to it.

  Your desire to give an apology *right now* doesn't mean that the receiver is ready for it. Some people need space to process, and you should respect that. When they're willing to reconnect, if at all, they may let you know (or they may not).

- **Self-aware**
  Know that the act of apology may not lead to the closure you expect.

  The apology receiver may choose to never interact with you again. Either after you give an apology or before you give it. You have to find a way to make peace with that. Do not pressure or shame someone into accepting your apology.

  One of the greatest gifts we can give ourselves is learning how to create closure within rather than expecting other people to give it to us.

- **Reflective**
  Signals that the apologizer is taking full responsibility for their actions.

  Apologizing means letting go of your ego to show that you care about someone and want to make things right. Good apologies center the person being apologized to. They also take direct ownership of the actions that caused pain by naming them clearly.

🎉 Contribute to this Guide

This Guide is open-source, meaning that anyone can contribute. I'm a queer Black femme and my voice should not be the only one shaping this guide.

If you identify as a member of an underinvested community and want to contribute, please submit a pull-request on this **GitHub repository.**

If you aren't a GitHub user and would still like to contribute, send me an email at **guidetoallyship [to] byamelie [dot] co**.

💌 Support & share this Guide

This Guide is a labor of love and provided as a shareable resource for you to use. Please make sure to credit back to the site if you decide to use any content here.

And if you've found this Guide helpful, feel free to show your support and **buy me a cup of tea.**

a **Heartshift Collective** project created by **amélie lamont**

Please provide your feedback for this session.

Dr. Jay B. Marks

Session Survey

AVOIDING DECISIONAL DELAY IN THE APPELLATE COURTS

Colette M. Bruggman, Oona Mallett, and John Doerner

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Colette is a Mandan, North Dakota, native and graduate of Mandan High School. Colette received her Bachelor of Business Administration from the University of North Dakota in 1984 with a degree in accounting and her Juris Doctor from the University of North Dakota school of law in 1987. She was admitted to the State Bar Association of North Dakota as an attorney in 1987.

Colette was named Clerk/Executive Officer for the California Court of Appeal, Third Appellate District, in Sacramento, on January 1, 2023, after first serving as its Assistant Clerk/Executive Officer since February 2009. Previously, Colette was Chief Deputy Clerk for the North Dakota Supreme Court from July 1992 through February 2009. Prior to joining the North Dakota Supreme Court, Colette practiced law with the Vogel Law Firm in Mandan and Legal Assistance of North Dakota in Bismarck.

Oona Mallett
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Oona Mallett joined the Third District Court of Appeal as an attorney in 2014, where she worked

in the court's central attorney pool before joining the chambers staff of the Honorable M. Kathleen Butz. She then moved to the court's writ staff before becoming the court's first female managing attorney in December 2021. Oona was awarded two Bachelor's degrees from the University of the Pacific in 2003, one in Global Economic Relations and one in Spanish. She then earned her master's degree in Spanish from the University of California at Davis in 2005 before earning her Juris Doctor from McGeorge School of Law in 2009. She was admitted to the State Bar of California as an attorney in December 2009.

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John Doerner joined the National Center for State Courts in 2007, bringing a broad range of experience in judicial administration and appellate courts. He has directed over 100 consulting projects in both trial and appellate courts in 42 states and US Territories. Before joining NCSC, he served as Clerk of Court & Court Administrator for the Colorado Court of Appeals. Prior to that appointment, Mr. Doerner was the Manager of Operations Support for the Colorado Judicial Branch. John was awarded a Bachelor's degree in Business Administration by the College of St. Francis (Joliet, Illinois) in 1975. He also earned an MBA degree from the University of Colorado at Denver in 1987 and is licensed as a Certified Public Accountant by the State of Colorado.

MODEL TIME STANDARDS

for

STATE APPELLATE COURTS

Conference of CHIEF JUSTICES

MODEL TIME STANDARDS

for

STATE APPELLATE COURTS

August 2014

A joint project of the Court Management Committee of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA), in conjunction with participation from the Conference of Chief Judges of the State Courts of Appeal (CCJSCA), the National Conference of Appellate Court Clerks (NCACC) and the American Bar Association (ABA).

PROJECT COMMITTEE

Hon. Linda S. Dalianis, Chief Justice, New Hampshire Supreme Court, co-chair
Hon. Roger S. Burdick, Chief Justice, Idaho Supreme Court, co-chair
Hon. Ann A. Scott Timmer, Justice, Arizona Supreme Court
Hon. William B. Murphy, Chief Judge, Michigan Court of Appeals
Frank Broccolina, State Court Administrator of Maryland (Retired)
David Slayton, State Court Administrator of Texas
Christie S. Cameron Roeder, Clerk of the North Carolina Supreme Court
Joseph Lane, Chief Executive Officer, California Court of Appeal-2nd Appellate District
Tillman J. Breckenridge, Reed Smith LLP, Washington, D.C.
John J. Bursch,, Grand Rapids, MI; formerly State of Michigan Solicitor General

PROJECT STAFF

John P. Doerner, Principal Court Management Consultant, National Center for State Courts

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Executive Summary

Time to disposition standards have existed in varying forms in a number of jurisdictions since the mid-twentieth century. The American Bar Association (ABA) played a leading role in these efforts by establishing speedy trial standards for criminal cases in the 1960s and time standards for other case types in the 1970s. These standards were revised in 1984 and again in 1992. The ABA also recommended time standards for state supreme courts and intermediate appellate courts in the *Standards Relating to Appellate Courts*[1] originally published in 1977 and amended in 1987 and again in 1994. A small number of appellate courts adopted the ABA developed standards and a few others adjusted them for their own internal aspirational guidelines, but overall, the standards were widely seen as unattainable.

This current project came about through the efforts of the Joint Court Management Committee of the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA). Funding was provided by the State Justice Institute (SJI) and project committee participants included members of CCJ and COSCA, as well as the Council of Chief Judges of the State Courts of Appeal (CCJSCA), the National Conference of Appellate Court Clerks (NCACC) and the ABA.

As the first phase of this effort, the project committee conducted preliminary research to ascertain which state appellate courts currently have time standards in place. Subsequent to that research, the committee developed and distributed surveys to all state and U.S. territory appellate courts, based on whether those courts had time standards in place.

These model time standards are designed to allow state appellate courts to adopt them as presented in this document, or to modify them to establish time standards based on their own particular circumstances. Modifying the model standards to local circumstances will create variation from one state to the next, making interstate comparisons less meaningful. However, the process of adjusting time standards to local conditions is necessary for realistic implementation of the standards throughout a nation of diverse courts. Consequently, any substantial deviations from the model time standards should be based on the requirements for doing justice in an individual state and not merely on disagreement with the concept of a national time standard. States with multiple intermediate appellate courts having the same case type jurisdiction

[1] *Standards of Judicial Administration, Volume III; The Standards Relating to Appellate Courts, 1994 Edition,* Copyright © 1977, 1995 American Bar Association

should agree upon and adopt a common set of time standards.

Use of the term "standards" does not imply that the model times presented in this document are intended to serve as overarching requirements that all state appellate courts would be expected to achieve. Many factors impact an individual court's ability to decide cases in accordance with any established timeline. The model standards should not be seen as a single national standard that should be imposed upon the appellate courts. Achievement of the standards presumes that appellate courts are adequately staffed and funded and that courts are utilizing their available resources effectively. At present, the model time standards presented in this document are likely to be fully achievable in a modest number of appellate courts, partially achievable in most others, and unattainable in the remainder. However, simply because an appellate court is not presently in a position to achieve these model time standards is not to say that they are without value. Use of these model time standards can provide appellate courts with a set of aspirational goals, inform legislatures in providing sufficient funding to enable courts to achieve those goals, and guide future revisions of applicable court rules and operating procedures that can have an impact on how long appellate courts take to resolve the cases before them.

Ideally, these model appellate court time standards will provide the courts with the information and impetus to implement their own time standards or reexamine their previously established time to disposition goals. Such efforts should be undertaken in accordance with Section VII of this document and be led by the chief justice of the COLR and the chief judge of the IAC who are in the best position to understand the effects of implementing the standards, including necessary procedural changes and resource requirements.

Common values among state appellate courts include accountability, efficiency and timeliness, productivity and quality. These values, in conjunction with the responsibilities of all appellate courts, form a foundation upon which time standards can be established. In an era of limited funding for state courts, it is increasingly important to demonstrate how well courts are operating relative to achieving their mission and goals, and accountability for their use of public resources. The timely resolution of cases is probably the most widely accepted objective measure of court operations. In addition, the appellate courts, as leaders within the Judicial Branch, are expected to lead by example. Institutional accountability of the Judicial Branch can be undermined when leadership does not demonstrate a willingness to establish time-based goals for the resolution of appellate cases. When an appellate court establishes time standards for itself, it is making a commitment toward

ensuring efficiency and timeliness in the resolution of appellate cases. This commitment is enhanced by the regular measurement of actual case resolution times with comparisons to the time standards. Publishing the actual results of a comparison between actual time to resolution and the time standards also demonstrates organizational accountability. Releasing this information may sometimes require an appellate court to acknowledge or explain a result that falls below the established standard and, if appropriate, make efforts to address the cause. However, when managed effectively, the response to such a temporary distress can build the court's credibility and engender public trust and confidence.

It must be acknowledged, that appellate courts need adequate funding and staffing to effectively fulfill their constitutional and statutory duties. This includes an appropriate number of judges to hear and decide cases in accordance with the adopted time standards. The inability of an appellate court to achieve its time standards can be an indicator that the court has an insufficient number of judges or judicial staff (law clerks and staff attorneys). However, to justify a request for more judges or staff, judicial leaders must first be able to demonstrate that they have examined all of the other potential reasons for the court's lack of timeliness.

The judicial leaders should be able to demonstrate that they have thoroughly evaluated whether they are making the best use of their available staff, that court procedures are simple, clear and streamlined, and that they are efficiently using their equipment and technology before requesting additional resources to reduce a backlog or maintain timeliness. It may also be appropriate to conduct a workload study, estimating the average amount of time that is devoted to each type of case in order to identify the number of judges and staff members needed in providing quality and timely resolutions of the number and type of cases in the court.

Model Time Standards for State Appellate Courts

In developing this model, the project committee reviewed survey responses and actual filing to disposition data on civil and criminal appeals from a wide variety of appellate courts across the country. Based on this research and the broad experience of the committee members in litigating, processing, reviewing and deciding appellate cases, the committee designed a model which includes time standards for both reviews by permission and appeals by right in the civil and criminal case categories. This model provides reasonably achievable times to disposition for both intermediate appellate courts and courts of last resort.

These model time standards, which are generally applicable to all state appellate courts, provide a sufficient challenge for the courts to aspire to in improving their time

to disposition, yet should also be viewed as reasonable by the courts themselves. They are currently expected to be at least partially achievable by about one-third of the state appellate courts and represent a challenge that all appellate courts should strive to attain.

The model provides discrete sets of time standards for both courts of last resort and intermediate appellate courts. The review by permission and appeal by right categories are structured to coincide with the State Court Guide to Statistical Reporting.[2] A review by permission is one that the appellate court can choose to review while an appeal by right is a case that the appellate court must review. Each state determines the particular aspects of the mandatory and discretionary jurisdictions of their appellate courts, which may be set by constitution, statute, or court rule.

Within each of the general appellate case type categories (review by permission, review granted and appeal by right), the model includes separate time standards for civil and criminal cases (excluding death penalty). Depending upon a particular court's jurisdiction, makeup of caseload, and procedural distinctions, it may also be helpful to supplement the model time standards with additional case types such as juvenile, death penalty, administrative agency, attorney discipline, etc.

[2] *State Court Guide to Statistical Reporting*, Conference of State Court Administrators and the National Center for State Courts, Williamsburg, VA. http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP%20StatisticsGuide%20v1%203.ashx

MODEL APPELLATE TIME STANDARDS IN DAYS						
Court	**Case Types**		**Starting Event**	**Ending Event**	**Time Standards**	
					75%	**95%**
COLR	Review By Permission	Civil	Filing Initial Document	Grant/Deny Decision	150	180
		Criminal	Filing Initial Document	Grant/Deny Decision	150	180
	Review Granted	Civil	Grant/Deny Decision	Disposition	180	240
		Criminal	Grant/Deny Decision	Disposition	180	240
	Appeal By Right	Civil	Filing Initial Document	Disposition	270	390
		Criminal (exc. Death penalty)	Filing Initial Document	Disposition	180	330
IAC & single level COLRs	Review By Permission	Civil	Filing Initial Document	Grant/Deny Decision	150	180
		Criminal	Filing Initial Document	Grant/Deny Decision	150	180
	Review Granted	Civil	Grant/Deny Decision	Disposition	240	270
		Criminal	Grant/Deny Decision	Disposition	300	420
	Appeal By Right	Civil	Filing Initial Document	Disposition	390	450
		Criminal (exc. Death penalty)	Filing Initial Document	Disposition	450	600

Appellate courts establishing time standards should include the following recommended practices;

- Time should begin to run at the occurrence of the case initiating event, typically filing of a notice of appeal or petition for review.
- Time should also be measured within discrete interim stages of the case which can help to identify any causes of undue delay.
- The results of measurements of time to disposition, relative to the established standards, should be published periodically. This can build accountability and credibility with the public.

This document also includes a suggested outline of activities that can be used as a guide in establishing time to disposition standards and implementing a program of time measurement. To be most successful,

such efforts must be championed by the chief justice of the court of last resort and/or chief judge of the intermediate appellate court. These individuals can provide the leadership and credibility that such a project requires among the bench, court staff, external stakeholders and the public.

I. Introduction

The establishment of time to disposition standards is not a new development in the state courts. Such standards have existed in varying forms in a number of jurisdictions since the mid-twentieth century. The American Bar Association (ABA) played a leading role in these efforts by establishing speedy trial standards for criminal cases in the 1960s and time standards for other case types in the 1970s. These standards were revised in 1984 and again in 1992. The Conference of State Court Administrators (COSCA) promulgated its own set of national time standards in 1983. These were revised and updated in 2011[3] through a joint effort of COSCA, the Conference of Chief Justices (CCJ), and the National Association for Court Management (NACM) and the National Center for State Courts (NCSC).

The ABA also recommended time standards for state supreme courts (also referred to as courts of last resort) and intermediate appellate courts in the *Standards Relating to Appellate Courts*[4] originally published in 1977. The *Standards* were amended in 1987 and again in 1994. A small number of appellate courts adopted the ABA developed standards and a few others adjusted them for their own internal aspirational guidelines, but overall, the standards were widely seen as unattainable and did not gain much traction. In recent years, further efforts toward developing and implementing time to disposition standards have taken place at the trial court level with only a relatively modest focus on the appellate courts.

It has now become a common refrain among many trial court judges and managers that their courts are required to manage toward a set of time to disposition goals or standards, often imposed by the state supreme court, but that most appellate courts do not have such requirements. While it is correct that a good number of appellate courts have not established such time standards, some of them have, and more are currently considering adopting them.

It should be noted that a variety of phrases are used by the courts to describe their established time to disposition goals. Some use the common term "time standards" while others refer to "time processing guidelines" or "time reference points." These varying phrases are often used to denote that the related time frames describe aspirational goals and to avoid a perception that those cases exceeding the time frames may not be receiving appropriate attention from the court. For simplicity, we will use the common term "time standards" throughout this document to identify time frames or goals related to the resolution of appellate cases.

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[3] *Model Time Standards for State Trial Courts*, National Center for State Courts, Williamsburg, VA, (2011)

[4] *Standards of Judicial Administration, Volume III; The Standards Relating to Appellate Courts, 1994 Edition,* Copyright © 1977, 1995 American Bar Association

This project came about through the efforts of CCJ and COSCA. At the request of those organizations' Joint Court Management Committee, NCSC sought and obtained grant funding from the State Justice Institute (SJI) and recruited project committee participants from CCJ and COSCA, as well as the Council of Chief Judges of the State Courts of Appeal (CCJSCA), the National Conference of Appellate Court Clerks (NCACC) and the ABA.

Although most appellate courts are subject to various rules or statutory directives specifying that certain case types should receive priority in docketing and scheduling, these directives frequently do not include a quantifiable time period during which such cases should be decided. Cases involving child custody, civil cases with particular election-related issues and appeals of certain types of decisions by administrative agencies are examples of the types of cases that are typically affected by such requirements. In the 2000s, the federally funded Court Improvement Program (CIP), encouraged courts at all levels to expedite cases involving foster care and permanent placements of children. Some states developed appellate rules with reduced time periods for filing a notice of appeal, preparing the trial court record and transcripts, and submitting briefs in appeals involving the termination of parental rights and child placement issues. Most appellate courts now expedite, or "fast track" such designated cases; however, the rules and statutes often do not provide for specific time-related goals for deciding such cases. However, this project focuses on "primary" time standards which are applicable to the general caseload of the court through issuance of a dispositional order or decision, rather than the "specially expedited" time requirements which apply only to certain case types or particular issues or circumstances.

Most appellate courts now expedite, or "fast track" such designated cases; however, the rules and statutes often do not provide for specific time-related goals for deciding such cases.

As the first phase of this effort, the project committee conducted preliminary research to ascertain which state appellate courts currently have time standards in place. Subsequent to that research, the committee developed and distributed surveys to all state and U.S. territory appellate courts, based on whether those courts had time standards in place. Among those states with multiple appellate districts or circuits, separate surveys were distributed to each individual court.

The goals of this project are 1) to develop a set of model time standards for both state intermediate appellate courts (IAC) and state supreme courts or courts of last resort (COLR); and 2) to discuss the impact that time to disposition goals have had on the courts that have individually developed and adopted them.

The model time standards are designed to allow appellate courts throughout the United States to adopt them as presented in this document, or to modify the model standards and establish time standards based on their own particular circumstances. Modifying the model standards to local circumstances will create variation from one state to the next, making interstate comparisons less meaningful. However, the process of adjusting time standards to local conditions is necessary for realistic implementation of the standards throughout a nation of diverse courts. Consequently, any substantial deviations from the model time standards should be based on the requirements for doing justice in an individual state and not merely on disagreement with the concept of a national time standard. States with multiple intermediate appellate courts having the same case type jurisdiction should agree upon and adopt a common set of time standards.

Use of the term "standards" does not imply that the model times presented in this document are intended to serve as overarching requirements that all state appellate courts would be expected to achieve. Many factors impact an individual court's ability to decide cases in accordance with any established timeline. It is imperative that this document not be seen as a single national standard that should be imposed upon the appellate courts. Achievement of the standards proposed here presumes that appellate courts are adequately staffed and funded, which is not the case in many states, and that courts are utilizing their available resources effectively. At present, the model time standards presented in this document are likely to be fully achievable in a modest number of appellate courts, partially achievable in most others, and unattainable in the remainder. However, simply because an appellate court is not presently in a position to achieve these model time standards is not to say that they are without value. Use of these model time standards can provide appellate courts with a set of aspirational goals, inform legislatures in providing sufficient funding to enable courts to achieve those goals, and guide future revisions of applicable court rules and operating procedures that can have an impact on how long appellate courts take to resolve the cases before them.

Ideally, these model appellate court time standards will provide the courts with the information and impetus to implement their own time standards or reexamine their previously established time to disposition goals. Such efforts should be undertaken in accordance with Section VII of this document and be led by the chief justice of the COLR and the chief judge of the IAC who are in the best position to understand the effects of implementing the standards, including necessary procedural changes and resource requirements.

II. Why Should Appellate Courts Establish Time Standards?

"Time standards should be used as an administrative goal to assist in achieving caseflow management that is efficient, productive, and produces quality results." [5]

Appellate courts, both as public institutions and as leaders within the judicial branch, are accountable to the litigants and the public at large for achieving the goals of productivity and efficiency while maintaining the highest quality in resolving cases before them. These goals help to shape many of the values held by appellate courts. A white paper[6] published by the CCJSCA and the NCSC identified a set of "shared values" common to many intermediate appellate courts. These include:

- Adopting effective internal management and operational structures that maximize public resources;
- Implementing case management processes that promote the timely and efficient disposition of cases;
- Promoting public awareness about the judicial system and avenues for access to the courts;
- Maintaining judicial integrity by promoting transparency regarding court processes; and
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court.

COLRs would likely express similar concepts as values that the highest state courts have in common with the intermediate appellate courts. These shared values clearly express the concepts of accountability, efficiency and timeliness, productivity, and quality. These values, in conjunction with the responsibilities of all appellate courts, serve to form a foundation upon which time standards can be established.

In an era of limited funding for state courts, it is increasingly important to demonstrate how well courts are operating relative to achieving their mission and goals, and accountability for their use of public resources. The timely resolution of cases is probably the most widely accepted objective measure of court operations and is also, fairly or otherwise, a primary concern of the other branches of government and the public regarding the courts. In fact, the

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5 *Standards Relating to Appellate Courts, at* §3.52 (a).

6 Doerner, J. and Markman, C., "*The Role of Intermediate Appellate Courts: Principles for Adapting to Change*"; Council of Chief Judges of the State Courts of Appeal and National Center for State Courts, Williamsburg, VA, (2012): p. 6

timely resolution of cases in court is a key element used by businesses considering whether to relocate to another state or remain in their current location.[7] Cases in the appellate courts are no exception to the focus on timely resolution. Former Chief Judge Lawrence Winthrop of the Arizona Court of Appeals, Division 1, says *"Annual reporting of performance against our case resolution reference points is critical to our dealings with the legislature and in showing businesses how well the courts are operating in Arizona."*

In addition, the appellate courts, as leaders within the Judicial Branch, are expected to lead by example. Institutional accountability of the Judicial Branch can be undermined when the leadership does not demonstrate its willingness to establish time-based goals for the resolution of appellate cases. Both the Minnesota Supreme Court and Court of Appeals have established time standards and publicly report their performance annually to the Minnesota Judicial Council. Honorable Lorie Gildea, Chief Justice of the Minnesota Supreme Court, puts it this way, *"We need to study our results against our time standards and report them to the Judicial Council to model accountability to the trial courts. This also puts the Judicial Branch on a stronger footing with the state legislature and citizens in terms of accountability and transparency."*

Data has not been collected demonstrating conclusively that appellate courts with time standards necessarily resolve cases more quickly than those without time standards. However, it is self-evident that when an appellate court establishes time standards for itself, it is also making a commitment toward ensuring efficiency and timeliness in the resolution of appellate cases. This commitment is enhanced by the regular measurement of actual case resolution times with comparisons to the time standards. The court's evaluation of such comparisons can often provide insight into the factors that may inordinately contribute to the amount of time cases take to resolve. This is particularly true when the standards and measurement process account for distinctive case types as well as specified interim stages of an appellate case. If insufficient resources are a contributing factor, measuring the achievement of

… it is self-evident that when an appellate court establishes time standards for itself, it is also making a commitment toward ensuring efficiency and timeliness in the resolution of appellate cases.

[7] *2012 Legal Climate Overall Rankings by State*; U.S. Chamber Institute for Legal Reform, Washington D.C. In this study, 1,125 general counsel/senior litigators were asked, "How likely would you say it is that the litigation environment in a state could affect an important business decision at your company such as where to locate or do business?" 70% of respondents said "somewhat likely" or "very likely." "Slow process/Delays" was the second most frequently mentioned issue (tied with "Corrupt/Unfair system") in creating the least fair and reasonable litigation environment.

established time standards can serve as a critical foundation for building evidence-based requests for additional resources.

In addition to strengthening an appellate court's commitment to the timely and efficient resolution of cases, publishing the actual results of a comparison between actual time to resolution and the time standards also demonstrates organizational accountability and a dedication to leading the Judicial Branch by example. Releasing this information may sometimes require an appellate court to acknowledge or explain a result that falls below the established standard and, if appropriate, make efforts to address the cause. However, when managed effectively, the response to such a temporary distress can build the court's credibility and engender public trust and confidence.

III. Selected Survey Results

Surveys were distributed in November 2012 and responses were collected over the next several months, resulting in good response rates from both IACs and COLRs. Because some information regarding time standards was known before distributing the surveys, different versions were provided to those courts with known information and those for which time standard information was not known. Copies of the surveys are included in Appendix A.

A brief summary of the survey responses follows -

A. Response Rate:

	Respondents	Maximum	Response Rate
Intermediate Appellate Courts (IAC)	71	87	82%
Courts of Last Resort (COLR)	40	56	71%
Total	111	143	78%

B. Establishment of Primary Time Standards:

	Respondents	Yes	Percentage
Intermediate Appellate Courts (IAC)	71	35	49%
Courts of Last Resort (COLR)	40	12	30%
Total	111	47	42%

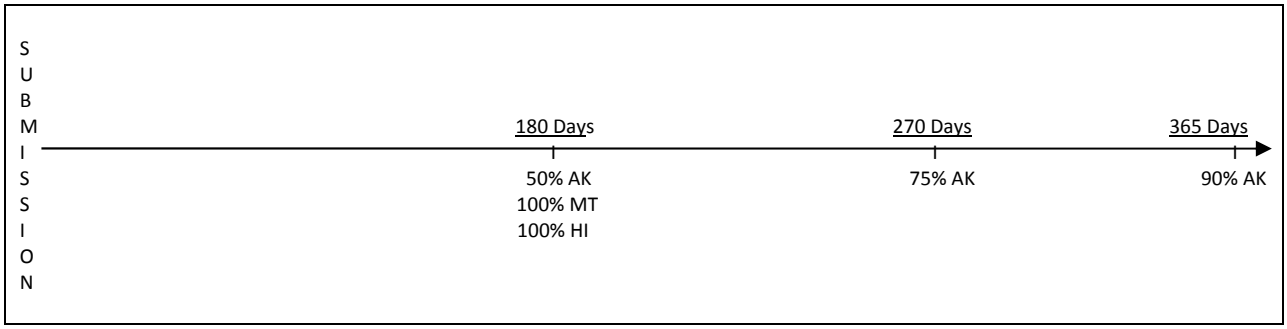
C. Variation of Established Appellate Time Standards:

Among the responding courts, both IACs and COLRs, that have established standards, most include a percentage with a time limit; i.e. 75% of cases should be resolved within 270 days. Some courts apply the percentage and time limit standards to their entire caseload while several others vary the percentage and time limit standards based on case type.

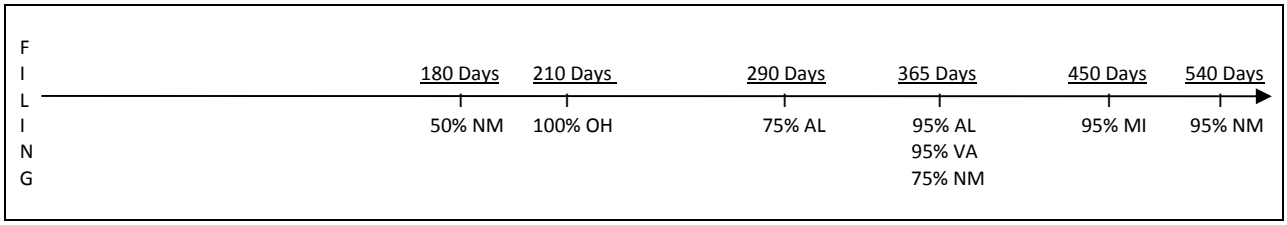
D. Example Time Standards

The length of time stated in the appellate courts' existing time to disposition standards also varied widely. The following examples demonstrate the variation in standards applicable to the general caseload (measured from either filing or submission to resolution).

Courts of Last Resort



Intermediate Appellate Courts



Established time standards sometimes also include interim times to various significant milestone events such as filing of the appeal to filing of the record, close of briefing to oral argument or submission of the case, etc. Some courts reported establishing internal standards applicable only to a particular phase of the case, usually from case assignment to circulation of a draft opinion. Such standards are useful case management tools but do not encompass the full life of the case and time to disposition.

E. Starting Point for Counting Time:

There were also substantial differences reported in the point at which the time starts being counted, as illustrated in the table below.

	Filing NOA or comparable document	Filing or Lodging the Record	Close of Briefing	Oral Argument/ Submission
IACs	21	3	1	10
COLRs	3	1	1	7

F. Process Used to Establish Time Standards

Among those responding courts with time standards, the state Supreme Courts have generally been the driving force behind their establishment. Among IACs, eleven reported that the standards were established by order or rule of the Supreme Court, six reported that the time standards were developed internally (one with Supreme Court prompting), and fourteen worked with the Supreme Court and a task force to develop time standards, some of which were in conjunction with implementing portions of the Appellate CourTools.[8] One responding IAC indicated that the standards were statutorily imposed and another did not know what the process was since the time standards have been in place for many years and all involved parties have since left the court.

Among COLRs, nine established standards by their own rule or order, two reportedly were by statute, one formed a task force in conjunction with implementing the Appellate CourTools and one did not know the process used to establish its time standards.

G. Case Stages Contributing to Delay

The responding courts were also asked to identify particular stages in an appeal that inordinately contribute to delay by making selections from a list. Respondents were allowed to select multiple items and a total of 198 individual selections were made. When "Other'" was selected, the reason for delay was variously described as: “court-appointed attorney process,”

[8] The Appellate CourTools, designed by the NCSC, is a set of six metrics that can be used by any appellate court to measure its performance. The Appellate CourTools is available at: http://www.courtools.org/

"self-represented litigants," and "substitution of counsel." Not all respondents explained their selection of "other" as contributing to delay.

Case Stage	Selections	% of Total
Filing of the Record	38	19%
Transcript Preparation	55	28%
Briefing	44	22%
Setting Argument or Assignment	8	4%
Opinion Preparation	19	10%
Other:	23	12%
None	11	6%
Total	198	100.00%

H. Additional Results

Among the forty-two responding courts with established time standards:

- 92% reported that the established time standards are appropriately set
- 85% reported that the court routinely meets the established standards
- 75% reported that the court regularly reviews the time standards
- 98% regularly prepare a report, of which 81% include time between various milestones or events (although fewer actually include those events in their standards)
- 54% prepare some type of external report on court performance relative to time standards

IV. Analyzing Actual Time to Disposition Data

In addition to the survey responses, the project committee reviewed data from two major studies studying civil and criminal appeals in the state courts. Civil appeals data was obtained through the 2005 Civil Justice Survey of State Courts, which tracked 26,950 general civil (i.e., tort, contract, and real property) cases that were disposed by bench or jury trials in 156 participating counties. Subsequently, 3,970 of those cases were appealed to eighty-four appellate courts in thirty-five states.[9] Criminal appeals data includes 2,978 appeals concluded in calendar year 2010 from one hundred forty three appellate courts (IACs and COLRs) in all fifty states and the District of Columbia. As part of each study, the collected data was compiled with the actual time between various events within the appeal process and from filing to disposition being calculated for each participating court.

These data showed:

Civil Appeals Data				
	Time to Disposition	Times for Interim Events (in Days)		
		Case Filing to Transcript	Transcript to Close of Briefing	Submission to Disposition
IACs				
75% of Cases	452	149	198	187
95% of Cases	546	201	249	269
COLRs				
75% of Cases	422	91	191	215
95% of Cases	Not available	Not available	Not available	Not available
Criminal Appeals Data				
	Time to Disposition	Times for Interim Events (in Days)		
		Case Filing to Transcript	Transcript to Close of Briefing	Submission to Disposition
IACs				
75% of Cases	521	164	152	177
95% of Cases	818	456	314	298
COLRs				
75% of Cases	204	80	194	175
95% of Cases	571	305	391	331

[9] This data collection examined civil bench and jury trials concluded in state trial courts in 2005 that were appealed to an intermediate appellate court or court of last resort. The Bureau of Justice Statistics' (BJS) Civil Justice Survey of Trials on Appeal (CJSTA) included information from those civil trials concluded in 2005 and tracked the subsequent appeals from 2005 through March 2010.

V. Structure of Appellate Time Standards

Time standards currently in use by appellate courts around the country vary significantly, not only in the time lengths established, but also in their form. Some courts have simply established an overall time standard that is generally applicable to all types of cases in the court. For example, "all cases should be decided within 270 days." This form of standard sometimes includes a percentage, such as 75% or 90%, of cases that should be resolved within the indicated length of time. The ABA Overall Time Standards, as amended in 1994, are an example of this form. Those standards, measured from the date of initial filing, are listed in Table 1 below:

Table 1 - ABA Overall Appellate Time Standards

Court Type	50th Percentile	75th Percentile	90th Percentile	95th Percentile	100%
COLR [10]	290 Days		365 Days		As expeditiously as possible
IAC [11]		290 Days		365 Days	

Other courts have established standards with different time lengths for different case types. The time reference point standards for the Arizona Court of Appeals, for example, state that 75% of general civil cases should be resolved within 400 days and that 75% of criminal cases should be resolved within 375 days from the date of filing in the appellate court.

In addition, some appellate courts include interim time standards for the various administrative and attorney or judge driven stages of an appellate case, along with an overall standard for the total time to disposition. The common stages for which time standards are developed include:

- Filing of the notice of appeal or other originating document to the filing of the trial court record (additionally, there may be a discrete time standard pertaining to filing the transcript, depending on applicable procedures)
- Filing of the trial court record to close of briefing or 'at issue' date
- Close of briefing to oral argument or submission on the briefs
- Oral argument or submission to issuance of a decision

[10] ABA time standards for courts of last resort are based upon the number of days from the filing of the petition for certiorari or the notice of appeal.

[11] ABA time standards for intermediate courts of appeal are based upon the number of days from the filing of the notice of appeal.

These discrete stages in the life cycle of an appeal or certiorari proceeding are also patterned similarly to the ABA standards which are listed in Table 2 below:

Table 2 - ABA Appellate Time Standards for Discrete Stages of an Appeal			
	Administrative Functions	**Attorney Functions**	**Judicial Functions**
Record	30 days from filing Notice of Appeal		
Transcript	30 days from filing Notice of Appeal		
Appellant's Brief		50 days from filing record & transcript	
Appellee's Brief		50 days from receipt appellant's brief	
Reply Brief		10 days from receipt appellee's brief	
Oral Argument			55 days from filing appellee's brief
Submission on Briefs			35 days from filing appellee's brief
Opinion Preparation (most cases)			55 days from oral argument or case assignment
Opinion Preparation (Death Penalty & cases of extraordinary complexity)			90 days from oral argument or case assignment
Voting on Circulating Draft Opinions			20 (COLR)/15 (IAC) days from receipt of draft opinion
File Dissenting Opinions			30 days from receipt of draft opinion
Memorandum Opinions			30 days from oral argument or case assignment

Establishing specific time standards for various case types and interim time standards within each of those case types provides court leadership with a wide range of objective data that can be used to focus in on the discrete stages that might consume more time than expected. This, in turn, enables the court to develop targeted strategies for improvement within specific stages to ensure the timely resolution of appellate cases.

As a part of establishing any overall time standards, a critical decision must be made with respect to when to start counting appellate case processing time. Based on the survey responses from those appellate courts that have adopted time standards, there are currently four distinct points at which those courts begin counting the time to disposition. Each of these four starting points was reported by both intermediate courts and courts of last resort:

- Date of filing the notice of appeal or other initiating document;
- Date of lodging the trial court record;
- Date of the close of briefing; and
- Date of oral argument or, if no argument, submission to the court.

Those courts with time standards that begin counting at lodging of the record, close of briefing or submission of the case, commonly consider the time period from initiation of the appellate proceeding to one of those latter stages to be outside the court's control. For example, the clerk of the trial court and one or more court reporters are responsible for the preparation and filing of the record and the transcripts, counsel for the various parties to the appeal are responsible for filing their respective briefs, and appellate court control begins after one of those particular events. While it is true that significant responsibility for the completion of the record, transcript and briefs is assigned to persons outside of the appellate court, it is also evident that the primary responsibility for case management and efficient processing of appeals must reside with the appellate court. According to the ABA, the first and most important contributing factor to appellate delay *"… is that an appellate court has exercised inadequate supervision of the movement of cases coming before it. Only the appellate court itself can provide such supervision."*[12] Neither the trial court nor counsel for the litigants is in a position to reliably give the necessary attention to appellate case management as the appellate court itself is.

… the primary responsibility for case management and efficient processing of appeals must reside with the appellate court.

[12] *Standards Relating to Appellate Courts at* page 89.

As a matter of fact, one of the most persistent factors contributing to lengthy times to disposition in appellate courts is the preparation of the trial transcripts. Many jurisdictions are now contending with a shortage of qualified court reporters whose principal duty is to make verbatim notes of the trial court proceedings. Preparation of appellate transcripts is often relegated by the court reporter to weekend and evening hours. In addition, heavy workloads in the offices of the appellate defender and the attorney general or appellate prosecutor are common in many states and are perceived to be a primary contributing factor to delays in briefing. When asked in the recent survey to identify whether particular stages of an appellate case contributed inordinately to delay in appellate cases, the most frequently selected were; transcript preparation (28%), briefing (22%) and filing the record (19%). (See Section II) These factors must be addressed in order to alleviate their impact on appellate court delay. In response, a number of state court systems have expanded the use of real-time reporting and digital audio recording of trial court proceedings, reducing the overall average time for transcript production. Appellate courts have also initiated discussions and worked in conjunction with their appellate defenders and attorneys general to improve case management procedures and reduce the overall length of briefing time in criminal cases.

VI. Minimum Recommended Features of Appellate Court Time Standards

There are several beneficial features pertaining to the implementation and use of time standards in appellate courts that the project committee recommends as best practices. Including these features enables the appellate court to effectively monitor its actual appellate processing time on an ongoing basis and also ensures that the court is accountable for its performance.

These recommended best practices are:

The minimum recommended features of Appellate Court Time Standards are:

- ***Run from the case initiating event.***
- ***Measure discrete interim stages.***
- ***Publish the results.***

A. Time Standards Should Run from the Case Initiating Event

Data over the full range of the life of a case is necessary for the appellate court and others to fully understand the amount of time it takes for cases to be resolved, what the contributing factors are to that amount of time, and whether specific procedural changes might be effective in resolving appeals more quickly. To obtain such data, appellate court time standards should start counting time at the earliest event, typically the filing of the notice of appeal, petition for review, or other comparable case initiating document[13]. This approach accounts for the entire life of an appellate proceeding and avoids the perception that the appellate court is not taking steps to manage the early stages of the case. It also corresponds with the public's perspective of when a case is considered to be on appeal. In order to provide accurate information however, time must not be included when a case is stayed due to bankruptcy proceedings, remand to the trial court, etc.

B. Measure Time Within Discrete Interim Stages

Measuring the actual time within the interim stages of an appellate case helps to pinpoint the causes of excessive delay so that the court can target its resources and improvement efforts most effectively. This can also provide insightful information to the court's partners

[13] There are some appellate systems in which the notice of appeal is first filed in the trial court and forwarded to the appellate court at some later time. Ideally, the time standards should run during this period and the two courts work jointly to ensure timely forwarding of the notice of appeal. Alternatively, this period could be designated as a discrete interim stage and measured separately (see Section V. b.)

in the appellate process such as the trial courts, court reporters and counsel, highlighting how completion of their respective roles affect overall time to disposition.

The discrete interim stages should include:

By Permission Cases

- Initial Case Filing to Grant/Deny Decision

By Right Cases

- Initial Case Filing to Filing of Record/Transcript
- Filing of Record/Transcript to Close of Briefing
- Close of Briefing to Oral Argument/Submission
- Oral Argument/Submission to Disposition

C. Publish the Results of Measurements to Time Standards

Disclosing summary results of a measurement of actual time to disposition statistics with a comparison to the established time standards provides a number of benefits to the appellate court. For example, publication of such objective data fosters accountability and transparency by encouraging courts to regularly review their performance, understand and explain their results, and consider operational improvements to address any shortfalls. This enables appellate courts to lead by example within the Judicial Branch, emphasize the importance of the timely resolution of cases, and ensure an ongoing commitment to the issue. It also builds the court's credibility with the public and other branches of state government, demonstrates accountability of the judicial branch, and helps to ensure that public resources are used effectively. Such public disclosure might typically include a press release, website posting, and reporting to legislatures or other public officials. For example, the Minnesota Court of Appeals and Supreme Court report their results directly to the Judicial Council at a public meeting, and the Arizona Court of Appeals, Division One, distributes copies to all legislators.

VII. Model Time Standards for State Appellate Courts

The failure to resolve appellate cases in an appropriately expeditious timeframe undermines the ability of the appellate courts to efficiently manage their publicly provided resources, demonstrate effective leadership within the Judicial Branch and promote public confidence in the courts. State appellate courts should take the lead to ensure that they and their partners in the appellate process maintain a focus on eliminating delays while ensuring the ability to produce well-reasoned, clearly written decisions. The model time standards listed below provides appellate courts with a framework for these efforts.

A. Establishing the Model Standards

In developing this model, the Appellate Time Standards Project Committee reviewed the survey responses and the actual filing to disposition data on civil and criminal appeals from a wide variety of appellate courts across the country. Based on this research and the broad experience of the committee members in litigating, processing, reviewing and deciding appellate cases, the committee designed a model which includes time standards for both reviews by permission and appeals by right in the civil and criminal case categories. This model provides reasonably achievable times to disposition for both intermediate appellate courts and courts of last resort.

> ***… there is a great deal; of variation in the current capacity of state appellate courts to review and decide cases expeditiously.***

It was critical to the process of developing these model time standards to acknowledge that there is a great deal of variation in the capacity of state appellate courts to review and decide cases expeditiously. This may be attributable to an insufficient number of judges or court staff, the inability of trial court personnel to prepare and submit the trial record and transcripts in the allotted time, inadequate attorney positions or excessive workload in the appellate public defender and prosecutor's offices, various provisions in the appellate rules, outdated procedures, a long-standing culture within the appellate system that does not place great value on the expeditious resolution of cases, or other reasons.

Regardless of the reasons for delays, establishing time standards and measuring court performance going forward is necessary in order to identify and make progress on the issues that impact an appellate court's ability to dispose of cases timely. Only the appellate courts themselves are capable of addressing the issues and driving reduction of delay in the appellate process.

It is important that these model time standards, which are generally applicable to all state appellate courts, provide a sufficient challenge for the courts to aspire to in improving their time to disposition, yet also be viewed as reasonable by the courts themselves. A set of overly aggressive time standards would likely be disheartening to many appellate courts. These proposed model time standards currently are at least partially achievable by about one-third of the state appellate courts. They also represent a reasonable challenge that all appellate courts should strive to attain.

The model provides discrete sets of time standards for both courts of last resort and intermediate appellate courts. The model time standards recognize the fact that the time for record preparation and transcript production generally occurs during the intermediate court case. However, there are a number of states that have a single level appellate system which includes only a court of last resort and no intermediate court. As a result, these "single level COLRs" encounter the same challenges with regard to record preparation and transcript production as intermediate appellate courts. To recognize this significant difference between COLRs in single and dual level appellate systems, the committee suggests that COLRs in a single level system consider applying the COLR standards as appropriate or the IAC time standards adapted as necessary to their particular circumstances.

The review by permission and appeal by right categories are structured to coincide with the State Court Guide to Statistical Reporting.[14] A review by permission is one that the appellate court can choose to review while an appeal by right is a case that the appellate court must review. Each state determines the particular aspects of the mandatory and discretionary jurisdictions of their appellate courts, which may be set by constitution, statute, or court rule.

When applying the model time standards to the review by permission case types, time begins running on the date the application, petition or comparable initiating document requesting review is filed and concludes when the decision to grant or deny the request is issued. When the decision is made to grant the request, the review granted time standards would then apply with time being counted from the date the decision to grant is issued through the disposition of the case. The review granted time standards assume that relevant portions of the lower court record and transcripts are available to the court prior to the grant/deny decision and that once review is granted these cases can proceed more quickly than a typical appeal by right.

[14] *State Court Guide to Statistical Reporting*, Conference of State Court Administrators and the National Center for State Courts, Williamsburg, VA. http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP%20StatisticsGuide%20v1%203.ashx

However, this is not true in all appellate courts, which impacts whether the time period specified in the model is appropriate for a particular court.

When applying the model time standards to the appeal by right case types, time begins running when the notice of appeal or comparable initiating document is filed and concludes upon the disposition of the case, typically on the issuance of a dispositive opinion or order closing the case or a mandate returning jurisdiction to the lower court. Time stops when a case is stayed due to bankruptcy proceedings, remand to the trial court, etc. restarting once the stay is lifted.

Within each of the general appellate case type categories (review by permission, review granted and appeal by right), the model includes separate time standards for civil and criminal cases (excluding death penalty). Depending upon a particular court's jurisdiction, makeup of caseload, and procedural distinctions, it may also be helpful to supplement the model time standards with additional case types such as juvenile, death penalty, administrative agency, attorney discipline, etc.

MODEL APPELLATE TIME STANDARDS IN NUMBER OF DAYS

Court Type	Case Types		Starting Event	Ending Event	Time Standards	
					75%	95%
COLR	Review By Permission	Civil	Filing Initial Document	Grant/Deny Decision	150	180
		Criminal	Filing Initial Document	Grant/Deny Decision	150	180
	Review Granted	Civil	Grant/Deny Decision	Disposition	180	240
		Criminal	Grant/Deny Decision	Disposition	180	240
	Appeal By Right	Civil	Filing Initial Document	Disposition	270	390
		Criminal (exc. Death penalty)	Filing Initial Document	Disposition	180	330
IAC & single level COLRs	Review By Permission	Civil	Filing Initial Document	Grant/Deny Decision	150	180
		Criminal	Filing Initial Document	Grant/Deny Decision	150	180
	Review Granted	Civil	Grant/Deny Decision	Disposition	240	270
		Criminal	Grant/Deny Decision	Disposition	300	420
	Appeal By Right	Civil	Filing Initial Document	Disposition	390	450
		Criminal (exc. Death penalty)	Filing Initial Document	Disposition	450	600

As suggested throughout this document, there will be instances in which statutes, rules or other requirements necessitate individual courts to modify or adapt these model standards. Following are two actual examples of circumstances that could be addressed either by modifying the model time standards or, if appropriate, revising the underlying authority and making corresponding procedural changes.

- The Kentucky Supreme Court is constitutionally mandated to hear, as original appeals, all criminal cases in which a sentence of life imprisonment or imprisonment over twenty years has been imposed. These cases bypass the Kentucky Court of Appeals and, as a result, a significantly greater amount of time is consumed in record preparation and briefing as compared to a motion for discretionary review in which the record and transcripts have already been provided. In this type of circumstance, a COLR implementing time standards could consider establishing a separate case class designation with an appropriate amount of time, preferably not in excess of that provided in the model for IAC criminal appeals by right.

- In many permissive appeals, the Michigan Court of Appeals makes its decisions to grant or deny petitions for review without the benefit of the complete trial court record or transcripts. If review is granted by the court, the case proceeds in the normal manner and timeline as an appeal by right without any scheduling priority. In this type of circumstance, an appellate court implementing time standards could consider modifying the amount of time provided in the model with a more appropriate length, preferably not in excess of that provided in the model for IAC appeals by right.

B. Suggested Progressive Benchmarks

In addition to the model appellate time standards, the committee has suggested a set of progressive benchmarks that are not as aggressive as the model time standards, but can nevertheless provide a target that less timely appellate courts could use to measure their progress as they seek to meet the model standards. The set of progressive benchmarks also provide an opportunity for these courts to establish both short-term and long-term objectives, identify the factors affecting their ability to achieve more timely dispositions, and to achieve interim successes as they progress in their efforts to reduce overall time to disposition.

PROGRESSIVE BENCHMARKS IN NUMBER OF DAYS								
Court Type	**Case Types**		**Starting Event**	**Ending Event**	**Progressive Benchmark – Level 1**		**Progressive Benchmark – Level 2**	
					75%	**95%**	**75%**	**95%**
COLR	Review By Permission	Civil	Filing Initial Document	Grant/Deny Decision	210	240	180	210
		Criminal	Filing Initial Document	Grant/Deny Decision	210	240	180	210
	Review Granted	Civil	Grant/Deny Decision	Disposition	300	360	240	300
		Criminal	Grant/Deny Decision	Disposition	240	330	210	270
	Appeal By Right	Civil	Filing Initial Document	Disposition	360	510	300	450
		Criminal (exc. Death penalty)	Filing Initial Document	Disposition	300	480	240	420
COLRs & single level COLRs	Review By Permission	Civil	Filing Initial Document	Grant/Deny Decision	210	240	180	210
		Criminal	Filing Initial Document	Grant/Deny Decision	210	240	180	210
	Review Granted	Civil	Grant/Deny Decision	Disposition	330	390	270	330
		Criminal	Grant/Deny Decision	Disposition	360	570	330	480
	Appeal By Right	Civil	Filing Initial Document	Disposition	510	600	450	570
		Criminal (exc. Death penalty)	Filing Initial Document	Disposition	540	720	510	660

The Level 1 Progressive Benchmarks indicate a minimal level of timeliness that all state appellate courts should be currently capable of achieving. It is critical that any courts currently unable to meet the Level 1 benchmarks investigate the contributing factors and develop strategies to resolve cases more expeditiously. Like the Model Time Standards, the Level 2 Progressive Benchmarks are informed by the results of the BJS civil and criminal appeals studies. The Level 2 benchmarks should currently be at least partially achievable by about half of all state appellate courts.

C. Standards for Interim Stages of an Appeal

In addition to overall model time to disposition standards, appellate courts can benefit by establishing separate time standards pertaining to the interim stages of an appeal. Such interim standards should be used internally by the appellate court for analyzing its own results. The length of time for the interim stages can vary significantly based on the allotment of time specified in each state's appellate rules for completing certain actions. For instance, California Rule 8.212 (b) allows the parties to extend each briefing period by stipulation for up to 60 days. While such a provision may reduce the impact of numerous motions for extension of time on court workload by eliminating the need for the court to rule on such motions, it can also negatively impair the court's ability to control briefing time. Because there are many such differences in appellate court rules among the states, the committee includes the following table as an example that appellate courts can use to establish their own standards for these interim stages. Results of measuring such interim standards would not necessarily be published in accordance with the recommended best practice in Section VI C, which focuses on the overall time to disposition.

This example is provided for four interim stages that typically occur in an appeal by right and the number of days is related to the model time standards provided above. The example days included here are considered reasonable by the committee. A court should carefully consider its own rules, procedures and practices regarding these stages of appeal and establish interim time standards appropriate to supporting its overall standards.

Example of Time Standards for Interim Stages of an Appeal - Civil Appeal By Right			
Starting Interim Event	**Ending Interim Event**	**Example Days**	
		75%	95%
Initial Filing	Filing of Record and Transcript(s)	90	120
Filing of Record and Transcript(s)	Close of Briefing	150	180
Close of Briefing	Oral Argument or Submission	60	90
Oral Argument or Submission	Issuance of Dispositional Order or Opinion	90	120

VIII. Implementing Appellate Court Time Standards

Time standards provide reference points for measuring court performance and management effectiveness, serving as benchmarks to determine whether appellate proceedings are being resolved at a reasonable and acceptable pace. However, simply adopting a set of time standards is not sufficient to ensure that appeals will be decided expeditiously. A number of additional management components of effective court administration should also be in place. First and foremost is a strong commitment on the part of the Chief Justice. Following is an outline that provides a general guide to the steps that an appellate court should consider when undertaking an effort to establish time standards and some additional discussion addressing the implementation process.

> ***… simply adopting a set of time standards is not sufficient … additional management components of effective court administration should also be in place.***

A. Outline for Establishing Appellate Court Time Standards

1. The Chief Justice of the court of last resort, with the support of the Chief Judge of the intermediate appellate court if applicable, and the State Court Administrator, would take a leadership role and identify the establishment of appellate court time standards as a priority within the Judicial Branch. This would include shepherding the time standards through their initial analysis, development, review and final adoption. This can set the tone for the process with all businesses partners and inter-related departments or groups that the appellate courts work with. This phase is likely to require multiple meetings and discussions to obtain buy-in from justices and judges in the appellate courts and officials with appellate system partners.
2. Establish an internal committee or working group to guide the process. This body should include several justices/judges from the COLR and the IAC, the clerks of each court and other key staff members as appropriate. Particular areas for the working group to explore are:
    - Analyze the current time frames in which appellate cases are being decided for both civil and criminal cases and other case types as desired.

This could provide a baseline for determining the courts' actual times relative to the model standards.

- Evaluate any causes of delay at each stage of an appellate case.
- Review the appellate rules, applicable statutes and the appellate courts' internal operating procedures to identify any provisions that might result in unnecessarily long time requirements by limiting time-saving options such as the use of electronic records and transcripts, creating difficult scheduling or cumbersome workflows perhaps in opinion review and circulation procedures, etc. Develop feasible solutions and draft proposed new rules, statutes or procedures.

3. Broaden the effort by involving business partner representatives, (trial court judges and clerks, appellate practitioners, Attorney General, appellate defender, etc.). This broader group would review the recommendations of the internal working group and assist in seeking solutions and alternative business practices to eliminate delays. Selected alternatives may initially warrant a limited application or pilot study to ensure they bring about the desired effect and avoid unintended consequences
4. Establish and adopt the model appellate time standards, with modifications as needed to address local circumstances and standards for interim stages. Depending on how greatly the actual time frames vary from the standards, the appellate courts might also develop initial goals by which to chart their improvement (see the example of progressive benchmarks provided in Section VI B). Such goals can be helpful to achieve interim successes and in maintaining the commitment and focus on the overall time standards. For the overall time standards and any initial goals, the courts should designate time frames for achieving each.
5. Once time standards are established, overall times to disposition should be regularly reported and published and times through various interim stages of appellate cases analyzed by the court. The reports should be provided to all judges and staff within the appellate courts to ensure that they remain relevant to them. If appropriate, they can also be distributed to the appellate business partners that participated in developing the time standards.

B. Adoption and Use of Model Time Standards

Establishing and measuring compliance with established time standards for the disposition of cases emphasizes the need for both judges and court personnel to recognize timely case processing as an essential expectation of their work. Doing so fosters the public's trust and confidence that the courts are committed to deciding cases expeditiously.

It is critical that an endeavor to establish appellate court time standards begin with a strong commitment from the chief justice, with support from the chief judge of the IAC. These leaders, along with other members of the appellate courts, will be jointly responsible for the vital leadership efforts and ongoing commitment for the implementation of the time standards. This includes shepherding the standards through an initial analysis, one or more pilot projects and the final adoption. In this way, they will set the tone for the process throughout the state with all businesses partners and inter-related departments and groups that the appellate courts work with. During this initial time period, the chief justice and chief judge will have to conduct discussions with all justices and judges regarding the effort. This may include overcoming any internal disagreements so that the project can go forward with as much majority support as possible.

When appellate court leaders embark on an effort to develop and adopt time standards, they should solicit discussion within the court as well as other groups that will be impacted. This can include judges, trial court clerks and court reporters, attorney general and appellate public defender offices, and appellate practitioners. The degree of participation in the process by these other groups may vary based on the culture and practices in a particular jurisdiction but their involvement is an essential ingredient. All participants should keep in mind that effective time standards are developed primarily to identify the length of time that provides both a deliberative and careful decision-making process as well as reasonable and appropriate timeliness in the resolution of cases. In addition, appellate courts must consider their own specific statutory mandates, rules and operating procedures. This process will result in implementing standards based on individual court circumstances and creating variations of the model from one state to another. However, any substantial variations from the model time standards should be based on the requirements for doing justice in an individual state; they should not result from disagreement with the concept of a nationally applicable model for time standards. Ideally, states with multiple intermediate appellate courts having the same case type jurisdiction would agree upon and adopt a common set of time standards for those courts.

Whatever the difference in circumstances may be from one appellate court to another, the provision of timely and affordable justice in compliance with time standards should be an

integral part of each court's management culture. The nature and importance of time standards as organizational goals should be communicated by the chief justice or chief judge and the court's executive management team to the judges and staff throughout the court, as well as to all of their appellate system partners.

Both in terms of overall public service and the court's own expectations of quality justice, appellate courts should consider the achievement of time standards as an important indicator of their performance.

C. Measuring Achievement of Time Standards

Once an appellate court has adopted either these model time standards or a modified set, the court leadership should regularly measure their achievement with respect to the established standards. Many state appellate courts already have a process for measuring timeliness of case disposition. Most of those include measures of time between interim events. The results of these measurements should be distributed on a regular basis, at least quarterly, to all judges and staff throughout the court. Results should also be released publicly at a minimum frequency of once each year, more frequently would be preferable.

If the results of these measurements consistently indicate that the court is not achieving its goals, the court leadership must develop and implement appropriate steps designed to improve timeliness. Depending upon the case stages that contribute to delay, such steps can include working with trial court clerks and court reporters to streamline the filing of records and transcripts, or with appellate counsel, especially offices of the appellate defenders and attorneys general offices, with respect to briefing timeliness. In addition, it is critical that court leadership also evaluate its internal policies and procedures to ensure that they do not contribute to the court's failure to meet its objectives.

Many appellate courts have instituted some form of screening process that can help to determine how best to review and decide cases, and some have accelerated the assignment of cases in their efforts to improve timeliness. Others have taken more systemic approaches. For example, since July 2009, Utah trial courts digitally record all proceedings and the appellate clerk's office centrally manages all transcript requests. The previous average of 138 days from transcript request to filing the transcript in the appellate court was reduced to an average of twenty-two days after this function was centralized.[15]

[15] Suskin, L. *A Case Study: Reengineering Utah's Courts Through the Lens of the Principles for Judicial*

D. Relationship Between Time Standards and Resources

Appellate courts must have adequate funding and staffing to effectively fulfill their constitutional and statutory duties. This includes an appropriate number of judges to hear and decide cases in accordance with the adopted time standards. The inability of an appellate court to achieve its time standards can be an indicator that the court has an insufficient number of judges or judicial staff (law clerks and staff attorneys). However, to justify a request for more judges or staff, judicial leaders must first be able to demonstrate that they have examined all of the other potential reasons for the court's lack of timeliness.

The judicial leaders should be able to demonstrate that they have thoroughly evaluated whether they are making the best use of their available staff, that court procedures are simple, clear and streamlined, and that they are efficiently using their equipment and technology before requesting additional resources to reduce a backlog or maintain timeliness. It may also be appropriate to conduct a workload study, estimating the average amount of time that is devoted to each type of case in order to identify the number of judges and staff members needed in providing quality and timely resolutions of the number and type of cases in the court.

Measuring the achievement of established time standards is a critical foundation for building evidence-based requests for additional resources.

Measuring the achievement of established time standards is a critical foundation for building evidence-based requests for additional resources. It ties budget proposals to the mission of meeting agreed-upon goals. Appellate courts that adopt model time standards, measure their degree of achievement, promote timeliness, and take steps to effectively govern, organize, administer and manage the appellate process are well positioned to request and justify the resources needed to enable them to hear and decide cases in a timely manner.

Administration, NCSC, Denver, February 2012; http://www.ncsc.org/services-and-experts/~/media/Files/PDF/Services%20and%20Experts/Court%20reengineering/Utah%20Case%20Study%202%2027.ashx

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING JUSTICE VANCE W. RAYE	DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT PURSUANT TO STIPULATION (Commission Rule 116.5)

This disciplinary matter concerns Justice Vance W. Raye of the California Court of Appeal, Third District. On May 27, 2022, Justice Raye and his counsel, Edith R. Matthai, Esq., entered into a stipulation with Director-Chief Counsel Gregory Dresser, pursuant to commission rule 116.5, to resolve the pending preliminary investigation involving Justice Raye by the imposition of a public admonishment and the justice's agreement to retire and not to serve in a judicial capacity in the future. Justice Raye tendered his retirement from judicial office, effective June 1, 2022. The commission approved the Stipulation for Discipline by Consent on May 30, 2022, pursuant to the following terms and conditions and stipulated facts and legal conclusions. A copy of the stipulation is attached.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Justice Vance W. Raye.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing a public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Justice Vance W. Raye waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118 et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Justice Vance W. Raye shall advise the Governor of California, in writing, of his retirement from judicial office, effective June 1, 2022.

7. If Justice Vance W. Raye does not retire as of June 1, 2022, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the staff inquiry and preliminary investigation letters. Failure to comply with the terms and conditions of this agreement may also constitute additional and independent grounds for discipline.

8. Justice Vance W. Raye has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after June 1, 2022, except that, in the interest of justice, to conclude matters, which have been previously assigned to him and cannot be completed by June 1, and which would place an undue burden on the other justices if they were reassigned. Justice Raye may also respond to any request from the Third District for information regarding a case that was assigned to Justice Raye before the date of his retirement.

9. If Justice Vance W. Raye attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the staff inquiry and preliminary investigation letters.

10. Justice Vance W. Raye agrees that the facts recited herein are true and correct, and that the discipline to which the parties stipulate herein is appropriate in light of those facts.

11. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted or conceded by either party.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

This disciplinary matter concerns Justice Vance W. Raye, the Administrative Presiding Justice of the Third District Court of Appeal since 2010. His current term began in 2015. Justice Raye was appointed to Sacramento Superior Court in 1989 and as an Associate Justice on the Third District Court of Appeal in 1991.

Justice Raye engaged in a pattern of delay in deciding around 200 appellate matters over a ten-year period.

I. PATTERN OF PERSISTENT DECISIONAL DELAY

"The failure to resolve appellate cases in an appropriately expeditious timeframe undermines the ability of the appellate courts to efficiently manage their publicly provided resources, demonstrate effective leadership within the Judicial Branch and promote public confidence in the courts." (Doerner, Model Time Standards for State Appellate Courts (2014) p. 18.)

Under California law, judges are expected to decide matters submitted to them within 90 days of submission and are prohibited from receiving their salaries when they have undecided matters under submission for more than 90 days. (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.) Other than the 90-day rule, there is no law or rule that sets a specific limit on the time an appellate court takes to decide a matter[1] and, in particular, nothing that directly addresses pre-submission delay.

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[1] "[F]ederal courts have held that undue delay in processing an appeal may rise to the level of a violation of due process." (*Daniel v. State* (Wy. 2003) 78 P.3d 205, 218 [citations omitted].) The Tenth Circuit has enunciated a general rule that delay in adjudicating a noncapital criminal appeal for more than two years after filing of the notice of appeal, including more than 11 months from the completion of briefing to the opinion's filing, raises a rebuttable presumption of prejudice from an ineffective appellate process. (*Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1555-1561 & fn. 11; accord, e.g., *U.S. ex rel. Green v. Washington* (N.D. Ill. 1996) 917 F.Supp. 1238, 1277.) The National Center for State Courts, along with the Court Management Committee of the Conference of Chief Justices and the Conference of State Court Administrators determined that,

More generally, however, the Code of Judicial Ethics requires judges to dispose of all judicial matters fairly, promptly, and efficiently (canon 3B(8)) and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A).

Appellate court cases are not "submitted" until after oral argument is heard, or argument is waived. At the Third District, a case is not set for oral argument until there is a full draft memorandum that at least two justices agree on. Justice Raye did not violate the 90-day rule on any matter assigned to him. Rather, the pre-submission decisional delay in this matter implicates the general standards of canons 3B(8) and 2A. Justice Raye engaged in a pattern of delay in deciding a significant number of appellate cases over a lengthy period. In particular, both with respect to the court as a whole (in his role as presiding justice) and as to cases assigned to him personally, he failed to encourage and adopt reasonable procedures to ensure that priority and older cases were decided first.

The commission surveyed approximately 200 matters (as set forth in Exhibit 1 and incorporated herein as though set forth in full) assigned to him from 2011 to 2021, in which more than one year passed between the completion of briefing and the issuance of an opinion (or dismissal of the matter). Not every such case warrants discipline, and whether it does depends on a number of relevant circumstances. During the ten-year time frame examined by the commission, Justice Raye authored opinions in over 1,200 matters, including the cases identified in Exhibit 1. A substantial portion of those cases were decided within one year from the completion of briefing.

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in 95% of civil cases, 570 days (one year and seven months) is considered a reasonable number of days from initial filing to issuance of an opinion. (Doerner*, supra,* at p. 22.) For criminal appeals (excluding death penalty cases), a reasonable number of days from initial filing to opinion is 600 days (approximately one year and eight months). (*Id.* at p. 20.) Given the amount of time required from initial filing to case fully briefed, to meet the 600-day target in criminal cases, the time from a case being fully briefed to opinion would be less than one year.

At the same time, a significant number of cases languished for years. Justice Raye's oldest completed case (No. C067600) had aged seven years and nine months after being fully briefed before the parties dismissed the matter. Two of Justice Raye's cases were delayed between six and seven years; five between five and six years; 17 between four and five years; 29 between three and four years; and 45 between two and three years. Justice Raye's oldest *pending* case (No. C070732, rating of 2) is a criminal matter with youthful offenders in which supplemental briefing was requested by the parties and authorized by the court in January 2022 after the case had been fully briefed for eight years and seven months.[2] Justice Raye failed to prioritize efforts so that older cases could be resolved before work began on newer ones.

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In approximately 14 to 35 percent of the cases assigned to Justice Raye from 2001 through 2019, more than a year passed between the date the cases were fully briefed and the date the opinions issued. In contrast to these high levels of delay, only 7 percent of cases assigned in 2020—after an inquiry from the commission—were unresolved more than a year after the completion of briefing. This suggests that Justice Raye could have decided the matters in a more timely manner. (See *Mardikian*, *supra*, at p. 482 [discipline appropriate where delays are persistent and avoidable].) The evidence does not show that the delay was caused by an intentional disregard of the justice's duties. (See *In re Jensen* (1978) 24 Cal.3d 72, 73 [discipline appropriate where there is a

[2] The court's managing attorney screens all appeals and numerically ranks each chambers case according to complexity, from 1 to 5, with higher numbers assigned to more complex cases. Most routine disposition appeals (RDAs) and juvenile dependency cases are initially prepared by a pool of central staff attorneys.

persistent failure to perform judicial duties, even if the failure is not an intentional disregard of duties].)

During the relevant time period, Justice Raye was aware of his growing backlog of cases. He received monthly reports that identified his assigned cases and the date of each assignment. The justices in the Third District discussed the topic of delay and the court's "growing backlog of appeals" at several justices' meetings and three court retreats from 2012 through 2018.

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Justice Raye did not minimize the impact of delay by prioritizing the delayed matters and taking into account the effect of delay on the parties in particular cases.

II. FAILURE TO EXERCISE ADMINISTRATIVE AND SUPERVISORY AUTHORITY

Between January 2011 and March 2021, Justice Raye failed to properly exercise his administrative and supervisory authority to provide a forum for the expeditious resolution of appellate disputes. His role as administrative presiding justice of the Third District Court of Appeal required that he advocate and encourage reasonable procedures to ensure that priority and older cases were decided first.

California Rules of Court, rule 10.1004 outlines the responsibilities of an appellate presiding justice. Subsection(b) states, "*The administrative presiding*

justice is responsible for leading the court, establishing policies, promoting access to justice for all members of the public, providing a forum for the fair and expeditious resolution of disputes, and maximizing the use of judicial and other resources." (Italics added.) Subsection (c)(1) states, "The administrative presiding justice has general direction and supervision of the clerk/executive officer and all court employees except those assigned to a particular justice or division[.]" Subsection (c)(5) states, "The administrative presiding justice supervises the administration of the court's day-to-day operations, including personnel matters, but must secure the approval of a majority of the justices in the district before implementing any change in court policies[.]"

Justice Raye was aware, throughout the time he served as the Presiding Justice, that there were chronic delays in cases assigned to some of the other justices on the court. From January 2011 through March 2021, the decisions in 1,861 matters were delayed for more than one year from the completion of the briefing on the appeal; 768 of those cases were pending for more than two years after the completion of the briefing in the case. Although Justice Raye repeatedly discussed the issue of delay with his colleagues on the court, he did not fulfill his administrative responsibility to propose and advocate changes to court procedure that would ensure the prompt resolution of older cases.

The delays affected the parties to the appeals. In some cases, the appeals became moot as a result of the passage of time. In other cases, one or more of the parties in the case suffered adverse economic impacts from the delays. Some defendants in criminal cases served time that would not have been served had the appellate decision been issued at an earlier date, and others had served their full term of probation, subject to conditions that were ultimately found to be improper.

Although Justice Raye, in 2012, circulated target standards for the timely processing of appeals, and reaffirmed the standards in 2015 and 2018, the standards were often excused. Although Justice Raye took various steps to reassign cases or pause assignments to chambers that were particularly

backlogged, these steps did not resolve the chronic delays. Justice Raye was aware that the steps he had taken did not resolve the backlogs and, at times, those efforts burdened the justices on the court who had fewer older cases.

In addition to canons 3B(8) and 2A, Justice Raye's failure to properly exercise his administrative and supervisory authority violated canons 3C(1) (duty to diligently discharge administrative responsibilities in a manner that promotes public confidence in the integrity of the judiciary), 3C(2) (duty to maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business), 3D(1) (duty to take appropriate corrective action when there is reliable information that another justice had violated provisions of the Code of Judicial Ethics), and 1 (duty to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and to establish, maintain, and enforce high standards of conduct, and personally observe those standards so that the integrity and independence of the judiciary is preserved).

The pattern of chronic delay, described in sections I and II above, creates the appearance that the delay could affect adjudicative decisions, and impede or deny meaningful appellate review.

Justice Raye's conduct was, at a minimum, improper action within the meaning of California Constitution, article VI, section 18(d).

The time period of the delay, and the number of delayed cases, aggravated the conduct, described above. In mitigation, Justice Raye resolved most of his pending aged matters promptly after contact by the commission. Also, he has been a bench officer for more than three decades and has not been the subject of prior discipline. Since he was appointed to the Court in 1991, Justice Raye authored over 3,600 opinions and participated as a panel member in over 7,000 other opinions. He issued over 1,200 opinions in the ten-year time frame addressed in this admonishment. In further mitigation, Justice Raye stipulated to this resolution, thereby bringing the matter to

conclusion and saving the commission the expenditure of further staff resources in investigating and resolving this matter.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Justice Raye expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

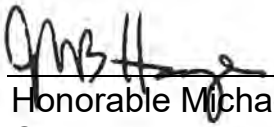
DISCIPLINE

The commission found the prejudice to litigants and the significant length of the delay in a number of Justice Raye's cases to be aggravating factors. In mitigation, Justice Raye has no prior discipline, after three decades of service as a judicial officer. Justice Raye acknowledged that he was aware of his own backlog and those of other justices. He admitted his misconduct and stipulated to discipline. In determining to accept the Stipulation, the commission took into consideration the justice's agreement to retire and not serve as a judicial officer again. The commission concluded that this resolution adequately fulfills its mandate to protect the public from further possible misconduct and avoids the need for further proceedings.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Rickey Ivie, Esq.; Ms. Kay Cooperman Jue; Ms. Sarah Kruer Jager; Hon. Lisa B. Lench; Victor E. Salazar, Esq.; Mr. Richard Simpson; and Ms. Beatriz E. Tapia voted to accept the stipulation.

Date: June 1, 2022

On behalf of the
Commission on Judicial Performance,



Honorable Michael B. Harper
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING JUSTICE VANCE W. RAYE	STIPULATION FOR DISCIPLINE BY CONSENT (Rule 116.5)

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Justice Vance W. Raye of the California Court of Appeal, Third District, represented by Edith R. Matthai, and commission counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's staff inquiry letter, dated November 30, 2020, preliminary investigation letter, dated February 23, 2021, and supplemental preliminary investigation letter, dated July 26, 2021. The parties request that the commission resolve this matter by imposition of a public admonishment. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Justice Raye because, among other reasons, in light of the stipulated facts and legal conclusions, a public admonishment, along with other terms, recited herein, adequately protects the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Justice Vance W. Raye.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing a public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Justice Vance W. Raye waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118 et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Justice Vance W. Raye shall advise the Governor of California, in writing, of his retirement from judicial office, effective June 1, 2022.

7. If Justice Vance W. Raye does not retire as of June 1, 2022, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the staff inquiry and preliminary investigation letters. Failure to comply with the terms and conditions of this agreement may also constitute additional and independent grounds for discipline.

8. Justice Vance W. Raye has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after June 1, 2022, except that, in the interest of justice, to conclude matters, which have been previously assigned to him and cannot be completed by June 1, and which would place an undue burden on the other justices if they were reassigned. Justice Raye may also respond to any request from the Third District for information regarding a case that was assigned to Justice Raye before the date of his retirement.

9. If Justice Vance W. Raye attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the staff inquiry and preliminary investigation letters.

10. Justice Vance W. Raye agrees that the facts recited herein are true and correct, and that the discipline to which the parties stipulate herein is appropriate in light of those facts.

11. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted or conceded by either party.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

This disciplinary matter concerns Justice Vance W. Raye, the Administrative Presiding Justice of the Third District Court of Appeal since 2010. His current term began in 2015. Justice Raye was appointed to Sacramento Superior Court in 1989 and as an Associate Justice on the Third District Court of Appeal in 1991.

Justice Raye engaged in a pattern of delay in deciding around 200 appellate matters over a ten-year period.

I. PATTERN OF PERSISTENT DECISIONAL DELAY

"The failure to resolve appellate cases in an appropriately expeditious timeframe undermines the ability of the appellate courts to efficiently manage their publicly provided resources, demonstrate effective leadership within the Judicial Branch and promote public confidence in the courts." (Doerner, Model Time Standards for State Appellate Courts (2014) p. 18.)

Under California law, judges are expected to decide matters submitted to them within 90 days of submission and are prohibited from receiving their salaries when they have undecided matters under submission for more than 90 days. (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.) Other than the 90-day rule, there is no law or rule that sets a specific limit on the time an appellate court takes to decide a matter[1] and, in particular, nothing that directly addresses pre-submission delay.

[1] "[F]ederal courts have held that undue delay in processing an appeal may rise to the level of a violation of due process." (*Daniel v. State* (Wy. 2003) 78 P.3d 205, 218 [citations omitted].) The Tenth Circuit has enunciated a general rule that delay in adjudicating a noncapital criminal appeal for more than two years after filing of the notice of appeal, including more than 11 months from the completion of briefing to the opinion's filing, raises a rebuttable presumption of

More generally, however, the Code of Judicial Ethics requires judges to dispose of all judicial matters fairly, promptly, and efficiently (canon 3B(8)) and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A).

Appellate court cases are not "submitted" until after oral argument is heard, or argument is waived. At the Third District, a case is not set for oral argument until there is a full draft memorandum that at least two justices agree on. Justice Raye did not violate the 90-day rule on any matter assigned to him. Rather, the pre-submission decisional delay in this matter implicates the general standards of canons 3B(8) and 2A. Justice Raye engaged in a pattern of delay in deciding a significant number of appellate cases over a lengthy period. In particular, both with respect to the court as a whole (in his role as presiding justice) and as to cases assigned to him personally, he failed to encourage and adopt reasonable procedures to ensure that priority and older cases were decided first.

The commission surveyed approximately 200 matters (as set forth in Exhibit 1 and incorporated herein as though set forth in full) assigned to him from 2011 to 2021, in which more than one year passed between the completion of briefing and the issuance of an opinion (or dismissal of the matter). Not every such case warrants discipline, and whether it does depends on a number of relevant

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prejudice from an ineffective appellate process. (*Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1555-1561 & fn. 11; accord, e.g., *U.S. ex rel. Green v. Washington* (N.D. Ill. 1996) 917 F.Supp. 1238, 1277.) The National Center for State Courts, along with the Court Management Committee of the Conference of Chief Justices and the Conference of State Court Administrators determined that, in 95% of civil cases, 570 days (one year and seven months) is considered a reasonable number of days from initial filing to issuance of an opinion. (Doerner*, supra,* at p. 22.) For criminal appeals (excluding death penalty cases), a reasonable number of days from initial filing to opinion is 600 days (approximately one year and eight months). (*Id.* at p. 20.) Given the amount of time required from initial filing to case fully briefed, to meet the 600-day target in criminal cases, the time from a case being fully briefed to opinion would be less than one year.

circumstances. During the ten-year time frame examined by the commission, Justice Raye authored opinions in over 1,200 matters, including the cases identified in Exhibit 1. A substantial portion of those cases were decided within one year from the completion of briefing.

At the same time, a significant number of cases languished for years. Justice Raye's oldest completed case (No. C067600) had aged seven years and nine months after being fully briefed before the parties dismissed the matter. Two of Justice Raye's cases were delayed between six and seven years; five between five and six years; 17 between four and five years; 29 between three and four years; and 45 between two and three years. Justice Raye's oldest *pending* case (No. C070732, rating of 2) is a criminal matter with youthful offenders in which supplemental briefing was requested by the parties and authorized by the court in January 2022 after the case had been fully briefed for eight years and seven months.[2] Justice Raye failed to prioritize efforts so that older cases could be resolved before work began on newer ones.

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justice of the Third District Court of Appeal required that he advocate and encourage reasonable procedures to ensure that priority and older cases were decided first.

California Rules of Court, rule 10.1004 outlines the responsibilities of an appellate presiding justice. Subsection(b) states, "*The administrative presiding justice is responsible for leading the court, establishing policies, promoting access to justice for all members of the public, providing a forum for the fair and expeditious resolution of disputes, and maximizing the use of judicial and other resources.*" (Italics added.) Subsection (c)(1) states, "The administrative presiding justice has general direction and supervision of the clerk/executive officer and all court employees except those assigned to a particular justice or division[.]" Subsection (c)(5) states, "The administrative presiding justice supervises the administration of the court's day-to-day operations, including personnel matters, but must secure the approval of a majority of the justices in the district before implementing any change in court policies[.]"

Justice Raye was aware, throughout the time he served as the Presiding Justice, that there were chronic delays in cases assigned to some of the other justices on the court. From January 2011 through March 2021, the decisions in 1,861 matters were delayed for more than one year from the completion of the briefing on the appeal; 768 of those cases were pending for more than two years after the completion of the briefing in the case. Although Justice Raye repeatedly discussed the issue of delay with his colleagues on the court, he did not fulfill his administrative responsibility to propose and advocate changes to court procedure that would ensure the prompt resolution of older cases.

The delays affected the parties to the appeals. In some cases, the appeals became moot as a result of the passage of time. In other cases, one or more of the parties in the case suffered adverse economic impacts from the delays. Some defendants in criminal cases served time that would not have been served had the appellate decision been issued at an earlier date, and others had served

their full term of probation, subject to conditions that were ultimately found to be improper.

Although Justice Raye, in 2012, circulated target standards for the timely processing of appeals, and reaffirmed the standards in 2015 and 2018, the standards were often excused. Although Justice Raye took various steps to reassign cases or pause assignments to chambers that were particularly backlogged, these steps did not resolve the chronic delays. Justice Raye was aware that the steps he had taken did not resolve the backlogs and, at times, those efforts burdened the justices on the court who had fewer older cases.

In addition to canons 3B(8) and 2A, Justice Raye's failure to properly exercise his administrative and supervisory authority violated canons 3C(1) (duty to diligently discharge administrative responsibilities in a manner that promotes public confidence in the integrity of the judiciary), 3C(2) (duty to maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business), 3D(1) (duty to take appropriate corrective action when there is reliable information that another justice had violated provisions of the Code of Judicial Ethics), and 1 (duty to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and to establish, maintain, and enforce high standards of conduct, and personally observe those standards so that the integrity and independence of the judiciary is preserved).

The pattern of chronic delay, described in sections I and II above, creates the appearance that the delay could affect adjudicative decisions, and impede or deny meaningful appellate review.

Justice Raye's conduct was, at a minimum, improper action within the meaning of California Constitution, article VI, section 18(d).

The time period of the delay, and the number of delayed cases, aggravated the conduct, described above. In mitigation, Justice Raye resolved most of his pending aged matters promptly after contact by the commission.

Also, he has been a bench officer for more than three decades and has not been the subject of prior discipline. Since he was appointed to the Court in 1991, Justice Raye authored over 3,600 opinions and participated as a panel member in over 7,000 other opinions. He issued over 1,200 opinions in the ten-year time frame addressed in this admonishment. In further mitigation, Justice Raye stipulated to this resolution, thereby bringing the matter to conclusion and saving the commission the expenditure of further staff resources in investigating and resolving this matter.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Justice Raye expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: May 27, 2022.

Vance W. Raye

Justice Vance W. Raye

Dated: _____, 2022.

Edith R. Matthai
Attorney for Justice Vance W. Raye

Dated: _____, 2022.

Gregory Dresser
Director-Chief Counsel
Commission on Judicial Performance

Also, he has been a bench officer for more than three decades and has not been the subject of prior discipline. Since he was appointed to the Court in 1991, Justice Raye authored over 3,600 opinions and participated as a panel member in over 7,000 other opinions. He issued over 1,200 opinions in the ten-year time frame addressed in this admonishment. In further mitigation, Justice Raye stipulated to this resolution, thereby bringing the matter to conclusion and saving the commission the expenditure of further staff resources in investigating and resolving this matter.

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Dated: _____, 2022.

Justice Vance W. Raye

Dated: May 26, 2022.

Edith R. Matthai
Attorney for Justice Vance W. Raye

Dated: _____, 2022.

Gregory Dresser
Director-Chief Counsel
Commission on Judicial Performance

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Dated: _____, 2022.

_____
Justice Vance W. Raye

Dated: _____, 2022.

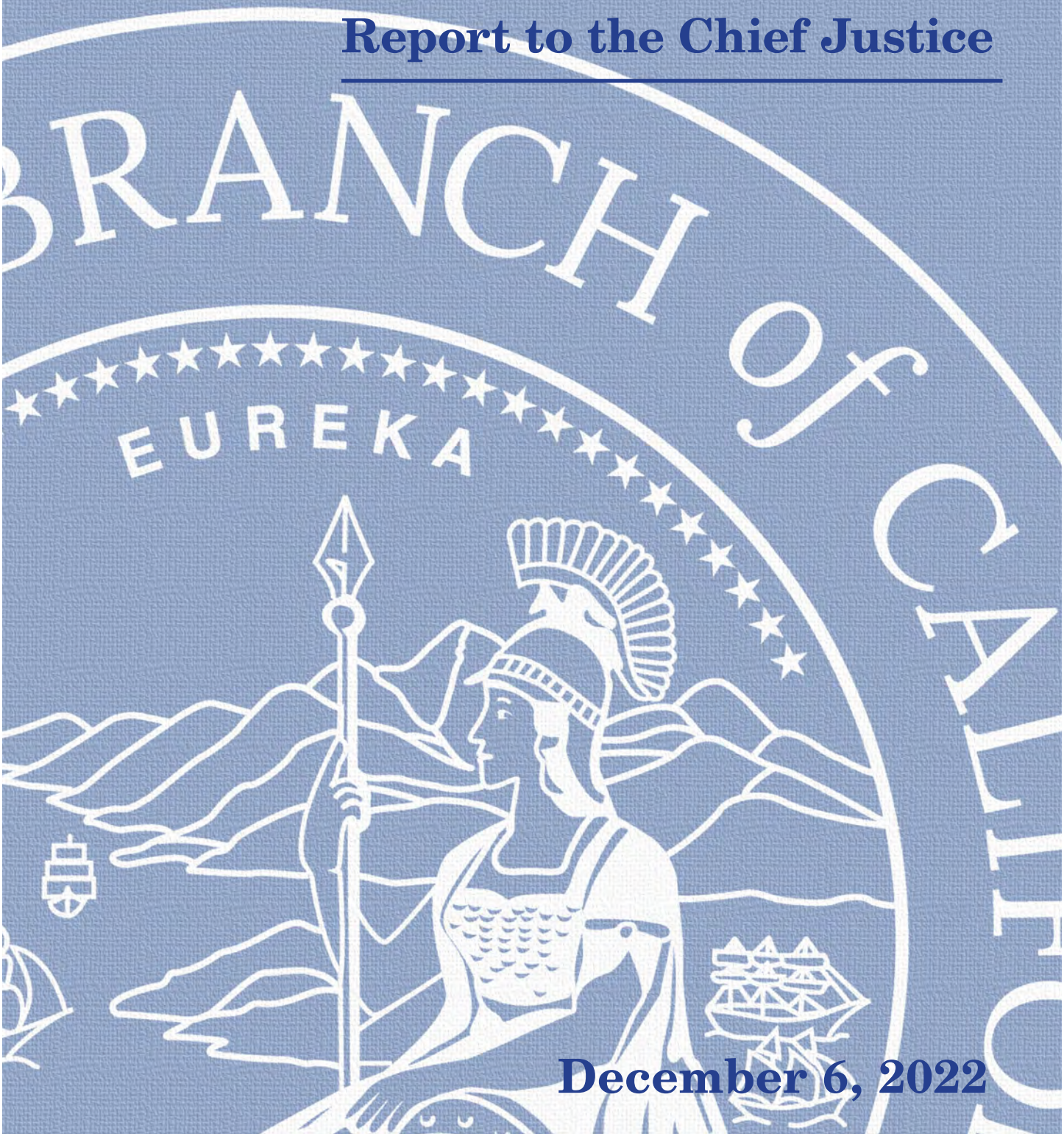
_____
Edith R. Matthai
Attorney for Justice Vance W. Raye

Dated: May 24, 2022.

Gregory Dresser
Director-Chief Counsel
Commission on Judicial Performance

APPELLATE CASEFLOW WORKGROUP

Report to the Chief Justice



December 6, 2022

APPELLATE CASEFLOW WORKGROUP

Hon. Jim Humes, Chair
Administrative Presiding Justice of the
Court of Appeal, First Appellate District

Hon. Laurie Earl
Associate Justice of the Court of Appeal,
Third Appellate District

Hon. Mary Greenwood
Administrative Presiding Justice of the Court
of Appeal, Sixth Appellate District

Hon. Brad R. Hill
Administrative Presiding Justice of the Court
of Appeal, Fifth Appellate District

Hon. Brian Hoffstadt
Associate Justice of the Court of Appeal,
Second Appellate District, Division Two

Hon. Elwood G. Lui
Administrative Presiding Justice of the Court
of Appeal, Second Appellate District

Hon. Judith McConnell
Administrative Presiding Justice of the Court
of Appeal, Fourth Appellate District

Ms. Marsha Amin
Managing Attorney to the Administrative
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Ms. Oona Mallett
Managing Attorney to the Administrative
Presiding Justice
Court of Appeal, Third Appellate District

Ms. Marina Meyere
Managing Attorney to the Administrative
Presiding Justice
Court of Appeal, Sixth Appellate District

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Clerk/Executive Officer
Court of Appeal, Second Appellate District

Ms. Linda McKinsey Rousse
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CONTENTS

EXECUTIVE SUMMARY

Charge and Background

Chief Justice Tani G. Cantil-Sakauye formed the Appellate Caseflow Workgroup (workgroup) in June 2022 in response to findings issued by the Commission on Judicial Performance (CJP) concerning case delays in the Third District Court of Appeal (Third District). The workgroup has eighteen members. They include seven justices (five administrative presiding justices and two associate justices), five appellate court managing attorneys, one appellate court clerk/executive officer, three private-sector appellate specialists (including the president of the California Academy of Appellate Lawyers and the chair of the California Lawyers Association Litigation Section's Committee on Appellate Courts), a deputy attorney general specializing in criminal appeals, and an executive director of a program that assigns counsel for qualified indigent appellate litigants.

The Chief Justice directed the workgroup to review policies, procedures, and management and administrative practices of the Courts of Appeal,[1] and to recommend measures to promote transparency, accountability, and efficiency in issuing timely judgments. She also directed the workgroup to recommend measures for these courts to report metrics on case delays. The workgroup was directed to report back no later than early 2023.

Meetings and Process

To fulfill its charge, the workgroup solicited input from appellate justices and their staff, appellate attorneys, appellate and superior court clerks, appellate practitioners, and other stakeholders.

The workgroup met five times over a five-month period to review, analyze, and discuss information and data; hear from stakeholders; review and discuss appellate policies and practices; exchange comments and ideas; and consider, develop, and propose recommendations.

Summary of Findings and Recommendations

The excessive case delays revealed by the CJP in the Third District were avoidable and inexcusable, and they were harmful to the parties, the aims of justice, and the reputation of the court. But the district has taken prompt and effective measures to remedy the problems and to prevent them from recurring.

[1] The references throughout this report to the Courts of Appeal or the appellate courts exclude the California Supreme Court.

The workgroup found that the main causes of the case delays were a lack of transparent reporting to identify delayed cases and a failure to adequately follow up on known delayed cases to prioritize and resolve them. These causes were exacerbated by the facts that the Third District has a high caseload and until recently had a comparatively small attorney workforce.

The workgroup also found that no similar problem of excessively delayed appeals exists in any other district. As of the last reporting period, September 30, 2022, only a small percentage of fully briefed cases statewide were pending for more than 12 months. Within this small percentage, almost all the cases were deferred for valid reasons or were transferred from one court to another for prompt processing. The remaining handful of cases are actively being worked on.

In addition, the workgroup found that the statewide backlog of fully briefed cases in the Courts of Appeal has fallen significantly. In the last five years, the number of these cases was reduced by 47 percent, far eclipsing the 14 percent reduction in the overall number of appeals during the same period. This progress has left the courts better positioned to resolve cases more quickly.

The revelation of the case delays in the Third District was crucial to correct the serious problem it exposed, but it overshadowed the larger context of the appellate courts' solid and improving overall condition.

The revelation of the excessive delays identified by the CJP was crucial to correct the serious problem it exposed, but it overshadowed the larger context of the appellate courts' solid and improving overall condition.

Still, the workgroup recommends that more be done to prevent excessive case delays from developing in any appellate district. Accordingly, it recommends that the Chief Justice take the following action:

- Request that a report be provided to the Judicial Council's Administrative Presiding Justices Advisory Committee (APJAC) every six months identifying appeals that have been fully briefed for more than a year and that do not have a valid reason for being deferred, and further direct that the APJAC ensure the prompt processing and resolution of identified cases.
- Direct that another report be provided to the APJAC annually to improve its ability to review and manage appellate caseload inequities.
- Urge the APJAC to recommend to the Judicial Council a new or amended rule authorizing the administrative presiding justices, under the oversight of the Chief Justice, to collectively review and address contentions that an administrative presiding justice or presiding justice has not properly managed an important matter.

The workgroup also recommends various other proposals to expedite the record preparation and briefing phases of the appellate process.

If adopted, these measures will speed up the appellate process, prevent excessive case delays from developing, and enhance the public's confidence in the appellate courts.

OVERVIEW OF THE COURTS OF APPEAL

The Courts of Appeal are charged by the California Constitution to render judgments on matters subject to the courts' appellate and original jurisdiction, and to issue decisions in writing with reasons stated for judgments that determine causes.[2] The appellate courts are busy. In fiscal year 2021–22, they issued 8,372 written opinions, of which 8,063 resolved appeals and 309 resolved writ petitions. In addition to resolving cases and writ petitions by issuing written opinions, the courts process appeals that are not resolved by opinions, decide writ petitions that are not resolved by opinions, rule on innumerable motions, and issue countless orders.

There are currently 106 justice positions authorized for the Courts of Appeal. These positions are distributed among 19 divisions within 6 districts, as follows:

District	Number of Divisions	Location	Number of Justices
First	5	San Francisco	20 justices (4 in each division)
Second	7	Los Angeles	28 justices (4 in each division)
	1	Ventura	4 justices
Third	1	Sacramento	11 justices
Fourth	1	San Diego	10 justices
	1	Riverside	8 justices
	1	Santa Ana	8 justices
Fifth	1	Fresno	10 justices
Sixth	1	San Jose	7 justices

The districts vary in terms of geography and population. The Third District, for example, has 11 justices and encompasses the largest geographic area, with 23 northern California counties within its jurisdiction. In contrast, the Sixth District has 7 justices and covers the smallest geographic area, with only 4 counties.

[2] Cal. Const., art. VI, §§ 3, 10, 11 & 14.

Following is a map showing the appellate district boundaries.

Each district is unique and has a set of local rules and internal operating procedures that supplement the California Constitution, statutes, and rules of court.

Presiding Justices and Administrative Presiding Justices

Each division of the Courts of Appeal has one presiding justice who is appointed by the Governor. In a district that has more than one division, the Chief Justice designates a presiding justice to act as the administrative presiding justice.[3] In a district with only one division, the presiding justice acts as the administrative presiding justice. Thus, in the First, Second, and

[3] Cal. Rules of Court, rule 10.1004.

All further rule references are to the California Rules of Court unless otherwise indicated.

Fourth Districts, the administrative presiding justice is appointed by the Chief Justice, while in the Third, Fifth, and Sixth Districts, the presiding justice is automatically the administrative presiding justice of their district.[4]

Each administrative presiding justice is "responsible for leading the court, establishing policies, promoting access to justice for all members of the public, providing a forum for the fair and expeditious resolution of disputes, and maximizing the use of judicial and other resources."[5] The administrative presiding justice must perform duties delegated by a majority of the justices in the district with the Chief Justice's concurrence. Among other duties, the administrative presiding justice is responsible for personnel matters, acting as a presiding justice in matters not assigned to a particular division, cooperating and coordinating with the Chief Justice regarding Judicial Council activities, working with the Chief Justice to expedite business and equalize work through the transfer of cases, administering the court's day-to-day operations, and handling matters involving the budget and facilities.[6]

Under the leadership of the Chief Justice, the administrative presiding justices sit on the APJAC.[7] In this capacity, they are tasked with establishing administrative policies to advance efficient functioning of the appellate courts; advising the Judicial Council of resource needs and soliciting the council's support in meeting budget, administrative, and staffing requirements; proposing training for justices and appellate support staff; commenting on and making recommendations to the council about appellate court operations; allocating resources among the appellate courts; and recommending budget change proposals.[8]

Three appellate divisions are separated geographically from the original base of their districts:

- Division Six of the Second District is located in Ventura;
- Division Two of the Fourth District is located in Riverside; and
- Division Three of the Fourth District is located in Santa Ana.

Presiding justices in these geographically separate divisions are authorized, under the general oversight of the district's administrative presiding justice, to supervise staff not assigned to particular justices, act on behalf of the division regarding day-to-day activities, administer the division budget for day-to-day operations, and manage the division's facilities.[9]

[4] Rule 10.1004(a).

[5] Rule 10.1004(b).

[6] Rule 10.1004(c).

[7] Rule 10.52(c).

[8] Rule 10.52(b) & (d).

[9] Rule 10.1004(d).

Appellate Courts' Writ Workload

In reviewing and developing recommendations to reduce appellate delay, the workgroup focused on the appellate courts' workload that involves processing appeals from superior court judgments. The workgroup, however, briefly describes another aspect of the appellate courts workload—the courts' work involving writ petitions—because it is significant and must often be prioritized over appeals.

Last fiscal year, approximately 5,844 writ petitions relating to civil, criminal, juvenile, and juvenile dependency matters were filed in the Courts of Appeal. Unlike appeals from superior court judgments, writ petitions involve the appellate courts' discretionary jurisdiction.[10] Most writ petitions are for mandate (to compel the performance of a nondiscretionary duty),[11] prohibition (to prevent a threatened judicial act that would exceed a lower court's jurisdiction),[12] certiorari,[13] supersedeas (to stay a lower court's judgment or order),[14] or habeas corpus (to review the legality of actions affecting incarcerated prisoners).[15]

When a writ petition is filed, the court must first decide whether to exercise its discretionary jurisdiction over the matter. The amount of discretion the court has in making this decision is extensive but not unbounded. When the court declines to exercise its discretionary jurisdiction, it may deny the petition with a limited or no explanation of its reasons. Nonetheless, extensive review, research, and analysis—often on an expedited and priority basis—is typically required to decide the issues presented.

All appellate courts typically assign the initial review and analysis of writ petitions to attorneys who specialize in the law governing such petitions. These attorneys normally prepare an analysis and recommendation for a panel of three randomly assigned justices to consider. Courts differ on the procedures used for panel members to confer and rule on the petitions.

Some categories of writs, such as those filed in connection with juvenile court dependency proceedings, are given very high priority and are treated more like appeals than writs in the sense that lengthy written decisions are usually issued.

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[10] Cal. Const., art. VI, §§ 10 & 11; Code Civ. Proc., § 904.1(a) ("An appeal, other than in a limited civil case, is to the court of appeal"); Pen. Code, § 1235(b) ("An appeal from the judgment or appealable order in a felony case is to the court of appeal for the district in which the court from which the appeal is taken is located").

[11] Code Civ. Proc., § 1085.

[12] Code Civ. Proc., § 1102.

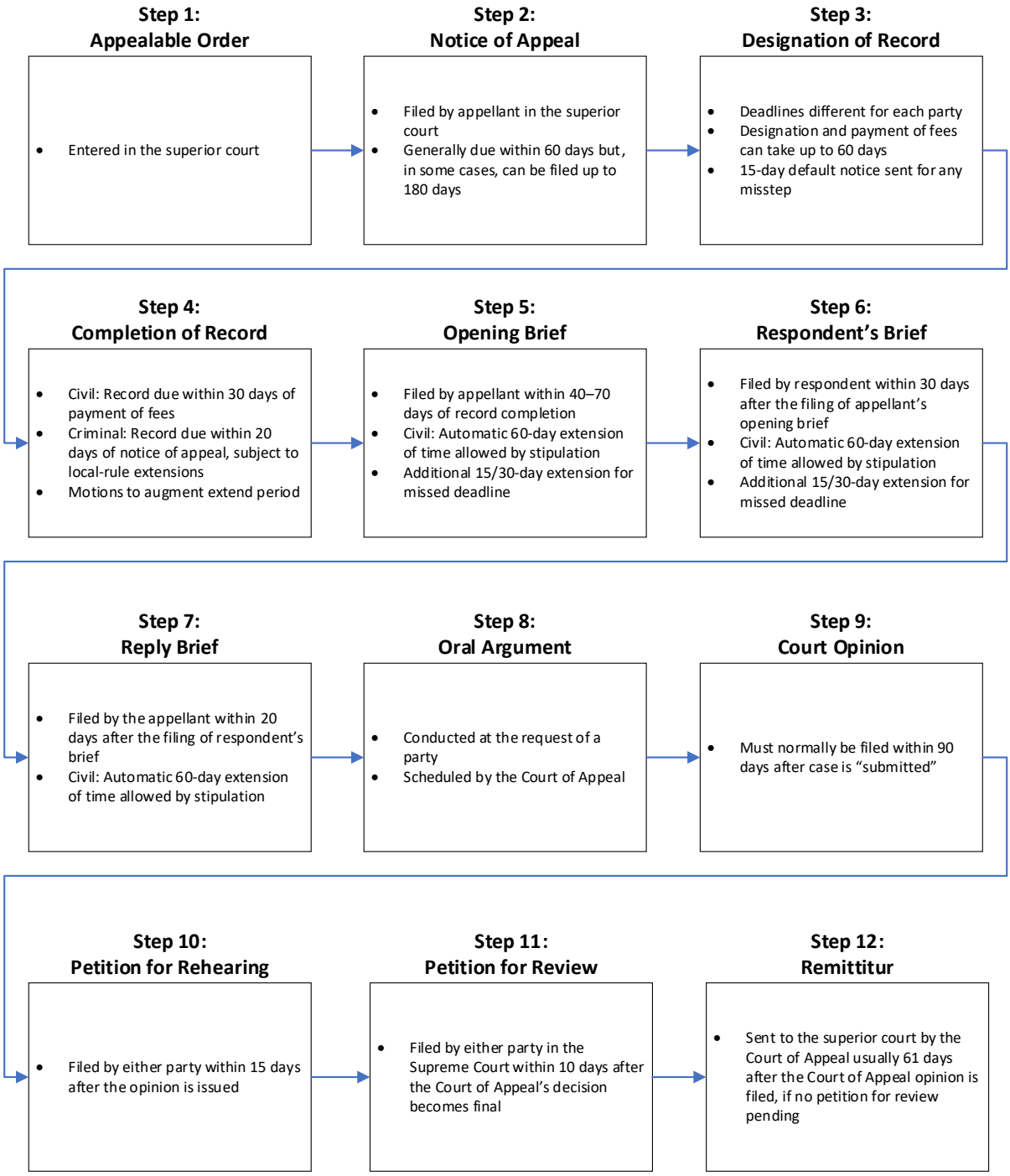
[13] Code Civ. Proc., §§ 1067, 1068.

[14] Rule 8.112.

[15] Cal. Const., art. VI, § 10; rules 8.380–8.387.

Appellate Courts' Appeals Workload

In contrast to the writ process, the appeals process begins when the superior court issues an appealable order or judgment that leaves a party dissatisfied. To appeal from the order or judgment, the party must file a notice of appeal in the superior court in the time frame set by law. The ensuing appellate process involves many steps, as illustrated in the following chart.



As indicated by the chart, the amount of time needed to process and resolve appeals is substantial even in best-case scenarios, such as when the record is timely prepared and filed, no record augmentations are sought, no extensions of the briefing deadlines are requested, oral argument is waived or promptly scheduled, no difficulties arise during the court's review and analysis of the issues or during its preparation and circulation of the draft memorandum or opinion, all panel members agree on the analysis and disposition, and no petitions for rehearing or review are sought. The appellate process can easily take a year or more, even when all these steps progress smoothly.

Considerations Affecting Appellate Case Processing

How quickly appeals can be processed is affected by several factors, many of which are unique to California and outside the appellate courts' control.

The Code of Judicial Ethics requires judges to dispose of judicial matters fairly, promptly, and efficiently and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.[16] Other authority indicates that judges are expected to decide matters assigned to them within 90 days after an appeal is "submitted," and they are prohibited from receiving their salaries when they have an undecided matter under submission for more than 90 days.[17] Appellate cases are submitted when the court has heard oral argument or approved its waiver.[18]

Excessive delays are easy to condemn but harder to define. The National Center for State Courts takes the position that in 95 percent of civil cases, 450 days (about one year and three months) is a reasonable time from the date the notice of appeal is filed to the date the opinion is issued.[19] And it takes the position that a reasonable time for criminal appeals, excluding death penalty cases, is 600 days (about a year and eight months). These guidelines are ill-fitting in California, given the many factors that delay appellate processing that are outside the control of the courts and justices.

The workgroup identified a number of systemic circumstances that can hasten or delay case processing.

[16] Cal. Code Jud. Ethics, canons 2A, 3B(8).

[17] Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.

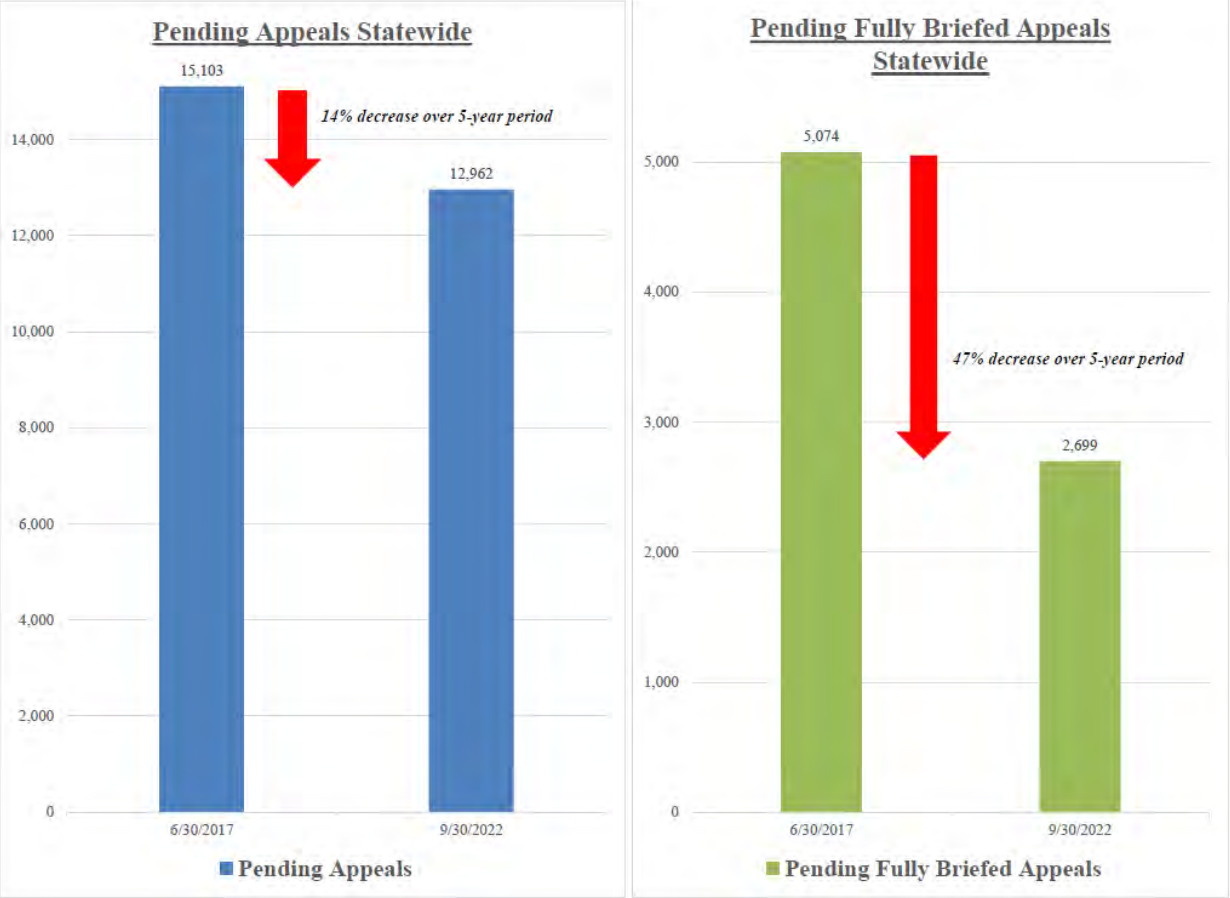
[18] Rule 8.256(d)(1).

[19] Doerner, John P. (2014), *Model Time Standards for State Appellate Courts*. National Center for State Courts. https://ncsc.contentdm.oclc.org/digital/collection/appellate/id/1032/.

Cases Can Be Resolved More Quickly Because Fully Briefed Caseloads Have Been Significantly Reduced

The part of the appellate process over which the courts and justices have the most control is the period that begins once a case is fully briefed. The workgroup found that in recent years significant statewide progress has been made in reducing the number of pending fully briefed cases. This reduction enables justices to start reviewing and deciding cases more quickly.

The significant reduction in pending caseloads cannot be explained away by suggesting that it was due to a decrease in appeals. While it is true that in the past five years the number of appeals pending fell by 14 percent, the number of pending fully briefed cases was reduced by 47 percent.



In short, the ability of the Courts of Appeal to resolve fully briefed cases more quickly has considerably improved in recent years.

Many Cases Are Deferred for Valid Reasons

The workgroup found that the processing of many appeals is properly extended for valid reasons. Examples of such reasons include:

- A bankruptcy court has stayed all related proceedings, including state appellate proceedings;
- Stays have been entered at the request of the parties, to allow for further proceedings in the trial court, or for other legitimate reasons;
- Supplemental briefs have been ordered to consider the effect of newly enacted legislation or for other legitimate reasons;
- Tentative opinions have been issued;
- Panel members are actively engaged in discussing the appropriate case resolution;
- Opinions have been issued but rehearing was granted;
- Interim petitions for review in the Supreme Court have been filed or granted;
- Cases are remanded by the United States or California Supreme Court; or
- Cases involve an appeal from a death sentence.

Cases Are Often Delayed Because of Automatic Extensions

California statutes and rules provide for many automatic extensions of time at various steps of the appellate process, and the courts have no ability to deny them. For example, if a party in a civil case makes a mistake in designating the record or fails to pay a record preparation fee, a notice of default must be sent by the superior court clerk, and the party is given 15 days from the date of the notice to remedy the problem.[20] Delays are compounded in cases in which multiple mistakes are made because multiple 15-day notices must be sent.

The parties in civil cases may also stipulate to extend the time for filing their briefs by up to 60 days.[21] And if a party in a civil case fails to file a brief within the prescribed deadline, the appellate court clerk is required to notify the party that the brief must be (but still can be) filed within 15 days from the date of the notice.[22] If a party in a criminal case fails to file a timely brief, a similar notice is sent, but it informs the party that the brief must be filed within 30 days from the date of the notice.[23] These automatic extensions can add up, and they result in a considerable amount of processing time over which the courts have no control.

[20] Rule 8.140(c).

[21] Rule 8.212(b)(1).

[22] Rule 8.220(a).

[23] Rule 8.360(c)(5).

Case Processing Is Affected by Statutory and Other Priorities

Statutory and other priorities also affect case processing. In California, many types of appeals are required by statute to be given priority. A list of statutes and rules that explicitly address many of these statutory priorities is provided in the appendix to this report. In addition, dozens of other statutes and rules indirectly suggest that other types of appeals should be prioritized. Prioritizing some appeals means that the appeals not prioritized necessarily take longer to resolve.

How best to prioritize cases requires a consideration of multiple factors in addition to the statutory directives, which can compete or be unclear. No guidelines explain how justices should apply these factors and directives, but they are best assessed by the assigned justice in the exercise of the justice's discretion and in consideration of the justice's entire docket.[24]

The statutory priorities are often expressed in categorical terms or are unclear and can lead to superficial assumptions about how cases should be prioritized. In the CJP findings that gave rise to the establishment of this workgroup, the justice was criticized because "more than half of [his] delayed cases were matters in which the people of the state were parties. He did not accord these matters calendar preference over civil appeals, and other cases (excluding juvenile matters) that had been filed during the same period, as provided by section 44 of the Code of Civil Procedure."[25]

The premise, however, assumes that Code of Civil Procedure section 44 categorically requires appeals involving the People to be prioritized over almost all other appeals. But dozens of other statutes expressly grant appellate preference. Without knowing the subject matter and circumstances of the "civil appeals, and other cases," it is unclear whether the justice's cases involving the People necessarily warranted a higher priority.

The premise also supposes that Code of Civil Procedure section 44 contains a clear directive. The section states:

> Appeals in probate proceedings, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign shall be given preference in hearing in the courts of appeal, and in the Supreme Court when transferred thereto. All these cases shall be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties.

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[24] As our Supreme Court recognized recently, while the Legislature may impose reasonable rules and regulations governing how the courts are to conduct their business, the courts retain the right to control their own dockets, including the right to determine the order in which cases are decided. (*Briggs v. Brown* (2017) 3 Cal.5th 808, 852–853.) If the rule were otherwise, serious constitutional questions would arise under the separation of powers doctrine. (*Id.* at p. 853.)

[25] Public admonishment by the CJP, https://cjp.ca.gov/wp-content/uploads/sites/40/2022/06/Raye_DO_Pub_Admon_6-1-22.pdf?emrc=f5c572.

The People are parties in every criminal appeal. While many criminal appeals warrant priority, others may not. Appeals potentially affecting a defendant's liberty certainly take precedence, but appeals involving minor issues may not. Should a court prioritize an appeal of a defendant who was sentenced to life in prison when the defendant's appeal only seeks, for example, a recalculation of a small fine? Should such a case be prioritized over other appeals that also have statutory priority or present more legitimate, time-sensitive concerns, such as a civil appeal threatening the economic livelihood of a person or small family-owned business?

Reflexive assumptions about case priorities are misguided and may be harmful. Prioritizing appeals in a way to best advance the interests of the parties and the public is complicated and requires justices to consider statutory directives, the individual circumstances of particular appeals, and the other cases on their dockets.

Most Proposition 66 Appeals Must Be Deferred

Appeals filed under Proposition 66 are often deferred as the result of policy and budgetary decisions made by the other branches of government. Proposition 66 was approved by the California electorate in November 2016 to hasten the review of death penalty cases by changing various court procedures. Before Proposition 66, habeas corpus petitions in death-penalty cases were filed in and decided by the Supreme Court. Now, these petitions are filed in and decided by the trial court in which the defendant was originally convicted. Once decided in that court, the decision may be appealed to a Court of Appeal, followed by a final review by the California Supreme Court.

Appeals under Proposition 66 often cannot be processed because the Legislature has declined to authorize funding to pay for the retention of counsel for the appellant, or to enable courts to hire the necessary staff to handle these cases. Since the passage of Proposition 66, the judicial branch has regularly, but unsuccessfully, sought funding to enable the appellate courts to implement it. Although some of these cases can be processed when they raise straightforward procedural issues and the appellant is represented by private or other retained counsel, most will continue to be deferred.

Case Processing Is Slowed When There Are Prolonged Vacancies in Justice Positions

Currently there are 14 justice vacancies, with 3 more expected at the beginning of 2023 as the result of planned retirements. Courts, of course, have no authority over appointments to fill justice vacancies. This authority lies with the Governor.[26] The Governor's decision to fill vacancies is weighty and takes time, but the appellate courts' ability to process and resolve cases efficiently is inevitably diminished when vacancies are left unfilled for prolonged periods. Exacerbating the problem is that when a justice retires or leaves, the court often loses some or all of the justice's staff, including attorneys. These positions cannot be easily filled while the justice position remains vacant.

[26] Cal. Const., art. VI, § 16.

The loss of productivity resulting from justice vacancies can be mitigated with the appointment of pro tempore judges, but only to some extent.[27] Pro tempore judges are typically authorized for 60 days, with the possibility of an additional 30- or 60-day extension. Within these short periods, these temporary judges must familiarize themselves with the workload and their assigned court's policies and practices. Successive pro tempore appointments to fill prolonged vacancies lead to additional unavoidable inefficiencies. Finally, it can be challenging to find judges who are available to be appointed pro tempore. Many superior courts have case backlogs and their own judicial vacancies, and superior court presiding judges facing such circumstances can resist or impose limits on allowing judges to serve pro tempore on an appellate court.

[27] See Cal. Const., art. VI, § 6 (authorizing the Chief Justice to assign judges to other courts).

THE THREE PHASES OF AN APPEAL

The workgroup separated the appellate process into three distinct phases:

1. Record preparation phase;
2. Briefing phase; and
3. Decisional phase.

The Record Preparation Phase

The appellate process begins when a litigant files a notice of appeal with the trial court.[28] The clerk of the trial court mails a notice that the appeal has been filed to all counsel of record and to the appropriate Court of Appeal.[29]

The next step is the preparation of the appellate record.[30] This record typically consists of the clerk's transcript[31] (or an appendix in lieu of the clerk's transcript)[32] and the reporter's transcript.[33]

Applicable rules contemplate that appellate records will be prepared quickly, but this aspiration is often unfulfilled for reasons discussed below. Generally, the rules require that the clerk's and the reporter's transcripts in a criminal appeal be completed within 20 days of the date of the notice of appeal.[34] Local rules in the districts sometimes grant automatic extensions.[35] While the appellate court may order "one or more extensions of time for preparing the record," the total time extended may not exceed 60 days.[36] The rules provide that "[e]ach clerk/executive officer of the Court of Appeal, under the supervision of the administrative presiding justice or the presiding justice, must take all appropriate steps to ensure that superior court clerks and reporters promptly perform their duties under this rule."[37]

[28] Rule 8.100.

[29] Rule 8.100(e).

[30] Rule 8.120.

[31] Rule 8.122.

[32] Rule 8.124.

[33] Rule 8.130.

[34] Rule 8.336(c)(2) & (d)(3).

[35] See Ct. App., First Dist., Local Rules, rule 2(b) (granting 30-day automatic extension).

[36] Rule 8.336(e)(2).

[37] Rule 8.336(h).

The workgroup met and spoke with court executive officers and representatives from multiple superior courts who identified two main causes of the most serious delays in the record preparation process:

- Many superior courts have too few fully trained record clerks.
- The pool of available certified shorthand reporters statewide is too small and has been shrinking.

Clerk's Transcript

The clerk's transcript is prepared by a clerk in the superior court. In civil cases, this transcript consists of the documents required by the rules of court[38] and the documents listed by the appellant on *Appellant's Notice Designating Record on Appeal* (form APP-003). A respondent may also designate documents to be included in the clerk's transcript.[39]

A clerk's transcript can include any documents that are contained in the trial court file, such as:

- Filed documents and/or forms;
- Orders that were issued;
- Minute orders that record what happened in the trial court;
- Any exhibit that was admitted into evidence, or that was refused or lodged; and
- The record of administrative proceedings (in cases involving such proceedings).

In criminal appeals, the clerk's transcript consists mainly of the documents that the rules of court require to be included.[40]

The superior courts have too few fully trained staff to compile clerks' transcripts promptly. The problem is particularly acute in smaller courts that may have too few appeals to justify hiring a full-time records preparation clerk. In these courts, the record preparation task becomes part of a larger job with competing duties, which may be perceived as having higher priority. In courts that are short-staffed, delays are worsened by employee turnover, vacancies, and absences.

Preparing the clerk's transcript can be difficult. The types of records needed for civil, criminal, and juvenile cases are all different, and it takes training and time to learn how to properly prepare these records. Finding case files, reviewing their contents, and identifying relevant documents takes time. In civil cases, designations of record submitted by self-represented litigants or less experienced attorneys can be unclear and imprecise, and they can require time-consuming follow-up measures, such as issuing multiple default notices. These difficulties

[38] Rule 8.122(b).

[39] Rule 8.122(a)(2).

[40] Rule 8.320(b) & (d).

are deepened when the court's newest and less experienced clerks are assigned record preparation duties.

On a positive note, technology is helping to make the record preparation process easier and faster. The adoption of rules requiring or allowing parties to file pleadings electronically, and programs that facilitate the electronic compilation and transfer of the appellate record, are easing the superior court's burdens. Preparing an electronic appellate record from an electronic database can be easier and more streamlined. But while this technological transition is underway, it is not complete, and in many courts, paper documents must be scanned for them to be included in an electronic record. Not all courts have full scanning capacity, and some courts, because of their small size or unique circumstances, want to retain the ability to transfer hard copies of appellate records.

Appendix in Lieu of Clerk's Transcript

In civil cases, an appendix can be used as an alternative to a clerk's transcript. Under this method of record preparation, the appellant prepares an appendix and decides which documents to include in it. If the respondent believes the appellant's appendix fails to include all of the relevant documents, the respondent may prepare a responsive appendix. The parties may also stipulate to using a joint appendix, under which the parties agree about which documents to include.

Because these appendixes are prepared by the parties rather than clerks, the record preparation process can be faster than the process of completing a clerk's transcript. Still, preparing an appendix is complicated and the parties, especially self-represented litigants and less experienced attorneys, frequently make errors. These errors cause delays because they require the appellate court clerks to notify the parties of the errors and await corrections. It is not uncommon for numerous notices of errors to be sent, thus compounding the delays.

Reporter's Transcript

A reporter's transcript is a written record prepared by a certified shorthand reporter of everything that was said in court, word-for-word, during proceedings relevant to the appeal. With a few minor exceptions, audio recordings are not permitted.[41] A reporter's transcript is needed when a written record of the oral proceedings is necessary for a full understanding of the appellate issues. The parties may elect either an agreed statement[42] or a settled statement[43] as a record of the proceedings instead of a reporter's transcript.

Obtaining timely submission of court reporters' transcripts is a growing problem that has two primary components. The first component is that court reporters are increasingly less accountable to the courts. In the past, more court reporters were employed by courts, which

[41] See Code Civ. Proc., § 269.

[42] Rule 8.134.

[43] Rule 8.137.

provided superior and appellate courts significant control over how and when transcripts were prepared. In recent decades, however, superior courts have been unable to employ court reporters in civil and other non-criminal cases. If parties in those cases want a written record of the oral discourse in their superior court proceedings for purposes of an appellate record, they must hire a private certified shorthand reporter. Courts have less control over how and when reporter's transcripts are prepared by private certified shorthand reporters. Reporter delays in preparing transcripts are frequent, and courts must often resort to time-consuming cajoling, pressure, and issuing orders to get reporters to complete and submit their transcripts.

The second primary component of the problem in obtaining timely submission of reporter's transcripts is that there are simply not enough certified shorthand reporters. The Superior Court of San Diego County, for example, reports that in 2021 alone, the court lost 11 court reporters through attrition while only 36 people passed the state certification examination during that same year. In November 2022, the Superior Court of Los Angeles County stopped providing court reporters in all cases except felony criminal and juvenile matters, citing a lack of available reporters.

> The pool of available certified shorthand reporters statewide is too small and has been shrinking.

The shortage of court reporters causes serious delays in record preparation. Even when court reporters are available, they often must be in court to transcribe hearings. When they are continuously transcribing hearings in court, they do not have time to prepare transcripts.

The shortage of reporters adversely affects the dispensation of justice in other ways. In cases in which court reporters are not provided by the superior court, only parties that can afford to pay for a reporter can develop an appellate record that includes a written, verbatim record of what was said in the superior court proceedings. A reporter's transcript can be critical to presenting the issues for appellate court review. When such a record is available only for those who can pay for it, the result is a two-tiered system of appellate justice: one for those with financial resources and another for those without.[44]

In 1993, the Judicial Council promulgated rules that would have allowed court proceedings to be recorded electronically, thereby reducing the need for court reporters. But in *California Court Reporters Association v. Judicial Council of California* (1995) 39 Cal.App.4th 15, the court struck down those rules, explaining that "[u]ntil the Legislature amends [Code of Civil Procedure] section 269 to permit electronic recording to create an official record, the normal

[44] Superior courts must provide a court reporter to civil litigants with a fee waiver who have made a timely request. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 599.) But even then, courts are obligated to provide a reporter only when one is available, and that is not always the case.

practice in California superior courts is for an official shorthand reporter to create the official record." (*Id.* at p. 33.)

It is unlikely the number of court reporters will significantly increase anytime soon and the number of active, licensed certified shorthand reporters in California falls every year. There are about 15 percent fewer licensed reporters in California than there were five years ago[45] and the number of people taking the licensing exam continues to decline. In 2018, there were 339 examinees; in 2021, there were only 175, and of those 175 examinees, only 36 passed.

One positive development was the passage of Assembly Bill 156 (Stats. 2022, ch. 569), which was signed into law by the Governor on September 27, 2022. This law allows certified reporters to create a verbatim record of proceedings by using voice-writing or voice-recognition technology instead of using symbols or abbreviations in written or machine shorthand. This enables reporters to use a closed microphone voice dictation silencer, steno mask, or similar device in capturing the court proceedings. The recent passage of this bill makes it difficult to know the extent to which it will encourage more reporters to join the field. Additional actions by the Legislature likely will be needed to allow alternative methods of creating an official record.

Record Preparation Phase Recommendations

To address some of these issues and to expedite other aspects of the record preparation process, the workgroup recommends that the Chief Justice take the following actions:

1. Encourage the Judicial Council to provide additional training to superior court record preparation clerks. The Judicial Council should consider advertising and expanding the training it provides through in-person classes and online training formats.[46]
2. Encourage the appellate courts to offer district-specific assistance to superior court record preparation clerks. This is because all appellate districts operate differently with district-specific rules and expectations.
3. Encourage the Judicial Council to consider whether there are ways to reduce the number of tasks required by superior court clerks to prepare the record.
4. Encourage the Judicial Council to consider revising applicable Judicial Council record-designation forms to be simpler, clearer, and more efficient, such as the Second District's form.
5. Encourage the Judicial Council to consider revising the rules of court to not only allow, but also to encourage, represented civil litigants to prepare their own joint appendixes.

[45] California Dept. of Consumer Affairs, Annual Reports (Court Reporters Board of California year-by-year comparison), https://www.dca.ca.gov/publications/annual_reports.shtml.

[46] The Judicial Council's Center for Judicial Education and Research currently offers a Court Clerks Training Institute course every two years. This course is a five-day orientation for new superior court clerks that includes a segment on preparing appellate records.

6. Encourage the appellate courts to work with local bar associations to offer programs to help self-represented litigants and less experienced attorneys navigate the process of designating the record.
7. Encourage the Courts of Appeal to consider methods and available funding to enhance the Appellate Self-Help Resource Center website with a feature that would ask users questions and then automatically populate forms based on the answers provided (such as the TurboTax model). The website is easy to use and has helped thousands of self-represented litigants and attorneys unfamiliar with the appellate process. The enhanced feature would lead to fewer mistakes, which would lead to faster case processing.
8. Encourage the Judicial Council to consider amending the rules of court governing reporter's transcripts in civil cases that require the clerk of the superior court to supervise and process the reporter's transcripts that will ultimately be part of the appellate record. The Second District allows parties in some cases to elect to proceed by filing transcripts directly in the Court of Appeal, and the clerk of that court reported that the process has generally worked well and has streamlined the cases.
9. Encourage the Judicial Council to consider adopting a rule of court that would allow litigants in criminal cases to stipulate to the use of the superior court file in lieu of a clerk's transcript. The need to cure omissions from and to make augmentations to the standard criminal record are two of the most significant causes for record preparation delay. Allowing the superior court to use its file in lieu of creating the clerk's transcript would eliminate those problems and facilitate timely submission of the record to the Court of Appeal. Consideration must be given to whether such a rule would increase the size of criminal case records such that they would be unwieldy for appellate review and whether any such increase could be mitigated by the adoption of electronic record preparation by all superior courts.
10. Encourage the appellate courts to consider adopting local rules expressing the expectation that record-augmentation requests be submitted in one motion on the earliest date practicable, or not later than 30 days after the record has been filed or counsel appointed.[47] Such a rule would reduce late requests to augment the record as a method of obtaining a stay of the briefing deadline.
11. Encourage the Judicial Council to review and consider whether to modify *Civil Case Information Statement* (form APP-004) to allow litigants or counsel to identify an alternative, non-statutory ground for an appeal to be given priority.

The Briefing Phase

The briefing phase of the appellate process begins when the parties are notified that the record has been completed, submitted to the Court of Appeal, and filed. During this phase, three briefs are typically filed: the appellant's opening brief, the respondent's brief, and the appellant's

[47] See Ct. App., First Dist., Local Rules, rule 4(c).

reply brief.[48] In some cases, additional briefs are filed because there are numerous parties, there is a cross appeal,[49] the court has permitted the filing of an amicus curiae brief,[50] the parties have requested and have been granted permission to file supplemental briefs, or the court on its own motion has requested supplemental briefing.

Generally, the appellant's opening brief describes the judgment or order being appealed and argues why it was legally incorrect. The respondent's brief responds to the points raised by the appellant and it argues why the appellant is not entitled to appellate relief. The appellant's reply brief addresses the respondent's brief, and it argues why the points made in the respondent's brief fail to overcome the points made in the opening brief.

The briefing phase takes multiple months even when parties do not take advantage of extensions of time to file their brief. The appellant's opening brief is due 40 days after the Court of Appeal notifies the appellant that the record or reporter's transcript has been filed.[51] In a civil case in which the appellant has elected to proceed with their own appendix and has not requested a reporter's transcript, the appellant's opening brief and appendix are due 70 days from the date of the election.[52] The respondent's brief is due 30 days after the appellant's opening brief was filed[53] and the appellant's reply brief is due 20 days after the respondent's brief was filed.[54]

The rules provide for certain automatic extensions of these deadlines. In most civil cases the parties may extend each of the time periods for filing a brief by up to an additional 60 days by stipulating to such an extension,[55] and the appellate court "may not shorten" any such extension.[56] In addition, if a party in a civil case fails to file a brief by a prescribed deadline, the appellate court clerk is required to notify the party that the brief must be filed within 15 days from the date of the notice.[57] If a party in a criminal case fails to file a timely brief, a similar notice is sent, but it informs the party that the brief must be filed within 30 days from the date of the notice.[58] The districts and divisions have different practices on how quickly they send these notices, an issue we address further below. Some districts send them almost immediately

[48] Rule 8.200(a).

[49] See rule 8.216.

[50] Rules 8.200(c), 8.360(f).

[51] Rules 8.212(a)(1)(A), 8.360(c)(1).

[52] Rule 8.212(a)(1)(B).

[53] Rules 8.212(a)(2), 8.360(c)(2).

[54] Rules 8.212(a)(3), 8.360(c)(3).

[55] Rule 8.212(b)(1).

[56] Rule 8.212(b)(2).

[57] Rule 8.220(a).

[58] Rule 8.360(c)(5).

and others do not. In any event, the appellate court must accept a brief that is filed within 15 days from the date of the notice.[59]

In addition to these automatic extensions of briefing deadlines, other mandatory extensions sometimes apply. For example, during the COVID-19 pandemic appellate courts extended briefing deadlines under the authority of emergency orders entered by the Judicial Council.[60] And under federal and state law, courts must provide a briefing extension when it constitutes a reasonable accommodation to a person with a disability or when not providing an extension would deny a person with a medical condition the full benefit of court services.[61] Together, these rules for automatic and mandatory extensions allow the briefing phase to be extended for 10 months or longer. The courts have little or no authority to shorten this period, and no court or justice can be fairly criticized for the processing time attributable to these nondiscretionary extensions.

Various automatic and mandatory extensions of time can result in protracted delays over which the courts have no control.

In addition to automatic and mandatory extensions, extensions for cause are also allowed under the rules. In describing the policies governing requests for such extensions, the rules state that, on one hand, the rule-established "time limits . . . should generally be met to ensure expeditious conduct of appellate business and public confidence in the efficient administration of appellate justice."[62] On the other hand, the rules state that a party's right to have effective assistance of counsel includes the right to have "adequate time for counsel to prepare briefs or other documents," and that adequate time allows the preparation of "accurate, clear, concise, and complete submissions."[63] In expressly balancing these interests, the rules conclude that any request for a non-automatic extension of time "must demonstrate good cause—or an exceptional showing of good cause."[64] If such cause is demonstrated, rule 8.63(a)(3) dictates that the court "must extend the time."[65]

[59] Rule 8.212(b)(4).

[60] See California Courts Newsroom, Court Emergency Orders, Appellate Courts (March 18, April 9, and April 15, 2020), https://newsroom.courts.ca.gov/covid-19-news-center/court-emergency-orders.

[61] See 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7) (2022); Gov. Code, § 11135.

[62] Rule 8.63(a)(1).

[63] Rule 8.63(a)(2).

[64] Rule 8.63(a)(3). An "exceptional showing of good cause" is required in certain priority appeals, such as appeals from judgments or orders terminating parental rights or freeing a child from parental custody. See rules 8.416(a) & (f), 8.450(d).

[65] Clouding the applicable standard, rule 8.60(b) states that if such cause is demonstrated, the "presiding justice *may* extend the time to do any act required or permitted under these rules" (italics added).

The rules describe wide-ranging considerations for assessing whether a party has demonstrated "good cause—or an exceptional showing of good cause,"[66] such as:

- The degree of prejudice, if any, to any party;
- The positions of the client and opponent in civil appeals;
- The length of the record;
- The number and complexity of the issues;
- Whether settlement negotiations are underway and their status;
- Whether the case is entitled to priority;
- Whether counsel is new to the case;
- Whether counsel or the client needs more time to review the brief;
- Whether counsel can make a specific showing of other time-limited commitments that prevent the timely filing of the brief;
- Whether counsel is ill, has a personal emergency, or has a planned vacation that was not expected to conflict with the due date; and
- Any other relevant factor.[67]

The workgroup had an extensive and lively discussion on non-automatic requests for extensions to file briefs. Members concluded that the rules articulate sensible policies and factors for courts to weigh in evaluating these requests. Still, some concerns were identified. First, some attorney members of the workgroup commented that, while they have no objections to the rules' policies and factors for courts to weigh, their experience has been that appellate courts inconsistently apply these policies and factors. One institutional attorney observed that appellate specialists often know which courts will be more lenient about extension requests, and they triage their workload by seeking extensions in those courts. Thus, decisions to seek extension requests in particular cases can be driven by this practical consideration rather than a more meaningful evaluation of the relative importance and priority of the cases in the attorney's workload.

> Presiding justices, especially those in districts with multiple presiding justices, should periodically confer to advance more consistent applications of the standards used in considering requests for discretionary extensions of time.

Some justices on the workgroup raised concerns with the approved Judicial Council forms for seeking extensions of time. These forms are different in civil (APP-006) and criminal (CR-126)

[66] Rule 8.63(b).

[67] Rule 8.63(b)(1)–(11).

appeals, but some justices believed that neither provides sufficient information on which to assess the factors set forth in rule 8.63(b)(1)–(11). The civil form includes no place for the movant to identify whether the case has priority, and while the form requires the movant to identify if the other side was unwilling to stipulate to an extension, it does not require the movant to otherwise explain the extent to which an extension may or may not prejudice the client or other side. Although the criminal form requires the movant to identify the defendant's conviction and the length of the record, it does not require the movant to otherwise explain the extent to which an extension may or may not prejudice the defendant.

Briefing Phase Recommendations

To address some of these issues and to expedite other aspects of the briefing phase, the workgroup recommends that the Chief Justice take the following actions:

1. Encourage presiding justices, especially those in districts with multiple presiding justices, to confer periodically in a meaningful attempt to advance more consistent applications of the standards used in considering requests for discretionary extensions of time.
2. Request that the appellate court clerks establish policies and practices that will ensure that notices to parties under rules 8.220(a) and 8.360(c)(5) are uniformly sent to the defaulting party within a day or two of the missed deadline. In addition, the Judicial Council's Appellate Advisory Committee should consider whether the rules of court should be modified to allow an opposing party to send out such a notice, and to make the 15-day time period for filing the brief start to run from the earlier of the clerk's or the party's notice.
3. Encourage the Judicial Council to review and consider whether forms APP-006 and CR-126 should be modified to enable courts to better evaluate whether a movant has demonstrated good cause. Specifically, the council should consider whether the civil form should require additional information such as whether the appeal is a priority case, and the degree to which any extension might prejudice the client or opponent. For the criminal form, the council should consider whether the form should require additional information to help the court assess the degree to which an extension might prejudice the defendant. The council should also consider whether the rules of court should be modified to require the parties to include all or some of this information when they request an extension without using an approved form.
4. Encourage the Judicial Council to consider whether parties should be encouraged or required to submit, along with their briefs, excerpts of the record that would compile all parts of the record that are relevant and useful to the court in deciding the appeal.

The Decisional Phase

Once the appellant's reply brief is filed (or the time for filing it has expired), the appeal is considered fully briefed and the decisional phase of the appeal begins. Many appeals are dismissed before becoming fully briefed because the parties have abandoned or settled the appeal, or a motion to dismiss was granted. Thus, the number of cases that become fully briefed (and that therefore require resolution by an opinion) is far less than the number of appeals filed. Because most cases are not assigned to justices until they are fully briefed, the number of cases that are fully briefed is the most important and meaningful measure of justices' caseloads.

The ways cases are assigned varies. In some courts, cases are assigned to justices immediately or shortly after they become fully briefed, while in other courts they are assigned later, after the cases have been reviewed and justices' workloads are assessed. In some courts, cases are assigned weights to account for their complexity and then distributed in a way to roughly equalize workloads, while in other courts cases are assigned with the understanding that over time justices will receive relatively equal workloads. In many courts, certain categories of cases are assigned on a rotational basis, such as dependency matters or *Wende* appeals.[68]

The ways in which cases are worked on also varies. All justices have full-time chambers attorneys, although the numbers vary. All courts also have writ and central staff attorneys, although their numbers also vary. In some courts all cases are assigned to chambers, which then seek assistance from central staff attorneys when they are available and needed to assist with the caseload. In other courts certain types of cases are assigned to chambers attorneys while other types of cases are first assigned to central staff attorneys.

Justices, chambers attorneys, and central staff attorneys all prepare memoranda or draft opinions proposing how a case should be decided. Some justices prepare many of their own drafts, while others rely more heavily on the attorneys for initial drafts. Each justice supervises his or her chambers staff. In some courts, justices decide whether and how their work is to be assigned to attorneys and completed; in others, cases are weighted and assigned first to attorneys who then coordinate with the responsible justice for the completion of the work.

Regardless of how cases are assigned, the next step in the decisional process is to draft a memorandum or proposed opinion. The steps required to prepare such a draft do not vary significantly. Briefs must be read and reread, the record must be reviewed, research must be conducted, analyses must be considered and evaluated, and the memorandum or draft opinion must be drafted, edited, cite-checked, and proofread.

The time required to complete these tasks varies significantly. An experienced attorney working with, consulting, and supporting the assigned justice can draft an opinion in a case with a

[68] A *Wende* appeal is one in which the criminal defendant's attorney has filed a statement declaring that no appealable issue was identified.

simple issue in a day or two. A case with average complexity that involves multiple issues can take a week or two. A difficult case can take a month or more.

When the assigned justice is satisfied with the draft, it is circulated to the other panel members who were randomly assigned to the case. Those panel members must consider the draft, read the briefs, evaluate the analysis, often conduct further research, and determine whether they agree or disagree with the proposed disposition. They may suggest revisions to the draft and these suggestions may or may not be accepted. If the panel members are unable to agree on the draft, concurring or dissenting opinions are considered and drafted. Depending on the case complexity and the existence of disagreements, the process of reaching a final opinion can be lengthy and involve significant additional justice and staff work.

What happens after an opinion is drafted depends on whether the parties have asked for oral argument. If argument has been waived, the assigned justice and any concurring or dissenting justices finalize their respective opinions and the majority opinion with any concurrence or dissent is filed. If argument has been requested, different procedures are followed. In some courts the assigned justice decides when to set the case for argument. In other courts the oral argument date is set at the time the case is assigned, requiring the justice to obtain an extension from the presiding justice if one is needed.

Different courts also have different procedures for conducting oral argument. Some courts issue tentative opinions or focus letters prior to argument. In courts that issue tentative opinions, if the parties accept the tentative opinion, oral argument is canceled and the tentative opinion typically becomes the court's final opinion. Some courts conduct arguments monthly or biweekly, and some even more frequently. Some courts strictly limit the length of oral argument, while others allow argument to continue as long as it remains productive. During the COVID-19 pandemic all courts conducted oral argument remotely. Courts are now increasingly holding arguments in the courtroom, or allowing hybrid arguments, in which one or more parties appear in person in court and one or more parties appear remotely.

Cases are typically deemed submitted after the conclusion of the argument. Cases in which argument was waived are deemed submitted when the court approves the waiver.[69] Once a case is deemed submitted, the opinion must be filed within 90 days.[70] After the argument, the panel continues to discuss any differences in views and the final opinions are prepared with any concurrences or dissents.

A filed opinion represents the court's initial determination of how an appeal should be decided and can be published or unpublished. Published opinions are used to resolve appeals that raise important legal issues that are either unresolved or that arise in a new or different factual context. Unpublished opinions are used when the issues involved are more common or uncontroversial. Less complicated opinions can be relatively short and can resolve the issues in

[69] Rule 8.256(d)(1).

[70] Cal. Const., art. VI, § 19.

a dozen pages or so. More complicated opinions can be lengthy, and they can require 50 pages or more.

Parties can challenge the court's initial filed opinion by filing a petition for rehearing, arguing the court made a legal or factual error when deciding the case.[71] In most courts, those petitions are forwarded to the authoring justice for investigation and a recommendation. If that justice determines the petition is possibly meritorious, he or she can request formal opposition from the opposing side.[72] Based on the petition and any opposition, the authoring justice commonly recommends either granting the petition (which vacates the opinion and places the case at large as if no opinion had ever been filed),[73] denying the petition (which leaves the opinion unchanged), or denying the petition and then modifying the opinion to make whatever changes are necessary to address points that were raised in the petition.

An opinion is final and is no longer subject to change 30 days after it is filed if no rehearing is granted.[74] If an order changes an opinion without modifying the judgment, the finality period is not extended.[75] But if an order changes an opinion and modifies the judgment, the finality period runs from the date of the modification order.[76]

In light of the CJP findings that gave rise to the establishment of this workgroup, the workgroup conducted an extensive review to determine whether there are cases in any of the Courts of Appeal in which the decisional phase has been excessively delayed. The result was heartening. The workgroup found that as of the end of the last quarter only a small percentage of fully briefed cases statewide were pending for more than 12 months. Within this small percentage, almost all of the cases were deferred for valid reasons or were transferred from one court to another for prompt processing. The remaining handful of cases within the small percentage are complex cases actively being worked on.

As of September 30, only a small percentage of fully briefed cases statewide were pending for more than 12 months, and the cases within this small percentage were pending for valid reasons or were actively being worked on.

[71] Rules 8.268, 8.366.

[72] Rule 8.268(b)(2).

[73] Rule 8.268(d).

[74] Rule 8.264(b)(1).

[75] Rule 8.264(c)(2).

[76] *Id.*

Decisional Phase Recommendations

The workgroup discussed whether, and to what extent, the different practices and approaches taken by different appellate courts affect the time of the decisional phase. It concluded that, while the differences may have some effect on the timing, any such effect is minimal. Far more significant is whether cases are monitored to ensure that they are not languishing and whether effective action is taken to ensure that delayed cases are promptly resolved. Specific recommendations to improve monitoring and to ensure effective follow-up to prevent excessive delays from developing are set forth in detail below.

> Efficient case processing is best achieved by managers monitoring whether cases are languishing and requiring prompt action when they are.

THE CASE DELAYS IN THE THIRD DISTRICT

The workgroup next turns to address its findings regarding the case delays in the Third District, and to present its recommendations to help ensure that similar case delays do not recur or develop in any appellate court.

The Problem of Excessively Delayed Appeals in the Third District Was Limited to Some Justices and Has Been Effectively Addressed

As mentioned earlier, the case delays revealed by the CJP in the Third District were avoidable and inexcusable, and they were harmful to the parties, the aims of justice, and the reputation of the court. But as also previously mentioned, the district has taken prompt and effective measures to address the identified problems and to prevent them from recurring.

The workgroup found that the primary causes of the problem were the lack of transparent reporting to identify delayed cases and the failure to follow up on known delayed cases to prioritize, process, and resolve them. This oversight was exacerbated by the facts that the district had and has a high caseload, had an attorney workforce that was relatively too small, and had judicial vacancies but eschewed the appointment of pro tempore justices.

Many measures have been taken within the district to remedy the problem and to minimize the chance of its recurrence. The workgroup is pleased to report that as a result of these actions, there is currently *no* appeal in the Third District that has been pending for more than 12 months without a valid reason.

The current acting administrative presiding justice implemented a number of management changes to increase transparency, foster communication, raise awareness, and help justices and staff prioritize and resolve delayed cases. For example, he instituted a transparent monthly reporting and follow-up process to identify, review, and help process fully briefed cases that have been pending for more than eight months. Each month, a report identifying these cases is given to all the justices.[77] The report includes comments by the assistant clerk/executive officer of statistical trends and relevant case circumstances. Now, the vast majority of cases identified on the report remain pending for valid reasons or are in their final stages (i.e., oral argument is scheduled but has not occurred, or the opinion is being cite-checked and finalized). The report is reviewed by the district's managing attorney, who makes recommendations on whether a justice who has an identified case that lacks a valid reason for delay needs assistance by, for example, being assigned fewer cases in subsequent case-assignment rotations, being given additional attorney or staff help, or having cases transferred to other justices.

[77] Although a similar report, one that identified cases that were pending for more than 12 months, was instituted by the former administrative presiding justice, the report was not shared with other justices, and for too long there was minimal follow-up.

The current acting administrative presiding justice also began inviting executive staff (the district's managing attorney, clerk/executive officer, and assistant clerk/executive officer) to participate in monthly justice meetings to report on filings, case dispositions, and other matters. Justices and executive staff are encouraged to share information freely, which has increased engagement by the justices in court administration.

More attention is also now given to properly identify cases that may warrant calendar preference. When docketing new criminal appeals in the Appellate Court Case Management System, clerks input when the cases are assigned and the length of the sentences imposed. The managing attorney then identifies cases with short sentences and points out other circumstances that may justify prioritizing the cases so that these factors are readily apparent.

Finally, the current administrative presiding justice has ended the practice of not seeking appointment of pro tempore justices. Appointing pro tempore justices in the future will help the district to sustain workflow productivity in resolving cases.

In addition to management changes, the district's staffing was increased. In June 2021, the APJAC determined that the district's judicial workforce was too small given the size of the district's caseload. The committee voted to allocate additional funds to the district, enabling it to hire seven additional attorneys.[78]

Perhaps the most notable and encouraging action taken in response to the CJP investigation and findings was that the district's justices, attorneys, and other staff collectively engaged in exceptional efforts to resolve older cases and reduce case backlogs. Between the end of 2020 (around the time the CJP initiated its investigation) and the end of September 2022 (the date of the most recent statistical report), the district filed 2,195 opinions. This is 338 more opinions than were filed in the preceding 21-month period, during which 1,857 opinions were filed.

The hard work has paid off. At the end of fiscal year 2019–20, the district had 814 fully briefed cases, and as of the end of September 2022, this number was reduced to 298. This reflects a *63.4 percent reduction* in fully briefed cases. This impressive progress cannot be explained away by pointing out that the number of appeals also fell during this period. While it is true that the number of appeals fell, likely because of the COVID-19 pandemic, the district's rate of resolving cases far eclipsed the rate of the slowdown of appeals. At the end of fiscal year 2019–20, the district had 2,039 pending appeals, while at the end of September 30, 2022, it had 1,350. Thus, while the number of appeals fell by 33.8 percent, the number of fully briefed cases fell by 63.4 percent.

In short, the Third District took prompt and effective measures to address the problems raised by the CJP investigation and findings, and to prevent them from recurring. It has no excessively

[78] According to the district, prior to this allocation the last time the district received additional funding for permanent attorney positions was 20 years earlier, in 2001, when it received funding for three such positions.

delayed cases, has significantly reduced its fully briefed caseload, and is in a far better position to ensure that appeals continue to be resolved in a timely manner.

Improved State-level Reporting and Oversight Will Help Prevent Appeals from Becoming Excessively Delayed

The workgroup found that the case delays in the Third District could have been discovered and remediated earlier if, in addition to better monitoring and follow-up internally, there had been better state-level oversight and accountability.

The workgroup therefore recommends that the Chief Justice direct the Administrative Director of the Judicial Council to provide a report every six months to the APJAC that identifies appeals that have been fully briefed for more than a year. It further recommends that the Chief Justice request that each appellate district compile from the report a list of cases for which there is no valid reason for their processing to be extended and to provide the list to the APJAC.

Examples of valid reasons include:

- When the appeal has been stayed by order of a bankruptcy court;
- When the appeal has been stayed as the result of the request of the parties, to allow for further proceedings in the trial court, or for other legitimate reasons;
- When supplemental briefs have been ordered to consider the effect of newly enacted legislation or for other legitimate reasons;
- When a tentative opinion has been issued;
- When panel members are actively engaged in discussing the appropriate case resolution;
- When an opinion has been issued but rehearing was granted;
- When an interim petition for review in the Supreme Court has been filed or granted;
- When a case is remanded by the United States Supreme Court or California Supreme Court; or
- When the case involves an appeal from a death sentence.

Finally, the workgroup recommends that the Chief Justice direct the APJAC to take action to ensure that identified cases are promptly processed and resolved. Such action may include the following:

- Providing the assigned justice of an identified case with additional resources;
- Assigning an identified case to a different authoring justice; or
- Requesting approval from the Supreme Court to transfer an identified case to a different appellate division or district.

Improved State-level Reporting and Oversight Will Help to Address Caseload Inequities

The workgroup found that the case delays in the Third District were partially caused and exacerbated by inequities in the ratios of caseload/workforce among the appellate courts.

Population, demographics, laws, and other factors affect the number and the types of appeals that are filed in different appellate courts. Recognizing that cases are not evenly distributed, the six administrative presiding justices periodically take measures to help equalize relative caseloads. These measures usually involve requesting transfers of cases to courts that are better positioned to handle them or allocating additional resources to overburdened courts to allow them to expand their workforce.[79]

In the past three fiscal years, hundreds of cases have been transferred between courts. These include cases transferred from Division Two of the Fourth District to other divisions in that district and cases transferred from the Fifth and Sixth Districts to the First, Second, and Fourth Districts. As another example, in June 2021 the APJAC allocated fiscal resources to enable courts to hire additional staff attorneys. Seven new attorney positions were authorized for the Third District, four new attorney positions were authorized for the Fifth District, two new attorney positions were authorized for the Fourth District, and one new attorney position was authorized for each of the remaining districts.

Evaluating and addressing caseload inequities is not as easy as it may seem. Each year, the Judicial Council publishes the *Court Statistics Report*, a report that analyzes statewide caseload trends in the state courts. The report uses various metrics to assess each district/division on various categories such as the number of appeals and writs filed, the number of cases decided, and the length of time it took to complete different phases of the appellate process.

These statistics are useful but are typically published a year after the fiscal year captured in the report,[80] are widely misunderstood, and are used inaccurately to assess the relative productivity of divisions and districts. Relying on these statistics alone to compare productivity results in faulty comparisons, yet these faulty comparisons are common.[81] Meaningful comparisons must take into account the judicial workforces available in, and the types of cases handled by, the different courts.

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[79] See Cal. Const., art. VI, § 12(a); rule 10.1000.

[80] This means that management responses to the data in this report cannot be adopted until, at the very earliest, one year after conditions are revealed that may need to be addressed. And because the budget cycle takes at least one year, this means that budgetary responses to the data cannot be authorized until, at the very earliest, two years after conditions are revealed that may need to be addressed.

[81] See, e.g., Judicial Council of Cal., *Report of the Appellate Process Task Force* (2000), www.courts.ca.gov/documents/min0800.pdf [suggesting workload comparisons should be made on a cases-per-justice basis]; *Daily Journal* (Sept. 21, 2022), Vol. 128, No. 183, p. 4 [same].

The judicial workforce in each district/division includes justices and attorneys.[82] The size of this workforce does not correlate directly to the number of justices assigned to the court. Inter-district/division redirection of fiscal resources, budget cuts and augmentations, and intra-district/division funding choices have resulted in judicial workforces that vary and are disproportionate. Variations on the size of courts' workforces are entirely appropriate. A court that processes more cases typically requires a larger workforce than a district that processes fewer cases of a similar type, regardless of the number of the courts' authorized justices.

Comparisons of district/division caseloads are flawed unless they take into account the full judicial workforces available in, and the types of cases handled by, the different courts.

Consider hypothetical District A and District B. District A has 10 justices, and it resolved 200 cases last year. District B has 20 justices, and it also resolved 200 cases last year. In isolation, these statistics suggest that District A was far more productive. A typical, but inaccurate, comment on the two districts might be something like, "The justices in District A averaged 20 cases each, while the justices in District B averaged 10 cases each." But in fact, *relative* productivity depends on the comparative levels of the two districts' judicial workforces. If District A had 40 attorneys (and thus a total of 50 justices and attorneys), and District B had 20 attorneys (and thus a total of 40 justices and attorneys), then District B was more productive than District A.

The most meaningful way to evaluate the districts' relative workload at any given time is to compare the number of fully briefed cases with the amount of the available judicial workforce. The chart below provides a snapshot of those statistics as of September 30, 2022. This snapshot depicts what the workload was at that time. It does not depict whether districts have been efficient or inefficient, nor does it depict whether appeals have been evenly distributed.

[82] We include attorneys in the judicial workforce because attorneys work with justices in the decisional process by researching and analyzing the legal issues and drafting memoranda, opinions, and substantive orders. We do not include judicial assistants and clerks in the definition of judicial workforce, but we of course recognize the critical roles they have in processing appeals effectively and in a timely manner.

Statewide Comparison of Pending Fully Briefed Workload Appeals Per Judicial Staff			
As of September 30, 2022			
	Number of Fully Briefed Cases (A)	Judicial Staff (B)	Appeals per Judicial Staff (C = A/B)
First District	396	71	5.78
Second District	784	152.5	5.14
Third District	298	55	5.42
Fourth District[83]	705	121	5.83
Division 1	*220*	*45*	*4.89*
Division 2	*279*	*38*	*7.34*
Division 3	*206*	*38*	*5.42*
Fifth District	317	46.63	6.80
Sixth District	199	34	5.85
Statewide Totals	***2,699***	***480.13***	***5.62***

The ratio of routine and complex cases filed in courts also matters. Civil appeals generally take longer on average to resolve than criminal appeals, which include as a subset *Wende* appeals, which are usually relatively easy to resolve. In fiscal year 2021–22, the districts' ratios of civil and criminal cases varied meaningfully.

Percentage of Appellate Opinions Written By Category in FY 2021–22			
	Civil	Adult and Juvenile Criminal	Juvenile Dependency
First District	40%	50%	10%
Second District	34%	45%	21%
Third District	21%	71%	8%
Fourth District	35%	49%	16%
Fifth District	15%	73%	12%
Sixth District	29%	62%	9%
Statewide Totals	***30.5%***	***54.5%***	***15%***

Accounting for variations in the nature and complexity of the caseloads is challenging, but failing to recognize these differences leads to imbalanced and incomplete productivity comparisons.

[83] Recognizing the differences in the caseload/workforce ratios among the divisions in the Fourth District, the district's administrative presiding justice years ago instituted a policy of transferring at least eight cases each month from Division 2 to Division 1.

In light of these considerations, the workgroup recommends that the Chief Justice direct the Administrative Director of the Judicial Council to provide an annual report to the APJAC to help it better monitor caseload/workforce inequities among the districts/divisions. In addition to other relevant metrics, the report should include for each district/division the number of appeals filed, the number of opinions issued, the number of pending fully briefed cases, the number of justices authorized, the available judicial workforce, and the types and complexity of cases filed to the extent they can be reasonably discerned.

Enhanced Oversight Will Help to Address Management Issues Earlier and to Strengthen Confidence in the Appellate Courts

The workgroup also found that the issues in the Third District might have been identified and remediated earlier if there had been, in addition to better management in the Third District, a mechanism for supplementary state-level management oversight.

Historically, administrative presiding justices or presiding justices in geographically separate divisions have largely managed their courts independently. Substantial management independence is appropriate and necessary given the considerable differences among the courts, but management actions or inactions should not be effectively immune from review.

Thus, to improve and strengthen confidence in management decisions, the workgroup recommends that the Chief Justice urge the APJAC to recommend that the Judicial Council adopt a new rule, or amend an existing rule, of the California Rules of Court authorizing the administrative presiding justices, under the oversight of the Chief Justice, to collectively review and address contentions that an administrative presiding justice or presiding justice has not properly managed an important matter. The workgroup recommends that the Chief Justice encourage the Judicial Council to adopt a new rule, or amend an existing rule, stating language substantially similar to the following:

> **Oversight of administrative presiding justices and presiding justices**
>
> (1) Administrative presiding justices and presiding justices are expected to manage their courts inclusively and transparently. A contention that an administrative presiding justice or presiding justice has not properly addressed or managed an important matter may be brought to the attention of the administrative presiding justices collectively, under the oversight of the Chief Justice, for them to review and take appropriate remedial or other lawful action.
>
> (2) Any administrative presiding justice who is the subject of such a contention is recused from reviewing the contention but must cooperate with those who are reviewing it.
>
> (3) Presiding justices in multi-division districts, including those in geographically separate divisions, must cooperate with the administrative presiding justice of their district when the administrative presiding justice is carrying out his or her oversight responsibilities.

Statistical Reliability Will Be Enhanced by Requiring Consistent Data Entry

The workgroup found that inconsistencies in data entry into the court's case management system impact the information reported in the *Court Statistics Report*. As an example, different protocols have been used when coding the fully briefed date in cases in which supplemental briefing was ordered. Some courts coded the fully briefed date as the date when the case first became fully briefed, while others coded the fully briefed date as the date when the supplemental briefing was complete. As another example, some courts open dockets for each appealing party, while others do not.

Furthermore, the data can also be affected by procedural anomalies, inadvertent clerical errors, or local court practices. If one of two consolidated appeals is inadvertently left open at the conclusion of the appeal, the statistical average for how long cases were pending may be skewed and the number of opinions issued may be higher or lower depending on how cases that can be resolved by either an order or an opinion are handled.

The workgroup recommends that the Chief Justice request that the appellate clerks work with Judicial Council staff to review current data-input practices and establish standards to ensure consistent coding and entry practices among the appellate courts.

SUMMARY OF RECOMMENDATIONS

The workgroup proposes that the Chief Justice take the following actions:

Summary of Recommendations		
PURPOSE OF RECOMMENDATIONS	**RECOMMENDATIONS**	**PAGE NUMBER**
To Help Ensure Excessive Case Delays Do Not Recur or Develop	1. Direct the Administrative Director of the Judicial Council to provide a report every six months to the Administrative Presiding Justices Advisory Committee (APJAC) that identifies appeals that have been fully briefed for more than a year. 2. Request that each appellate court compile from the report a list of cases for which there is no valid reason for deferral and to provide the list to the APJAC. 3. Direct the APJAC to ensure the prompt processing and resolution of identified cases.	Page 31
To Reduce Caseload/Workforce Inequities Among Districts/Divisions	1. Direct the Administrative Director of the Judicial Council to provide an annual report to the APJAC to help it better monitor caseload/workforce inequities among the districts/divisions. 2. Direct the Administrative Director of the Judicial Council to include metrics that identify for each district/division the number of appeals filed, the number of opinions issued, the number of pending fully briefed cases, the number of justices authorized, the available judicial workforce, and the types and complexity of cases filed to the extent they can be reasonably discerned.	Page 35
To Enhance Management Oversight and Increase Confidence in Management Decisions	1. Urge the APJAC to recommend to the Judicial Council a new rule, or amend an existing rule, of the California Rules of Court stating language substantially similar to the following: **Oversight of administrative presiding justices and presiding justices** (1) Administrative presiding justices and presiding justices are expected to manage their courts inclusively and transparently. A contention that an administrative presiding justice or presiding justice has not properly addressed or managed an important matter may be brought to the attention of the administrative presiding justices collectively, under the oversight of the Chief Justice, for them to review and take appropriate remedial or other lawful action. (2) Any administrative presiding justice who is the subject of such a contention is recused from reviewing the contention but must cooperate with those who are reviewing it. (3) Presiding justices in multi-division districts, including those in geographically separate divisions, must cooperate with the	Page 35

Summary of Recommendations		
PURPOSE OF RECOMMENDATIONS	**RECOMMENDATIONS**	**PAGE NUMBER**
	administrative presiding justice of their district when the administrative presiding justice is carrying out such oversight responsibilities.	
To Improve the Usefulness of Statistical Data	1. Request that the appellate clerks work with Judicial Council staff to review current data-input practices and establish standards to ensure consistent coding and entry practices among the appellate courts.	Page 36
To Expedite the Preparation of the Appellate Record and the Parties' Briefing	1. Encourage the Judicial Council to provide additional training to superior court record preparation clerks and to consider advertising and expanding the training it provides through in-person classes and online courses. 2. Encourage the appellate courts to offer district-specific assistance to superior court record preparation clerks to help those clerks better understand district-specific rules and expectations. 3. Encourage the Judicial Council to consider whether there are ways to reduce the number of tasks required by superior court clerks in preparing records. 4. Encourage the Judicial Council to consider revising applicable Judicial Council record-designation forms to be simpler, clearer, and more efficient. 5. Encourage the Judicial Council to consider revising the rules of court to not only allow, but also to encourage, represented civil litigants to prepare their own joint appendixes. 6. Encourage the Courts of Appeal to work with local bar associations to offer programs to help less experienced attorneys and self-represented litigants navigate the record designation process. 7. Encourage the Courts of Appeal to consider methods and available funding to enhance the Appellate Self-Help Resource Center website with a feature that would ask users questions and then automatically populate forms based on the answers provided. 8. Encourage the Judicial Council to consider amending the rules of court governing reporter's transcripts in civil cases that require the clerk of the superior court to supervise and process the reporter's transcripts that will ultimately be part of the appellate record. 9. Encourage the Judicial Council to consider adopting a rule of court that would allow litigants in criminal cases to stipulate to the use of the superior court file in lieu of a clerk's transcript. 10. Encourage the Courts of Appeal to consider adopting local rules that express the expectation that a record-augmentation request be submitted in one motion on the earliest date	Pages 19–20

Summary of Recommendations		
PURPOSE OF RECOMMENDATIONS	**RECOMMENDATIONS**	**PAGE NUMBER**
	practicable, or not later than 30 days after the record has been filed or counsel appointed. 11. Encourage the Judicial Council to review and consider whether to modify *Civil Case Information Statement* (form APP-004) to allow litigants or counsel to identify an alternative, non-statutory ground for an appeal to be given priority.	
	12. Encourage presiding justices, especially those in districts with multiple presiding justices, to confer periodically in a meaningful attempt to advance more consistent applications of the standards used in considering requests for discretionary extensions of time. 13. Request that the appellate clerks establish policies and practices to ensure that notices to parties under rules 8.220(a) and 8.360(c)(5) are uniformly sent to the defaulting party within a day or two of the missed deadline. 14. Encourage the Judicial Council to review and consider whether forms APP-006 and CR-126 should be modified to enable courts to better evaluate whether a movant has demonstrated good cause. 15. Encourage the Judicial Council to consider whether parties should be encouraged or required to submit, along with their briefs, excerpts of the record that would compile the parts of the record that are relevant and useful to the court in deciding the appeal.	Page 24

PRIORITIZING APPELLATE CASES

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
RULES OF COURT	
Cal. Rules of Court, rule 8.240	"A party seeking calendar preference must promptly serve and file a motion for preference in the reviewing court. As used in this rule, 'calendar preference' means an expedited appeal schedule, which may include expedited briefing and preference in setting the date of oral argument."
Cal. Rules of Court, rule 8.416	Expedited process for appeals of termination of parental rights and juvenile dependency appeals in expedited review project courts: (a) Application (1) This rule governs: (A) Appeals from judgments or appealable orders of all superior courts terminating parental rights under Welfare and Institutions Code section 366.26 or freeing a child from parental custody and control under Family Code section 7800 et seq.; and (B) Appeals from judgments or appealable orders in all juvenile dependency cases of: (i) The Superior Courts of Orange, Imperial, and San Diego Counties; and (ii) Other superior courts when the superior court and the District Court of Appeal with jurisdiction to hear appeals from that superior court have agreed and have adopted local rules providing that this rule will govern appeals from that superior court. (2) In all respects not provided for in this rule, rules 8.403–8.412 apply. * * *

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	(h) Oral argument and submission of the cause (1) Unless the reviewing court orders otherwise, counsel must serve and file any request for oral argument no later than 15 days after the appellant's reply brief is filed or due to be filed. Failure to file a timely request will be deemed a waiver. (2) The court must hear oral argument within 60 days after the appellant's last reply brief is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument. (3) If counsel waive argument, the cause is deemed submitted no later than 60 days after the appellant's reply brief is filed or due to be filed.
Cal. Rules of Court, rule 8.417 (takes effect 1/1/2023)	Expedited process for appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction: (a) Application This rule governs appeals from orders of the juvenile court granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction. * * * (i) Oral argument and submission of the cause (1) Unless the reviewing court orders otherwise, counsel must serve and file any request for oral argument no later than 15 days after the appellant's reply brief is filed or due to be filed. Failure to file a timely request will be deemed a waiver. (2) The court must hear oral argument within 60 days after the appellant's last reply brief is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	(3) If counsel waive argument, the cause is deemed submitted no later than 60 days after the appellant's reply brief is filed or due to be filed.
Cal. Rules of Court, rule 10.660(d)	Appeal of superior court decision on writ petition under Gov. Code, § 71639.1 regarding trial court labor relations disputes: An appeal of the superior court decision must be heard and decided on an expedited basis in the Court of Appeal for the district in which the petition was heard and must be given priority over other matters to the extent permitted by law and the rules of court. The notice of appeal must state the following on the first page, below the case number, in the statement of the character of the proceeding (see rule 2.111(6)): "Notice of Appeal on Petition filed under Government Code sections 71639.5 and 71825.2—Expedited Processing Requested."
Cal. Rules of Court, rule 10.803(d)	Appeal of superior court decision on writ petition under Gov. Code, § 71675 regarding release of budget and management information by Judicial Council (i.e., information access disputes): An appeal of the superior court decision must be heard and decided on an expedited basis in the Court of Appeal for the district in which the petition was heard and must be given priority over other matters to the extent permitted by law and rules of court. The notice of appeal must state the following on the first page, below the case number, in the statement of the character of the proceeding (see rule 2.111(6)): "Notice of Appeal on Writ Petition filed under rule 10.500(j)(1) and Government Code section 71675—Expedited Processing Requested."

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
CALIFORNIA CONSTITUTION	
Cal. Const., art. X A, § 6	Appeal of action involving water resources development: (c) The superior court or a court of appeals shall give preference to the actions or proceedings described in this section over all civil actions or proceedings pending in the court. The superior court shall commence hearing any such action or proceeding within six months after the commencement of the action or proceeding, provided that any such hearing may be delayed by joint stipulation of the parties or at the discretion of the court for good cause shown. The provisions of this section shall supersede any provisions of law requiring courts to give preference to other civil actions or proceedings. The provisions of this subdivision may be enforced by mandamus.
CODE OF CIVIL PROCEDURE	
Code Civ. Proc., § 44	Appeal of probate proceedings, contested election proceedings, and certain libel/slander actions: Appeals in probate proceedings, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign shall be given preference in hearing in the courts of appeal, and in the Supreme Court when transferred thereto. All these cases shall be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
Code Civ. Proc., § 45	Appeal of judgment freeing or denying a recommendation to free minor from parental control: An appeal from a judgment freeing a minor who is a dependent child of the juvenile court from parental custody and control, or denying a recommendation to free a minor from parental custody or control, shall have precedence over all cases in the court to which an appeal in the matter is taken. In order to enable the child to be available for adoption as soon as possible and to minimize the anxiety to all parties, the appellate court shall grant an extension of time to a court reporter or to counsel only upon an exceptional showing of good cause.
Code Civ. Proc., § 1062.5	Appeal of proceedings involving declaratory relief in medical malpractice insurance cases: If the declaration is appealed, the appeal shall be given precedence in the court of appeal and Supreme Court and placed on the calendar in the order of its date of issue immediately following cases in which the state is a party.
Code Civ. Proc., § 1291.2	Appeal of arbitration proceedings: In all proceedings brought under the provisions of this title, all courts wherein such proceedings are pending shall give such proceedings preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, in the matter of setting the same for hearing and in hearing the same to the end that all such proceedings shall be quickly heard and determined.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
Code Civ. Proc., § 1294.4(a) (See Cal. Rules of Court, rules 8.710 et seq.; rule 8.717.)	Appeal of order dismissing or denying a petition to compel arbitration involving a claim under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15657.03) in which a party has been granted a trial court preference: (a) Except as provided in subdivision (b), in an appeal filed pursuant to subdivision (a) of Section 1294 involving a claim under the Elder and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code) in which a party has been granted a preference pursuant to Section 36 of this code, the court of appeal shall issue its decision no later than 100 days after the notice of appeal is filed. (b) The court of appeal may grant an extension of time in the appeal only if good cause is shown and the extension will promote the interests of justice.
ELECTIONS CODE	
Elec. Code, § 13314	Appeal of writ proceedings involving alleged error in placement of name on ballot or other election materials: (a) (1) An elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide, state voter information guide, or other official matter, or that any neglect of duty has occurred, or is about to occur. (2) A peremptory writ of mandate shall issue only upon proof of both of the following: (A) That the error, omission, or neglect is in violation of this code or the Constitution. (B) That issuance of the writ will not substantially interfere with the conduct of the election.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	(3) The action or appeal shall have priority over all other civil matters.
Elec. Code, § 14310(c)(2)(B)	Appeal of action relating to request for order that provisional ballot be included in official canvass: A voter may seek the court order specified in this paragraph regarding his or her own ballot at any time prior to completion of the official canvass. Any judicial action or appeal shall have priority over all other civil matters. A fee shall not be charged to the claimant by the clerk of the court for services rendered in an action under this section.
Elec. Code, § 16003	Appeal of action contesting election of presidential electors: In a contest of the election of presidential electors the action or appeal shall have priority over all other civil matters. Final determination and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December.
Elec. Code, § 16920	Appeal of action contesting primary election other than recount: Either party to a contest may appeal to the district court of appeal of the district where the contest is brought, if the appeal is perfected by the appellant within 10 days after judgment of the superior court is pronounced. The appeal shall have precedence over all other appeals and shall be acted upon by the district court of appeal within 10 days after the appeal is filed.
FAMILY CODE	

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
Fam. Code, § 3454	Appeal of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) cases: An appeal may be taken from a final order in a proceeding under this chapter in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under Section 3424, the enforcing court may not stay an order enforcing a child custody determination pending appeal.
GOVERNMENT CODE	
Gov. Code, § 7910(c)	Appeal of action involving judicial review of local appropriations limits: A court in which an action described in subdivision (b) is pending, including any court reviewing the action on appeal from the decision of a lower court, shall give the action preference over all other civil actions, in the manner of setting the action for hearing or trial and in hearing the action, to the end that the action shall be quickly heard and determined.
Gov. Code, § 7911	Appeal of action involving judicial review of return of excess local revenue: Judicial review of such determination may be obtained only by a proceeding for a writ of mandate which shall be brought within 30 days after the governing body's determination. All courts wherein such actions are or may be hereafter pending, including any court reviewing such action on appeal from the decision of a lower court, shall give such actions preference over all other civil actions therein, in the manner of setting the same

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	for hearing or trial and in hearing the same, to the end that all such actions shall be quickly heard and determined.
Gov. Code, § 12963.5(d)	Appeal of action to compel compliance with subpoena brought by civil rights department: The order of the superior court is immediately appealable in the court of appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order, serve and file a notice of appeal. The appeal shall have precedence in the court to which the appeal is taken and shall be determined as soon as practicable after the notice of appeal is filed.
Gov. Code, § 15475.5(a)	Appeal of action involving judicial review of decisions of Office of Energy Infrastructure Safety: The decisions of the office are subject to judicial review in the superior court. The superior court shall give preference to cases seeking judicial review of decisions of the office over all civil actions or proceedings pending before the superior court. Appeals of the superior court's decision of those cases shall be given preference in hearings before the court of appeal and the Supreme Court.
Gov. Code, § 65752	Appeal of certain proceedings involving local general plans: All actions brought pursuant to Section 65751, including the hearing of any such action on appeal from the decision of a lower court, shall be given preference over all other civil actions before the court in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be speedily heard and determined.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
PENAL CODE	
Pen. Code, § 1509.1(c)	Appeal from grant or denial of relief on successive habeas petition: The people may appeal the decision of the superior court granting relief on a successive petition. The petitioner may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability. A certificate of appealability may issue under this subdivision only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of Section 1509 have been met. An appeal under this subdivision shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision. The superior court shall grant or deny a certificate of appealability concurrently with a decision denying relief on the petition. The court of appeal shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate. The jurisdiction of the court of appeal is limited to the claims identified in the certificate and any additional claims added by the court of appeal within 60 days of the notice of appeal. An appeal under this subdivision shall have priority over all other matters and be decided as expeditiously as possible.
PROBATE CODE	
Prob. Code, § 1962(b) (See Cal. Rules of Court, rule 8.482.)	Appeal of judgment authorizing conservator to consent to sterilization: When a judgment authorizing the conservator of a person to consent to the sterilization is rendered, an appeal is automatically taken by the person proposed to be sterilized

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	without any action by that person, or by his or her counsel. The Judicial Council shall provide by rule for notice of and procedure for the appeal. The appeal shall have precedence over other cases in the court in which the appeal is pending.
PUBLIC RESOURCES CODE	
Pub. Resources Code, § 21167.1(a)	Appeal of certain proceedings involving environmental impact: In all actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5, including the hearing of an action or proceeding on appeal from a decision of a lower court, all courts in which the action or proceeding is pending shall give the action or proceeding preference over all other civil actions, in the matter of setting the action or proceeding for hearing or trial, and in hearing or trying the action or proceeding, so that the action or proceeding shall be quickly heard and determined. The court shall regulate the briefing schedule so that, to the extent feasible, the court shall commence hearings on an appeal within one year of the date of the filing of the appeal.
Pub. Resources Code, § 21168.6.7(c) (See Cal. Rules of Court, rule 8.700 et seq.; rule 8.705.)	Appeal of streamlined CEQA proceedings relating to Oakland Sports and Mixed Use Project: Rules 3.2220 to 3.2237, inclusive, of the California Rules of Court, as may be amended by the Judicial Council, shall apply to any action or proceeding brought to attack, review, set aside, void, or annul the certification or adoption of any environmental impact report for the project that is certified pursuant to subdivision (d) or the granting of any project approvals, to require the action or proceeding, including any potential appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	the certified record of proceedings with the court. On or before September 1, 2019, the Judicial Council shall amend the California Rules of Court, as necessary, to implement this subdivision.
Pub. Resources Code, § 21168.6.8(f) (See Cal. Rules of Court, rule 8.700 et seq.; rule 8.705.)	Appeal of streamlined CEQA proceedings relating to Inglewood Sports and Entertainment Complex: Rules 3.2220 to 3.2237, inclusive, of the California Rules of Court, as may be amended by the Judicial Council, shall apply to any action or proceeding brought to attack, review, set aside, void, or annul the certification of any environmental impact report for the project or granting of any project approvals to require the actions or proceeding, including any potential appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings with the court. On or before July 1, 2019, the Judicial Council shall amend the California Rules of Court, as necessary, to implement this subdivision.
Pub. Resources Code, § 21168.6.9(d) (See Cal. Rules of Court, rule 8.700 et seq.; rule 8.705.)	Appeal of streamlined CEQA proceedings involving environmental leadership transit projects: On or before January 1, 2023, the Judicial Council shall adopt rules of court that apply to any action or proceeding brought to attack, review, set aside, void, or annul the certification of an environmental impact report for an environmental leadership transit project or the granting of any project approval that require the action or proceeding, including any potential appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 365 calendar days of the filing of the certified record of proceedings with the court.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
Pub. Resources Code, § 21185 (See Cal Rules of Court, rule 8.700 et seq.; rule 8.702(g) ["Unless otherwise ordered by the reviewing court, oral argument will be held within 45 days after the last reply brief is filed"].)	Appeal of streamlined CEQA proceedings involving environmental leadership development projects: The Judicial Council shall adopt a rule of court to establish procedures that require actions or proceedings brought to attack, review, set aside, void, or annul the certification of an environmental impact report for an environmental leadership development project certified by the Governor under this chapter or the granting of any project approvals that require the actions or proceedings, including any potential appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings with the court.
Pub. Resources Code, § 21189.51 (See Cal Rules of Court, rule 8.700 et seq.; rule 8.702(g) ["Unless otherwise ordered by the reviewing court, oral argument will be held within 45 days after the last reply brief is filed"].)	Appeal of CEQA proceedings relating to Capitol Building Annex and State Office Building Projects: (a) On or before July 1, 2017, the Judicial Council shall adopt a rule of court to establish procedures applicable to actions or proceedings brought to attack, review, set aside, void, or annul the certification of the environmental impact report for a capitol building annex project or the granting of any project approvals that require the actions or proceedings, including any potential appeals therefrom, be resolved, to the extent feasible, within 270 days of certification of the record of proceedings pursuant to Section 21189.52. (b) On or before July 1, 2019, the Judicial Council shall adopt a rule of court to establish procedures applicable to actions or proceedings brought to attack, review, set aside, void, or annul the certification of the environmental impact report for annex project related work or a state office building or the granting of any project approvals

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	with respect to either that work or building that require the actions or proceedings, including any potential appeals therefrom, be resolved, to the extent feasible, within 270 days of certification of the record of proceedings pursuant to Section 21189.52.
Pub. Resources Code, § 21189.70.3 (See Cal. Rules of Court, rule 8.700 et seq.; rule 8.705.)	Appeal of streamlined CEQA proceedings involving Old Town Center transit and transportation facilities project: Notwithstanding any other law, Rules 3.2220 to 3.2237, inclusive, of the California Rules of Court, as may be amended by the Judicial Council, shall apply to an action or proceeding brought to attack, review, set aside, void, or annul the certification of an environmental impact report for the transit and transportation facilities project approved pursuant to Section 21189.70.2 or the granting of any approvals for this project, including any potential appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 business days of the filing of the certified record of proceedings with the court. On or before January 1, 2022, the Judicial Council shall amend the California Rules of Court, as necessary, to implement this section.
Pub. Resources Code, § 25903	Appeal of judicial review of site and facility certification validity provisions: If any provision of subdivision (a) of Section 25531, with respect to judicial review of the decision on certification of a site and related facility, is held invalid, judicial review of such decisions shall be conducted in the superior court subject to the conditions of subdivision (b) of Section 25531. The superior court shall grant priority in setting such matters for review, and the appeals from any such review shall be given preference in hearings in the Supreme Court and courts of appeal.

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
WELFARE & INSTITUTIONS CODE	
Welf. & Inst. Code, § 395(a)(1)	Appeal of child dependency proceedings under Welf. & Inst. Code, § 300 et seq.: A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment. However, that order or judgment shall not be stayed by the appeal, unless, pending the appeal, suitable provision is made for the maintenance, care, and custody of the person alleged or found to come within the provisions of Section 300, and unless the provision is approved by an order of the juvenile court. The appeal shall have precedence over all other cases in the court to which the appeal is taken.
Welf. & Inst. Code, § 800(a)	Appeal of proceeding declaring minor a ward of the court: A judgment in a proceeding under Section 601 or 602 may be appealed from, by the minor, in the same manner as any final judgment, and any subsequent order may be appealed from, by the minor, as from an order after judgment. Pending appeal of the order or judgment, the granting or refusal to order release shall rest in the discretion of the juvenile court. The appeal shall have precedence over all other cases in the court to which the appeal is taken.
Welf. & Inst. Code, § 801 (See Cal. Rules of Court, rule 8.417.)	Appeal of juvenile transfer order: (a) An order transferring a minor from the juvenile court to a court of criminal jurisdiction shall be subject to immediate appellate review if a notice of appeal is filed within 30 days of the order transferring the minor to a court of criminal jurisdiction. An

Authorities Expressly Providing for Appellate Calendar Priority	
Code Section / Rule	**Description / Statutory Language**
	order transferring the minor from the juvenile court to a court of criminal jurisdiction may not be heard on appeal from the judgment of conviction. (b) Upon request of the minor, the superior court shall issue a stay of the criminal court proceedings until a final determination of the appeal. The superior court shall retain jurisdiction to modify or lift the stay upon request of the minor. (c) The appeal shall have precedence in the court to which the appeal is taken and shall be determined as soon as practicable after the notice of appeal is filed.

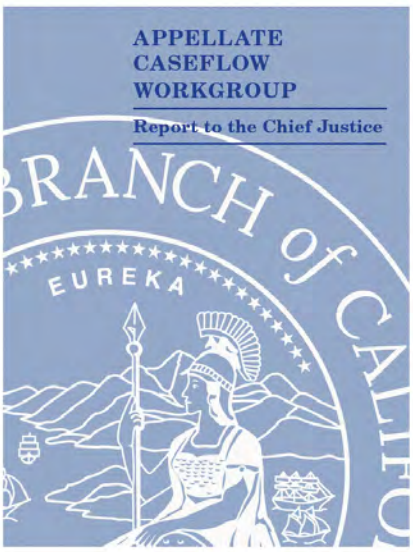
CALIFORNIA COURTS NEWSROOM

News Release

Report: Third Appellate District Eliminated Excessive Delays, Problems Not Found in Other Appellate Districts

Workgroup also found that appellate courts statewide have reduced case backlogs by nearly 50% over the past five years

By Merrill Balassone
Dec 12, 2022



The Third District Court of Appeal in Sacramento took "prompt and effective measures" to eliminate excessive case delays, and no similar problem exists in any other appellate district, according to a judicial workgroup report released Monday.

The latest data from the Third District shows that no fully briefed appeals have been pending for more than a year without a valid reason (such as on-going settlement negotiations). The data shows that the same is true for all appellate districts statewide, with the exception of a handful of cases that have been transferred to another court for processing or are actively being worked on.

Chief Justice Tani G. Cantil-Sakauye launched the Appellate Caseflow Workgroup in June in response to findings issued by the Commission on Judicial Performance concerning case delays in the Third District.

In its report, the workgroup found that the Third District made effective changes to remedy the problems, including hiring additional staff attorneys to right-size its workforce; instituting transparent monthly reporting and follow-up; more clearly identifying cases that need priority calendaring, and holding monthly meetings to report on the status of cases.

The report issued three main recommendations to improve state-level oversight to prevent excessive delays from developing in any appellate court in the future:

- Requiring a report every six months to identify fully briefed appeals that have been pending for more than a year without a valid reason, and directing that identified cases be promptly processed.

- Requiring an annual report to review and manage caseload inequities among the appellate districts.

- Enacting a new rule to enhance districts' collective management responsibilities.

The workgroup also issued dozens of recommendations to help speed up the appellate process, including recommendations to expedite the record-preparation and briefing phases of the process and to improve the usefulness of statistical data for tracking case progress.

"I thank the workgroup for its quick work in reviewing the remedial measures taken in the Third District, verifying that similar case delays are not occurring in other districts, and proposing recommendations to ensure that appeals do not become unnecessarily delayed in the future," said **Chief Justice Cantil-Sakauye**. "This workgroup's comprehensive report shows that the efficiency of California's appellate courts continues to improve, and these new recommendations will ensure that the courts are more transparent and accountable. I am forwarding the recommendations to the Judicial Council for immediate action."

Said workgroup member **Michael Colantuono,** president of the California Academy of Appellate Lawyers: "This report is evidence that every stumble is an opportunity to start afresh and make real progress. The recommendations of the working group will make a real

improvement in how California provides appellate justice. These changes will help ensure our appellate courts distribute resources — and appeals — fairly and efficiently to get the most speedy justice our resources allow consistent with careful review of appeals. I applaud the presiding justices for their recommendation to accept shared accountability for, and to provide collective transparency as to, appeal processing times in all our Courts of Appeal."

Significant Statewide Progress Reducing Case Backlogs

The workgroup also found that California's appellate courts have made significant progress in reducing case backlogs in recent years.

The statewide backlog of fully briefed appellate cases was reduced by 47 percent over the last five years, far eclipsing a 14 percent reduction in the overall number of appeals during that period.

"The revelation of the excessive delays in the Third District was crucial to correct the serious problem it exposed, but it overshadowed the larger context of the appellate courts' solid and improving overall condition," said workgroup chair **Administrative Presiding Justice Jim Humes**, of the First District Court of Appeal. "This progress has left the courts better positioned to resolve cases more quickly."

The workgroup has 18 members, including justices, court and institutional attorneys, private appellate specialists, and an appellate clerk/executive officer

Images

Click on an image below to view in full size

Please provide your feedback for this session.

Colette M. Bruggman, Oona Mallett, and John Doerner

Session Survey

MOVING FORWARD WITH OPTIMISM AND RESILIENCE

Jean Steel

Opperman Speaker

Happiness – it's a very simple topic, yet one that we tend to struggle with the most in our adulthood, and Jean Steel has devoted her life's work as a speaker and author to help people not only find their happiness but thrive in it. Her experience growing up overseas with her family in Africa and Asia, as well as her extensive education in mind-body health and wellness have led a life full of gratitude, vast perspective, and joy that she so thoughtfully and humorously shares with the world through motivational keynotes and books. Her timeless messages and universal appeal are unforgettable and just what you need to find you happy!

Jean received her master's degree in Wellness/Mind/Body health from California State University-Sacramento and a Bachelor of Arts degree from UC Santa Barbara. She has served on the faculty of Santa Barbara City College, Allan Hancock College, and Cal Poly San Luis Obispo. Her books include I'd Like to Run Wild!, a Wellness Action Guide, and Need Change? Customer Service Tips to Grow from Good to Great!. Jean has a vast and loyal client portfolio, such as the American Heart Association, California Hospital Association, G3 Enterprises, Arizona Association of Counties, Georgia Institute on Aging, U.S. Women in Nuclear, International Association of Exhibitions and Events (IAEE), Central California Women's Conference, the YMCA, and countless other organizations. And years later, Jean still pays visits to Africa as often as possible while also giving back much of her time and profits to several local and global charities.

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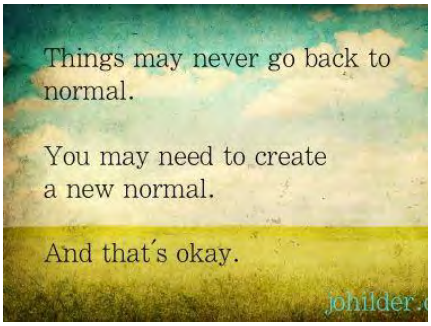
Moving Forward with Optimism & Resilience

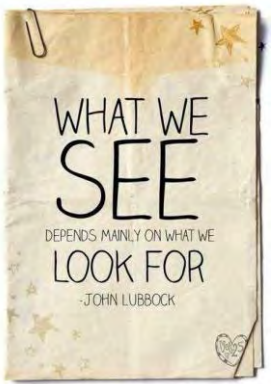
A good half of the art of living is resilience. - Alain de Botton

Change



- Finding your new normal
- You are stronger than you think
- The maelstrom of emotions is normal
- Acknowledge your fear and resistance
- Face your fears
- Accept your feelings and seek support
- *"Never be afraid to admit you need help. Asking for someone's support or advice is a sign of strength and courage."*

Happiness



- "The Happiness Advantage" by Shawn Achor
- Defined:
  - Experience of positive emotions
  - Pleasant mood now, positive outlook for the future
- Happiness is the precursor to success, not a result
- Brain change is possible depending on how you live your life
- We can prime our brains to focus on positivity or negativity
- LOOK for the good

Resilience

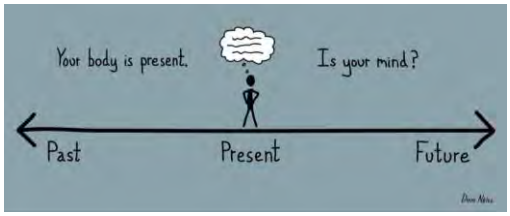
- Ability to bounce ~~back~~ forward from adversity, ability to grow from challenges.

Resilience Skills / Protective Factors

Mindfulness - *Present in the moment and grounded in the actual situation at hand*

1

- Be. Here. Now.
- Perfect moments
- Breathe
- We don't know what the future holds
- 10/10/10 Rule (minutes/months/years)



Gratitude - *Notice the good things in life and stay connected*

2

- *"Gratitude is a great mind state shifter."* – Jay Shetty
- Develop an attitude of gratitude
- Hunt the good stuff

3 Good Things Today

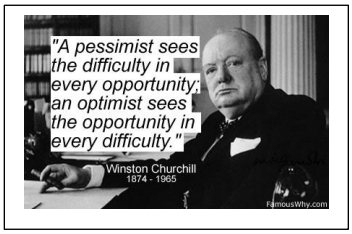
What are you grateful for?

Mindful/Gratitude - *Someone else is happy with less than what you have*

3

Optimism - *Hopefulness and confidence about the future or to anticipate the best possible outcome.*

- Engine of resilience – belief in a positive future
- What you can control // what you have to accept
- Optimism is the result of genetics, environment & experience.
- You can cultivate optimism
- Create reminders of positive memories
- Protect yourself from energy vampires
- Decide your day

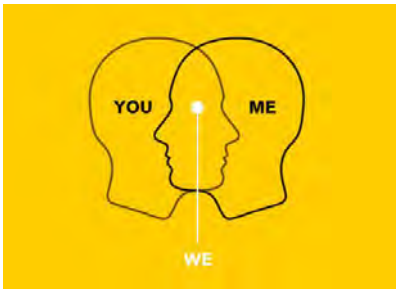


4

Self-Compassion / Empathy - *Forgiving yourself for things that have gone wrong and channeling your energy into the next steps.*

--Believe in yourself

- Self-kindness
  - If others could hear your thoughts, would they be shocked by what you say about yourself?
- Cultivate Empathy
  - Pathway to resilience
  - Increase empathy
    - Get out of your comfort zone
    - See their world
    - Stop judging
    - Understand feelings
    - Communicate understanding
    - EMPATHY ASSESSMENT: https://testyourself.psychtests.com/testid/2099

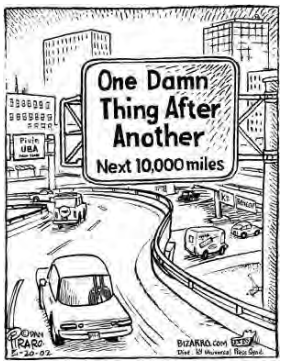


5

AWE - *A feeling of reverential respect mixed with wonder.*

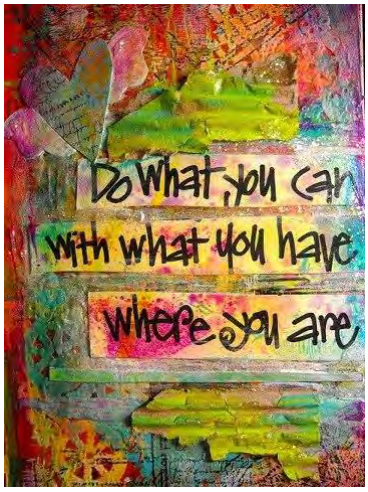
- AWE produces "a reduced sense of self-importance relative to something larger and more powerful that they felt connected to."
- Brief experiences of AWE redefine the self in terms of the collective and orient our actions toward the interests of others.
- Experience AWE through:
  - *Music*
  - *Inspirational people*
  - *Everyday nobility*
  - *Museums*
  - *Theater*
  - *Nature*

final thoughts



- Acknowledge pain and grief
- Give back
- Life is short
- Have adventures
    - Create experiences
    - Date nights
- RUN WILD!!!

"Remember that the **happiest** people are not those getting more, but those **giving more**.
— H. Jackson Brown Jr.



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5 Major Changes since COVID began/ended

Life / Personal Changes

1. _____

2. _____

3. _____

4. _____

5. _____

Work Changes

1. _____

2. _____

3. _____

4. _____

5. _____

ACTION PLAN

What are you going to do differently?

1. _____

_____

How often?_____

What do I need to be able to follow through? _____

_____

2. _____

_____

How often?_____

What do I need to be able to follow through? _____

_____

3. _____

_____

How often?_____

What do I need to be able to follow through? _____

_____

-- Plan Adventures --

1 Date: Companion

Adventure

2 Date: Companion

Adventure

3 Date: Companion

Adventure

4 Date: Companion

Adventure

gratitude

My gratitude list -

"If the only prayer you said in your whole life was, "thank you," that would suffice." - MEISTER ECKHART

happypeoplewin

Personal Stress Management ACTION Plan

Time	Activity
Morning 	1. 2.
Work Day 	1. 2. 3.
Evening 	1. 2. 3.
Day Off 	1. 2. 3. 4. 5.

I _____ promise to myself that I will prioritize my self-care, stress relief and happiness.

Name _____ Date _____

Please provide your feedback for this session.

Jean Steel

OPPERMAN SPEAKER

Session Survey

SURVEY OF KEY EMPLOYMENT LAWS, REGULATIONS, AND PRACTICES: COMPLIANCE, LEADER EDUCATION, AND CULTURE

Edward Zobeck

Edward Zobeck (Ed) served as the Chief Administrative Officer and HR Director for the Michigan Supreme Court and State Court Administrative Office from 2014 until he retired in 2020. Earlier, he worked for Renaissance Health Services and Delta Dental of Michigan (a large dental services provider) in several capacities, including Sr. Vice President of HR and Chief Administrative Officer. Prior to that, he worked for AAA in Michigan as the VP, HR. He currently serves as an HR consultant for the National Center for State Courts practicing in compensation consulting, organizational design, and teamwork.

National Conference of Appellate Court Clerks

Ed Zobeck
Detroit, Michigan
July 31, 2023

EMPLOYMENT LAW AND HUMAN RESOURCES PRACTICES

EDWARD ZOBECK
313-378-9371
EJZOBECK@GMAIL.COM

Five rules that, when violated, lead to increased risk

It is not enough to teach your supervisors employment law

Five high risk areas of human resource management

1.
2.
3.
4.
5.

Where can you go for help?

Discrimination Exists

- When an employee OR _____ is treated differently
- than a similarly situated co-worker or _____
- based on protected characteristics

Discrimination can be shown:

- Disparate impact

- Disparate treatment

Protected personal characteristics

- Race
- Color
- Sex
- Sexual Orientation
- Gender Identity or Expression
- National Origin
- Religion
- Age
- Military Status
- Equal Pay
- Pregnancy
- Disability
- Genetic Information

State Laws May Expand on These

Minimizing Risk

1. Guard your words and action

2. Document

3. Get Help

4. Be Consistent and Professional

5. Welcome Concerns

Selection Questions

1. Applicants do not generally have the same rights as employees with regard to claims of discrimination?
   - ☐ Yes
   - ☐ No

2. You notified your Chief Judge of your intention to retire in 2-3 months. The Chief asks you to manage the selection process for your successor. You revise the job description and create a posting with which you advertise the position. You received 15 applications and screen the pool down to 7 based on the minimum qualifications of the position. You develop a phone interview script, and conduct a phone screen with these seven and screen the pool down to 4 for the Chief Judge to interview. You apprise the Chief Judge of what you've done and he is thrilled and compliments you on an excellent job. As you are about to leave the room, the Judge says, "By the way, this is the resume of an acquaintance. I know she's not qualified for the position, but it would be really helpful to me if you could include her in the group to be interviewed." Is there a problem interviewing this candidate? Why?

3. You are recruiting for Deputy Clerk, and the Chief Judge 'doesn't want to be constrained by those Human Resources rules". She says, "It's important that we find the right person for the job because this person is your successor." What is your response?

Selection Process

1. Determine that you are looking for
2. Develop a pool of candidates
3. Narrow the pool of candidates
4. Examine the pool of candidates
5. Select the best candidate

What are you looking for

1. Best Practice: link to a comprehensive job description
    a. Clear minimum qualifications: education, experience, licensing/professional certification, knowledge, ability, skills, physical requirements
2. Create a job posting based on the job description
    a. Describes job and essential duties
    b. Minimum qualifications
    c. Application procedure

Develop a pool of candidates

1. Posting services
2. Other sources

Narrow the pool

1. Verify that the candidate meets the minimum qualifications
2. Rank order
3. May conduct telephone interviews

Examine the pool

1. Best Practice: behaviorally based interviews
    a. Past behavior is the best indicator of future behavior
    b. Create an interview guide
    c. Determine how you will evaluate / score the interview BEFORE you interview

Select the best candidate

1. Score the interviews
2. Reference checks
3. Background checks
4. Verify past/current employment
5. Develop and make a job offer

Promotion

Compensation and Benefits Questions

1. Your IT manager just retired and you are having a very hard time recruiting a replacement. You want to bring her back as a full-time independent contractor for three months. She says she doesn't want to work and won't work for anyone else, but she'll do it for you as a favor. Can you do this?

2. . A nonexempt employee who performs overtime work without the permission of his/her supervisor cannot claim overtime pay for such work under the Fair Labor Standards Act.
   - ☐ True
   - ☐ False

3. One of your IT Support Technicians (a non-exempt position) often gets calls during off hours. Because of this, your court provides her with a smart-phone and she also has access to court systems to check email and check on their status. She recently went to a union organizing event. Upon her return, she writes you a memo detailing over 250 hours over the last three years that she worked from home checking email and doing other work. Should you be worried about this claim?

4. Workers' compensation leave does not count against an employee's FMLA leave entitlement.
   - ☐ True
   - ☐ False

5. An employer can require an employee to return to work before FMLA leave is exhausted if the employee fails to provide supporting medical certification.
   - ☐ True
   - ☐ False

6. Mary is a clerk whose job involves sitting or standing at the front desk most of the day. She recently fell at home and began suffering from back pain preventing her from standing or sitting for long periods of time and was approved for FMLA. In week 12 of her approved FMLA leave she had back surgery which will require an additional two to three months of recovery. She's requested continuation of her leave. What do you do? What are the ramifications of approving her additional leave request? What are the ramifications of denying it? Assume you deny the request you terminate her employment and invite her to apply for any open positions at the court when she is medically cleared to return to work. She contacts you and requests additional leave as an Americans with Disabilities Act (ADA) accommodation. What do you do?

Is a "contractor" an employee?

If you answer these questions "NO", it is likely the individual is an employee	If you answer these questions "YES", it is likely the individual is an employee
• Profit or loss • Investment • Works for more than one firm • Offers services to general public	• Instructions • Training • Services rendered personally • Hiring assistants • Continuing relationship • Work hours • Full-time work • Work done on premises • Sequence • Reports • Pay Schedules • Expenses • Tools & materials • Right to fire • Worker's right to quit

Source: http://corporate.rfmh.org/accounts_payable/forms/IRS_ChecklistforIndependentContractors.pdf
Based on IRS Form SS-8

Fair Labor Standards Act (FLSA)

- Regulates
  - Minimum wage
  - Overtime provisions
  - Child labor restrictions
  - Equal pay for equal work (Equal Pay Act)
- Exemptions
  - Elected Officials (EO)
  - Staff of Elected Officials
    - Six Factor Test
      1. *EO has power to hire/fire*
      2. *EE is personally accountable ONLY to the EO*
      3. *EE represents the EO in the eye of the public*
      4. *EO has considerable amount of control over the EE*
      5. *Location of the EE's position in the chain of command*
      6. *Closeness or intimacy between the EO and EE*
- Exemptions
  - 'Exempt' means exempt from the overtime provisions of the FLSA
  - FLSA Exemptions
    - Executive
    - Professional
    - Administrative
    - Outside Sales
    - Computer Employee
  - Minimizing Risk – GET HELP!

Additional Information: FLSA Fact Sheet 17a
https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime

Family and Medical Leave Act (FMLA)

- Provides employees of covered employers up to 12 weeks of unpaid leave for:
    - The employee's serious health condition that make the employee unable to perform the essential duties of his or her job
    - Birth and care of a newborn
    - Placement of a childe for foster care or adoption
    - Care for an immediate family member with a serious health condition
        - Spouse, son, daughter, parent
- FMLA eligible employee
    - Worked for employer for at least 12 months
    - Worked at least 1,250 hour over the previous twelve months
    - Work at a location where at least 50 employees are employed by the employer within 75 miles
    - All public employees are covered regardless of the size of the agency
- What is 'injury' or 'illness'?
    - Continuing treatment by a health care professional
        - Incapacity of more than 3 calendar days
        - 2 or more in-person visits withing 30 days
        - 1 in-person visit resulting in continuing care
    - Chronic conditions
    - Permanent or long-term conditions
    - Multiple treatments
    - Substance abuse treatment
    - Employee is unable to perform the essential duties of the job
    - Leave may be continuous or intermittent
- Applying for FMLA
    - You must tell employees what the FMLA rules and processes are
        - Notification & when FMLA leave is counted
    - You may require medical certification – BE CONSISTENT
    - You may request AND PAY FOR a second medical opinion
    - You may request recertification if the need for FMLA goes beyond a single FMLA year – BE CONSISTENT
- GET HELP

Discipline and Termination Questions

1. Employees in judicial chambers are not subject to the same employment rules that other employees in court are?
   - ☐ True
   - ☐ False

2. You have a non-union workforce. Your past employment practice has been to enforce a four-step disciplinary process: verbal warning, written warning, suspension, and termination. You have a Court Clerk who has had significant problem with errors. He just returned from a 3-day suspension two weeks ago, and your investigation shows that he committed the same error again.
   - ☐ You should call him in, advise him of the error and terminate his employment.
   - ☐ You should conduct a Loudermill Hearing prior to any further employment action.

3. You've recently promoted one of your clerks to a new position that takes her out of contact with staff in judicial chambers. In chatting with her, she tells that for the past year or so, working with Judge Judy's JA and Law Clerk has been awful, but she was afraid to tell anyone because she worried about getting fired. But now, she feels the freedom to tell you. You ask her what happened and she tells you that she was regularly harassed by both of them. You ask, "What do you mean", and she says that they frequently criticized her wardrobe – at one point insinuating that she was dressed like a 'whore'. They made comments about her breasts and 'butt' and often 'body-shamed' her. She also produced emails that they sent to other staff commenting on her appearance and work. You begin to ask around, and get a consistent message that these two employees treat others in a similar fashion and have created a level of fear of retaliation among other clerks. Judge Judy is a nice person but, in the past, she's absolutely refused to deal with any performance issues with her staff. Now what?

Discipline and Termination (Corrective Action)

- How do you become ware of a situations requiring corrective action?
  -
  -
  - Third Party
    -
    -
  - If other than personal observation, an investigation needs to be conducted
- Progressive discipline or corrective action policies.
  - Typical steps:
    - Counseling and verbal warning
    - Written warning
    - Suspension with written warning
    - Termination
  - Generally includes an appeal process to present information that may challenge management's information
  - A progressive discipline policy typically doesn't apply to certain conduct or behavior such as theft, substance abuse, intoxication, violence, fighting, etc.
  - DANGER – a poorly written policy can be construed to be a contract of employment
- Implementing corrective action
  - If you don't have all the facts, ensure a full and thorough investigation is completed – GET HELP!
  - Ensure you have completely documented all of the facts and circumstances
  - Ensure you are handling this situation consistently with your policies and past practice
  - Prepare to meet with the employee
  - Meet with the employee (preferably in person)

- Generic meeting template
    - State the problem or concern describing facts uncovered in the investigation – NOT opinions
    - Describe the impact of the behavior
    - Describe what you need them to do
    - PAUSE: ask for a response or comment
    - Tell them what you are requiring them to do (ask them to restate it back to you)
    - Describe how you will monitor their behavior
    - Describe the consequences of not correcting the behavior
    - Document the meeting
- Public Employees and Due Process Rights (Loudermill Hearing)
    - May be applicable to you – GET HELP!
    - Written or implied contract or past practice
    - What is required
        - Advance, written notice of the termination (or serious discipline)
        - An opportunity to be heard at a hearing giving the employee the chance to argue to charges
    - GET HELP to determine if this applies to you

Other Questions

1. As long as sexual jokes, innuendos or physical advances in the workplace are welcomed by all participants, this conduct is not considered to be sexual harassment.
   - ☐ True
   - ☐ False

2. You walk in the break room to top off your coffee cup and notice a Judge sitting at a table with his Judicial Assistant. He's talking to her in low tones. You notice he puts his hand on her knee and she pulls away from him. He then moves closer to her and puts his hand on her knee again. You overhear him say, "You don't need to worry about those things – you really are very attractive." While she's not saying anything, she appears distressed and uncomfortable. Later, you see her sitting in the break room again. She's on her cell phone and appears to be crying. What do you do?

3. Betty is a very shy and quiet person. She happened to walk in on a group meeting between a number of Law Clerks discussing an appeals case. The tone was quite heated and Betty heard the "F-word" used more than once. Betty was shocked, and complained to the Chief Clerk. The Chief Clerk, in order to avoid such incidents in the future, moved Betty to an area of the Court in which she would less frequently come into contact with law clerks. Is the employer (the Court) likely to be found guilty of sexual harassment if Betty complains?
   - ☐ Yes
   - ☐ No

   What, if anything, should the Chief Clerk have done differently or additionally?

4. The Court has a clear policy against sexual harassment. Nevertheless, Mary, head of the civil division, has continually made sexual innuendos toward Frank, the only male employee in her unit. While Frank never complained during his tenure in the department, after leaving he sends a letter to the chief judge describing Mary's behavior. The Court investigates and disciplines Mary. Nevertheless, Frank files a sexual harassment charge alleging a hostile work environment. Given that the Court has disciplined its manager for violation of its policy, is it likely that the Court will still be found liable for sexual harassment?
   - ☐ Yes
   - ☐ No

5. Judges and Court Administrators who are sued as a result of an employment action are always indemnified by their employer.
   - ☐ True
   - ☐ False

6. Charley is your IT Manager. He is the subject matter expert for and is managing the implementation of your new Court Management System. This is a significant effort and needs to get done right to assure the smooth operation of your court. Because you can't close the court down for the system implementation, you've scheduled it for Friday night and Saturday two months from now. Charley comes to you and tells you he is a devout Jew and attends Shabbat services on Friday evenings and Saturdays and can't work on the implementation days that are scheduled. He's asking to be excused. What do you do?

Sexual Harassment

- ..unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature. Even if the harassment is not of a sexual nature, offensive behavior directed toward someone b/c of his/her sex can also be sexual harassment (e.g. rude behavior directed only toward women). Sexual harassment is illegal and can involve situations between males and females or individuals of the same sex.
- Type of sexual harassment
    - Quid Pro Quo
        -
        - Job or benefit contingent on sexual favors
        - 'leader' follows through
        - Committed by someone in a position to impact the conditions of employment
    - Hostile work environment
        - Severe or pervasive behavior
        - Because of a protected class
        - Offensive to the recipient
        - Offensive to a reasonable person
        - Results in an abusive or hostile environment affecting the employee's ability to perform their job
        - Can be committed by anyone
    - Third party sexual harassment
- Minimizing risk for harassment and discrimination
    - Clear policies
        - WHAT
        - Supervisor and employee responsibilities
        - MULTIPLE ways to report
    - TRAIN and frequently communicate policies
    - Model the values
    - Discourage inappropriate jokes/comments
    - Address issues promptly
    - Immediately stop sex oriented conduct
    - Welcome concerns

American's With Disabilities Act (ADA)

- Prohibits discrimination against a person who has a disability
    - Definition
        - Physical or mental impairment the substantially limits one or more life activities
        - A history or a record of impairment
        - Is perceived by others as having an impairment
    - Designed to level the playing field
    - Request for an accommodation
        - Requires a dialogue between the employer and employee
        - Employers must make a reasonable accommodation
    - GET HELP!

Age Discrimination in Employment Act (ADEA) 1967

- Prohibits discrimination against employees 40 years of age and older
- Applies to
    - All employers
    - Labor unions
    - Employment agencies with more than 40 employees
- Amended in 1990 by the Older Workers Benefit Protection Act (OWBPA)
    - Prohibits waiver of ADEA rights unless voluntary and fulfills minimum requirements

Religious Accommodation (Title VII)

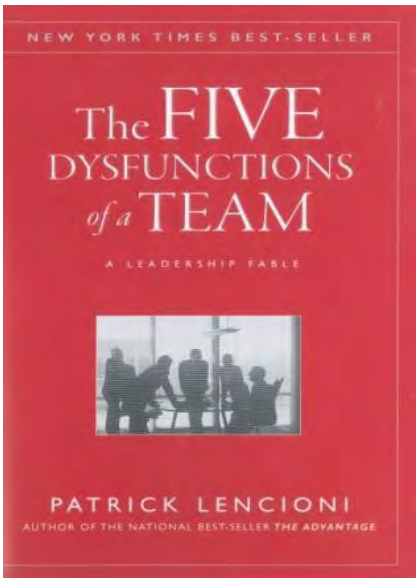
- The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a *substantial hardship* on the operations of the employer's business
    - Flex scheduling
    - Voluntary shift substitutions or swaps
    - Job reassignments
    - Modifications to workplace policies or practices
    - Dress (Jewish yarmulke or Muslim headscarf)
    - Hairstyles or facial hair (Rastafarian dreadlocks or Sikh hair/beard)
- Prior to 2023, it was a deminimus hardship
    - Groff v. DeJoy changed the interpretation to a substantial hardship
- GET HELP!
    - This is new ground
- Engage the employee in an interactive process to discuss the request

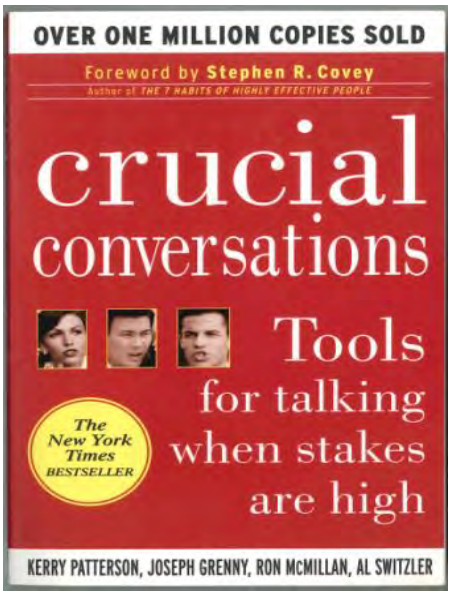
Training Resources

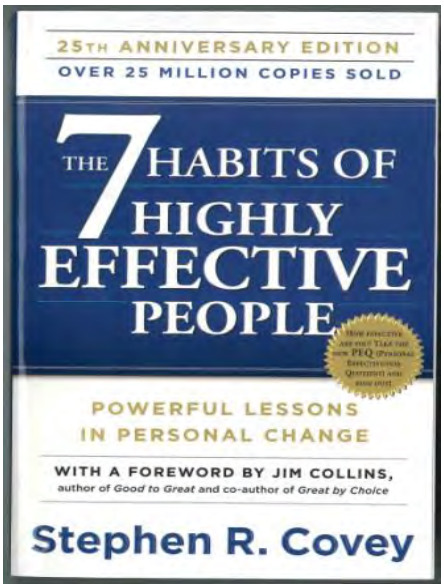
"Creating a Civil Treatment Workplace"
ELI – Employment Learning Innovations
www.eliinc.com

Joshua Ford
Director of Client Development
jford@eliinc.com
312-505-4379

Books of Interest







Please provide your feedback for this session.

Edward Zobeck

Session Survey

DATA ANALYTICS IN LITIGATION

Mike Bird

Michael Bird joined the University of Detroit Mercy School of Law in 2022 as the Reference & Serials Librarian. His experience lies in reference and instruction in legal research. Previously, he worked with the University of Arizona's Indigenous People's Law and Policy Project, and Head of Public Services at the Capital University Law School Library in Columbus Ohio. His areas of interest include legal research and the legal publishing industry, Administrative Law, Copyright Law, and American Indian Law. Michael received a B.A. degree from Michigan State University (2002), a J.D. degree (2006), and M.L.I.S. degree (2007) from the University of Arizona.


NCACC
EST. 1973

Data Analytics in Litigation

MICHAEL BIRD
REFERENCE AND SERIALS LIBRARIAN
UNIVERSITY OF DETROIT MERCY

WHO AM I?

- Academic Librarian
- Somewhat removed from your work
- Information systems analysis
- Neutral assessment of new products and trends in legal publishing

MY GOALS TODAY:

- Overview of the history and current state of litigation analytics
- Basics of how they work, their purpose, and how they relate to your work
- A “neutral” view; I’ll try not to either over- or under-sell this
  - Much of the available writing has been done by representatives of analytics firms

METADATA

- “Metadata”: “information about information”
- “Field/Segment Searching” in Westlaw/Lexis
- Descriptive categories to arrange documents
  - Author
  - Title
  - Subject heading
- Allows arrangement (and searching) of documents by criteria other than actual content
  - Moby-Dick > AU: Herman Melville > Billy Budd, Sailor
  - Particular motion types, authoring judges, attorneys of record…

Add synonyms and related concepts to your Terms & Connectors search

Document Fields (Boolean Terms & Connectors Only)

Date (DA)

All

Party Name (TI)

Citation (CI)

Synopsis (SY)

Digest (DI)

Synopsis/Digest (SY,DI)

Judge (JU)

Judge - Concurring Opinion By (COB)

Judge - Dissenting Opinion By (DIB)

Attorney (AT)

Court Name/Prelim (PR)

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LITIGATION ANALYTICS: THE BASICS

- Gathering and analyzing public data about court activity to predict the behavior of judges
- Electronic court filings means this can now be done at scale
- Most common use: advising clients at the trial level about likely costs and timeframe
- Some have begun moving into the appellate space, which is obviously more relevant to you but we'll get to that.

TRIAL ANALYTICS USE CASES

- “How long will this case take? How likely are we to win?”
- In-House Counsel can evaluate firms
- Expert witness background
- Lexis/ALM Survey of AM200 firms: **36%** use analytics, and **80%** of those consider them “must have”

DEVELOPMENT AND FUNCTIONALITY

- Long history but ramped up in early 2010's
- "Start date": **2015** (Lexis acquires Lex Machina and Ravel Law)
- Bloomberg Analytics, Westlaw Analytics, Lex Machina, etc.: all pull from electronic filing systems (PACER and state court docket sites)
- Innovation here has slowed; development has moved in other directions

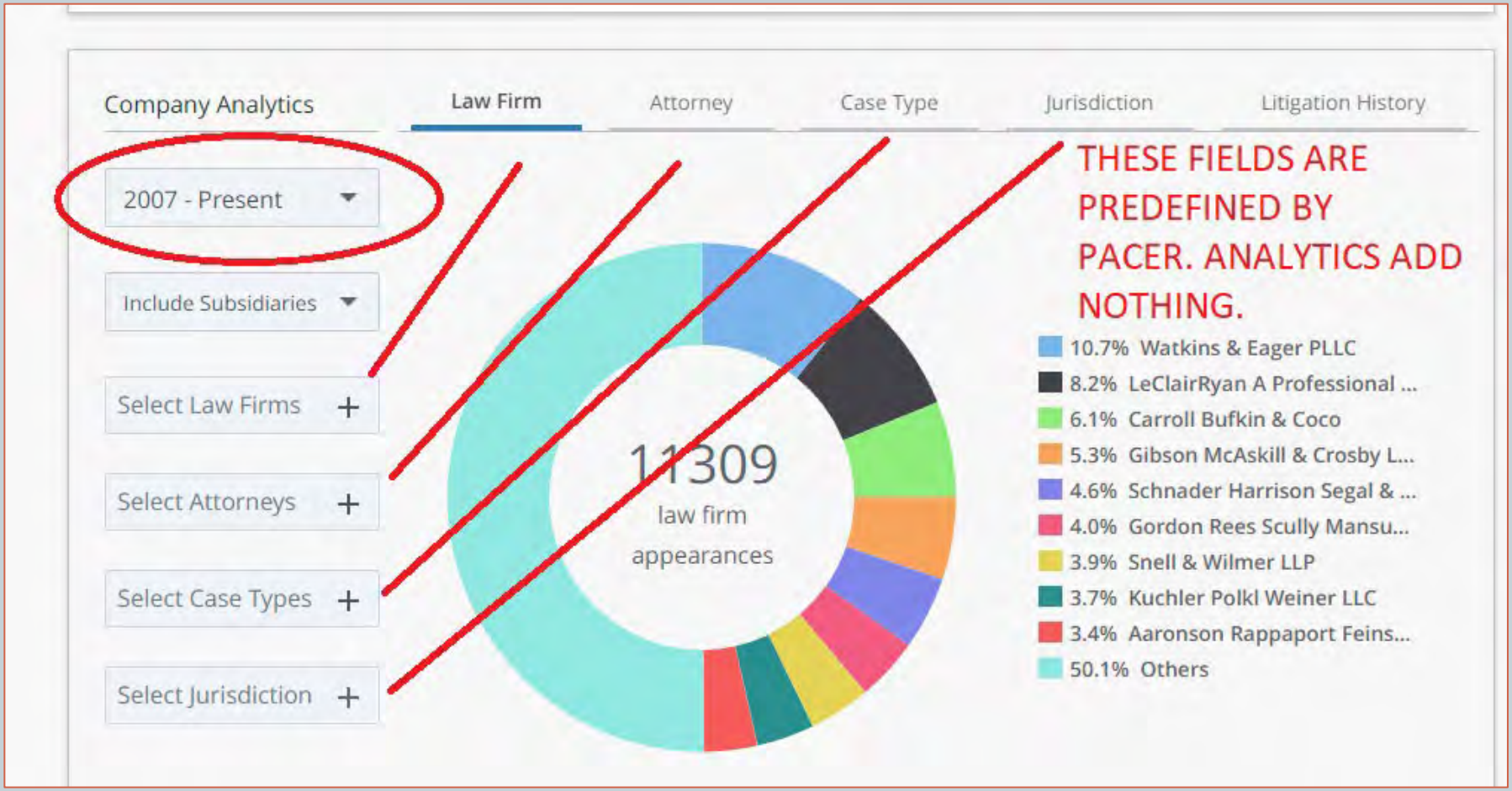
STATE VS. FEDERAL COVERAGE

- Coverage: service must have pulled from electronic dockets BEFORE search is run
- Federal is simpler because everything comes from PACER
- States lack a unified system so coverage is touch-and-go, and usually more expensive

ALAMEDA COUNTY, CA

* **Document Downloads:** Non-confidential, non-sealed documents are available for download if permitted under the California Rules of Court. A case number is needed to download documents. The fee for document download is $1 per page for the first 5 pages and, $.50 per page for each additional page (per document) with a cap of $50 per document. Document downloads are available for 30-days. There is a half page preview of the documents available for free.

METADATA AT WORK IN ANALYTICS



With All This In Mind…

- …let's take a look at a representative platform: Bloomberg Analytics
- Lex Machina
- Westlaw Analytics
- (Basic) Lexis+ Analytics
- They're all pretty much the same because they're all restricted by PACER's metadata fields in the exact same way.

LEXIS CONTEXT: APPELLATE ANALYTICS

- Rolled out in 2021
- Combines docket-scraping with Shepard's analysis to create more complete profiles of Courts/Judges
- We can now track SUBSTANTIVE behavior, not just PROCEDURAL
- Analyze common uses of language or turns of phrase, which cases or judges they most commonly cite…
- "Like knowing their favorite song before a first date"

ARTIFICIAL INTELLIGENCE

Maddie Abuyuan / BuzzFeed News; Getty Images

THE FUTURE: ANALYTICS AND AI

- **Pre/Dicta:** AI prediction of motion outcomes for various judges.
- **Does NOT consider legal substance**! Main factors are various demographic data of judges, litigants, and attorneys.
- 85% claimed accuracy

THE FUTURE: ANALYTICS AND AI

"We are entirely uninterested in precedent, stare decisis…or even which law is applicable. Instead, we are looking at other factors which are more influential in terms of making a prediction. And those factors are: who the parties are, and who the attorneys are. Because that is ultimately what a case hinges on."

-Dan Rabinowitz, CEO Pre/Dicta

(*Legal Rebels* Podcast, 5/17/23)

WHERE DO WE GO FROM HERE?

SEARCH

ALM | LAW.COM INTERNATIONAL

LAW

Photo: Shutterstock.com

NEWS

France Bans Data Analytics Related to Judges' Rulings

The new legislation bans the publication of data analytics that reveal patterns in judges court decisions. The law, which calls for a prison sentence of up to 5 years for violators, is expected to have a big impact on legal tech companies

June 04, 2019 at 06:00 PM

1 minute read

By Simon Taylor | June 04, 2019 at 06:00 PM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Please provide your feedback for this session.

Mike Bird

Session Survey

COURTHOUSE SECURITY TRAINING

Nick P. Barsetti

Nick Barsetti is a Court Security Specialist with the Texas Office of Court Administration's Court Security Division, a position he has held since January of 2020. His duties include providing security consultation services to Judicial Officers, court leadership and law enforcement regarding threats against judges and court staff, conducting physical security assessments on court facilities, and working with courts and justice partners to improve the security of Texas courts. Nick is also a staff instructor who teaches safety, security and disaster preparedness courses throughout the state. Prior to working for OCA, Nick served 11 years as a Peace Officer with the California Judicial Council's Office of Security, as the director of security for a private high school in downtown San Francisco, 5 years as a municipal police officer in a San Francisco suburb and was a Corporal in the United States Marine Corps. Nick holds a Master of Science degree in Criminal Justice from the University of Cincinnati and a Bachelor of Public Administration from the University of San Francisco.

Security Considerations for Appellate Court Clerks

PRESENTED BY:

NICK BARSETTI

TEXAS JUDICIAL BRANCH

OFFICE OF COURT ADMINISTRATION

COURT SECURITY DIVISION

Overview

- Personal Security
- De-Escalation
- Courthouse Policy & Security
- Discussion

RULES OF THUMB

- Every state is different.
- The laws and policies governing your courts will vary.
- Court security is not "*one size fits all*."
- I'm giving you "*Best Practices*." Take what makes sense for you, apply what's helpful and leave the rest.
- Talk to your security provider on what is best for your specific environment.

Normalcy Bias

Levels of Awareness

White	Unprepared and unready to take action.
Yellow	Prepared, alert & relaxed. Good situational awareness.
Orange	Alert to probable danger. Ready to take action.
Red	Action Mode. Focused on the emergency at hand.
Black	Panic. Breakdown of physical & mental performance.

- **Unless you are asleep-You should *ALWAYS* be at yellow**

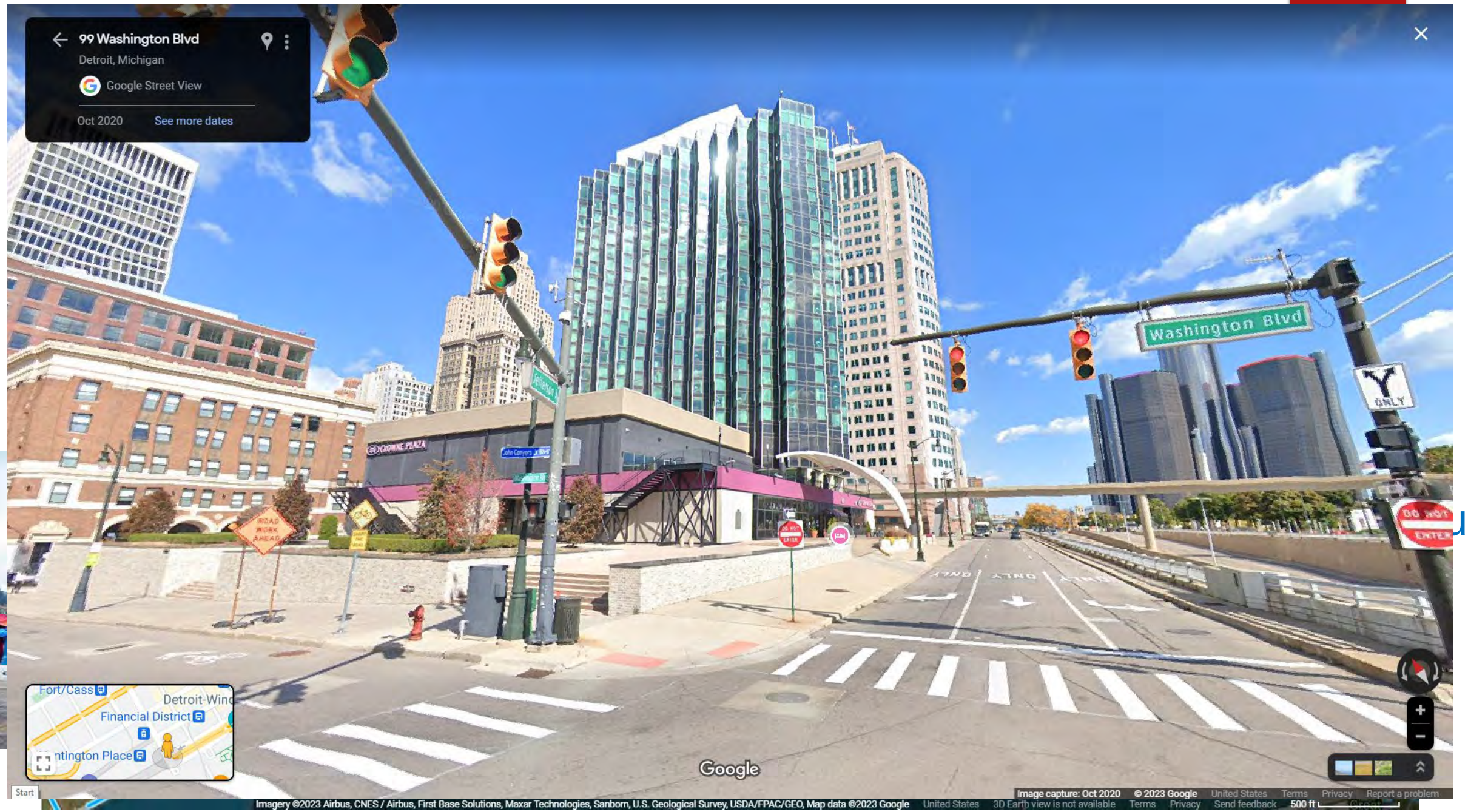
The Basics-Personal Safety

- Always Be Aware
- Trust Your Instincts
- "If it doesn't seem right, it probably isn't!" or "Knowing without knowing why"
- If you see something-say something!
- Confidence!!

We judge BEHAVIORS & ACTIONS

Pre-Attack Indicators

- Scanning Eyes Back/Forth
  - Looking for witnesses/LE/victims/escape routes
  - “Bad Guy Bounce” or Pacing
- Raised Voice/Rapid Speech
- Heavy Breathing/Flared Nostrils
- Flushed Red Face/Sweating
- Wide Eyes/Dilated Pupils
- Rapid Blinking or no Blinking
- Adjusting/Removing Clothing
- Clenched Jaw & Balled Fists
- “Puffing” of Chest or Fighting Stance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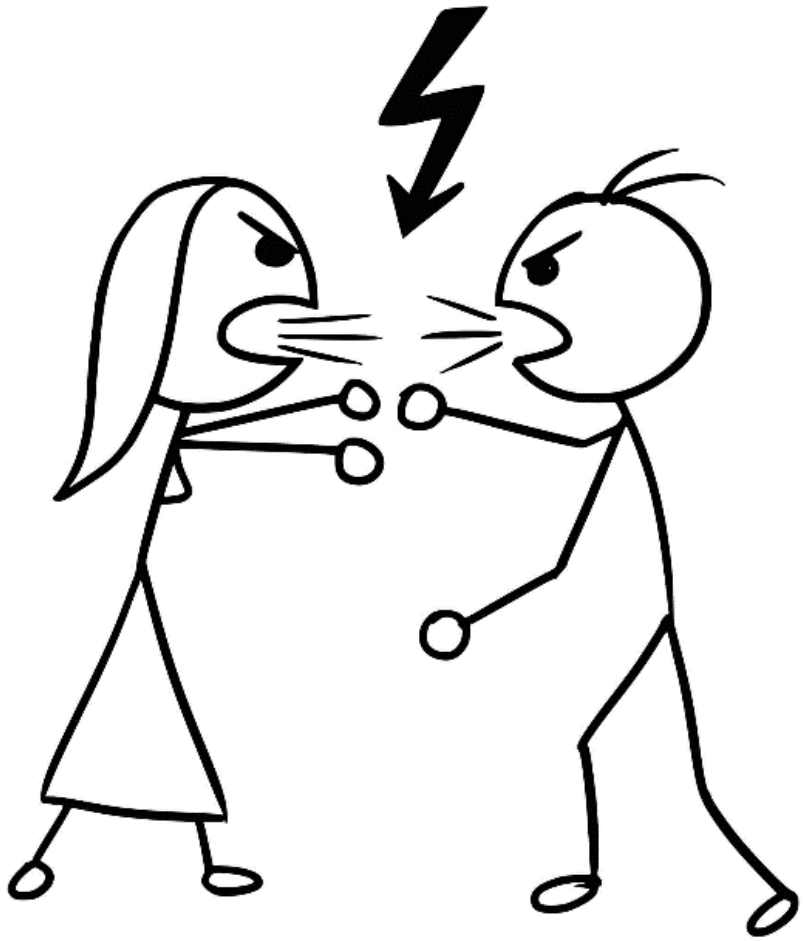
On the Road

Vary your routes/routines/times

No personalization

Be aware of choke points

Transitional spaces



De-Escalation

Taking it Down a Notch

The “Baseline”

- What is the “baseline” of anger, “crazy,” confrontation, etc. where you work?
- It’s different for all of you, but each of you knows what is “typical” vs. what is “alarming.”
- Learn to read the room. Take the temperature of the people. When you get that *hinky* feeling, tune in and take action.
- When things feel or look different, *bad* different, take immediate action.
- The evil word….”Yet”

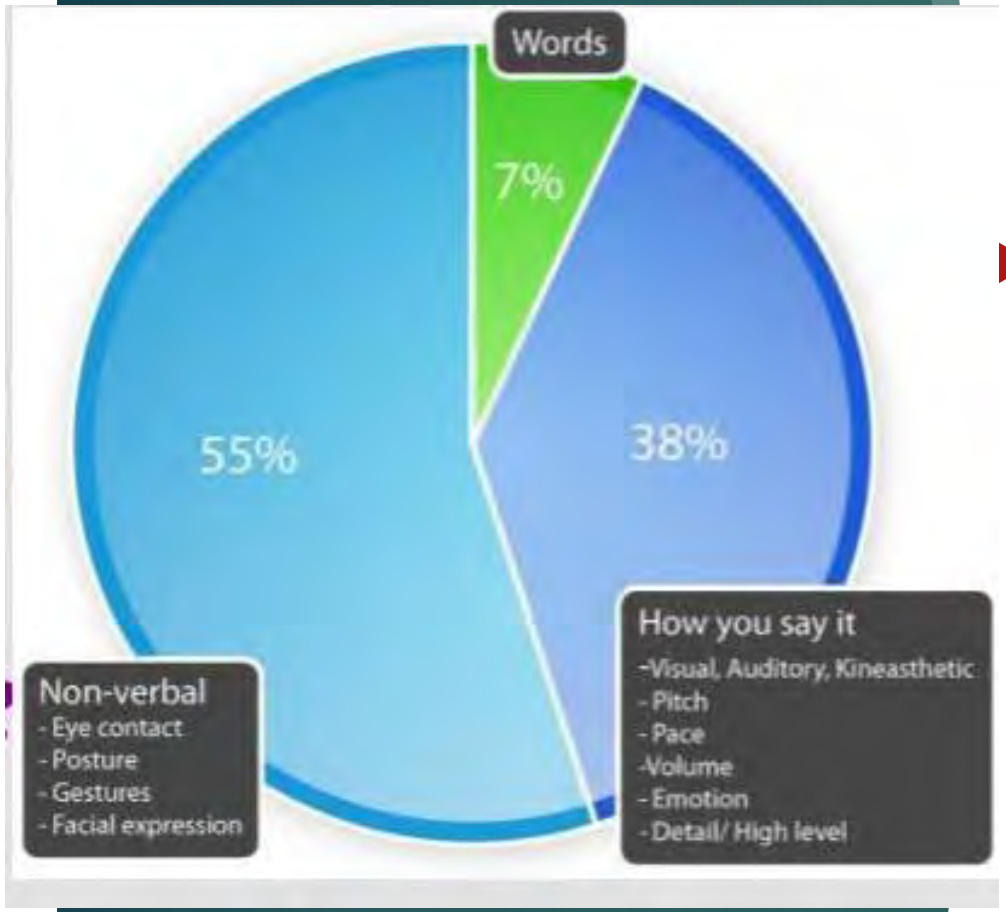
Danger Times & Stressors

- People react to outside influences, aka….”stressors”
- Things that make them angry, embarrassed, nervous, hopeless, etc.
  - What are the stressors in your environment?
  - Negative judgement, sentencing, fines, fees, etc.
  - Delays, extensions, postponements
  - Incomplete or confusing paperwork, bureaucracy
  - Lack of understanding, confusion, complex system

PERCEIVED LOSS OF CONTROL IS THE SINGLE BIGGEST FACTOR THAT TRIGGERS CONFRONTATION

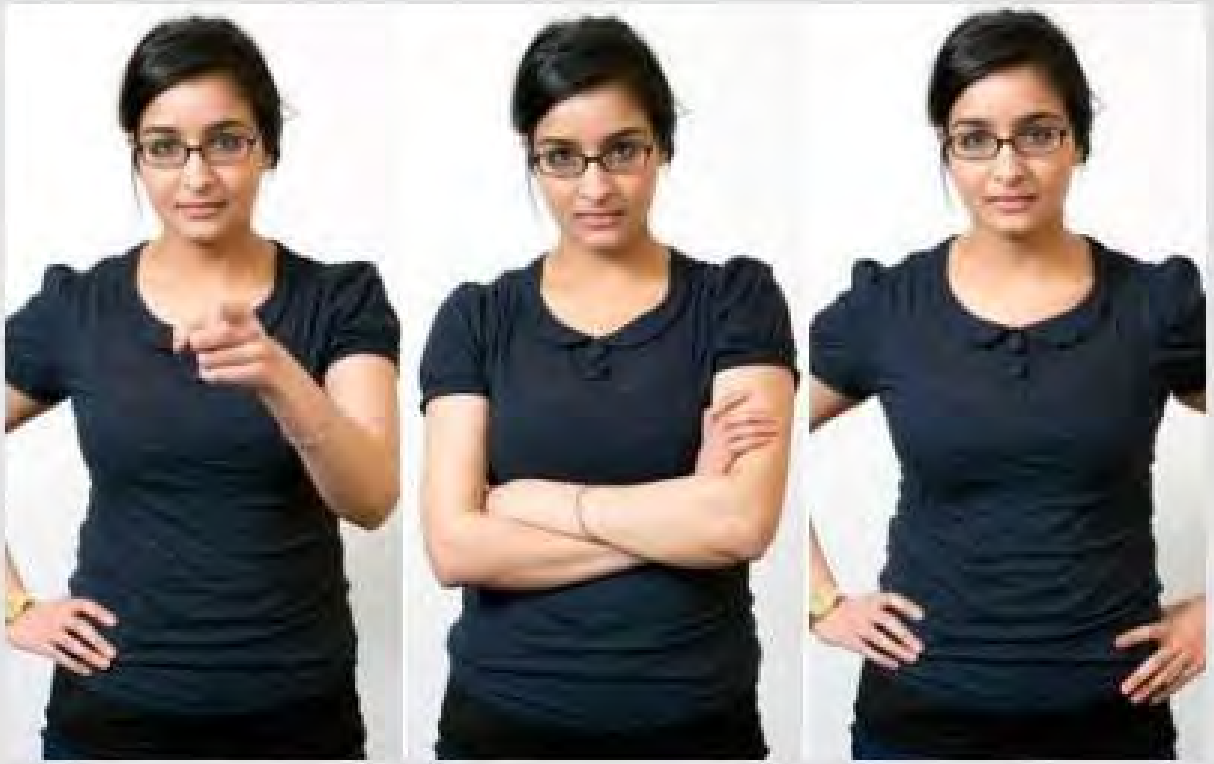
When They Get Angry

- When things begin to escalate, take a breath. Center yourself.
- Calm is king. Stay calm. Keep breathing. Keep thinking.
- Measure your tone. Present a composed and confident demeanor.
- Know your limitations. Put ego aside. If you're becoming overwhelmed or losing control, get help.
- In every situation, you have a choice: push things towards or away from confrontation



- **Calm language, clear communication, body language and tone used together to bring a peaceful resolution to a growing conflict.**
- **3 ways we communicate:**
  - **Words.** What you say. *Least influence* on others in a conflict situation (7%)
  - **Tone.** *What you sound like* when you say it. Next highest influence (38%)
  - **Body language.** *What you look like* when you say it. Most influence on others in a conflict situation (55%)

BODY LANGUAGE
55% OF COMMUNICATION IS NON-VERBAL



What is her body language saying?

BODY LANGUAGE

- No matter what you feel on the inside, be calm on the outside! "Fake it 'til you make it" can be good advice!
- Don't stand over the person. Eye level is best (if possible).
- Don't fidget.
- Proper eye contact. Eye contact is a funny thing….
  - Forehead trick
- Keep your expression pleasant. Neutral smile. Head Nod.
- Keep your hands at your sides. Palms open. No pointing. No fists. Limited gesturing. Slow and calming when you do.

HOW YOU SAY IT

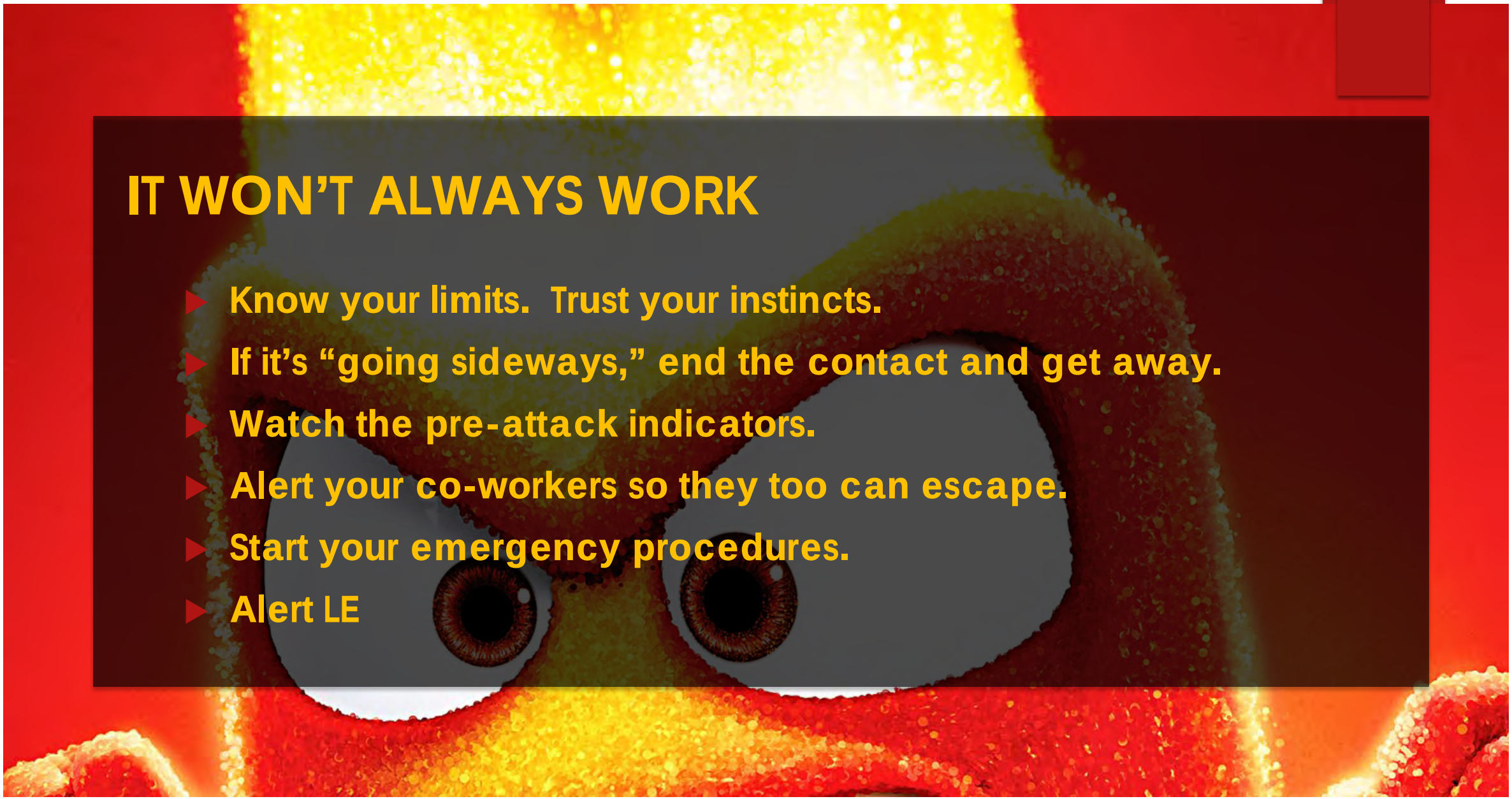
- **TONE**
  - Stern: confident but can be aggressive
  - Timid/wavering: fearful, unsure, invites aggression
  - Lowered: uncertain, invites being questioned
  - Raised: angry, provokes a reaction
- **VOLUME**
  - Loud/overpowering: Authoritative, not listening
  - Soft/unassuming: Docile, afraid
- **RATE OF SPEECH**
  - Slow/rhythmic: Soothing
  - Controlled: Calm and Firm
  - Fast: Nervous or unsure
- **POLITENESS**
  - RESPECT. Be Nice. Don't take it personal.
  - "Please" & " Thank you." "Sir" & Ma'am."

Choose Your Words Wisely

- Give them some “control.”
  - “What can I do to help you?” “What do you need?” “Is there something I could do different?”
- Empathize. Let them know their feelings are O.K. That their frustration is justified.
  - “I know this can be complicated.” “They sure don’t make it easy.” “I know the system is cumbersome.”
  - Be on their team. You’re in it together, working to navigate the system you were *both put into…*
- Be positive. Avoid judgement phrases. “You don’t get it.” “It’s not that hard.”
- Be respectful but firm. Set boundaries. It’s good to justify their feelings and frustrations, but never their negative behaviors.
- Don’t threaten them will law enforcement or arrest but do mention the presence of LE.

WORDS *CAN* MATTER

- Be Patient. Don't cut them off. You've heard it 100 times. 1000 times. *They haven't.* Let them get it out. Show them they matter. Let them speak/vent.
- Ask questions. Don't assume. Don't fill in their blanks. Every situation has differences.
- Be honest.
  - Resist the urge to tell a "white lie" to calm them down. If it comes out, it'll make things worse.
- Timing is important.
  - If there is more bad news, wait to tell them until they've worked through the current issue. Don't pile it on if you don't have to.
- Say it back to them. Sum it up. Para-phrasing.
  - "What I'm hearing is…"
  - "If I understand correctly…."
  - "The biggest issue *we're* facing is…"



IT WON'T ALWAYS WORK

- Know your limits. Trust your instincts.
- If it's "going sideways," end the contact and get away.
- Watch the pre-attack indicators.
- Alert your co-workers so they too can escape.
- Start your emergency procedures.
- Alert LE

Public Contact-Phone & Internet

- Harassing callers/mailers
  - Give proper advice/routing
  - Explain process/limitations of your power to address issue
  - Tell them you can no longer assist them
  - Stop responding to/accepting comms
  - Let supervisors/peers know-document incidents
  - Contact Security/LE if necessary

Rules of Thumb

Don't get	Don't get loud, yell or try and speak over someone else who is yelling.
Wait	Wait until they stop to take a breath. Don't get into a screaming match.
Give	Give simple, clear, concise answers. Repeat if necessary.
Don't keep	Don't keep saying the same thing the same way. Re-phrase, re-state, use different words to convey your point.
Don't respond	Don't respond to insults or negative statements. Let them go and stay focused on the business purpose.
Let	Let them speak, vent, get it out…to a point.

Courthouse Safety & Workplace Violence Principles

Security Committee

- Does your jurisdiction require a committee? Is there one at your court?
- Senior judge of jurisdiction usually establishes and leads
- Makeup:
  - LE/security provider (sheriff/constable/marshal/bailiff/state police/etc.)
  - Court staff (Clerks/Court Coordinator/Court Administer/etc.)
  - Other building tenants (DA/PD/State or County agencies/Justice Partners/etc.)
  - Facilities maintenance. Landscaping. Janitorial. Fire/EMS.
  - Anyone else?

Security Committee

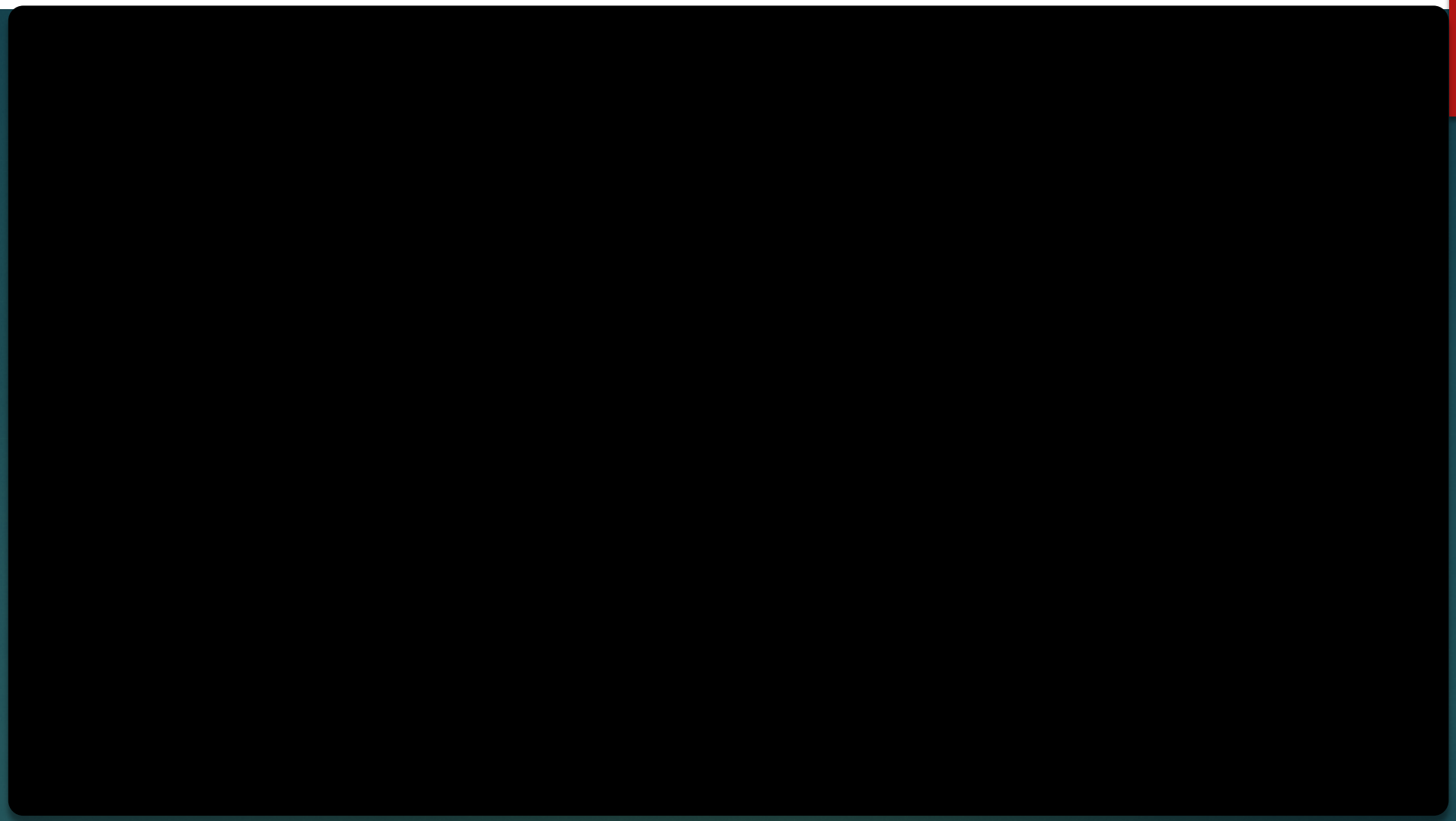
- Develops security & emergency policy & procedure
- Designs and implements staff training program
  - Initial training, drills & refresher training
- Meets regularly to discuss security concerns and challenges
  - Monthly or Quarterly meeting of designee members, Annual or Bi-Annual meeting of primary members
- Security issues are identified, mitigation strategies are discussed, impact is weighed, etc.

Policy & Procedure

- Do you know:
  - Who is on the court security committee?
    - Building security committee?
    - Who has a seat at the table?
  - Who can carry guns in the courthouse?
    - Judges? LE? Staff? Under what circumstances?
    - Coordination with LE for armed judges/staff?
    - Policy for armed judges/staff?

Do you know what to do?

- When was the last time you discussed security emergencies?
  - Bomb threat
  - Violence in court
  - Active shooter
  - Angry customers
  - Suspicious packages
  - Threat against judge, staff or court? Where to report?
    - Sheriff? Constable? Police?



How Fast Can it Happen?

Mail Safety

- Is your mail screened?
- All mail and packages entering the building should go through a package X-ray before distribution.
- Secondary inspection by court staff
  - Suspicious stains/smells/lumps/shape
  - Misspelled words/address
  - Excess postage
  - “Private” “Judge’s Eyes Only”
  - Beware of anything coming from a correctional institution

Should we stay or should we go?

When is evacuation the right call?

Shelter in place?

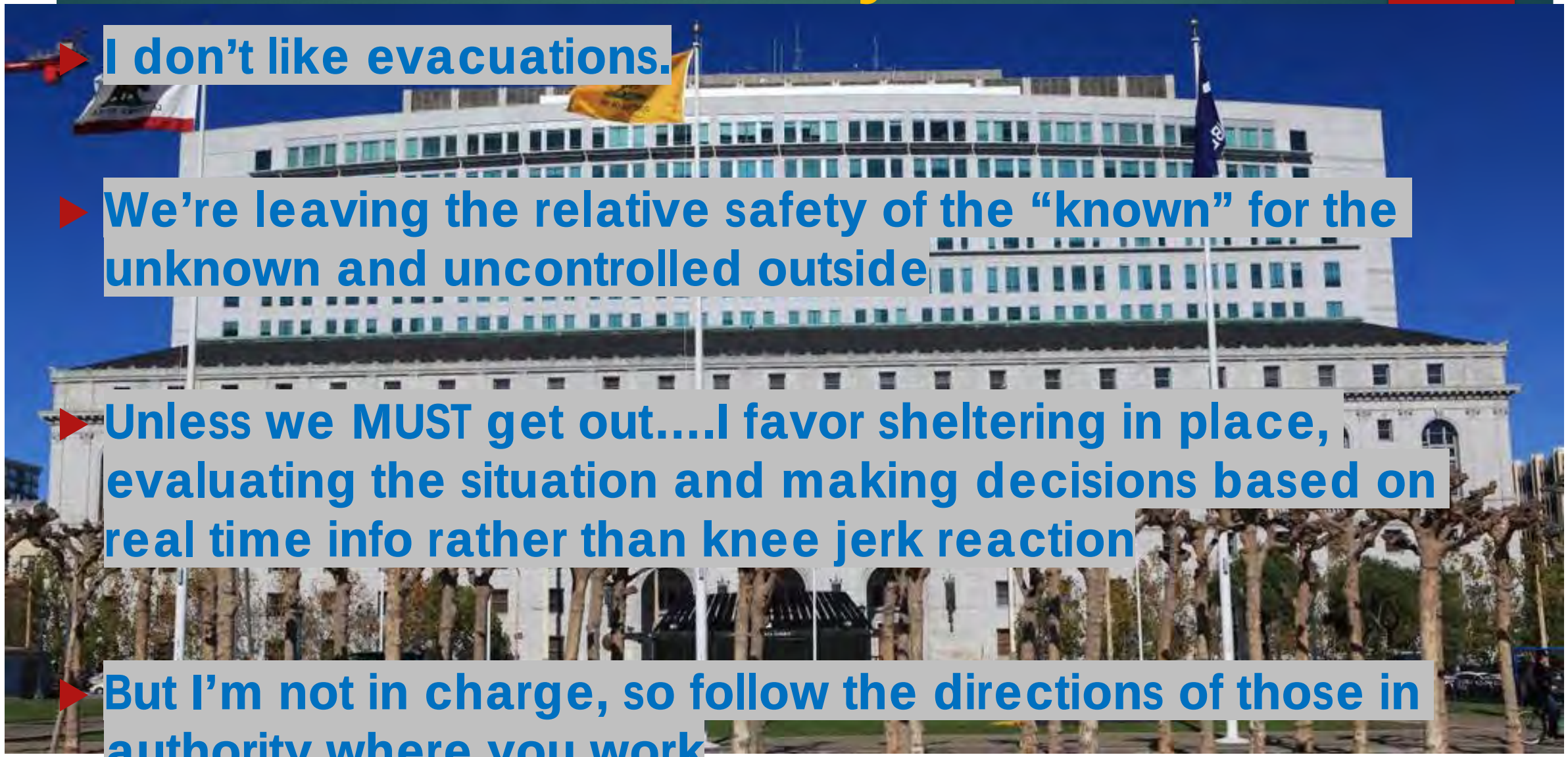
Evacuation Protocol

- Evacuation is for fire or when the danger is inside
- Know evacuation procedure-Where do you go & How do you get there?
- Security should clear evac area first!-Why?
  - Alt. rendezvous point?
    - What if your route is blocked?

Evacuation Protocol

- Do not use the elevators
- Do not go back to office to retrieve personal items
- Take your coat, purse, keys, etc. *only if they are readily accessible*
- Hold onto stair handrails
- Give right-of-way to first responders-stay right
- JUDGES-**remove the robe!**

Evacuation…My 2 Cents



- I don't like evacuations.
- We're leaving the relative safety of the "known" for the unknown and uncontrolled outside
- Unless we MUST get out….I favor sheltering in place, evaluating the situation and making decisions based on real time info rather than knee jerk reaction
- But I'm not in charge, so follow the directions of those in authority where you work

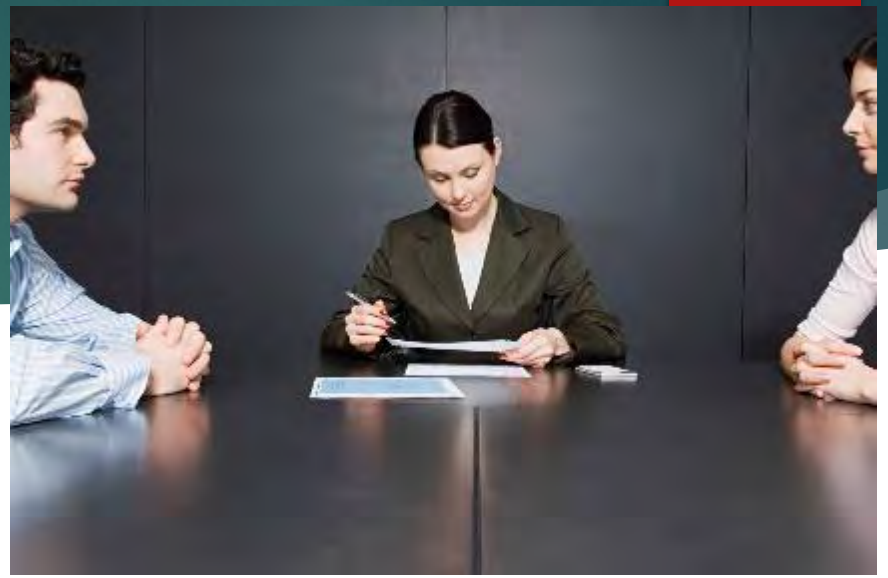
Shelter in Place (SIP)

- SIP in response to:
  - Natural disaster
  - Hazardous chemicals release
  - Law enforcement emergency
- When the danger is outside or localized inside

Courthouse Design for Safety

- **Exterior Security**
  - Secure Parking, Proper Lighting, Trimmed Landscaping, Staff entrances, Physical barriers to prevent ramming
- **Weapons screening**
  - X-Ray and Magnetometer
- **Separation-3 Zones**
  - Public, Private (Judicial & Staff), Secure (Inmates)
- **Access control between zones**
  - Card readers, cypher locks, biometrics
- **Physical separation for staff**
  - Partitions & Transaction windows
- **Security Technology**
  - Cameras, Duress system, Integration, Control room

Set up your Space for Public Contact

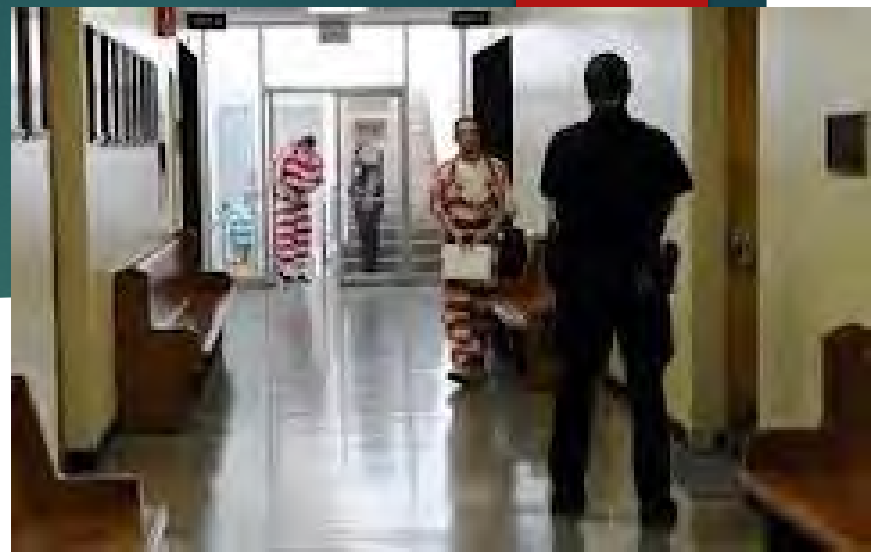


- Don’t box yourself in-leave an escape
- Two arms distance between you and customer
- Scan for and remove weapons of opportunity
  - Anything that can be used to stab or strike

Learn Your Space

- Ingress
  - What is my primary route into the court?
  - My Secondary?
- Egress
  - What is my primary route out of the court?
  - My Secondary?
- Refuge
  - If I can't get out, where is the best place to seek cover? Ballistic bench?
- Listen for and follow bailiff instructions…but be ready to save yourself

Courtroom Safety Plan



- Develop courtroom safety plan
  - Roles of courtroom staff
  - Ingress, egress & refuge (Plan A, B & C)
  - Duress button location and testing
- Daily calendar meeting
- Bailiff-Judge-Clerk Communication
- Staff incident debrief

Emergency Action

Define roles of each courthouse staffer

- **Clerk -press duress button & get out or get down**
- **Court Reporter -clear well & seek refuge/get out with judge/clerk**
- **Bailiff**
  - ***Priority is judge's safety***
  - **Once judge is safe, restore order in courtroom**
- **Judge**
  - **Escape is priority**
  - **Don't bang gavel or call for order**
  - **Go direct to chambers and lock themselves in-take staff with them if possible but don't wait**


LSJ

Get Help

- Duress buttons- Where are they?
  - Are they tested?
  - By whom?
  - How often?
- Alternate methods of summoning assistance
  - Court Security Unit telephone number
  - Program it into every courtroom phone

Calendar Meeting

- Before court meet with staff & bailiff
- Review calendar for defendants/cases that:
  - Have caused disruptions in the past
  - Are having disciplinary issues in jail
  - Are facing sentencing/an unfavorable ruling/remand
  - Are high profile/gang related
- Identify issues before they occur and take steps to prevent them

Stealth Communications

- Verbal & Non-Verbal Communication
  - Judge to Bailiff/Staff
  - Bailiff to Judge/Staff
  - Staff to Bailiff/Judge
- Can you communicate a threat without the defendant or spectators knowing?
- How do you contact security staff?
  - Duress buttons
  - Phone numbers
  - Code words

Violence in the Courts

- **If attacked-*Don't be a victim!***
  - **Fight back until separated from attacker**
  - **Speed & Violence**
  - **Get away**
  - **Alert Court Security Unit**

Incident Debrief

- If an incident does occur, learn from it
- What:
  - Worked well
  - Needs improvement
  - Equipment needs to be added/repaired
  - May have prevented the incident
- Ensure the emotional & physical well being of staff- Employee Assistance Plan

BE AWARE

HAVE A PLAN

COMMUNICATE

MITIGATE

KNOW HOW TO GET HELP

Contact & Questions

- **Nick Barsetti,** **Court Security Specialist**

Texas Judicial Branch, Office of Court Administration, Court Security Division

- Email:

Nicholas.Barsetti@txcourts.gov

- Phone:

830-388-1030

Texas Office of Court Administration
Court Security Division

COURT SECURITY PLAN TEMPLATE

SECTION I - Facility Information (Add Each Facility)

Building Name

County Administration Building

Description of Facility

Briefly describe the city or community where the building is located (e.g., population, main businesses, urban, suburban, rural, community highlights, etc.).

Is this building a shared facility?

Describe the other building occupants (e.g. D.A., county offices, sheriff, etc.) and the percentage of occupancy for each group/agency (e.g. court 75 percent, county offices 15 percent, D.A. 10 percent).

Briefly describe the immediate environment of the building in all directions: (e.g. business, urban, suburban, residential, high crime, etc.).

Describe how many courtrooms are supported in the facility and their typical use (e.g. family, criminal, civil, etc.).

Which floors contain judicial facilities (e.g. courtrooms, offices, chambers, etc.)?

Building construction date:

Is the building a historically registered landmark?

Executive Team

List the court wide executive team as well as the executive team established for each court facility.

SECTION II - Policies, Procedures, Plans, and Committees

Building Name (if policies differ for multiple buildings)

County Administration Building

Court Security Committee

Is a court security committee in place?

Identify the members of the court security committee and each subcommittee, including the subcommittee's primary point of contact.

Texas Senate Bill 42 requires each superior court to establish a standing court security committee and if appropriate, subcommittees.

Has the court and the security provider signed a security services MOU for the current fiscal year or multi-year plan over several fiscal years?

What date was the MOU signed/put into effect, and for what length of time?

**** It is suggested that the MOU between the court and security provider for court security services be attached for reference purposes.*

Incident Command System

Is an Incident Command System currently in place?

Please describe your Incident Command System structure:

Evacuation Planning

Describe the evacuation plans for judicial staff, employees, in custody defendants, and visitors from public areas, staff areas and courtrooms. Separate the responsibilities and actions for court employees and the court security provider. If these areas are addressed in existing emergency plans, refer to documentation by manual name, title, and page number.

When was the last evacuation drill conducted at this facility?

Are drills conducted:

Annually	
Semi-Annually	
Other	

Describe the policies and procedures for after-hours access to the facility, including authorization process, means of entry (e.g., keys, access cards, escort, etc.), areas available, and authorized hours of access.

List contact names and telephone numbers for after-hours emergencies:

Describe the specific plans and procedures employed during public demonstrations to ensure the safety and security of staff, visitors, and the facility and to ensure unobstructed access to the courts. Court may refer to existing written plans or policies by manual name, page number, and location.

Public Access to Court Proceedings

Describe policies and procedures for ensuring that security services are provided in a manner that protects the legal rights of criminal defendants to a public trial and the legal rights of public access to court proceedings.

Describe the training provided to ensure compliance with policies addressing public access to court proceedings.

Describe efforts at communicating with local bar groups, the media, and other stakeholders, regarding the formulation and implementation of court security policy and procedures.

Is special access to courtrooms granted to any group of or individual spectators prior to allowing the general public to enter?

To who is special access granted, and under what circumstances?

Computer and Data Security

Describe the policies for training all employees on basic computer security. Basic computer security includes password use, backup policies for specific data, and security of electronic media.

How frequently are passwords changed for users?

Is data backed up off site?

Is data stored off site?

Workplace Violence Prevention

Has workplace violence prevention training been conducted?

Describe who receives this training, (i.e. court staff, executive team, court security staff, etc.) if applicable, and the frequency of any such training? Who provided / conducted the training?

Is any such training scheduled?

Jury Trial Procedures *(Law Enforcement)*

Describe jury control procedures, including care of the jury during trial, transportation, deliberations, etc.

Are there any special security provisions for jurors during high-profile / high-risk trials?

Explain special provisions:

High-Profile and High-Risk Trials *(Law Enforcement)*

Describe pretrial planning procedures and the measures taken for high-profile or high-risk trials. Include information about the allocation of security personnel based on factors such as the type of trial, number of participants, media coverage, and degree of anticipated risk.

Describe any special accommodations made for witnesses. Identify specific courtrooms that may be specially equipped or suitable for high-security, multi-defendant or high media or public interest trials.

Incident Reporting and Recording *(Law Enforcement)*

Describe the system for reporting security breaches and incidents.

Identify who receives these reports, such as court administration, judges, and the Administrative Office of the Courts.

Describe whether the reporting system is standardized and the procedures for maintaining confidentiality of these reports and distribution lists.

Hostage, Escape, Lockdown, and Active Shooter Procedures *(Law Enforcement)*

Are specific procedures provided to all court staff regarding hostage situations, escapes or escape attempts, active shooter situations, and lockdowns?

Describe the specific procedures:

Describe if procedures are consistent with local agencies managing hostage negotiations and how often those procedures are drilled and tested with those agencies.

Does the capability exist to secure a courtroom from the outside?

Does the capability exist to secure a courtroom from the inside?

Firearms Policies and Procedures *(Law Enforcement)*

Does a courthouse firearms policy exist?

Has the policy been approved / signed by:

Presiding Judge	
Court Administrator	
Court Security Provider	

Briefly describe the courthouse policies on carrying firearms inside the facility by anyone, including but not limited to the public, judicial staff, and on- and off-duty law enforcement.

Describe the policies for security staff carrying weapons in holding cell areas, while escorting inmates, and while performing bailiff duties inside courtrooms, or refer to existing policy by name, manual, page number, and location.

Describe the policies for the availability and use of less-lethal weapons. (Reference existing policy documentation by manual, page number, etc.)

SECTION III - Perimeter Security

Building Name

County Administration Building

Facility Landscaping

Do landscape features provide places of concealment for individuals, explosive devices or other contraband?

Are there items such as bricks, stones or wooden fence pickets available that could be used as weapons, missiles, or tools?

Best practices suggest landscaping be at least 3’ from the building line, bushes and hedges not more than 4’ high, and trees trimmed 6’ up from the ground. Does existing landscaping conform to these guidelines?

Document procedures for and frequency of inspections of facility landscaping, describing the monitoring and removal of plants, particularly against facility walls.

Parking Plan

What kind of parking is available at this location?

Reserved-staff	
Reserved-Judicial Officers	
Reserved-Jury	
Public parking lot	
Street parking	

Is entry to and exit from parking areas controlled by:

Guard	
Automatic gate	
Other	

Is a reserved parking lot located on courthouse grounds?

Do reserved parking spaces block access to the courthouse by fire or other emergency vehicles?

Is there secure, fenced, parking for judges?

Is there reserved parking for law enforcement?

Are parking spaces reserved by:

Name	
Number	
Title	
Other	

Is there direct access for judges from parking areas to non-public elevators or restricted/secure corridors?

Are parking areas:

Fully illuminated	

Partially illuminated	
Not illuminated	

Include identified deficiencies here, and any suggested resolutions.

Exterior Lighting Plan

Document procedures for inspecting and maintaining lighting, including emergency lighting. Include lighting deficiencies and planned upgrades in the annual self-assessment/audit report.

Is the entire perimeter lighted?

Do lights remain on all night?

Are lights controlled:

Automatically	
Manually	

Are lighting controls accessible to unauthorized persons?

Do any exterior or perimeter lights have an auxiliary power source?

Excluding parking areas, is the lighting of the building grounds:

Fully illuminated	
Partially illuminated	
Not illuminated	

Is the exterior of the building (particularly around entry points) sufficiently lighted to discourage unlawful entry attempts or the placement of an explosive device?

Are public areas (including parking lots and walkways) sufficiently lighted to discourage criminal activity?

If you answered NO to either of the two questions above, please describe the deficiency, exact location, and any suggested resolutions.

<u>Weapons Screening</u> ***(Law Enforcement)***

Is any screening conducted at the facility to search for weapons or contraband?

Describe the security at each entry point and how many personnel are used at each location.

Describe the procedures used to screen all persons and items entering the facility.

Describe any special provisions for screening individuals with wheelchairs or baby carriages.

Describe the type of signage used to notify individuals of the court's screening policies and prohibited items.

Are there written weapons screening policies or administrative orders?

Are signs posted at all entrances announcing screening?

Are screening stations staffed by:

Sheriff Deputies	
Deputy Constables	
Court Attendants	
Contract Guards	
Other	

Are screening staff armed?

Are people and packages screened at all public entrances?

Is anyone allowed to use private unscreened entrances?

Who is allowed to use private unscreened entrances?

Which of the following is used for weapons screening:

Magnetometer	
X-ray	
Hand held metal detector	
Other	

Is screening equipment tested on a regular basis?

Are x-ray machines properly registered as required by law?

Are employees allowed into the building before screening stations are opened?

Are employees allowed into the building on weekends?

Is screening provided for after hours events?

SECTION IV - Interior Security

Building Name

County Administration Building

Mail Handling

Procedures for handling mail should be detailed below, including point of receipt and x-ray or screening of deliveries from the U.S. Postal Service, UPS, FedEx, and couriers.

Describe specific procedures for identifying and responding to suspicious packages and letters.

Is mail processed in a central location?

Are all incoming packages x-rayed?

Who distributes mail within the court building?

Are staff trained in handling unusual, suspicious, or hazardous mail?

A power point presentation provided by the USPS entitled "Mail Center Security" can be found in the File Archive.

Identification Cards, Access Control, and Key Control

Do written policies and procedures exist for identification cards (ID), access, and key control of facilities, including signature receipts and the issuing and reclaiming of IDs, access cards, and keys.

Describe procedures for scheduled checks of access doors and exit doors to ensure locking systems are functioning properly.

Access Control

Are interior doors equipped with electronic access controls?

Which doors?

All interior doors	
Doors leading to secure staff areas	
Other	

What type of access control? (Proximity card, card swipe, bio-metric, key fob, etc.)

If an access card is used, does it also serve as an ID badge?

If hard keys are used to gain access through locked doors, is a key control system in place?

Are all master keys and sub-masters accounted for?

Who is responsible for key management and security of keys?

Interior Lighting Plan

Document procedures for inspecting and maintaining interior lighting, including emergency lighting and exit signage. Include lighting deficiencies and planned upgrades here.

Administrative/Clerk's Office Security

Describe what security measures (e.g., controlled entrances, bullet-resistant screens at public counters, panic alarms, etc.) are in place in administrative offices and the clerk's office by answering the questions below.

Is access to cashier's areas restricted to staff only?

Do cashier's windows have security features:

Separate drawers for each cashier	
Duress Alarm	
Recessed pass through tray	
Protective Barrier	
Ballistic Protection	
Non recessed pass through	
Locking cash drawers	

Is money held after hours in a safe?

Deposits are delivered to the bank by:

Unescorted staff	
Armored car service	
Staff member with security escort	
Other	

If staff delivers deposits to the bank, are the times varied to avoid establishing a pattern?

General Public Counters

Do public counters (those that do not handle money) have security features:

Duress alarm	
Protective barrier (non ballistic)	
Recessed pass through tray	

Ballistic protection	
Non recessed pass through	

Describe the procedures for responding to bomb threats and under what circumstances, and by whom an evacuation may be ordered. Include specific instructions for the recipient of a bomb threat (e.g., bomb threat checklist, notifications, etc.). Include emergency telephone numbers, such as court security, 911, etc.

Custodial Services

Describe the facility's custodial services, including supervision of custodial personnel, hours of operation, after-hours work, controls on trash removal, etc.

Describe the contract or human resource policy on screening and background checks of custodial personnel. Include contact information for business hours and after hours.

Interior and Public Waiting Areas *(Law Enforcement)*

Are hallways and public waiting areas monitored regularly?

Monitoring conducted by:

Court Security Staff	
CCTV	
Other	

Are procedures in place to provide for the separation of juries, witnesses, and others in a public setting?

Please describe the procedures.

Who responds to incidents in public areas of the facility?

Local Police Department	
Court Security (Sheriff, Marshal, etc.)	
Patrol Deputies	

Who responds to incidents in exterior public areas of the facility, such as parking lots, perimeter walkways, etc.?

Local Police Department	
Court Security (Sheriff, Marshal, etc.)	
Patrol Deputies	

Are child-care facilities located on the premises?

Describe procedures for ensuring children leave only with an authorized person.

Vital Records Storage Security

Are vital records stored:

Onsite	
Offsite	

Is storage area subject to flooding (i.e. basement level, or other flood prone area?)

Are records storage areas secured by:

Intrusion Alarm	
Electronic Access Controls	
Hard-key locks	

Do records storage areas have:

Smoke Detectors	
Fire Extinguishers	
Fire Alarms	
Fire Sprinklers	

Courthouse Security Communication *(Law Enforcement)*

Describe the security information provided to court staff and judges. Identify whether this information is reinforced through security directives, rules, manuals,

handbooks, bulletins, announcements, e-mail, and newsletters. List standard publications provided to employees.

Which of the following methods of communication are used in the courthouse?

Public Address System	
Telephones	
Cellular Phones	
Radios	
Pagers	
Other	

Does the court have its own radio frequency, restricted for court use only?

Are all security personnel equipped with portable radios?

Are existing communications adequate:

For routine security use	
For emergencies	

If not, what is needed for improvement?

Are radios inter-operable with other agencies?

If so, which agencies?

Do incoming telephone calls to all court staff go through a central receptionist, automated switchboard or call center?

Are emergency procedures such as a bomb threat checklist located wherever incoming calls are received?

SECTION V - Electronic Security Systems
County Administration Building

Intrusion Alarm System

Does the facility have an intrusion alarm system?

Is the system tested regularly?

How often?

Where does the system terminate?

Alarm company monitoring service	
Sheriff's department	
Local law enforcement	
Other	

Does the alarm have an emergency power source?

Are duress alarms located in the following locations?

Judges bench inside courtroom	
Jury assembly counter	
Clerk's area supervisor	
Mediator's offices	
Bailiff's workstation inside courtroom	
Clerk's workstation inside courtroom	
Judge's chambers	
Public clerk's counters	
Family law office areas	
Entrance screening area	
Other	

Are duress alarms monitored by:

Court security personnel on site	
An alarm monitoring company off site	
Other	

Are duress alarms responded to:

In person	
With a phone call initially	

Who responds to a duress alarm?

Is duress alarm system:

Hard wired	
Wireless	

Is duress alarm system reliable?

If not, what is needed for improvement?

Describe procedures for testing intrusion and panic alarms, including the testing schedule.

Describe how employees are instructed to respond to such alarms.

Describe instructions or guidelines regarding the use of panic/duress alarms provided to judges and court staff.

Provide information on who conducts maintenance and repairs, including contact information. Include deficiencies and planned upgrades in the annual self-assessment/audit report. List contacts below:

Include deficiencies and planned upgrades here.

Closed Circuit Television System

Does the facility have a Closed Circuit Television (CCTV) system?

How many cameras and monitors does the system contain?

Age of current CCTV system?

Are cameras located in the following locations?

Jury assembly area	
Courtrooms	
Entrance screening areas	
Parking areas	
Building exterior	
Interior public hallways	
Public clerk's counters	
Other	

Are cameras:

Black and white?	
Color?	

Does CCTV system allow for storage of images?

If so, how long are images stored before destruction?

Who monitors cameras?

Are cameras monitored:

After hours	
During normal business hours	
Randomly or as needed	

Is camera and quality of monitoring equipment adequate?

What is needed for improvement to make the camera and/or quality of monitoring equipment adequate?
SECTION VI - Courtrooms and Related Areas
County Administration Building
Does this facility have court rooms?

<u>Courtroom Security</u> ***(Law Enforcement)***

Describe bailiff's duties, including courtroom preparation, security sweeps, and in-session courtroom duties.

Document the allocation of court security personnel based on perceived risks posed in a particular calendar or case (e.g., family, criminal, juvenile, etc.).

Describe the security of environmental controls, such as lights, heat, etc.

Identify where ballistic protection is installed, if applicable.

Describe witness, spectator, and inmate management procedures.

Describe the procedures for emergency medical response in the courtroom.

Describe the lockdown procedures for unused courtrooms and procedures for ensuring that potential assault items are removed or secured, such as flagpoles, shelving, books, furniture, etc.

Describe security procedures for fire, earthquake, bomb threats, and power failures affecting the courtrooms.

Do judges, bailiff's, clerks and other courtroom staff meet to discuss courtroom emergency procedures?

Courtroom Security ***(Law Enforcement)***

Do spaces above, below and adjacent to courtrooms present security concerns?

Please list here:

Are all unused doors secured?

Are there separate entrances into the courtroom for judges, in-custody defendants, and spectators?
Are windows furnished with drapes, blinds, or tinting to obscure vision from the outside?
Is the courtroom equipped with emergency lighting?
Are courtroom lighting controls secured?

Are all benches reinforced with ballistic material?
List locations where protection is absent.

Are courtrooms routinely searched before and after court?

Who serves as bailiff in the courtroom?

Sheriff's Deputies	
Court Attendants	
Deputy Marshal	
Contract Guards	
Other	

Are bailiffs armed in the courtroom?

Are prisoners kept in restraints except in the presence of a jury?

Are there written procedures for the emergency evacuation from the courtroom of:

Prisoners	
Jurors	
Judges	
Spectators	

Judges Chambers ***(Law Enforcement)***

Are judges chambers routinely searched?

Is visitor access controlled by clerks or bailiffs?

Are the Judge's chambers locked when vacant?
Are judges routinely escorted to and from secure areas?

Jury Personnel and Jury Rooms

Is there a separate jury assembly area?

Does the jury assembly area allow access to restricted areas?

How are jurors moved from the assembly area to the courtrooms?

Jury Deliberation Rooms

Are jury deliberation rooms connected to the courtrooms or accessible through a secure corridor?
Are deliberation rooms routinely searched for contraband?
Are deliberation rooms locked when not in use?
Are deliberation rooms equipped with restrooms?
Describe any additional measures taken to ensure security of jurors, and jury rooms.

Witness Waiting Rooms

Are witness waiting rooms available?
Are prosecution and defense witnesses separated?
Is public access to witness waiting rooms restricted?

Attorney Client Conference Rooms

Are rooms available in the courthouse for attorney client conferences?
Please describe the conference rooms and locations.

Mediator's Offices/Rooms

Are mediator's offices or rooms located in the facility?

Do mediator's offices/rooms have security features such as:

Controlled entry for individuals seeking mediation	
Duress alarm	

SECTION VII - Prisoner and Inmate Transport

Building Name

County Administration Building

Prisoner and Inmate Transport *(Law Enforcement)*

Describe inmate transportation and emergency plans and procedures in the event of an escape, attempted escape, or in-transit medical emergencies.

Describe the protocols governing the escort of prisoners to and from the courthouse, including staffing levels required to safely escort prisoners. Include juvenile transportation policies.

Do inmates brought from outside the courthouse enter through a:

Public Entrance	
Sally Port	
Private Entrance	
Tunnel	
Other	

Is the prisoner entrance out of public view?

Holding Cells *(Law Enforcement)*

Does the court have:

Central/main holding cells	
Courtroom holding cells	

If neither, where are prisoners held?

Do temporary holding cells open directly into:

The courtroom	
A secure passage	

Are cells and areas used by prisoners routinely searched?
How are holding cells monitored by court security staff? (camera, audio)

Are law enforcement officers required to secure weapons in locked cabinets prior to entering holding areas?
Is there a written procedure for the emergency evacuation of inmates from temporary holding cells?
Is there a written procedure for handling inmate medical emergencies while in court or temporary holding cells?

Restraint of Defendants ***(Law Enforcement)***

Describe policies and procedures for restraining defendants in the courtroom. Include types of restraints available and how the court security provider receives authorization from the court to implement additional security measures.

SECTION VIII - Emergency Power and Fire Life Safety
County Administration Building
Fire Detection and Equipment

Describe procedures for inspecting fire extinguishers, hoses, pull stations, and alarms. Include who is responsible for scheduling these inspections.

List vendor and maintenance contact information.

Describe any employee fire equipment training at the facility.

Are floor plans of the building available?
Floor plans should indicate the location of firefighting equipment, alarm stations, and emergency exits. Floor plans should also identify emergency shut-off locations for gas, electricity, and water. Actual floor plans are not required for completing this plan, however the File Archive functionality is available for uploading and including these in the final Security Plan. Do existing floor plans provide this information?

Does the building have:

Fire Alarms	
Sprinkler system	
Smoke detectors	
Fire extinguisher	

Are floor plans or evacuation routes posted in the courthouse?
Are evacuation routes equipped with emergency lighting?
Are emergency exits clearly identified with illuminated signs?

Emergency Power Supply

Does the facility have an emergency power supply?
If so, is the system, including fuel source, located in a secure area?
Is the system tested on a regular basis?
How often?

How long will the emergency power supply provide electricity?

Emergency and Auxiliary Power

If the facility is equipped with emergency power supplies, describe the areas covered by the system, the testing schedules, fuel supply, checks, etc. Include security measures in place used to protect the system (e.g., fencing, monitored by CCTV, etc.).

Provide maintenance contact information and alternate emergency power generator vendor and resource information.

SECTION IX - Court Security Staffing

Building Name

County Administration Building

Security Personnel and Staffing ***(Law Enforcement)***

Describe staffing requirements at each court facility, including the number, classification, roles, and responsibilities of staff for:

Entry screening and perimeter security; courtroom security; holding cells; public waiting areas; judicial protection, control room(s)

Does a judicial protection unit exist?
Please list the composition, duties, and responsibilities of the judicial protection unit.

Is the route taken by judges between chambers and courtrooms secure?
Describe non secure routes.

Describe specific methods for maintaining separation of judges from the general public as they arrive and depart from work.

Detail any access control for separate judicial entrances.

Describe procedures for handling threats against judicial officers and court staff, and who the threats are reported to.

Private Security Contractors

Does the court use private security contractors at this facility?
Describe the duties of security contractors (e.g., perimeter screening, patrols, reception, etc.) and reference who administers the contract (e.g., court, sheriff, county, etc.).

Include contractor supervisory authority, training requirements, and background check requirements.

Are contract security guards armed?
Do contract security guards possess defensive weapons?

Identify types of defensive weapons used by contract security guards:

Baton or other impact weapon	
Pepper Spray, MACE or other irritant	
Taser or similar weapon	

Court Attendants and Employees

Are court attendants used at this facility?
Describe the use of civil court attendants, the types of court proceedings in which they are used, and their basic court duties.

Security Personnel Training *(Law Enforcement)*

Describe the training and frequency of training provided to court security personnel on evacuations, emergency procedures, general security awareness, and enhancements to the local security plan.

Describe any drills involving all staff and how often these drills are conducted.

Are court security personnel required to attend specialized court security training courses?

Are the courses TCOLE certified?

Scope of a court security plan

Each court security plan should, at a minimum, address the following general security subject areas:

1. Composition and role of court security committees;
2. Composition and role of executive team;
3. Incident command system;
4. Self-assessments and audits of court security;
5. Mail handling security;
6. Identification cards and access control;
7. Courthouse landscaping security plan;
8. Parking plan security;
9. Interior and exterior lighting plan security;
10. Intrusion and panic alarm systems;
11. Fire detection and equipment;
12. Emergency and auxiliary power;
13. Use of private security contractors;
14. Use of court attendants and employees;
15. Administrative/clerk's office security;
16. Jury personnel and jury room security;
17. Security for public demonstrations;
18. Vital records storage security;
19. Evacuation planning;
20. Security for after-hours operations;
21. Custodial services;
22. Computer and data security;
23. Workplace violence prevention; and
24. Public access to court proceedings.

Each court security plan should, at a minimum, address the following law enforcement subject areas:

1. Security personnel and staffing;
2. Perimeter and entry screening;
3. Prisoner and inmate transport;
4. Holding cells;
5. Interior and public waiting area security;
6. Courtroom security;
7. Jury trial procedures;
8. High-profile and high-risk trial security;
9. Judicial protection;
10. Incident reporting and recording;
11. Security personnel training;
12. Courthouse security communication;
13. Hostage, escape, lockdown, and active shooter procedures;
14. Firearms policies and procedures; and
15. Restraint of defendants.

Each court security plan should address additional security issues as needed.

Personal SECURITY Guide

Office of Court Administration | Court Security Division

PERSONAL SECURITY

The 85th Texas Legislature passed, and Governor Greg Abbott signed into law, Senate Bill 42, cited as "The Judge Julie Kocurek Judicial and Courthouse Security Act of 2017". This Act relates to the security of courts and judges instituting security and privacy reforms in Texas courthouses. The Act is named for Travis County District Judge Julie Kocurek, who survived a violent encounter by a subject charged in her court in 2015.

Among the reforms, the Act calls for the lifetime suppression of personal and residential information of judges and spouses from the Texas Department of Public Safety, Texas Ethics Commission, County Appraisal Districts and County Voter Registrars.

The potential danger associated with your position is understandably an unpleasant topic of family conversation. However, avoiding the subject does not lessen the potential for harm or make it go away. Discussing everyday practical habits with your family will no doubt enhance your safety against violent encounters.

Today, security challenges for those charged with the responsibility of ensuring judicial security have never been greater. Considering the volume and violent nature of cases brought into the Texas justice system, it is imperative that prudent safety and security measures along with a general awareness are practiced ensuring the safety for the judiciary, court participants, and the public.

Review, consider and adopt these recommended security practices as part of a holistic approach towards minimizing your and your family's vulnerability. The following suggestions are basic in their approach and you may already practice these measures as part of your daily routine. Be certain family members are aware of these practices as a family unit, to ensure that everyone is conscientious of their surroundings.

Some of these recommendations may appear obvious and apparent by applying common sense. Others may appear a bit extreme, but the purpose of these points is to provide you with a broad range of personal security considerations so that you can avoid unnecessary risk and deal with a dangerous circumstance should the need arise.

Criminal conduct and terroristic action against an individual generally occur outside the home after confirmation of the individual's established habits, practices, and routines. ***Your most predictable habit is the route of travel from home to office or commonly frequented locations.***

TABLE OF CONTENTS

HOME

HOME SECURITY

Home Safety

- Restrict possession of house keys. Change locks if keys are lost or stolen and when moving into a previously occupied residence.
- Lock all entrances at night, including the garage. Keep the house locked, even if you are at home.
- Invest in a quality shredder. Destroy all envelopes, correspondence, and other items that reflect your name and official position.
- Get to know your neighbors.
- Have a non-published number and unlisted residential address.
- Do not answer the telephone with your name or title, utilize caller ID and avoid ordering products or services by phone.
- Consider un-subscribing out of websites or use opt-out features.
- Be alert to public utility crews or any work person requesting access to your residence; check their identification through a peep-hole before allowing entry.
- Be alert to solicitors and strangers.
- Write down license numbers of suspicious vehicles; note descriptions of occupants, take picture if you can.
- Refuse unordered packages.
- Never eat consumables that are delivered to your residence from an unknown source. Contact local police.
- Be suspicious concerning any inquiries as to the whereabouts or activities of family members.
- Report suspicious activity to your local police.

Telephone Security

- Know the location of posted emergency numbers: Police, Fire/EMS, Hospital, Poison Control, etc.
- Do not answer your telephone with your official title.
- Report all threats to your local police.
- Enable your location on your cell phone, so in case of emergency, or if someone takes your phone, your phone can be tracked.

Mail

- Do not use your name, title, or any reference to your position on your mail.
- Have mail delivered to courthouse so it can be X-rayed and scanned.
- If possible, change home address to office address.

- Refuse unordered packages.
- Use a Post Office Box.
- Do not leave mail/newspapers in your mailbox overnight or while away for some time.

Suspicious Packages

- Never cut tape, strings, or wrappings on a suspected package. Never immerse a suspected letter or package in water. These actions could cause an explosive device to detonate.
- Never touch or move a suspicious package or letter.
- Report any suspicious packages or mail to your local police or the US Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

Domestic Employees

- Conduct a thorough review of references.
- Inform employees about security responsibilities.
- Instruct them as to which phone or other means of communication to use in an emergency.

SIGNS OF A SUSPICIOUS PACKAGE

- ⚠ An unusual or unknown place of origin;
- ⚠ No return address;
- ⚠ An excessive amount of postage;
- ⚠ Oily stain on package;
- ⚠ Wires or strings protruding from or attached to an item;
- ⚠ Incorrect spelling on a package label;
- ⚠ Differing return address and postmark;
- ⚠ Appearance of foreign-style handwriting;
- ⚠ Peculiar odor; (Many explosives smell like shoe polish or almonds.)
- ⚠ Unusual heaviness or lightness;
- ⚠ Uneven balance or shape; or
- ⚠ Springiness on the top, bottom, or sides.

HOME

Security Precautions When Away

- Leave the house with a “lived-in” look.
- Stop deliveries or direct them to a neighbor’s home.
- Don’t leave notes on doors.
- Don’t hide keys outside the house.
- Use a timer to turn lights on and off at varying times and locations.
- Leave a radio on (with a timer.)
- Hide valuables.
- Notify police or a trusted neighbor of your absence.

RESIDENTIAL

RESIDENTIAL SECURITY

Exterior Grounds

- Do not place your name on the outside of your residence or mailbox.
- Install motion, spot or timer lights around perimeter of home.
- Exterior lighting should be fixed out of reach to prevent tampering.
- Create impression you are home by utilizing timers for interior lights.
- Control and trim vegetation and trees to eliminate hiding places.
- Plant cactus, or shrubs with thorns under first floor windows.
- Landscaping and light must work in unison with one another.
- Illuminate trees and shrubs from the ground up.
- Use outward facing light to illuminate yard.
- Secure outdoor sheds, outbuildings, and ladders. Tools can be used to break into home.

Other Exterior Features

- A clear view of approaches with clear sight lines allowing you to observe anything out of the ordinary.
- More than one access road.
- Off-street parking.
- Acquire a web-based camera system that alerts you to any motion via an associated app.

Entrances and Exits

- Equip glass doors and ground floor windows with interior release mechanisms that are not reachable from outside.
- Draw curtains, blinds, and shutters on all windows and doors during evening hours.
- Most break-ins occur through glass. Glass break sensors will enhance home security.
- Install three-inch strike plates with screws in all entry doors.

ENTRANCES AND EXITS RECOMMENDATIONS

- **Solid doors with double cylinder deadbolt locks whenever there is glass in or near the door lock;**
- **Solid core doors with deadbolt lock; (Pin tumbler locks recommended)**
- **Pick-proof or bum-proof locks; (Cypher or combination locks <u>not</u> recommended);**
- **One-way peep-holes in doors;**
- **Bars and locks on skylights; and**
- **Three-inch strike plates with screws in all entry doors.**

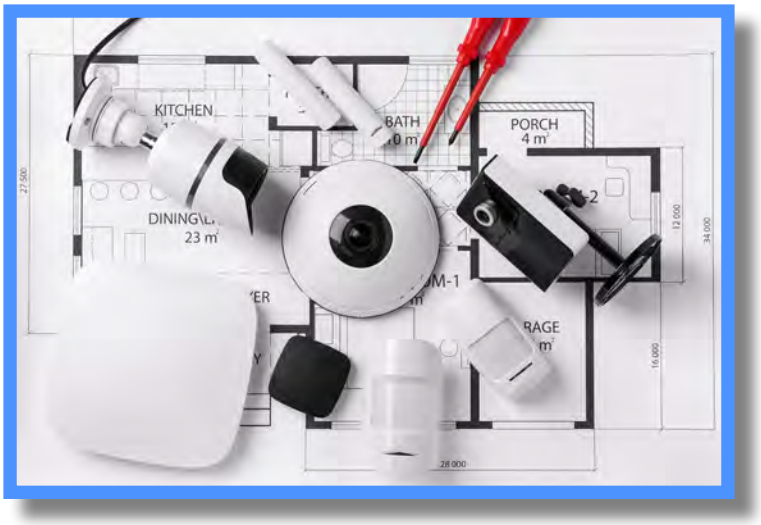
RESIDENTIAL

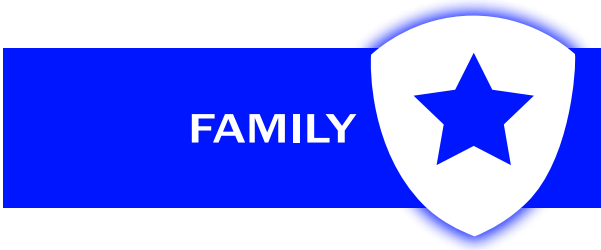
Vehicle/Garage

- Secure your vehicle in the garage. Enter/exit vehicle from inside the garage.
- If parked outside, make sure area is well lit.
- Door from garage to house should be a solid core door with dead bolt lock.
- Have a remote start installed on your vehicle unless so equipped.
- Install a garage door shield to prevent access to the garage door release mechanism.

Interior Features

- Acquire a home security system and intercom system, and **USE IT**!
- Keep your security system "On" while at home.
- Familiarize yourself with the emergency feature of the alarm system.
- Do not use sensitive personal information as passcodes.
- Display signage and/or decals indicating you have a security system.
- Ensure system has a battery backup in case of power failure.
- Install a system that includes heat sensors, smoke detectors, window and door sensors.
- Have security system inspected annually.
- Have fire extinguishers.
- Have medical and first-aid equipment.
- Minimally, acquire a wireless home security camera system that sends motion-activated alerts & HD video to your smartphone.





FAMILY

Safety for Children

- Instruct children to keep doors and windows locked, and never to admit strangers.
- Teach children how to contact the police or a neighbor in an emergency.
- If it is necessary to leave children at home, keep the house well lighted and notify the neighbors.
- Know where your children are all the time – morning, noon, and night.

ADVICE FOR CHILDREN

- Keep doors and windows locked and never allow strangers into the home;
- Never leave home without advising parents where you will be and who will accompany you;
- Travel in pairs or groups;
- Walk along busy streets and avoid isolated areas;
- Use play areas where recreational activities are supervised by responsible adults and where police protection is readily available;
- Refuse automobile rides from strangers and refuse to accompany strangers anywhere even if the stranger tells you that mom or dad sent him or said it was okay; and
- Report immediately to the nearest person of authority (teacher, police) anyone who attempts to molest or annoy you.

INTERNET

INTERNET SECURITY

Social Media

- Have a strong password and store password in secure place.
- Limit the type/amount of information you post. Do not check in to places on social media.
- Restrict who can view certain information on your profile.
- Review the service's privacy policy. You may realize that many of these 'free' services aren't all that free. Ex: You're giving them information in return for use of the service.

Safety for Children

- Never give out identifying information – home address, school name or telephone number in a public message such as chat or bulletin boards and be sure you're dealing with someone who both you and your child know and trust before giving it out via e-mail. Think carefully before revealing any personal information such as age, marital status, financial information. Consider using a pseudonym or un-listing your child's name if your services allow it.
- Get to know the services your child uses. If you don't know how to log on, get your child to show you. Find out what types of information it offers and whether there are ways for parents to block out objectionable material.
- Never allow a child to arrange a face-to-face meeting with another computer user without parental permission. If a meeting is arranged, make the first one in a public spot, and be sure to accompany your child.
- Never respond to messages or bulletin board items that are suggestive, obscene, belligerent, threatening, or make you feel uncomfortable. Encourage your children to tell you if they encounter such messages. If you or your children receive a message that is harassing, of a sexual nature, or threatening, forward a copy of the message to your service provider and ask for their assistance.
- Should you become aware of the transmission, use, or viewing of child pornography while online, immediately report this to the National Center for Missing and Exploited Children (NCMEC) by calling ***1-800-843-5678***. You should also notify your online service.
- Remember that people online may not be who they seem. Because you can't see or even hear the person it would be easy for someone to misrepresent him or herself. Thus, someone indicating that "she" is a "12-year-old-girl" could be a 40-year-old man.
- Remember that everything you read online may not be true. Any offer that's "too good to be true" probably is. Be very careful about any offers that involve your coming to a meeting or having someone visit your house.
- Be sure to make this a family activity. Consider keeping the computer in a family room rather than the child's bedroom. Get to know their "online friends" just as you get to know all their other friends.

GROUND TRANSPORTATION SECURITY

Vehicles

- Do not use “vanity” plates that identify you by name or official position.
- Do not have your name or official title displayed at your office parking space.

Auto Maintenance

- Keep your vehicle in good repair. You don’t want it to fail when you need it the most.
- Keep your gas tank at least ½ full always.
- Park in well-lighted areas.
- Always lock your car, even when it’s outside your home.
- Don’t leave it on the street overnight, if possible.
- Never get out without checking for suspicious persons. If in doubt, drive away.
- Leave only the ignition key with parking attendants.
- Don’t allow entry to the trunk unless you’re there to watch.
- Never leave garage doors open or unlocked.
- Use a remote starter for your car if available.
- Use a remote garage door opener if available.

When Going Out

- Avoid high risk areas and vary movements so as not to be predictable.
- Try to be inconspicuous when using public transportation and facilities. Dress, conduct, and mannerisms should not attract attention.
- Avoid public demonstrations; do not be curious.

On the Road

- Before leaving buildings to get into your vehicle, check the surrounding area to determine if anything of a suspicious nature exists. Display the same vigilance before exiting your vehicle.
- Before entering vehicles, check for suspicious objects on the seats and floor.
- Vary times, routes, and modes of travel.
- Avoid isolated roads and dark alleys.
- Know location of safe-havens along routes of routine travel.
- Habitually ride with seatbelts buckled, doors locked, and windows closed.
- Do not allow your vehicle to be boxed in; maintain a minimum 8-foot interval between you and the vehicle in front and avoid the inner lanes.

GROUND TRANSPORTATION

- Be alert while driving or riding.
- Know how to react if surveillance is suspected or confirmed.
- Circle the block for a confirmation of surveillance.
- Do not stop or take other actions which could lead to confrontation.
- Do not drive home if you think you are being followed.
- Get a description of car and its occupants.
- Go to the nearest safe-haven.
- Report incident to your local police.

Actions if Attacked

- Without subjecting yourself, passengers, or pedestrians to harm, try to draw attention to your car by sounding the horn.
- Put another vehicle between you and your pursuer.
- Execute immediate turn and escape, jump curb if necessary at a 30-45-degree angle, 35 mph maximum.
- Ram blocking vehicle if necessary.

EVENTS THAT CAN SIGNAL THE START OF AN ATTACK

- ⚠ **Cyclist falling in front of your car.**
- ⚠ **Flagman or workman stopping your car.**
- ⚠ **Fake police checkpoint.**
- ⚠ **Disabled vehicle/accident victims on the road.**
- ⚠ **Unusual detours.**
- ⚠ **An accident in which your car is struck.**
- ⚠ **Cars or pedestrian traffic that box you in.**
- ⚠ **Sudden activity or gunfire.**

Commercial Buses, Trains & Taxis

- Vary mode of commercial transportation.
- Select busy stops.
- Use different taxi service.

- Don’t let someone unknown to you direct you to a specific cab.
- Affirm the driver and the picture on the license are the same.
- Try to travel with a companion.
- If possible, specify the route you want the taxi to follow.

TRAVELING DEFENSIVELY BY AIR

Travel Arrangements

- Don't use title or office address on tickets, travel documents, or hotel reservations.
- Select window seat for more protection. Aisle seats would be closer to a hijacker's movements up and down the aisle.
- Rear seats offer more protection since they are farther from the center of hostile action, which is often near the cockpit.
- Seats at an emergency exit may provide an opportunity to escape.

Personal Identification

- If you are using a tourist passport, consider placing your official identification and related documents in your checked luggage, not in your wallet or briefcase.
- If you must carry these documents on your person, select a hiding place onboard the aircraft where you could "ditch" them in case of a hijacking.
- Ensure luggage tags don't show your official title.

Precautions at Airports

- Look for the nervous passengers who maintain eye contact with others from a distance. Note behavior not consistent with that of others in the area.
- No matter where you are in the terminal, identify objects suitable for cover in the event of attack. Pillars, trash cans, luggage, large planters, counters, and furniture can provide protection.
- Avoid secluded areas that provide concealment for attackers.
- Be aware of unattended baggage anywhere in the terminal.
- Report suspicious activity to airport security personnel.

Actions if Attacked

- Dive for cover. Do not run.
- If you must move, belly crawl or roll. Stay low to the ground, using available cover.
- Place arms and elbows next to your rib cage to protect your lungs, heart, and chest. Cover your ears and head with your hands to protect neck arteries, ears and skull.
- Responding security personnel will not be able to recognize you from attackers. Do not attempt to assist them in any way. Lie still until told to get up.

Actions if Hijacked

- Remain calm and cooperate with your captors.
- Be aware that all hijackers may not reveal themselves at the same time. A lone hijacker may be used to draw out security personnel for neutralization by other hijackers.
- Surrender your tourist passport in response to a general demand for identification.
- Discretely dispose of any US affiliated documents.
- Don't offer any information; confirm your official position if directly confronted with the fact. Be prepared to explain that you always travel on your personal passport and that no deceit was intended.
- Don't draw attention to yourself through sudden body movements, verbal remarks, or hostile looks.
- Prepare yourself for possible verbal and physical abuse, lack of food, drink and sanitary conditions.
- If permitted, read, sleep, or write to occupy your time.
- Discretely observe your captors and get a thorough physical description. Include voice patterns and language distinctions, as well as clothing and unique physical characteristics, scars, marks or tattoos.
- Cooperate with any rescue attempt. Lie on the floor until told to rise.

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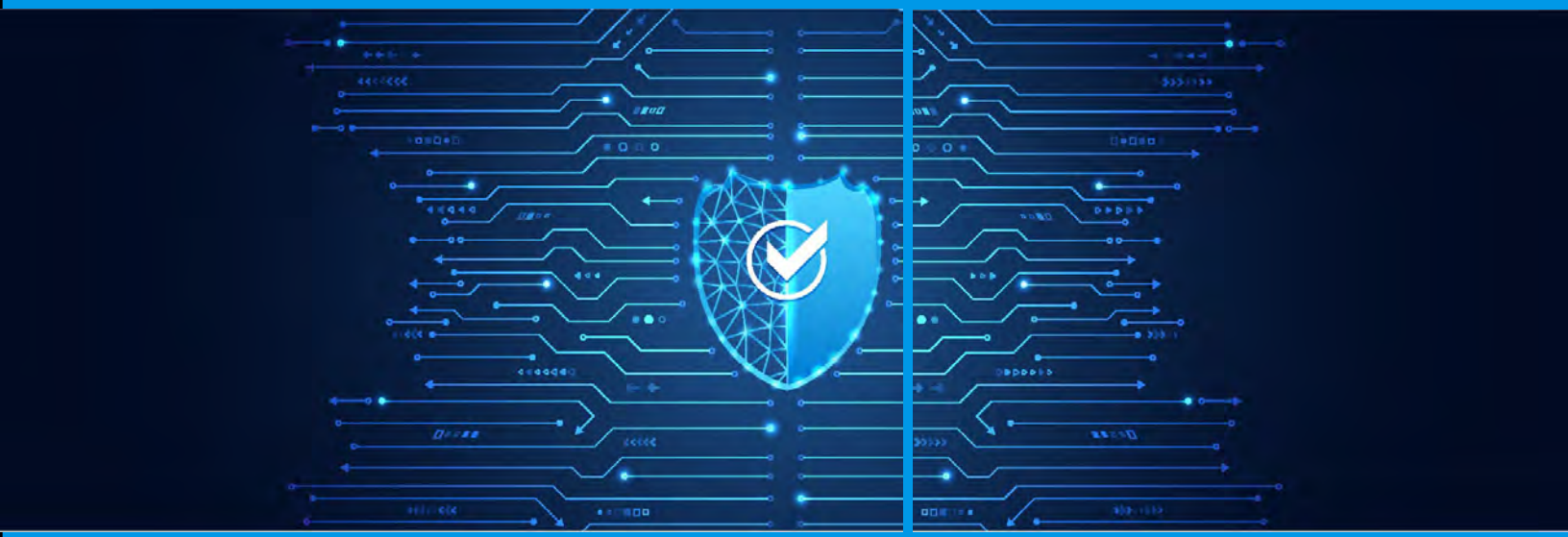


Court Security Director | Hector Gomez

Please provide your feedback for this session.

Nick P. Barsetti

Session Survey

ACCESS TO JUSTICE: GENERATIVE AI AND THE COURTHOUSE OF THE FUTURE

Hon. Bridget Mary McCormack

The Honorable Bridget Mary McCormack is the current President and Chief Executive Officer of the American Arbitration Association. She also serves as the Strategic Advisor to the Future of the Profession Initiative at the University of Pennsylvania Carey Law School. She was a Justice of the Michigan Supreme Court from 2013 to 2022, serving as the Chief Justice from 2019 to 2022.

AMERICAN ARBITRATION ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

ACCESS TO JUSTICE: GENERATIVE AI AND COURTROOM OF THE FUTURE

BRIDGET MCCORMACK
PRESIDENT AND CEO

Low-income Americans do not get any or enough legal help for **92%** **of their substantial civil legal problems.**

3 in 4 (74%) low-income households experienced 1+ civil legal problems in the past year.

2 in 5 (39%) experienced 5+ problems and 1 in 5 (20%) experienced 10+ problems.

Most common types of problems: consumer issues, health care, housing, income maintenance.

---

1 in 2 (55%) low-income Americans who personally experienced a problem say these problems substantially impacted their lives – with the consequences affecting their finances, mental health, physical health and safety, and relationships.

https://justicegap.lsc.gov/the-report/

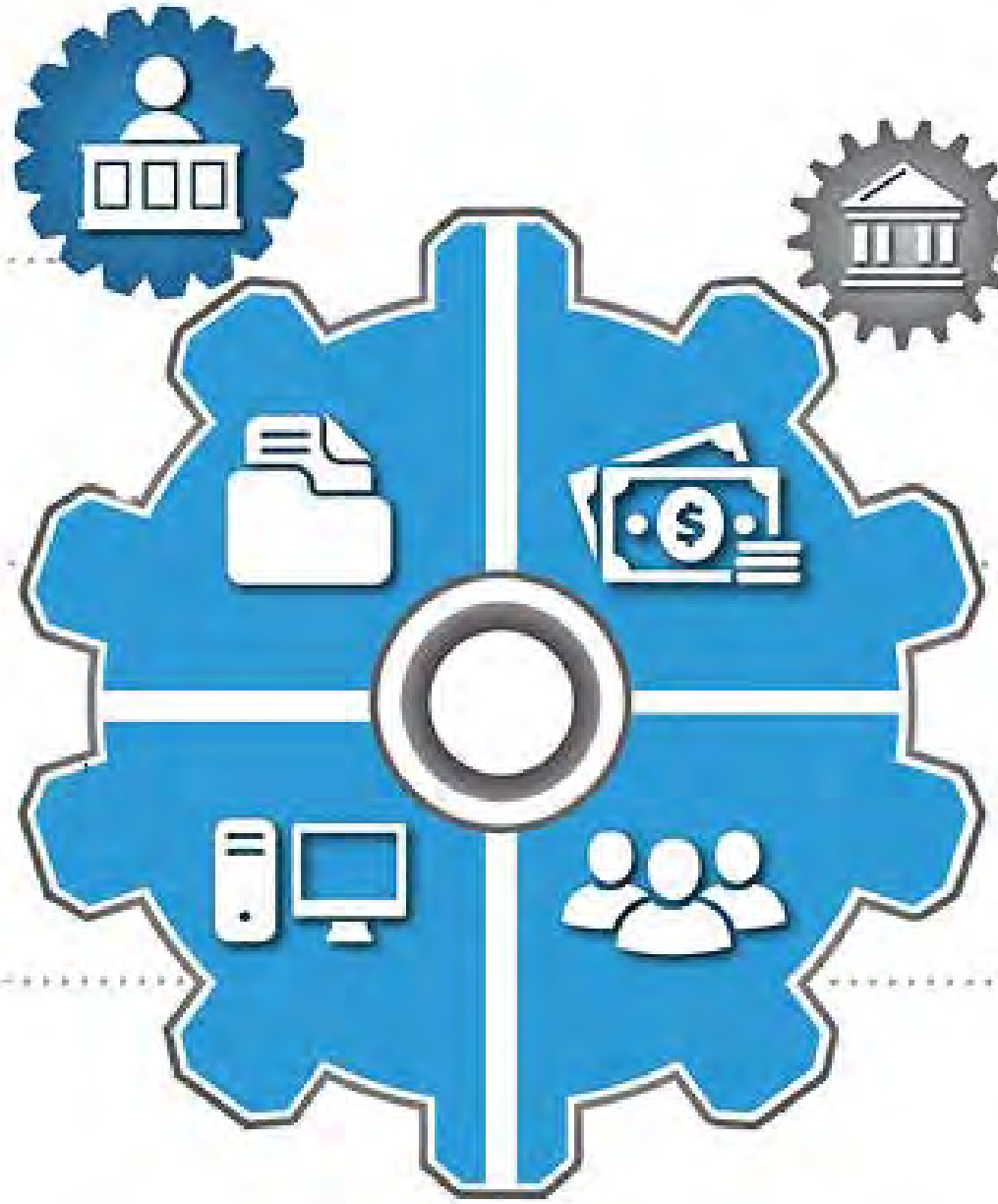
HOW DID WE GET HERE?

A Thought Experiment

A MICHIGAN STORY – TACKLING ATJ

- About two million Michigan residents qualify for free legal aid.
- Imagine filling Michigan Stadium 20 times.
- Only one legal aid lawyer for every 10,000 eligible.

Michigan Stadium – Capacity 107,000+


559 LOCAL TRIAL COURT JUDGES
242 LOCAL TRIAL COURTS
20 DIFFERENT CASE MANAGEMENT SYSTEMS
165 LOCAL FUNDING UNITS
150 DIFFERENT COMPUTER SYSTEMS
83 COUNTY CLERKS WHO ARE NOT JUDICIAL EMPLOYEES

Efforts:

- Bar Foundation and Legal Aid
- MILegalHelp, Collaborative Gap filling
- IT Solutions: text reminders, signage and wayfinding
- JFA Taskforce
- MIResolve

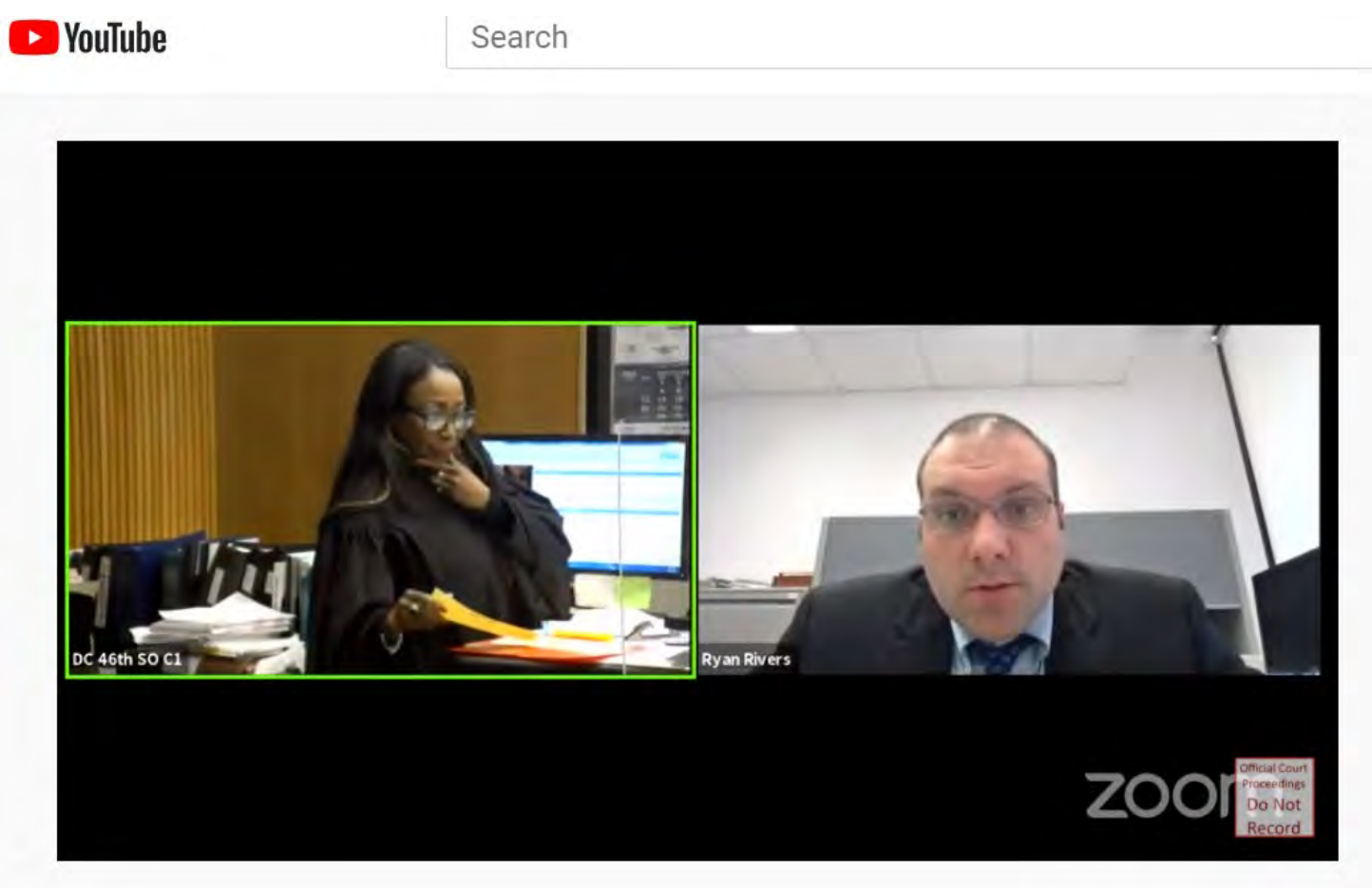
Barriers:

- Infrastructure Misfit
- Culture
- Public funding
- Elected judges

COVID-19: THE DISRUPTION WE NEEDED.

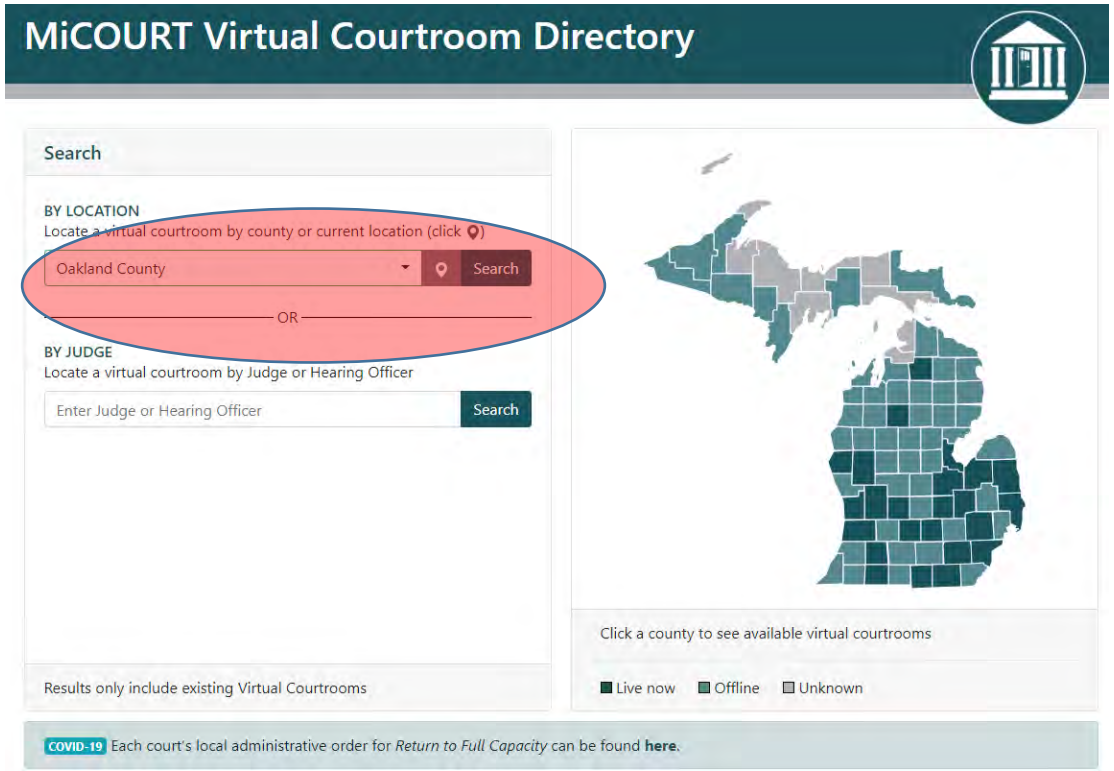
INNOVATION AND COLLABORATION FLOURISHED.

REMOTE PROCEEDINGS KEEP JUDICIARY RUNNING



- Virtual Courtroom Directory has been accessed more than 600,000 times.
- Trial court YouTube channels have nearly 250,000 subscribers.
- YouTube hearings have been viewed by millions.
- Nearly 1,000 court officers have participated in more than 6 million hours of remote hearings.

List of Judges and Livestream Status



MI-RESOLVE – EXPANDS STATEWIDE

- Michigan is the first state with ODR available statewide.
- Expanding to more case types.
- Piloting kiosks to reach parties without computers or Wi-Fi.
- www.courts.mi.gov/miresolve

STATEWIDE EVICTION DIVERSION

THE HILL

To prevent an eviction nightmare, utilize the nation's court systems

BY BRIDGET MARY MCCORMACK, OPINION CONTRIBUTOR — 07/27/21 05:31 PM EDT
THE VIEWS EXPRESSED BY CONTRIBUTORS ARE THEIR OWN AND NOT THE VIEW OF THE HILL

306 COMMENTS

195 SHARES SHARE TWEET

Just In...

The Hill's Morning Report - Presented by Facebook - A huge win for Biden, centrist senators
MORNING REPORT — 12M 1S AGO

House at war over Jan. 6 inquiry, mask mandate
HOUSE — 39M 56S AGO

Virginia Democrats seek to tie Youngkin to Trump's election claims
CAMPAIGN — 40M 1S AGO

'Blue wave' Democrats eye comebacks after losing reelection
CAMPAIGN — 40M 6S AGO

Democrats consider scaling back new funds

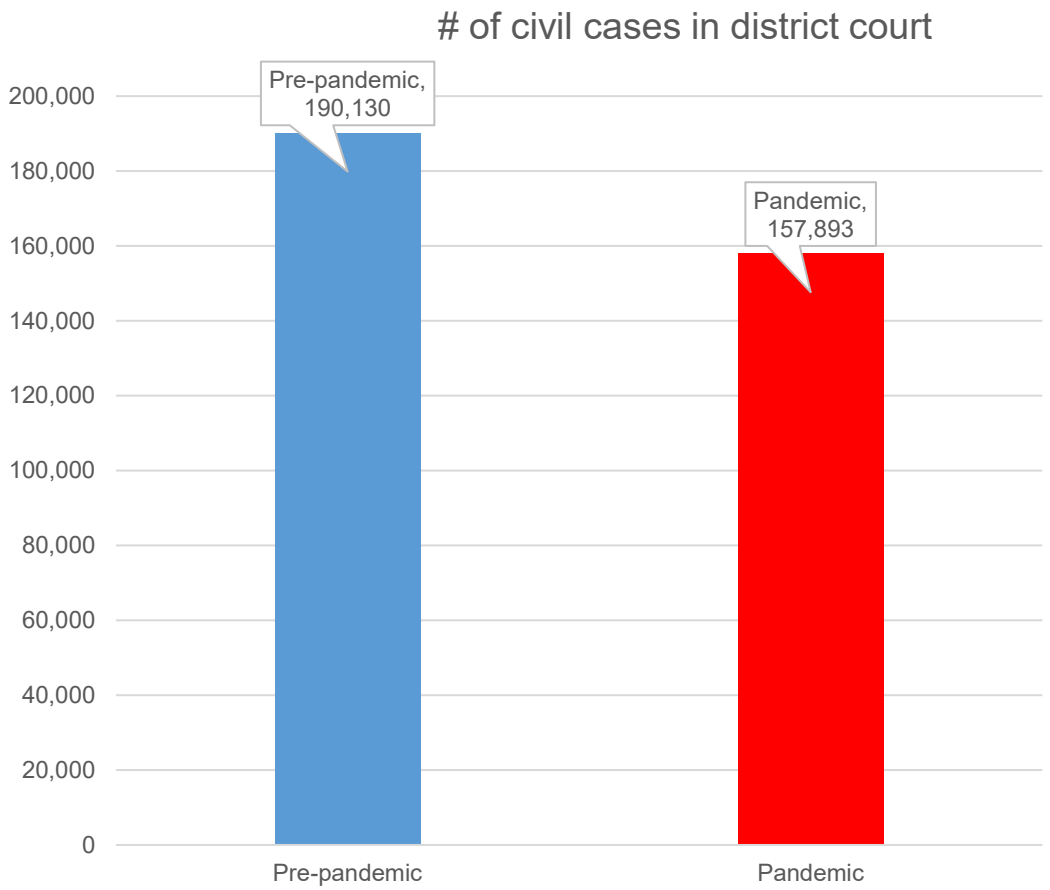
© Getty Images

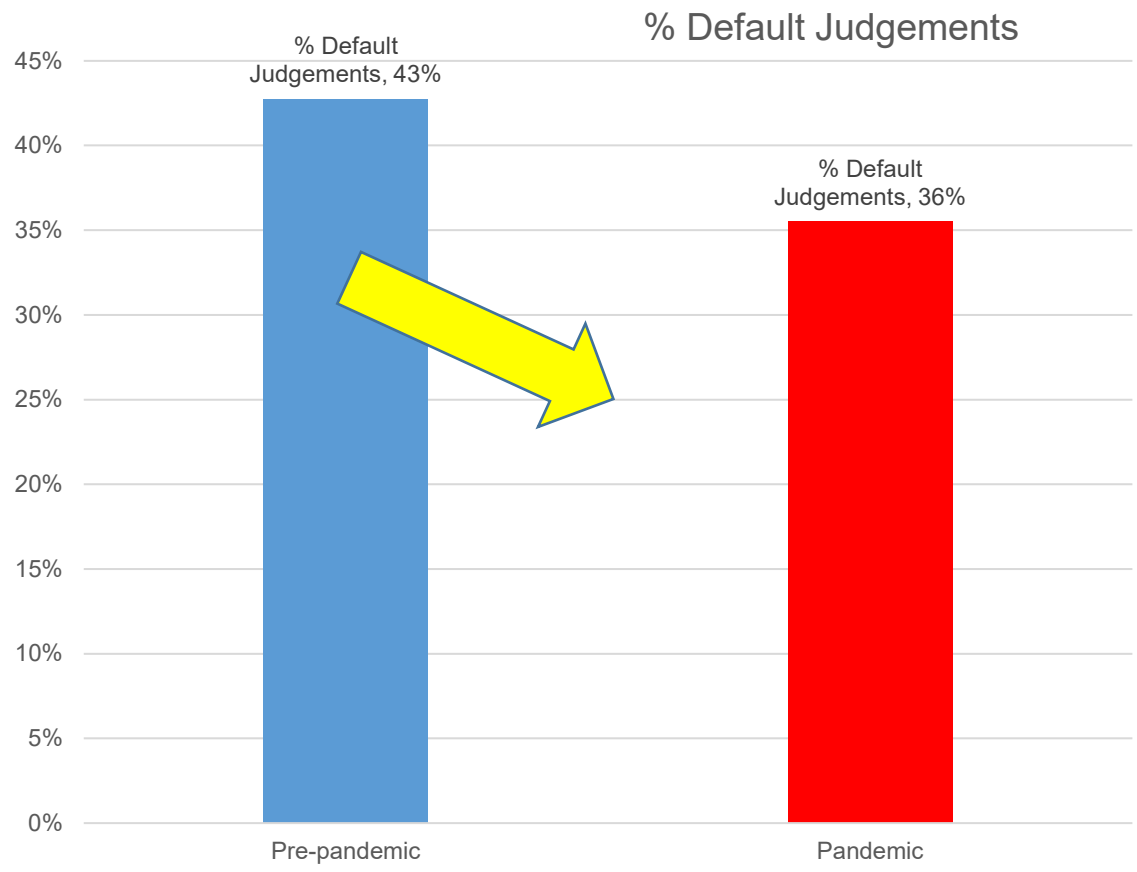
One of the great fears throughout the ongoing pandemic was that millions of renters forced out of their jobs would be unable to pay rent, triggering a wave of evictions and homelessness. Government action, thanks to the tireless efforts of housing advocates and lawyers, prevented such a nightmare scenario. Still, rather than a tsunami of evictions, what emerged was a hastily dammed reservoir. Watertight or built-to-last? It

Ad closed by Google

- 150,000 MI residents received nearly $850 million in rental/utility aid.
- Lawyers capacity increased nearly 700%
- Exported it to Texas and Indiana and
- Substantive lessons learned that caused permanent change

Default rates for all litigants (including SRLs) have declined. The percentage of default judgements has dropped from 43% to 36%.

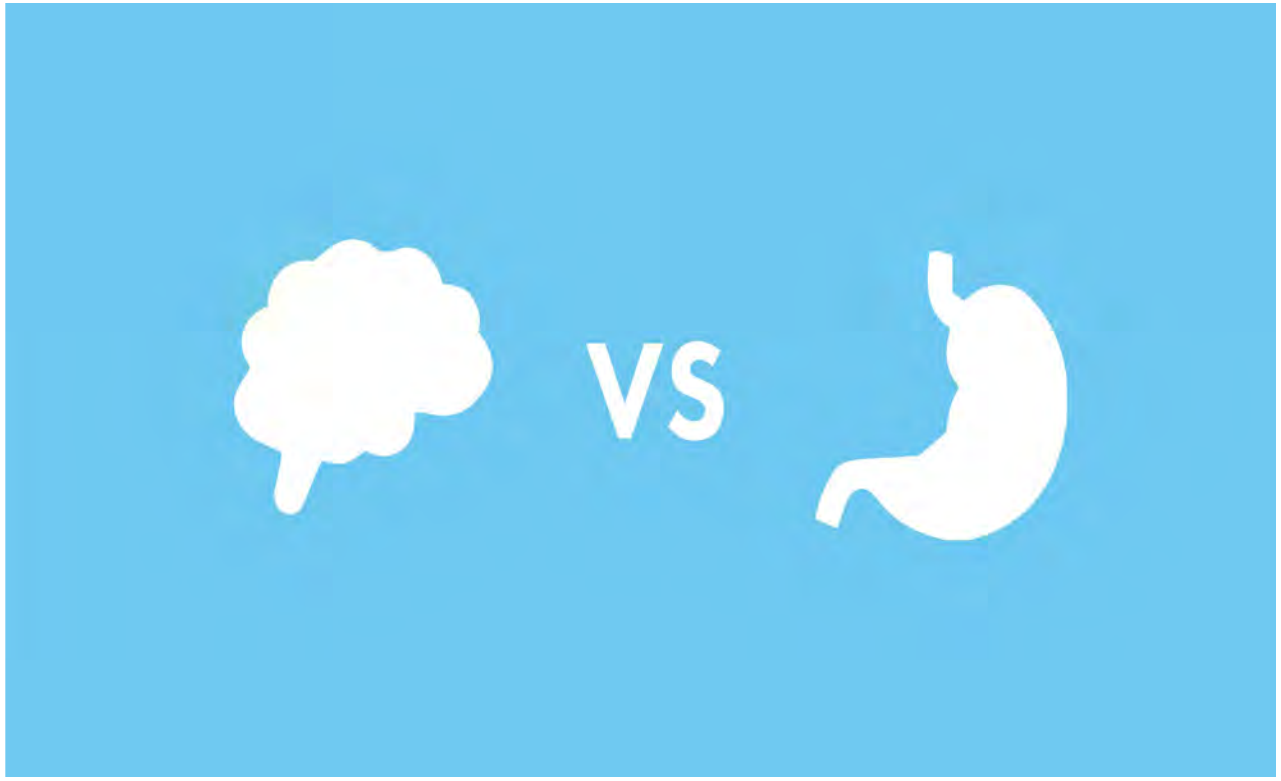




https://www.wxyz.com/news/region/detroit/courts-prepare-for-surge-in-evictions

WHAT HAPPENED NEXT?


We traced the call.
It's coming from inside the house.



Decisions in the courtroom are based on the evidence presented.

What about decisions about administering our courts to deliver equal access to justice?

BARRIERS TO COURTS LEADING CHANGE

- Culture
- Leadership
- Decentralized judiciaries (feature, not a bug)
- Public Funding

- Legal Education
  - Accreditation
  - Ranking System
  - Curriculum
- The Profession
  - State Bars
- State Supreme Courts
  - Licensure
  - Regulation
- The Public

ENTER CHATGPT

ChatGPT

Software

ChatGPT is an artificial intelligence chatbot developed by OpenAI and launched on November 30, 2022. It is notable for enabling users to refine and steer a conversation towards a desired length, format, style, level of detail, and language used. Wikipedia

Developer(s): OpenAI

Engine: GPT-3.5; GPT-4

License: Proprietary

Platform: Cloud computing platforms

Stable release: May 24, 2023; 29 days ago

Written in: Python

WHAT IS AN LLM?

What is Large Language Model?

CHATGPT

A Large Language Model (LLM) refers to a type of artificial intelligence model that is specifically designed to understand and generate human language. LLMs are trained on vast amounts of textual data and utilize deep learning techniques to process and generate language-based content.

LLMs are characterized by their immense size and complexity, typically consisting of millions or even billions of parameters. They employ transformer architectures, such as the popular GPT (Generative Pre-trained Transformer) models, which enable them to capture the relationships and patterns in language data and generate coherent and contextually relevant responses.

These models learn from a wide range of text sources, such as books, articles, websites, and other forms of

How does a Large Language Model work?

CHATGPT

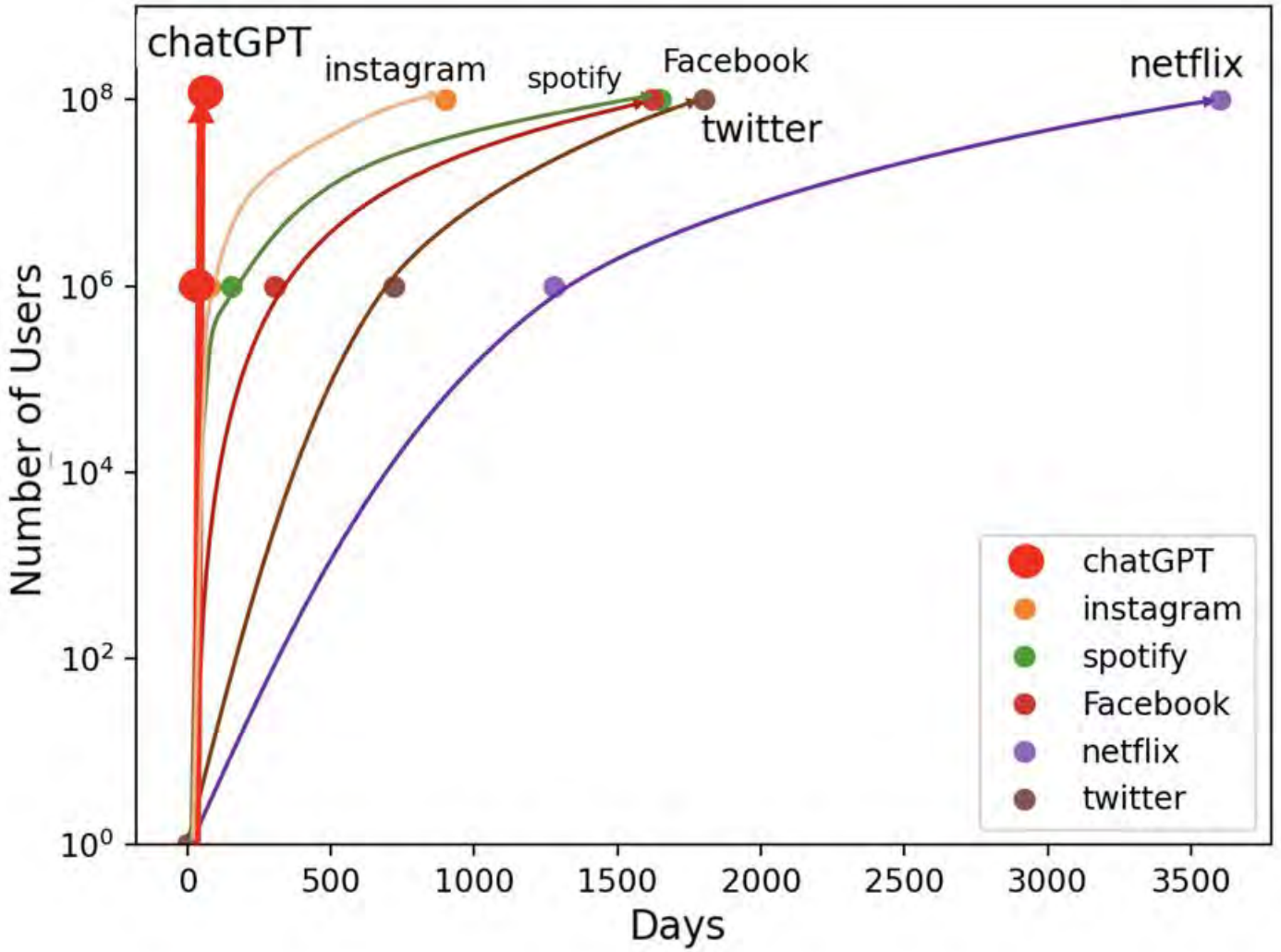
A Large Language Model (LLM) typically follows a two-step process: pre-training and fine-tuning. Here's an overview of how it works:

1. Pre-training: In the pre-training phase, the LLM is exposed to a massive amount of text data. It learns to predict the next word in a sentence based on the context of the previous words. The model employs a transformer architecture, which consists of multiple layers of self-attention and feed-forward neural networks. During pre-training, the model learns to capture the statistical patterns, semantic relationships, and syntactic structures present in the training data.
2. Fine-tuning: After pre-training, the LLM is fine-tuned on a specific downstream task using task-specific data. This could involve

World of Engineering
@engineers_feed

Time it took to reach 100 million users worldwide:

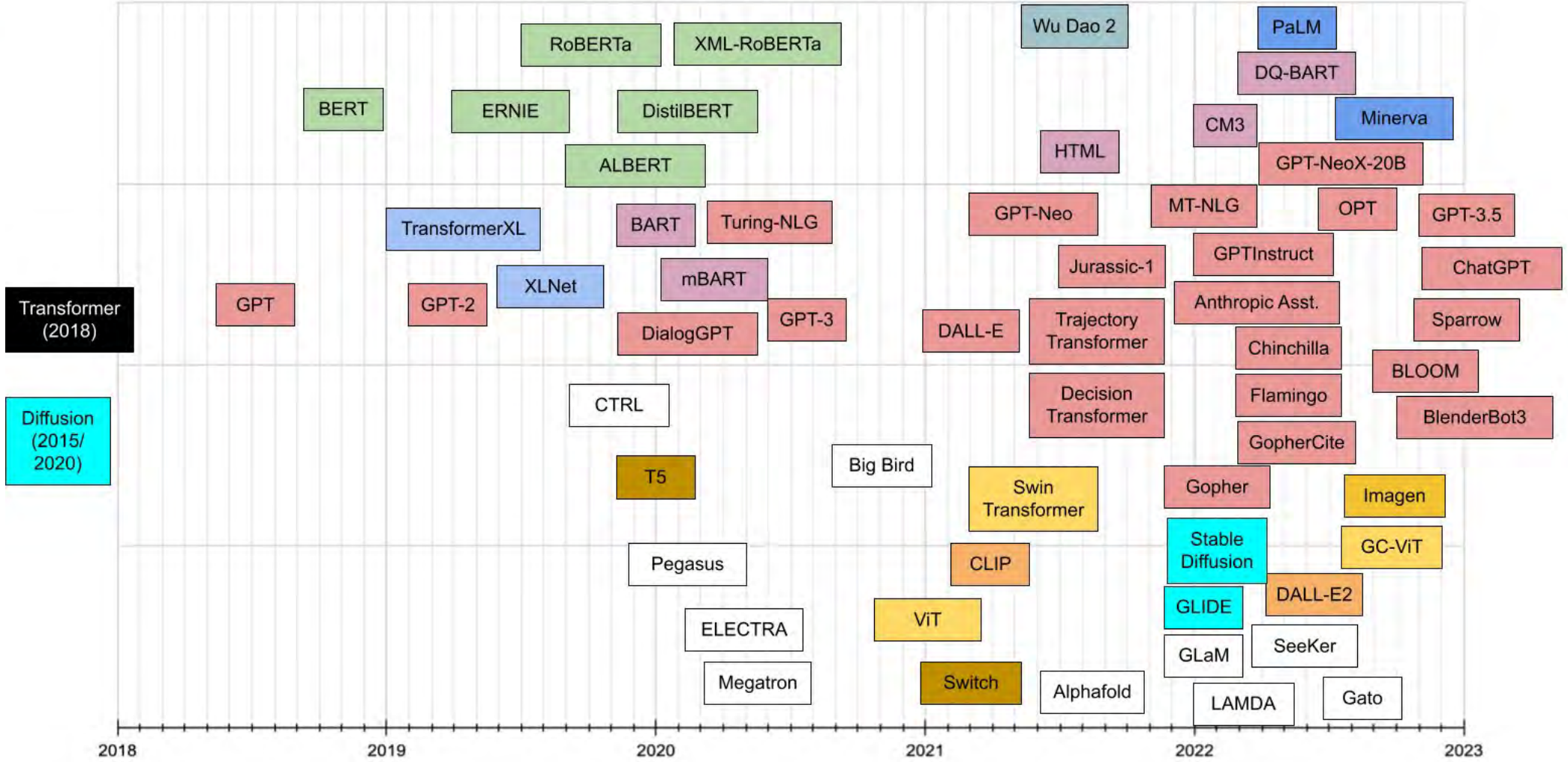
Telephone: 75 years
Mobile phone: 16 years
World Wide Web: 7 years
iTunes: 6.5 years
Twitter: 5 years
Facebook: 4.5 years
WhatsApp: 3.5 years
Instagram: 2.5 years
Apple App Store: 2 years
ChatGPT: 2 months



GPT = GENERATIVE
PRE-TRAINED
TRANSFORMER

IT IS A
LARGE LANGUAGE MODEL (LLM) BUT
FAR FROM THE ONLY ONE

The Leading LLM Models



Xavier Amatriain, Transformer Models: An Introduction and Catalog, ARXIV:2302.07730 (2023) https://arxiv.org/abs/2302.07730

- GPT – 1 Released in 2018
- GPT – 2 Released in 2019
- GPT – 3 Released in 2020
- InstructGPT Released in 2022
- GPT – 4 Released in 2023

GPT-4 Technical Report

OpenAI*

Abstract

We report the development of GPT-4, a large-scale, multimodal model which can accept image and text inputs and produce text outputs. While less capable than humans in many real-world scenarios, GPT-4 exhibits human-level performance on various professional and academic benchmarks, including passing a simulated bar exam with a score around the top 10% of test takers. GPT-4 is a Transformer-based model pre-trained to predict the next token in a document. The post-training alignment process results in improved performance on measures of factuality and adherence to desired behavior. A core component of this project was developing infrastructure and optimization methods that behave predictably across a wide range of scales. This allowed us to accurately predict some aspects of GPT-4's performance based on models trained with no more than 1/1,000th the compute of GPT-4.

1 Introduction

This technical report presents GPT-4, a large multimodal model capable of processing image and text inputs and producing text outputs. Such models are an important area of study as they have the potential to be used in a wide range of applications, such as dialogue systems, text summarization, and machine translation. As such, they have been the subject of substantial interest and progress in recent years [1–34].

One of the main goals of developing such models is to improve their ability to understand and generate natural language text, particularly in more complex and nuanced scenarios. To test its capabilities in such scenarios, GPT-4 was evaluated on a variety of exams originally designed for humans. In these evaluations it performs quite well and often outscores the vast majority of human test takers. For example, on a simulated bar exam, GPT-4 achieves a score that falls in the top 10% of test takers. This contrasts with GPT-3.5, which scores in the bottom 10%.

arXiv:2303.08774 **[cs.CL]**

GPT Takes the Bar Exam

December 29, 2022

Michael Bommarito II [1,2,3], Daniel Martin Katz[1,2,3,*]

1 Illinois Tech - Chicago Kent College of Law (Chicago, IL USA)
2 Bucerius Law School (Hamburg, Germany)
3 CodeX - The Stanford Center for Legal Informatics (Stanford, CA USA)

* Corresponding Author: dkatz3@kentlaw.iit.edu

Abstract

Nearly all jurisdictions in the United States require a professional license exam, commonly referred to as "the Bar Exam," as a precondition for law practice. To even sit for the exam, most jurisdictions require that an applicant completes at least seven years of post-secondary education, including three years at an accredited law school. In addition, most test-takers also undergo weeks to months of further, exam-specific preparation. Despite this significant investment of time and capital, approximately one in five test-takers still score under the rate required to pass the exam on their first try. In the face of a complex task that requires such depth of knowledge, what, then, should we expect of the state of the art in "AI"? In this research, we document our experimental evaluation of the performance of OpenAI's TEXT-DAVINCI-003 model, often-referred to as GPT-3.5, on the multistate multiple choice (MBE) section of the exam. While we find no benefit in fine-tuning over GPT-3.5's zero-shot performance at the scale of our training data, we do find that hyperparameter optimization and prompt engineering positively impacted GPT-3.5's zero-shot performance. For best prompt and parameters, GPT-3.5 achieves a headline correct rate of 50.3% on a complete NCBE MBE practice exam, significantly in excess of the 25% baseline guessing rate, and performs at a passing rate for both Evidence and Torts. GPT-3.5's ranking of responses is also highly-correlated with correctness; its top two and top three choices are correct 71% and 88% of the time, respectively, indicating very strong non-entailment performance. While our ability to interpret these results is limited by nascent scientific understanding of LLMs and the proprietary nature of GPT, we believe that these results strongly suggest that an LLM will pass the MBE component of the Bar Exam in the near future.

	GPT	GPT Top 2	GPT Top 3	NCBE
Evidence	63%	84%	98%	65%
Torts	62%	72%	93%	71%
Civil Procedure	52%	63%	79%	59%
Constitutional Law	49%	67%	87%	72%
Real Property	45%	72%	85%	65%
Contracts	45%	77%	86%	70%
Criminal Law & Procedure	35%	62%	86%	71%
AVERAGE	50%	71%	88%	68%

Table 2. Summary of performance by question category for GPT-3.5 and NCBE-Reported Students

Fig 1. Summary of performance by question category for GPT-4.5 and NCBE-Reported Students

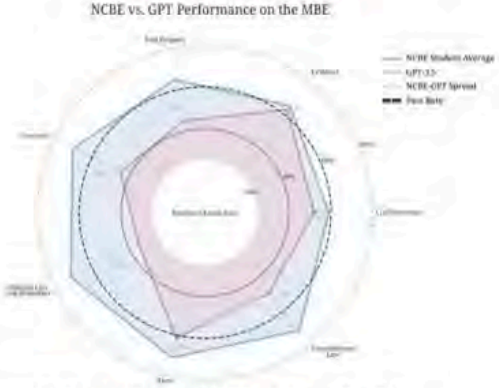


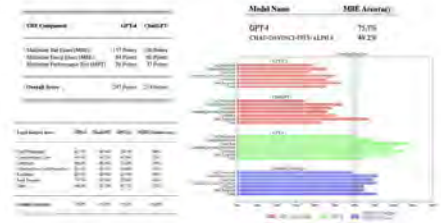
Fig 2. Accuracy by Question Category for GPT and Average Test-Takers

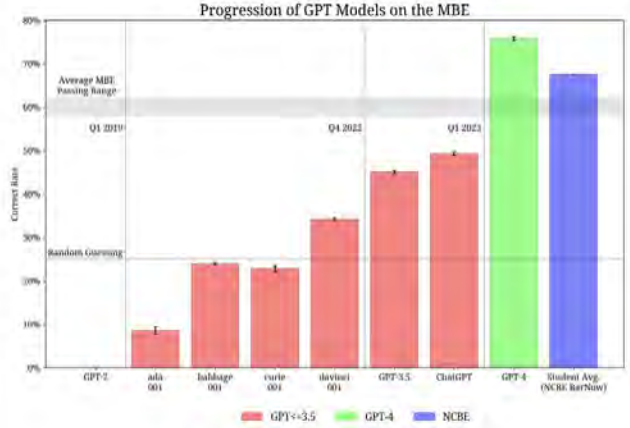
https://ssrn.com/abstract=4314839

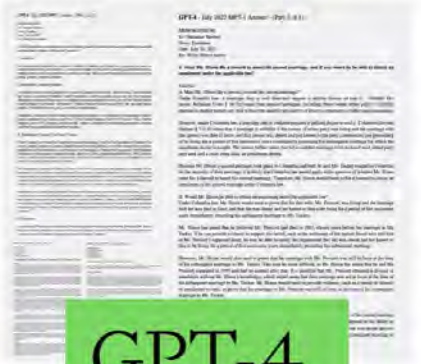
GPT-4 Passes the Bar Exam

Daniel Martin Katz[1,2,3,4,*], Michael James Bommarito[1,2,3,4], Shang Gao[5], and Pablo David Arredondo[2,5]

[1]Illinois Tech - Chicago Kent College of Law (USA)
[2]CodeX - The Stanford Center for Legal Informatics (USA)
[3]Bucerius Law School (Germany)
[4]273 Ventures (USA)
[5]Casetext, Inc. (USA)
*Corresponding Author: dkatz3@kentlaw.iit.edu





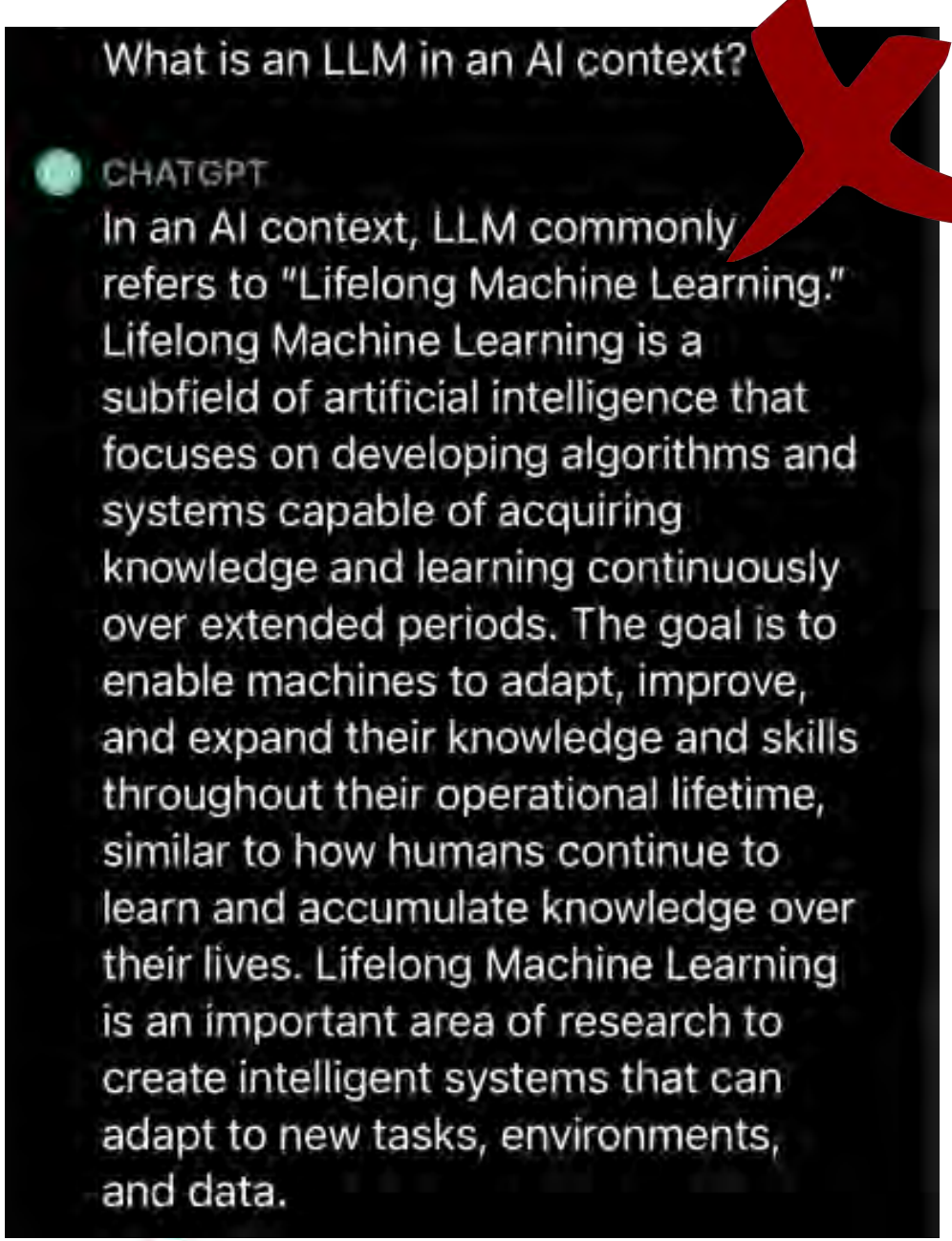


March 15, 2023 - Version 1.01
Paper Now Available on SSRN!

GPT-4
OpenAI

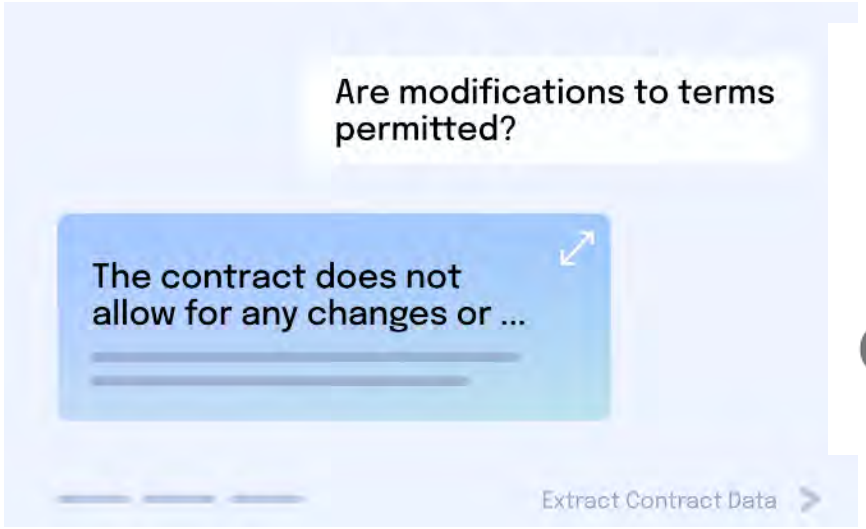
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233

HALLUCINATIONS IN LLMS



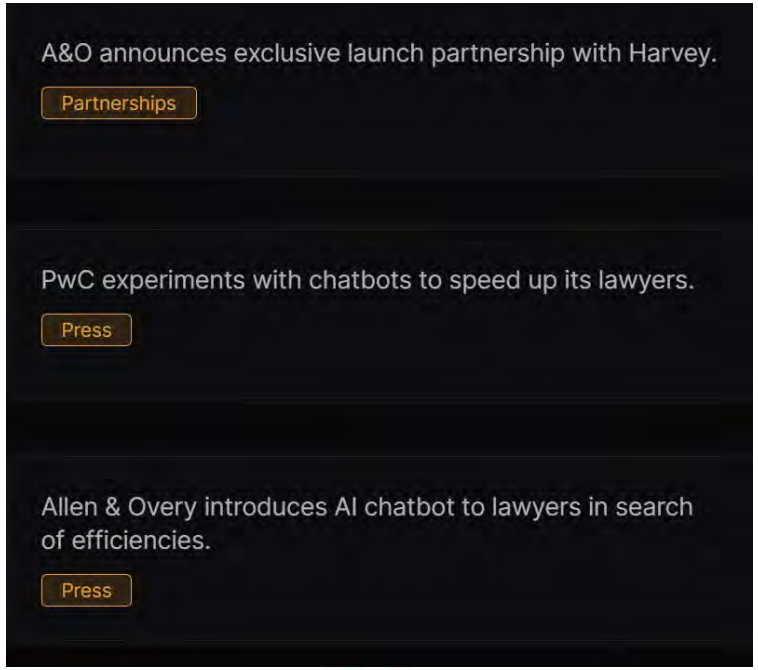
LLMS FOR LEGAL

- Co-Counsel (by CaseText)
- “Accomplish shockingly thorough, accurate, and efficient work—so you can do more of what AI can’t.”



casetext

- Harvey
- “Harvey builds custom LLMs for elite law firms to tackle the most complex legal challenges across every practice area, jurisdiction and legal system.”



LLMS IN THE DELIVERY OF LEGAL SERVICES

- Drafting + Editing Communications (emails, reports, presentations, marketing materials)
- Drafting + Editing Legal Documents (contracts, briefs, memos, interrogatories, demand letters)
- Conducting Legal Research (external points of law, internal knowledge management)
- Summarizing Legal Documents (summarizing large bodies of textual material)
- Decision-making?

Ethan Mollick in • 3rd+
Associate Professor at The Wharton School
3mo • Edited •

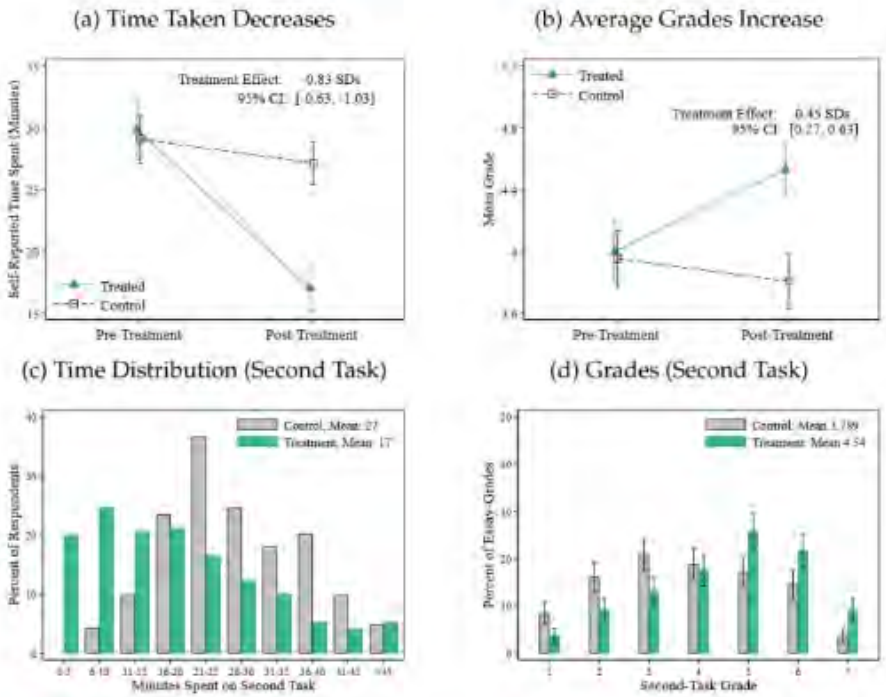
+ Follow ...

Two early papers find the effects of generative AI on knowledge work are completely unprecedented in modern history. Separate studies of both writers and programmers find 35%-50% increases in productivity with AI, and higher performance and satisfaction.

It is really hard to look at these early controlled experiments and dismiss AI as entirely hype. For reference, the productivity gains of adding steam power in the mid-1800s was about 25% for a small factory.

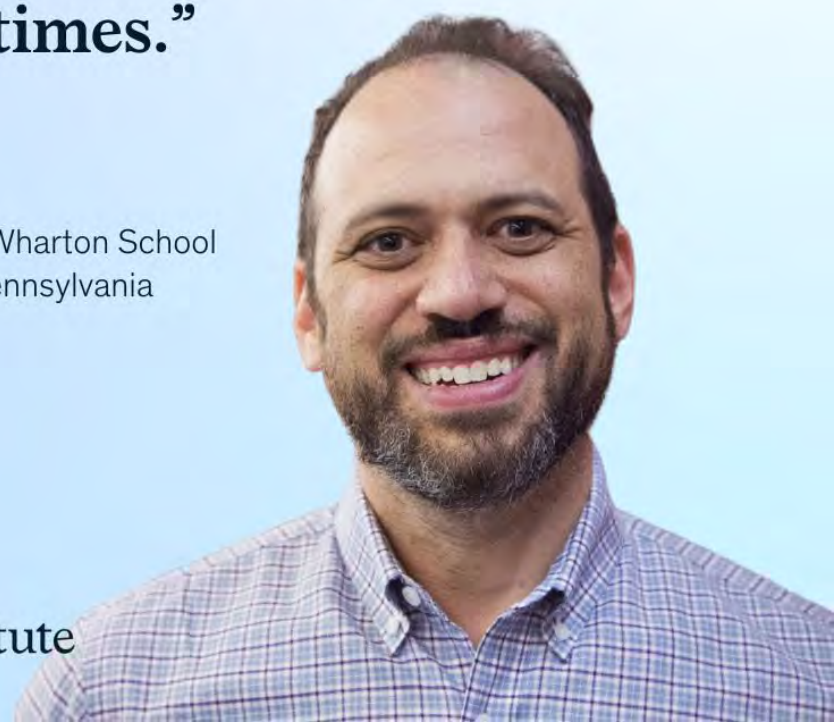
Link to working paper on writing: https://lnkd.in/eTTWcBrj

Link to one on programming: https://lnkd.in/eVgXKYWg



"Generative AI fundamentally is going to be a shift in how we work and how we interact at a level that's as big as anything we've seen in our lifetimes."

Ethan Mollick
Associate professor, Wharton School
at the University of Pennsylvania



McKinsey
Global Institute

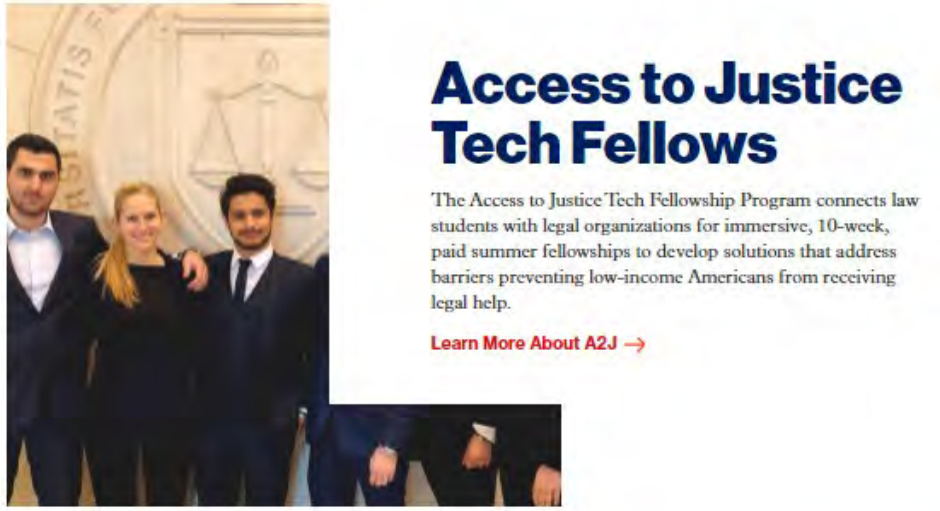
https://www.mckinsey.com/mgi/Forward-Thinking/Forward-Thinking-on-the-brave-new-world-of-generative-AI-with-Ethan-Mollick

SO NOW WHAT?

FUTURE OF THE PROFESSION INITIATIVE PROGRAM

"FPI seeks to transform the legal profession in part by examining new ways law schools can create true lifelong learning for students. One of the ways FPI puts this theory into practice is through real-world projects with actionable results."

Penn Carey Law
University of Pennsylvania



Access to Justice Tech Fellows

The Access to Justice Tech Fellowship Program connects law students with legal organizations for immersive, 10-week, paid summer fellowships to develop solutions that address barriers preventing low-income Americans from receiving legal help.

Learn More About A2J →

Weil Gotshal Legal Innovators Program

A partnership with Penn Carey Law, FPI, and paid public service fellowship that engages with incoming law students in addressing some of the most pressing social and legal challenges in our communities.

Learn More About Weil Gotshal LIP →

FUTURE OF THE PROFESSION INITIATIVE PROGRAM LAB

Our Pillars

Human-centered design

- FPL will incorporate users – the audiences we want to serve better – in all aspects of our approach to problem-solving
- We want to improve the legal system for both users and providers

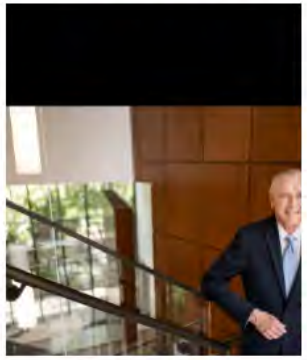
Interdisciplinary partnerships

- FPL will partner across disciplines and across institutions, with students, lawyers and other professionals, people with justice problems, and other innovators
- We will collaborate with existing legal problem-solving labs to grow solutions
- We will incorporate students from Penn Carey law and from across the University in all our work

Scaling for impact

- FPL will set priorities based on the potential for impact, with the goal of seeding long-term change in the legal system
- We'll focus on the important and the scalable
- We'll let the market drive our work, rather than our own perceptions and preferences

Our Team



Jim Sandman L'76

Senior Consultant, Future of the Profession Initiative; President Emeritus, Legal Services Corporation

The Honorable Bridget McCormack

Strategic Advisor, Future of the Profession Initiative; Chief Justice, Michigan Supreme Court

Erica Dixon

Project Director, Future of the Profession Initiative

"The Future of the Profession Lab tackles the most significant challenges facing the American legal profession.

The lab uses a human-centered design approach to problem-solving with a collaborative, interdisciplinary model.

Our priorities are driven by users – the audiences we serve - who need improvements in the legal system.

Our goal is scalable impact and generational change."

WHAT'S AT STAKE: THE RULE OF LAW

Public trust and confidence in the rule of law and in therefore in government are at stake.

The rule of law is just a set of ideas that is only as good as our collective confidence in it.

Please provide your feedback for this session.

Hon. Bridget Mary McCormack

Session Survey

EXPANDING ACCESS TO JUSTICE WITH PRISONER E-FILING

Colette M. Bruggman, Jamie Kambich, Erin Lennon, Theresa McCarthy,
Larry Royster, and Tristen Worthen

Colette is a Mandan, North Dakota native and graduate of Mandan High School. Colette received her Bachelor of Business Administration from the University of North Dakota in 1984 with a degree in accounting and her Juris Doctor from the University of North Dakota School of Law in 1987. Colette was admitted to the North Dakota bar in October 1987.

In January 2023, Colette was appointed as the Clerk Executive Officer for the Court of Appeal, Third Appellate District, in Sacramento, California after serving as the Assistant Clerk Executive Officer since February 2009. Previously, Colette was Chief Deputy Clerk for the North Dakota Supreme Court from July 1992 through February 2009. Prior to joining the North Dakota Supreme Court, Colette practiced law with the Vogel Law Firm in Mandan, North Dakota, and Legal Assistance of North Dakota in Bismarck.

Colette is a member of the National Conference of Appellate Court Clerks (NCACC), the State Bar Association of North Dakota, and the California Appellate Court Clerk Executive Officers, currently serving as its President.

Jamie Kambich is a manager and business analysis expert from Chehalis, Washington. Jamie began his public service career in social work helping juveniles who struggled with delinquency as well as helping families involved with the child welfare system in 1999. He then switched careers in 2012 and became an IT business analyst and then a supervisor where he supported applications used by workplace safety and health inspectors and consultants as well as applications used by court staff, judicial officers, justice partners and public citizens in Washington State. Over the past few years Jamie has led court business teams responsible for supporting technology and court business processes for Washington State courts. Jamie is spearheading strategic planning efforts to improve court business processes and technologies used by the courts.

Erin L. Lennon was sworn in as Washington Supreme Court clerk on July 1, 2021. Lennon is the 11th Washington Supreme Court clerk in the state's history. She has served as deputy clerk since 2016. Lennon is a graduate of the University of Washington School of Law where she served as managing editor of the Washington Law Review and was appointed Student Regent by Gov. Chris Gregoire. She previously served five years as a law clerk for Justice Susan Owens, served as an extern for federal Judge John Coughenour of the U.S. District Court of Western Washington, volunteered as the manager of the LGBTQ Legal Clinic in Seattle, and worked in private practice.

Theresa McCarthy received an A.A. in Paralegal Studies from Nunez Community College, a B.A. in English from the University of New Orleans and a J.D. from Loyola University College of Law. She also has certificates in Common Law and International Legal Studies from Loyola University.

Theresa practiced personal injury law and estate law at the Law Office of Jeffrey Perigoni before going on to become the Program Manager of Paralegal Studies and the Department Chair of Business at Nunez Community College. She joined the Supreme Court of Louisiana in 2014 as an Assistant Clerk and now serves as the Second Deputy.

Larry Royster is the Clerk and Chief of Staff for the Michigan Supreme Court. Bachelor of Landscape Architecture, Michigan State University, 1982; J.D., Thomas M. Cooley Law School, 1985. After graduating from law school, Larry worked as a staff attorney with the Michigan Court of Appeals for eighteen months and then as a law clerk for one of the court's judges for two years. From 1989 to 1998, Larry supervised a group of senior staff attorneys at the court. He became the court's deputy research director in 1998 and the research director in 2001, overseeing a staff of sixty attorneys and twelve support personnel. In 2011, Larry assumed the dual role of both research director and chief clerk of the Court of Appeals. In 2013, Larry left the Michigan Court of Appeals to become the chief of staff and clerk of the Michigan Supreme Court. Larry is married to Dawn McCarty and has two adult daughters, Meghan and Jordan.

Tristen Worthen is the Court Administrator/Clerk for the Court of Appeals, Division III located in Spokane, Washington. In her almost 33 years of court service, she was the elected Clerk of Douglas County, Court Administrator for the City of Chelan Municipal Court and various deputy clerk positions in the municipal and superior court levels of Washington State.

During her almost 33 years, she has served on many committees, including Court Education Committee, and the various association Executive Boards. She currently sits on the Court of Appeals Executive Board, Court Management Council, and several committees for the National Conference of Appellate Court Clerks. Her motto – get involved to stay informed.

Tristen holds a B.A. in Public Administration. She is an avid quilter, knitter and general fiber crafter. She is a mother of two grown men and currently resides in Cheney, Washington with her husband and Border Collie, Bo.

MEMORANDUM OF UNDERSTANDING
BETWEEN
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
AND
THE CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT

I. PURPOSE

This is an agreement between the California Department of Corrections and Rehabilitation (CDCR) and the California Court of Appeal, Third Appellate District (3DCA), to establish guidelines for sending certified true and correct copies of and receiving CDCR Administration's copy of legal documents (opinions and remittiturs) pertaining to CDCR inmates, through an established electronic mail (e-mail) process, which will be deemed the official method for CDCR receiving said documents.

II. EFFECTIVE DATE, MODIFICATION AND TERMINATION

This Agreement will become effective upon the signing by both parties and remain in effect for three months, during which both parties will evaluate the process, make recommendations for changes, and implement any changes. The intent will be to pilot with the 3DCA with a plan to move to statewide implementation for all six Courts of Appeal.

The Agreement may be modified by mutual agreement of the parties. Any such modifications shall be in writing and signed by the parties or their successors. Any such modification shall be subject to all remaining terms of this Agreement.

III. INTENDED USE OF INFORMATION

Certified true and correct documents submitted via the e-mail process by the 3DCA to CDCR will be used for official CDCR business purposes only. CDCR shall comply with all applicable federal and state laws regarding use and disclosure of the documents.

The CDCR Inmate Records Office will utilize the legal documents received from the 3DCA to record additional commitment information to an inmate's existing record, and to recalculate the inmate's release date, if applicable.

CDCR will not be required to provide the inmate with a copy of any of the documents received from the 3DCA via the e-mail process that would otherwise be provided by the court or inmate's attorney.

IV. INFORMATION SECURITY

The 3DCA will utilize the e-mail process to ensure security of the legal documents. These documents in the form submitted are considered public documents as they are final opinions filed by the court.

V. INFORMATION ELEMENTS

Through the e-mail process, the 3DCA shall provide certified true and correct copies of opinions and remittiturs to CDCR that, without requiring further proceedings in the trial court, change the length of a state prison sentence, applicable credits, or the maximum permissible confinement to the CDCR, and any amendments thereto.

All related legal documents for one inmate will be uploaded together. When multiple inmates are co-appellants on an appeal, each inmate's documents will be sent separately but all co-appellants will be sent consecutively.

The CDCR will be notified via the e-mail system of any pending e-mails. CDCR will be responsible for checking the e-mail system and processing the documents pursuant to its policies.

Documents will be sent in a Portable Document Format (PDF) file. The 3DCA will use the following CDCR email address to send PDFs: daicrsAdminassist@cdcr.ca.gov.

In the event the e-mail system is not operable (loss of power or technical difficulties) to the extent that the 3DCA cannot send and/or CDCR cannot receive, CDCR and the 3DCA shall communicate with each other and decide upon an alternative method for sending and/or receiving any of the documents listed in Section V, Information Elements.

VI. SITE ADMINISTRATION

The 3DCA and CDCR will provide their respective account administration to ensure send and receive are appropriately managed. Administration/password resets will be handled by the respective organizations pursuant to current operational protocols.

VII. FILE RETENTION

The e-mail process will provide temporary file storage for documents transferred. This is not a data storage service or solution. As current CDCR retention policy dictates, the e-mail will be retained for 90 days. The PDF document will be imported into the inmates' Central File in CDCR's Electronic Records Manager System (ERMS) for permanent retention.

VIII. TECHNICAL REQUIREMENTS

- E-mail access

XI. NOTIFICATION OF SECURITY BREACHES

Both CDCR and 3DCA agree that in the event of any breach or compromise of the security, confidentiality, or integrity of computerized information where inmate information was, or is reasonably believed to have been, acquired and/or accessed by an unauthorized person, CDCR or 3DCA shall be notified of the breach of the security system containing such information within 24 hours, comply with all notification actions, and/or assist CDCR or 3DCA with all notification actions required by State policy and law.

CDCR contact for such notification is Vitaliy Pnaych, Agency Information Security Officer (A), at (916) 208-1132 or Vitaliy.Pnaych@cdcr.ca.gov.

3DCA contact for such notification is Andrea K. Rohmann, Clerk/Administrator, at (916) 265-8421 or andrea.rohmann@jud.ca.gov.

XII. AUTHORIZATION

By the signatures of their duly authorized representatives below, CDCR and the 3DCA, intending to be legally bound, agree to all of the provisions of this Memorandum of Understanding.

California Department of Corrections and Rehabilitation Approval:

Cynthia Burris — 3/16/2017

CYNTHIA BURRIS, Chief
Correctional Case Records Services

Date

K. Allison — 3/17/17

KATHLEEN ALLISON
Director
Division of Adult Institutions

Date

Vitaliy Pnaych — 3/24/17

Vitaliy Pnaych
Agency Information Security Officer
Enterprise Information Services

Date

3/24/17

RUSSELL J. NICHOLS
Director
Enterprise Information Services

Date

Third District Court of Appeal:

March 6, 2017

ANDREA K. ROHMANN
Clerk/Administrator
Court of Appeal, Third Appellate District

Date

PROTOCOL FOR PRISONER ELECTRONIC DELIVERY PILOT PROGRAM

This protocol is adopted pursuant to Part III of the Memorandum of Understanding (MOU) dated September 13, 2019, between the California Department of Corrections and Rehabilitation (CDCR) and the Court of Appeal of the State of California, Third Appellate District (Court) pertaining to the Court's Prisoner Electronic Delivery Pilot Program (Pilot Program).

A. Eligibility:

Eligible documents (Pilot Program Documents) are defined as follows:

1. The filer is a self-represented prisoner at the Facility.

2. The filer wishes to file a document in the Court.

3. The proposed filing is for a civil appeal or a habeas corpus proceeding.

4. The proposed filing can be converted to the following electronic format: text-searchable portable document format (pdf); single-sided; 25 pages or less; 25 megabytes or less; legible; and presented on designated judicial branch forms, if available, such as Petition for Writ of Habeas Corpus (Form HC-001). Any proposed filing not complying with these requirements must be delivered to the Court in paper format.

B. Process:

1. The Pilot Program is voluntary. Self-represented prisoners are not required to electronically deliver civil and habeas documents to the Court, they may mail such documents to the Court if they wish.

2. To participate in the Pilot Program, a prisoner must inform Facility staff that they want to electronically deliver a Pilot Program Document to the Court.

3. Facility staff will confirm that the proposed filing meets the eligibility criteria for a Pilot Program Document.

4. Facility staff will check to see if the original document is double-sided; if so, Facility staff will copy the document to make it single-sided.

5. Facility staff will scan the proposed filing so that it complies with the format requirements for a Pilot Program Document.

6. Facility staff will email the Pilot Program Document to the Court, using the following email address provided by the Court: 3DCefiling@jud.ca.gov

7. After scanning and emailing the Pilot Program Document, Facility staff will return the original Pilot Program Document to the prisoner. If the prisoner has filed a petition for writ of habeas corpus, which must be signed under penalty of perjury, the prisoner must keep the original signed petition in case it is needed later.

8. Facility staff will enter in a log the following information: the date of receipt and type of documents received from a prisoner; the date of scanning and the date of emailing a Pilot Program Document to the Court; and the date of returning a Pilot Program Document to the prisoner. Facility staff will arrange for the prisoner to initial the log entries as appropriate.

9. The Court will send an email reply confirming receipt of a Pilot Program Document to the following email address provided by CDCR:

For Folsom State Prison: M_FSP.Filings@cdcr.ca.gov
For California State Prison, Sacramento: Filings.CDCRSAC@cdcr.ca.gov

10. The Court will subsequently inform the prisoner whether the Pilot Program Document was or was not accepted for filing as follows:

(a) In a habeas corpus proceeding, if the habeas petition is filed, the Court will mail the prisoner a paper copy of the docket sheet for the proceeding, along with a conformed paper copy of the petition's cover page. If the habeas petition is not filed, the Court will mail a paper copy of the petition to the prisoner with a letter. For subsequent proposed filings in habeas proceedings, if the document is accepted for filing, the Court will mail the prisoner either a paper docket sheet or a conformed paper copy of the cover page of the filed document. If the document is not filed, the Court will mail a paper copy of the proposed filing to the prisoner with a letter.

(b) In a civil appeal, the Court will mail a letter to the prisoner when the Court opens the case. When a document is accepted for filing in the case, the Court will mail the prisoner either a paper docket sheet or a conformed paper copy of the cover page of the filed document. If the document is not filed, the Court will mail a paper copy of the proposed filing to the prisoner with a letter.

11. The Court and the Facility have provided each other with contact information to use for the Pilot Program.

12. The Court and the Facility will inform each other within a reasonable time of any system interruption or failure relevant to the Pilot Program.

13. There will be no additional charge to a prisoner for choosing to electronically deliver a Pilot Program Document under the Pilot Program.

ELECTRONIC DELIVERY

The California Court of Appeal, Third Appellate District (Court), is offering a voluntary Electronic Delivery Pilot Program for inmates. Designated librarians at Folsom Prison and California State Prison Sacramento (the Facilities) will arrange to scan and email eligible inmate documents to the Court. The program is designed to provide faster delivery of filings to the Court and faster confirmation of filings.

The following documents are eligible for the Pilot Program:

1. The filer is a self-represented inmate at one of the Facilities.
2. The filer wishes to file a document in the Court.
3. The proposed filing is for a civil appeal or a habeas corpus proceeding.
4. The proposed filing can be converted to the following required electronic format (which the designated librarian will help you with and confirm for you):
    a. text-searchable portable document format (pdf);
    b. single-sided, 25 pages or less;
    c. 25 megabytes or less;
    d. legible; and
    e. presented on designated Judicial Branch forms, when available, such as Petition for Writ of Habeas Corpus (Form HC-001).

If you would like to participate in the Pilot Program, please inform library staff at your Facility that you are interested in electronically delivering a document to the Court.

LOUISIANA SUPREME COURT

INMATE ELECTRONIC FILING PROGRAM

THERESA MC CARTHY
2ND DEPUTY CLERK
LOUISIANA SUPREME COURT

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into by and between the Louisiana Department of Public Safety and Corrections – Louisiana State Penitentiary (LSP), the Louisiana Supreme Court (LASC) and the Louisiana Fourth Circuit Court of Appeal and Louisiana Fifth Circuit Court of Appeal (together, LACA).

PURPOSE:

This agreement outlines the terms under which the LASC and LACA will allow LSP to file documents to their courts via an Electronic Filing Program. This program will provide a more efficient filing process and decrease indigent mail costs, "lost mail" and overall postage for offenders.

TERMS AND CONDITIONS:

1. LASC shall provide LSP a high volume scanner/printer that will be utilized in the LSP Legal Programs Department. This scanner/printer will have the capability to email scanned documents directly to the selected court (LASC or LACA) for processing.

2. LASC shall retain ownership of the scanner/printer including but not limited to maintenance of device and technology updates along with any service needs (i.e. toner, drum, parts, and paper).

3. All parties will allow IP address acceptance for this system to work. LSP shall provide any hardwiring for program capabilities and LASC shall provide IP maintenance of the technology with LSP assisting with on-site access.

4. LSP shall provide one staff member to process offender requests, scan the document to be sent to either court and monitor the output to be directed to the requesting offender.

5. LSP shall incur any cost associated with printing of requested documents from the LASC or LACA.

6. At the termination of this MOU regarding LASC/LACA Electronic Filing Program all equipment shall be retrieved by the owning party within a reasonable timeframe.

7. LSP, LASC nor LACA shall assign or transfer any responsibilities within this MOU to another party. No modification of this MOU shall be binding upon the parties hereto unless consent is given, in writing, by all parties.

8. No compensation or other remuneration is being requested or exchanged as a result of this electronic filing program. This MOU does not obligate any funds or resources of LSP, LASC or LACA, and does not establish authority for any non-competitive award for any contract or other agreement by either party.

9. The protocols used by LSP, LASC & LACA under this MOU are outlined in at attachment entitled "State Court Electronic Filing Program". The obligations in the attached document are expressly incorporated herein.

10. The procedures agreed upon through this MOU shall take effect on the date below and terminate at said time which all parties agree.

State Court Electronic Filing Program
Protocol/Procedures

- LSP will provide each living area with a locked mail box labeled "Outgoing US Mail".
- Offender will place their legal mail, which must be clearly addressed to the specific court.
- LSP Mailroom personnel will pick up all mail Monday through Friday (excluding weekends, holidays, or emergency situations). Mail will be sorted and stamped with the location it was picked up and date.
- LSP Mailroom personnel will hand deliver all Louisiana Supreme Court (LASC) and Louisiana Fourth or Fifth Circuit Court of Appeal (LACA) mail to the LSP Legal Department for scanning.
- LSP Legal staff will process the received mail, which includes date stamp, count pages and enter all required information into the "Scan Log Book".
- LSP Legal staff will utilize the designated scanner/printer provided by LASC & LACA to scan all pages of the offender's letter and send it to the court as it is addressed on the envelope. Once confirmation is obtained it will be logged into the "Scan Log Book".
- All original documents that were sent by the offender will then be repackaged and returned to him via the LSP Mailroom.
- Courts will receive and process the offenders request in accordance with their own regulations. Responses will be submitted to the offender through the same scanner/printer that was used to send the request to the court.
- LSP Legal staff will monitor the printer for any output. Once a document is received it will include a cover sheet prepared by the Clerk's office in the applicable court (includes offender name, doc number, housing unit, and number of pages in the document including cover sheet) that will be utilized as a mailing label to send the documents to the correct offender.
- LSP Legal staff will record all received documents into the "Scan Log Book" to include name of court, name of offender and doc number, date document sent to LSP Mailroom for delivery.
- LSP Mailroom will enter all court documents received from LSP Legal into the Privileged Mail Log database for delivery within 48 hours of receipt.
- All offenders must sign the Privileged Mail Receipt for receipt of mail.

ACCEPTED AND AGREED TO BY THE FOLLOWING PARTIES ON THIS 20th DAY OF JANUARY 2017.

LOUISIANA SUPREME COURT

Name: Bernette J. Johnson
Title: Chief Justice

Jan 20, 2017
Date

LOUISIANA FIFTH CIRCUIT COURT OF APPEAL

Name: Susan M Chehardy
Title: Chief Judge

1/20/17
Date

LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

Name: James F. McKay III
Title: Chief Judge – Fourth Circuit

1-20-17
Date

LOUISIANA STATE PENITENTIARY

Name: Darryl Vannoy
Title: Warden

1-30-17
Date

LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

Name: Thomas C. Bickham, III
Title: Undersecretary

2/3/17
Date

JOHN BEL EDWARDS
Governor

JAMES M. Le BLANC
Secretary

State of Louisiana

Department of Public Safety and Corrections

May 1, 2017

TO: Offender Population

FROM: Bruce Dodd
Deputy Warden/Operations

RE: Electronic Filing Program

In 2012, the institution began the Federal Electronic Filing Program. Effective May 8, 2017, this practice will be expanded to the Louisiana State Supreme Court and the Louisiana Fourth and Fifth Circuit Courts of Appeals.

All pleadings addressed to the United States District Courts (Middle, Western, and Eastern), the Louisiana Supreme Court, and the Louisiana Fourth and Fifth Circuit Courts of Appeal shall be placed in the standard outgoing mailbox at each housing location in an envelope addressed to the appropriate court. The Federal Mail boxes will no longer be used for this purpose. No postage shall be placed on these envelopes. After pick-up by Mail/Package Department personnel, all pleadings will be delivered to the Legal Programs Department for scanning to these courts. After scanning, the originals will be returned to the offender through the Farm Mail system.

Pleadings submitted by an offender to the above noted courts through the U.S. Postal System, which have not been scanned and emailed by LSP Legal Programs staff, may be returned at the direction of the court.

It is to be noted that the United States Fifth Circuit Court of Appeal is not yet participating in this program. Mail to the U.S. Fifth Circuit Court of Appeals must still be mailed through the U.S. Postal Service.

Legal Programs personnel shall also receive orders and judgments from these same courts which will print on a designated printer. These orders and judgments will be placed in an envelope and forwarded to the LSP Mail Room for handling as privileged correspondence.

In addition, transcripts requested from the Louisiana Fourth and Fifth Circuit Courts of Appeals shall print on a designated printer. These transcripts will be delivered through the privileged mail system with a cover letter from the appropriate court and do not need to be returned.

Questions concerning this procedure should be directed to Legal Programs or the Offender Counsel assigned to your area.

Bruce Dodd
Deputy Warden/Operations

xc: All Wardens

POST IN ALL OFFENDER HOUSING AREAS

[The articles below were published in the April 2017 and April 2018 editions of *The Docket*, respectively.]

MICHIGAN SUPREME COURT'S PRISONER E-FILING PILOT PROGRAM

by Larry Royster, Chief of Staff/Clerk of the Michigan Supreme Court

The Michigan Supreme Court implemented a web-based electronic filing system in January 2015. From the very beginning, it was embraced and almost fully utilized by practitioners. We now rarely receive hard copy filings from attorneys. Unfortunately, approximately one-half of the 2,000 new cases filed each year with the Court are initiated by incarcerated self-represented litigants who cannot access the e-filing system from inside the correctional facilities. Because the Clerk's Office no longer maintains hard copy files of our cases, we must scan the paper documents filed by prisoners and manually link them to our case management system. That task takes several hours a day and strains our limited personnel resources.

A few years ago, I learned about a program operated by some federal district courts in cooperation with their state's prisons in which inmate filings are scanned and emailed by prison officials to the courts. The program appears to have originated in the middle and southern district courts of Illinois and has expanded to district courts in other states, including Arizona, Connecticut, Indiana, Louisiana, and Washington. After speaking with the staffs of several courts and prisons and hearing only glowing praise for the programs, I contacted the Michigan Department of Corrections (MDOC) in early 2015 to propose a similar pilot program in our state. Over two years and a lot of bureaucratic red tape later, we have yet to receive our first prisoner e-filings—but we are very close.

For the pilot phase of the program, the Court purchased two "digital senders" for installation in separate correctional facilities. A digital sender is similar to a high speed fax machine but, instead of creating paper copies at the receiving end, it transmits a digital file to a pre-programmed email address. The digital sender requires a connection to a data line but it does not allow for Internet access. The same process can be done with many high-end multi-function copiers but we thought that providing dedicated machines to the prisons would ease some of the MDOC's security concerns. The machines were installed on March 2, 2017, and have been configured to require individual log-ins for every transmission and are restricted to sending to a specific Court email address. The prisons are currently waiting for a MDOC policy document to begin transmitting the prisoners' documents. At the MDOC's request, filings will be limited to applications for leave to appeal in criminal cases during the initial phase of the pilot program.

Once the program is underway, a prisoner will give his pleadings to the prison's librarian for scanning into the digital sender. After being scanned, the hard copy documents will be

immediately handed back to the prisoner. The prisoner must retain the documents in their original form and produce them at a later time if directed by the Court. The Court's IT staff has configured our email server to generate an automated reply acknowledging receipt of the emailed filing. No later than the end of the next business day, the Clerk's Office will conduct a jurisdictional review of the pleading and determine whether it complies with the court rules. If the pleading is accepted for filing, the Clerk's Office will email a one-page notice of acceptance and a date-stamped copy of the pleading's cover page to the prison librarian, who will print copies for the prisoner's personal file. To increase acceptance by both the prisons and the prisoners, the Clerk's Office has agreed to electronically serve an accepted pleading on opposing counsel, as well as to provide notices of the filing to the Court of Appeals and the trial court. If the Court does not have jurisdiction or if the filing does not substantially comply with the court rules, the Clerk's Office will transmit a notice of rejection to the prison librarian that specifies the reason(s) for the rejection. A copy of that notice is to be given to the prisoner without delay.

All filings by prisoners must be transmitted electronically to the Clerk's Office unless the digital sender is not operational when the documents are presented to the prison librarian. If the machine is not operational at the time of presentment, the filing is be sent by regular mail unless the system will resume operation before the filing deadline. If a prisoner is subsequently transferred to a correctional facility without e-filing capability, he must submit all future filings in hard copy by mail and must immediately notify the Clerk's Office of the change of address.

For reference, the form notices of acceptance and rejection are appended.

Michigan Supreme Court

Office of the Clerk

*****NOTICE OF ACCEPTANCE OF ELECTRONIC FILING*****

The following electronic filing was received on MM/DD/YYYY at HH:MM [a.m./p.m.] and has been accepted by the Court:

Filer's name:

Title(s) of Electronic Filing:

Case name:

Supreme Court case number:

Court of Appeals case number:

Lower court/tribunal and case number:

The filing has been electronically served on the following persons or entities identified in the filing:

Name: Email address:

Name: Email address:

Name: Email address:

The filing has been served by mail on the following persons or entities identified in the filing:

Name: Mailing address:

Name: Mailing address:

Name: Mailing address:

The Court of Appeals and trial court have been given notice of the filing of the application.

Attached: Date-stamped cover page of filing

Michigan Supreme Court

Office of the Clerk

*****NOTICE OF REJECTION*****

The following electronic filing was received on MM/DD/YYYY at HH:MM [a.m./p.m.]:

Filer's name:

Title(s) of Electronic Filing:

Case name:

Court of Appeals case number:

Lower court/tribunal and case number:

The filing has been rejected by the Clerk's Office and will not be docketed for the following reason(s):

- ☐ Filing was received too late. See MCR 7.305 and MCR 7.311.
- ☐ Filing pertains to a closed case; no further filings may be submitted in the case.
- ☐ An action for superintending control cannot be filed because it involves a matter in which an application for leave to appeal could have been filed. See MCR 7.306(A)(1).
- ☐ Filing is precluded under MCL 600.2963 because you have unpaid filing fees in a prior civil action.
- ☐ Filing was submitted to the wrong court. Explanation:
- ☐ Filing is insufficient to constitute an [application for leave to appeal/action for superintending control] under the court rules. Explanation:
- ☐ Other. Explanation:

MICHIGAN SUPREME COURT'S PRISONER E-FILING PROGRAM:

AN UPDATE

by Larry Royster, Chief of Staff/Clerk of the Michigan Supreme Court

In the April 2017 edition of *The Docket*, I wrote an article about a pilot program in the Michigan Supreme Court that allowed self-represented persons in two state prisons to transmit their filings to the court by email. The pilot program is based on programs successfully operating in several federal district courts across the country. This article will provide more information about the program's implementation and its current status.

In the spring of 2017, the court purchased two digital senders that the department of corrections installed in correctional facilities located close to the court's mid-Michigan office. A digital sender scans a paper document and transmits the digital version to a pre-programmed email address. The program is meant to address the lack of internet access in the prisons and the resulting inability of incarcerated persons to access our web-based e-filing system, an ImageSoft, Inc., product called TrueFiling. Of the approximately 2,000 cases filed annually with the court, 70% are criminal appeals. The vast majority of those are filed *in propria persona* by incarcerated defendants in paper form. Consequently, we receive a large number of paper documents that must be scanned by court staff before uploading them to our digital case files (we stopped maintaining hard copy files two-and-a-half years ago). Those documents are often in poor condition and in varying sizes, which increases the time and difficulty in scanning them.

With the pilot program, the prisoner gives his hard copy documents to the prison librarian for scanning and transmission to an email address monitored by the clerk's office. After being scanned, the papers are returned to the prisoner. The court's email server generates an automated reply acknowledging receipt of the emailed filings so that the prisoner immediately knows that his documents were received by the court. Staff of the clerk's office review the documents to verify jurisdiction and compliance with the court rule requirements. We then email a one-page notice of acceptance or rejection, along with a date-stamped copy of the document's cover page, to the prison librarian who prints copies for the prisoner to retain. We also electronically serve accepted filings on opposing counsel and provide notices of the filings to the Court of Appeals and the trial court. Those responsibilities previously fell on the prisoners but we have undertaken them as an incentive to participate in the program and, candidly, to eliminate the myriad service and notice problems that often take more time to resolve than doing it ourselves.

The first prisoner e-filing was transmitted to the court on May 2, 2017. In the subsequent ten months, 105 appeals have been filed under the program. While not a huge number, we are

expanding the program to two more correctional facilities in the near future thanks to its perceived success by everyone involved—the prisoners and prison librarians, the court staff, and perhaps most importantly the department of corrections.

Having the department of corrections fully on board with the program is no small deal. I first approached the department about implementing the program in January 2015. After many months and several unreturned letters and phone calls, an official finally agreed to schedule a meeting to discuss the program. At the first meeting, it was clear we had some convincing to do. The department officials thought the program would increase the work of prison staff and were worried that the digital senders might allow the prisoners to access the internet. Also, the department had suffered public backlash a short time before for allocating money to train select prisoners to assist other prisoners in preparing legal documents. Some people accused the department of spending taxpayer dollars to teach prisoners how to sue the state and its subdivisions. The officials feared the public might similarly perceive the prisoner e-filing program. That did not occur. In January 2018, I contacted the lead department official about expanding the program to additional correctional facilities. This time, there was no reluctance or concerns. The program has saved time for prison staff overall and there have been no incidents of abuse by the prisoners.

Michigan has 39 correctional facilities, seven of which are located in the Upper Peninsula. One of the two machines will be installed in the state's only all-women's prison in the Detroit area. The other will be installed in a prison in the Upper Peninsula. Installing the machines at the remote prisons will be especially beneficial given the short filing times of certain document types (e.g., 21 days for motions for reconsideration) and the long mail delivery times. The state's most remote prison, Ojibway Correctional Facility, is located at the far western edge of the U.P., just six miles from the Wisconsin border. Mail delivery to and from our courthouse location, which is 529 miles away, can easily take three to four days. That delay significantly shortens the time a prisoner has to prepare his filing. Besides alleviating mail delays, the program also resolves the problem of mail *non-delivery*. Last year alone, the court was made aware of seven new case filings that were lost in the mail. Although the cases were eventually docketed, they were many months late (almost two years in one case) and required substantial staff time to verify their legitimacy. Prisoner e-filing eliminates the problem of delayed or lost mail.

After installing the new digital senders this spring, the plan is to expand into four to six more prisons in the fall. However, the digital senders are fairly expensive. Our model, the HP Digital Sender Flow 8500 fn 1, currently sells for $1,000 to $1,500. Newer models of the digital sender can be two or three times that amount. The court simply does not have the funds to purchase new machines and maintain old machines for all the prisons. Fortunately, there are a couple no/low cost options that we are exploring with the department of corrections. First, the

documents can be scanned on existing prison equipment and manually attached to an email message and transmitted to the court by the prison librarian. Second, the prison librarians can register as users of the court's regular e-filing system, TrueFiling, and submit the documents directly through that system. Because those options require additional steps by the librarians, I anticipate the department of corrections will not be enthusiastic about them. But from the very beginning of Michigan's prisoner e-filing program, the key to its implementation has been persistence and patience, and the willingness to proceed at a pace comfortable for department officials.

Washington State Appellate eFiling Application

August 1, 2023

History of Inmate eFiling

The application was built in 2018 and implemented a pilot project with two of the four appellate courts and one prison for one year. In 2020 and 2021, the project expanded to the rest of the courts and prisons. E-filing is voluntary, but most incarcerated people choose to participate because of its many advantages.

High Level Steps:

1. **Incarcerated individual** creates paper document and brings document(s) to the eFiling location in facility.
2. **DOC employee** scans document(s) using a designated Multifunction Device (MFD), creates an email with the document attached, enters subject line containing specific information in a specific order separated by a comma, and sends email. The original paper document(s) are returned to incarcerated individual.
3. **System scheduled task** runs every 5 minutes to monitor the exchange server for newly received inmate email. Data elements are retrieved from the subject line of the email & data associated with the case number is extracted and stored in the appropriate case tables.
4. **eFiling solution** validates document and is time/date stamped. The filing of the document is recorded in the efiling database tables. System generates csv file using the same naming standard. Document and corresponding csv files are copied to the efiling pickup folder.
5. **eFiling Confirmation** email is sent to the correctional facility where the DOC employee prints and delivers the email to the incarcerated individual. If there are other case participants listed on the case in the case management system, the eFiling solution will send an email confirmation as well as a copy of the filed document(s) to the parties.
6. **Sure Sync** keeps source code and content in sync between servers. Also moves files from eFiling pickup folder to the document management system (OnBase) pick up folder then to the OnBase server.
7. **OnBase** processes the uploaded document and csv file; information on the csv file is used to create an index and populate keywords and moves to the document to designated folder.
8. **Court Staff** accesses documents in OnBase workflow and takes actions as needed.

What's Next:

1. Rebuilding the application
2. Onboarding four more prisons

Demographics:

- 8 of the 12 Washington prisons use inmate eFiling
- 21 locations within the prisons are able to file documents using the inmate eFiling application
- As of April 2023, the average daily prison population for the 8 prisons is 11,850
- 8,921 filings received since 2018

Issues:

- If the subject line is not correctly typed, documents may not make it into OnBase
- Occasionally, a document with a case number will end up in the wrong queue
- Currently, no monitoring and notification capabilities
- Currently, no notification if the confirmation email is sent to a bad email address or the email service fails to send an email

Contacts:

Erin Lennon
Clerk
Washington State Supreme Court
erin.lennon@courts.wa.gov

Tristen Worthen
Court Administrator/Clerk
Washington State Court of Appeals Division III
tristen.worthen@courts.wa.gov

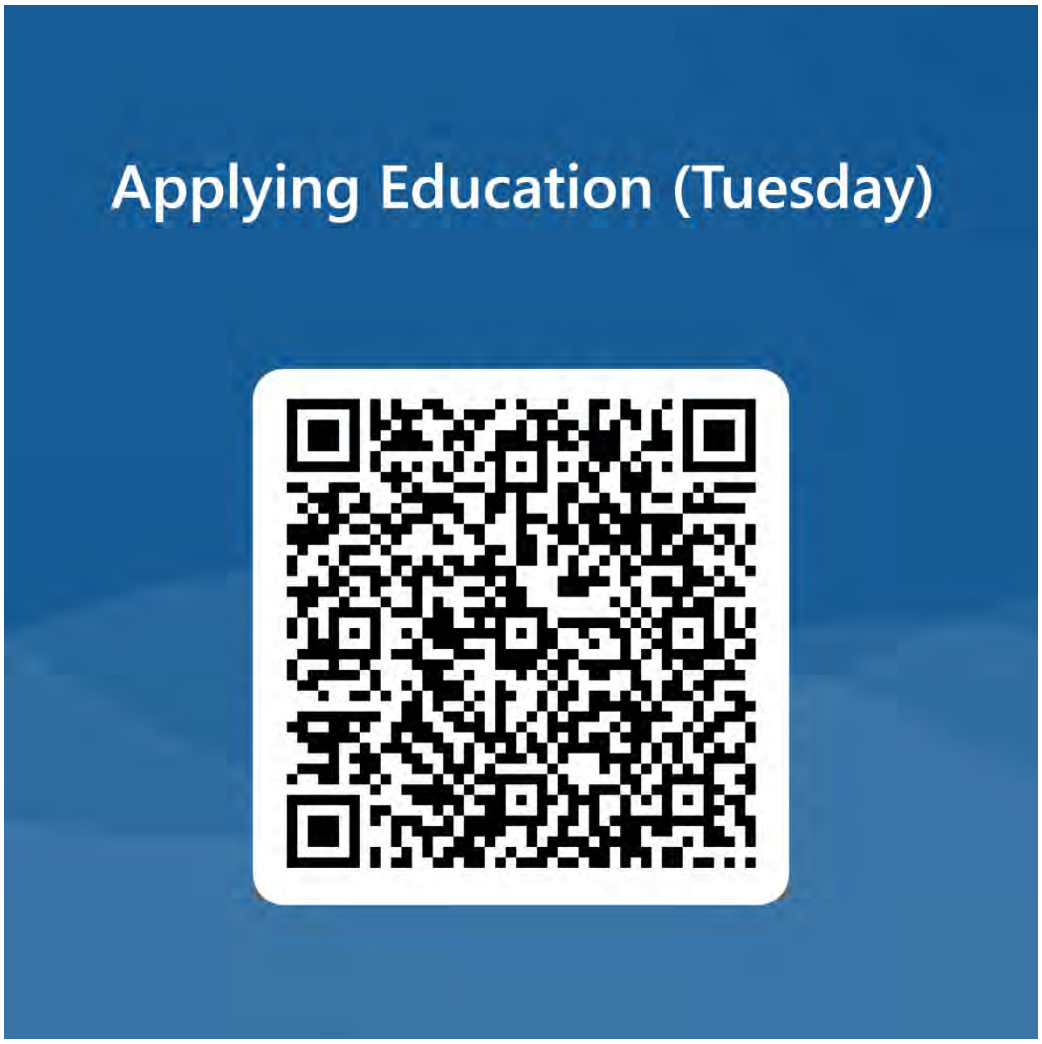
Jamie Kambich
Court Business Office Manager
Washington State Administrative Office of the Courts
jamie.kambich@courts.wa.gov

Please provide your feedback for this session.

Colette M. Bruggman, Jamie Kambich, Erin Lennon,
Theresa McCarthy, Larry Royster, and Tristen Worthen

Session Survey

Please provide your feedback for this session.



Session Survey

PLAIN LANGUAGE IN COURT DOCUMENTS

Julie Clement

Julie Clement is the Deputy Clerk of the Michigan Supreme Court. She is president of Clarity Inc., an international organization that promotes plain legal language. She is also a member of the International Plain Language Federation and the Center for Plain Language boards and an instructor in Simon Fraser University's Plain Language Certificate program. Julie is a Distinguished Professor Emerita of the Western Michigan University Cooley Law School and served as editor in chief of The Clarity Journal for 14 years.

Plain Language in Court Documents

Julie Clement, JD

Deputy Clerk, Michigan Supreme Court

What is “plain language”?

Myths many people still believe

- It means “dumbing down.” (Translate: it’s not appropriate for most legal documents.)
- Plain language is “one size fits all,” with rules that apply to most documents.
- Reading-grade-level scores can tell you whether a document is in plain language.
- Achieving plain language is part of the final editing process.
- It’s only about words and sentences.

Why does it matter?

Plain language

- conveys credibility, trustworthiness, empathy, & relatability;
- shows respect for people's time;
- significantly improves the odds that people will read, understand, and use your document, and
- saves **you** time and money.

Fewer calls from customers (Veterans' benefits letter)

	Old letter	New letter
Calls per month (per counselor)	9.4	1.6
Calls per year (10 counselors)	1128	192

Fewer errors
(Gov't form for requesting free trees)

	Old form	New form
Forms received with errors	40%	20%

Higher compliance rates (Gov't form to register livestock)

	Old form	New form
Compliance with registration requirement	40%	95%

Cost savings

	Original doc	New doc
FCC regulation -- # of staff answering calls and letters	5	0
VA letter requesting information – compliance	43%	65%
Estimated savings:	**$4.4 million**	

Is this plain language?

NOW COMES, Appellee, the People of the State of Michigan, by and through Jane Smith of the Pleasantville County Prosecutor's office, and does state the following: Appellee hereby stipulates to the use and entry of the Appendix filed by Appellant within his supplemental brief, and does incorporate it by reference within Appellee's Supplemental Brief.

Is this plain language?

(This is a title to a journal article)

Translating the DCFR and Drafting the CESL. A Pragmatic Perspective.

Is this plain language?

Have you ever been refused admission to the U.S., or been the subject of a deportation hearing or sought to obtain or assist others to obtain a visa, entry into the U.S., or any other U.S. immigration benefit by fraud or willful misrepresentation or other unlawful means? Have you attended a U.S. public elementary school on student (F) status or a public secondary school after November 30, 1996 without reimbursing the school?

Yes □ No□

What is “plain language”?

A communication is in plain language if its wording, structure, and design are so clear that the intended audience can easily

- find what they need,
- understand what they find, and
- use that information.

- International Plain Language Federation

Main points

- **Reader focused**
- Uses **wording**, **structure**, and **design**
- Outcome-driven – can the intended reader easily **find**, **understand**, and **use** the information they need?

Quick start: Reader focus

- Consider your multiple audiences
- Write to help the least experienced reader understand.
- Use techniques that minimize reader fatigue.
- Keep context in mind. What will this reader be doing, thinking, expecting, etc. when they read this document?

Quick start: Wording

- Use familiar words and short sentences that readers are likely to understand.
- Define or explain words that readers might not understand.
- Be mindful of words and structures that lead to confusion and reader fatigue, like
  - Unnecessary passive voice
  - Nominalizations
  - “Thinking words”

Quick start: Structure

- Start with the most important information (most important to the reader).
- Chunk information into logical groups (sections and paragraphs).
- Use descriptive headings to visually show how information is structured.

Quick start: Design

- Use design techniques that help readers navigate the content.
- Vary fonts to distinguish between text and headings.
- Use white space strategically, to show structure, hierarchy of information, etc.
- Avoid all caps.

Which would you rather read?

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988**,** "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DHS has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988**,** "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements:

(1) Eliminate drafting errors and ambiguity;

(2) write regulations to minimize litigation; and

(3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation:

(1) Clearly specifies the preemptive effect, if any;

(2) clearly specifies any effect on existing Federal law or regulation;

(3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction;

(4) specifies the retroactive effect, if any;

(5) adequately defines key terms; and

(6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DHS has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

Executive agencies must . . .

Draft in a way that	Ensure that the content	Ensure compliance by
(1) Eliminates drafting errors and ambiguity. (2) Minimizes litigation. (3) Provides a clear legal standard for affected conduct, rather than a general standard. (4) Promotes simplification. (5) Reduces burden.	(1) Clearly specifies the preemptive effect, if any. (2) Clearly specifies any effect on existing Federal law or regulation. (3) Provides a clear legal standard for affected conduct while promoting simplification and burden reduction. (4) Specifies the retroactive effect, if any. (5) Adequately defines key terms. (6) Addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.	(1) Reviewing each regulation under sections 3(a) and 3(b) to confirm that (a) The regulation meets those requirements, or (b) It is unreasonable to meet one or more of the sections' requirements. AND (2) Concluding that DHS has completed the required review and determined that, to the extend permitted by law, the final rule meets the Executive Order's relevant standards.

Executive Order 12988, §§ 3(a)-(c), "Civil Justice Reform," 61 FR 4729 (Feb 7, 1996)

(Reader: Self-represented criminal, incarcerated defendant)

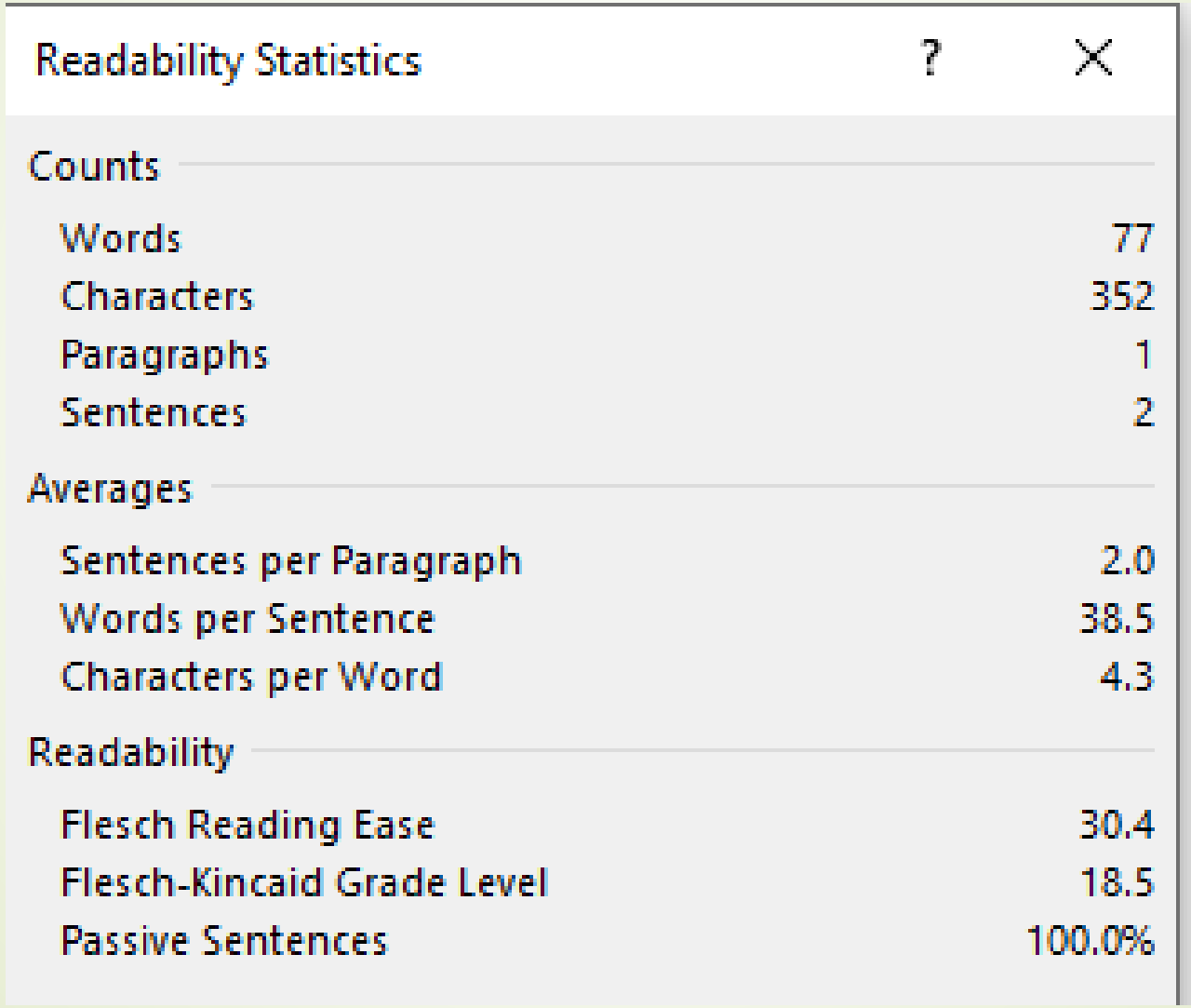
What are the main points of this order?

What challenges might this order pose to this defendant?

Exercise 1

By order of October 4, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the June 8, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Partial diagnosis



Readability Statistics	
Counts	
Words	77
Characters	352
Paragraphs	1
Sentences	2
Averages	
Sentences per Paragraph	2.0
Words per Sentence	38.5
Characters per Word	4.3
Readability	
Flesch Reading Ease	30.4
Flesch-Kincaid Grade Level	18.5
Passive Sentences	100.0%

Exercise 1
What would you do with it?

By order of October 4, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the June 8, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Exercise 1
One example

On October 4, 2022, this Court ordered the prosecutor to answer the application for leave to appeal. We received the answer and considered the application again. Instead of granting leave to appeal, we REMAND this case to the Court of Appeals. On remand, the Court of Appeals is to consider the issues that defendant-appellant raised in his original appeal.

Who is the intended reader of this letter?

What are the main points of this order?

What challenges might this order pose to this defendant?

Exercise 2

Your letter of December 8, 2004, to Chief Justice [name] has been referred to this office for response. Any remedy you may have on appeal from the alleged inaction of the trial court in your matter must first be taken to the Michigan Court of Appeals. Before attempting to file there, you should first inquire of the Clerk regarding their procedural requirements to avoid unnecessary delay in the disposition of your matter. Should the decision of the Court of Appeals ultimately prove unfavorable, you may then apply for leave to appeal to this Court.

Exercise 2
What would you do with it?

Your letter of December 8, 2004, to Chief Justice [name] has been referred to this office for response. Any remedy you may have on appeal from the alleged inaction of the trial court in your matter must first be taken to the Michigan Court of Appeals. Before attempting to file there, you should first inquire of the Clerk regarding their procedural requirements to avoid unnecessary delay in the disposition of your matter. Should the decision of the Court of Appeals ultimately prove unfavorable, you may then apply for leave to appeal to this Court.

Who is the intended reader of this letter?

What questions will the criminal defendant have about this order?

Can we make it better in a way that answers those questions?

Exercise 3

On November 12, 2020, the Court heard oral argument on the application for leave to appeal the July 23, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Is this plain language?

Have you ever been refused admission to the U.S., or been the subject of a deportation hearing or sought to obtain or assist others to obtain a visa, entry into the U.S., or any other U.S. immigration benefit by fraud or willful misrepresentation or other unlawful means? Have you attended a U.S. public elementary school on student (F) status or a public secondary school after November 30, 1996 without reimbursing the school?

Yes □ No□

Is this plain language?

NOW COMES, Appellee, the People of the State of Michigan, by and through Jane Smith of the _____ County Prosecutor's office, and does state the following: Appellee hereby stipulates to the use and entry of the Appendix filed by Appellant within his supplemental brief, and does incorporate it by reference within Appellee's Supplemental Brief.

Is this plain language?

(This is a title to a journal article)

Translating the DCFR and Drafting the CESL. A Pragmatic Perspective.

Is this plain language?

The National Center for State Courts (hereinafter "Center") shall serve as the Secretariat of the Conference. The President, with the approval of the Executive Committee, shall negotiate a contract with the Center annually for the calendar year for a period of no more than five years. The contract shall delineate what services the Center will provide and specify the costs to be borne by the Conference. Secretariat services will cover, as a minimum, the following: membership; distribution of publications; annual corporate reports; billing and collection of revenue; disbursement of expenses; accounting and reporting; monthly and yearly reports; tax returns; investment of funds; use of Center facilities; and fees, billing, and payment.

Questions?

The first international standard for plain language was published by the International Organization for Standardization (ISO) in June 2023. The full document is available for purchase on ISO's website, but the portions below are available to the public and will give you a strong idea of what the standard covers. (The substantive parts begin on page 2.)

ISO/DIS 24495-1(en)

Plain language — Part 1: Governing principles and guidelines

Foreword

ISO (the International Organization for Standardization) is a worldwide federation of national standards bodies (ISO member bodies). The work of preparing International Standards is normally carried out through ISO technical committees. Each member body interested in a subject for which a technical committee has been established has the right to be represented on that committee. International organizations, governmental and non-governmental, in liaison with ISO, also take part in the work. ISO collaborates closely with the International Electrotechnical Commission (IEC) on all matters of electrotechnical standardization.

The procedures used to develop this document and those intended for its further maintenance are described in the ISO/IEC Directives, Part 1. In particular, the different approval criteria needed for the different types of ISO documents should be noted. This document was drafted in accordance with the editorial rules of the ISO/IEC Directives, Part 2 (see www.iso.org/directives).

Attention is drawn to the possibility that some of the elements of this document may be the subject of patent rights. ISO shall not be held responsible for identifying any or all such patent rights. Details of any patent rights identified during the development of the document will be in the Introduction and/or on the ISO list of patent declarations received (see www.iso.org/patents).

Any trade name used in this document is information given for the convenience of users and does not constitute an endorsement.

For an explanation of the voluntary nature of standards, the meaning of ISO specific terms and expressions related to conformity assessment, as well as information about ISO's adherence to the World Trade Organization (WTO) principles in the Technical Barriers to Trade (TBT), see www.iso.org/iso/foreword.html.

This document was prepared by Technical Committee ISO/TC 37, *Language and terminology*, WG 11, *Plain Language*.

Any feedback or questions on this document should be directed to the user's national standards body. A complete listing of these bodies can be found at www.iso.org/members.html.

Introduction

Plain language is communication that puts readers first. It considers:

- — what readers want and need to know,
- — readers' level of interest, expertise, and literacy skills, and
- — the context in which readers will use the document.

Plain language ensures readers can find what they need, understand it, and use it. Thus, plain language focuses on how successfully readers can use the document rather than on mechanical measures such as readability formulas.

Extensive studies have shown that writing in plain language saves time or money (or both) for readers and organizations. Plain language is more effective and produces better outcomes. In addition, readers prefer plain language. For organizations, plain language is an important way to build trust with the readers. Finally, the process of translating is more efficient for plain language documents than for documents that are difficult to understand.

1 Scope

This International Standard is for anybody who creates or helps create documents. The widest use of plain language is for documents that are intended for the general public, but it is also applicable, for example, to technical writing, legislative drafting, or using controlled languages. This Standard will help authors develop documents that communicate effectively with their intended readers. It applies to most written languages and reflects the most recent research on plain language and the experience of plain language experts.

This Standard provides principles and guidelines for developing plain language documents. The guidelines detail how the principles should be interpreted and applied. The four governing principles are as follows:

- — Principle 1: Readers get what they need (relevant)
- — Principle 2: Readers can easily find what they need (findable)
- — Principle 3: Readers can easily understand what they find (understandable)
- — Principle 4: Readers can easily use the information (usable)

These principles rest on the premise that a document will be usable if the information in it is relevant, findable, and understandable (see Figure 1).

Figure 1 — The relationship of the four principles

From the perspective of authors, following the guidelines under the first three principles will make it likely that readers can use a document. But the only way to ensure that is to evaluate the document continually by applying Principle 4 guidelines. In other words, the Standard does not describe a sequential process, because the four principles are interdependent and influence each other. Applying them all together is crucial for developing plain language documents.

Annex A provides a visual overview of the principles and guidelines. Annex B provides a checklist to help authors apply this Standard.

The guidelines that the International Standard provides are recommendations. They do not establish requirements. The Standard applies to most, if not all, written languages, but it provides examples only in English. When localising the Standard, national standards bodies can adapt and expand the Standard to achieve the goals of plain language in their own languages.

Contrary to best practices and its own recommendation, the Standard cannot use the second person (“you”) to address readers due to ISO rules.

While this Standard covers the essential elements of plain language, it has some intentional limits:

- — It does not cover all types of communication. It applies only to printed or digital information that is primarily in the form of text. However, creators of other types of communications, such as podcasts and videos, may find this Standard useful.
- — It does not include existing technical guidance about accessibility and digital documents, although this Standard’s guidance can apply to both. For guidance on accessibility, authors of digital documents are urged to consider the Web Content Accessibility Guidelines and EN 301 549: Accessibility requirements for ICT products and services.
- — Later Parts of this Standard may provide case studies, best practices, and other supporting information.

2 Normative references

There are no normative references in this document.

3 Terms and definitions

For the purposes of this document, the following terms and definitions apply.

Where terms and definitions come from the ISO databases, they are referenced.

3.1
plain language

communication in which wording, structure, and design are so clear that intended readers (3.2) can easily

- — find what they need,
- — understand what they find, and
- — use that information

[SOURCE:International Plain Language Federation]

3.2
reader

member of the intended audience for the **document** (3.3)

Note 1 to entry: While the word “reader” is historically rooted in the verb “to read”, all intended audience members don’t necessarily “read” documents. For the purposes of this standard, reader includes everyone who uses the document, whether they view it, hear it, touch it, or a combination. Reader also includes someone who will skim or scan a **document** (3.3), looking only for particular information. Reader also includes someone to whom a **document** (3.3) is read, whether by a person or a device.

Note 2 to entry: There might be several different audiences for the same **document** (3.3). For example, the primary audience of an income tax form is the taxpayer, and the secondary audience is the tax agency. If the needs of different readers conflict, then the needs of the primary audience have priority.

3.3
document

set of printed or digital information, primarily in the form of text

EXAMPLE:

Audio description, email, error message, printed document, podcast script, video manuscript, web content.

3.4
author

individual or organization who develops or helps develop **documents** (3.3)

EXAMPLE:

Content developers or managers, editors, information architects or designers, information developers or managers, legislative drafters, professional writers, public relations officers, technical writers, translators, UX writers, writing project managers.

3.5
document type

class of **documents** (3.3) having similar characteristics

EXAMPLE:

email, webpage, postal letter, instruction manual, newspaper article, form.

[SOURCE:ISO 8879:1986(en), 4.102, modified – the list of examples is modified and separated from the text of the definition]

3.6
image

visual representation of information

EXAMPLE:

Chart, diagram, drawing, flowchart, graph, icon, infographic, map, picture, photograph, table.

3.7
information design

visual integration of text, typography, images, and multimedia to help **readers** (3.2) find, understand, and use information

Note 1 to entry: Information design makes the structure and content visual.

3.8
evaluation

assessment of how well **readers** (3.2) find, understand, and use information

ONTARIO COURT OF JUSTICE

DATE: February 11, 2015
COURT FILE No.: Toronto
Citation: *R. v. Armitage*, 2015 ONCJ 64

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JESSE ARMITAGE

Before Justice Nakatsuru
Heard on October 30, 2014
Reasons for Judgment released on February 11, 2015

L. Fineberg .....counsel for the Crown
S. Kelly ..... counsel for the Offender

NAKATSURU J.:

[1] This case was heard in the *Gladue* court at Old City Hall in Toronto. Jesse Armitage is a troubled man of Aboriginal heritage who was sentenced by me a number of months ago. At the time I gave my decision, I said that I would draft and release a written decision. This is that decision.

[2] Before I get to this, I would like to make two short comments. First of all, I want to say something about the style of this decision. For those who have read some of my past judgments, the reader may notice a change. For Jesse Armitage, I have tried to say what I wanted to say in very plain language. I believe that this is very important for judges to do in every decision. However, judges often do not do a good job of this. I would describe myself as one of the worst sinners. As lawyers first and then judges, we get used to using words that are long and complicated. This only muddies the message we are trying to say. That message is very important when it comes to passing a sentence on an offender. That the message is clear is even more important in the *Gladue* courtroom.

[3] I say this because in the *Gladue* court at Old City Hall, accused persons who share a proud history of the first people who lived in this nation, not only have a right to be heard, but they also have a right to fully understand. Their voices are heard by the judges. And they must also know that we have heard them. I believe that the accused persons who have been in this court have had good experiences in this. This is something that they have come to appreciate. This is something they have a right to expect.

[4] I know that all accused, whether they have any Aboriginal blood or not, should have this right. Judges struggle to make sure they do. However, when judges write their decisions, they are writing for different readers, different audiences. Judges write not only for the parties before them. Judges write to other readers of the law. Lawyers. Other judges. The community.

[5] In this case, I am writing for Jesse Armitage.

[6] The other thing I wanted to say is something about our *Gladue* court. This court was established in 2001. It was the first court of its kind in Ontario. Since then, it has matured. It is well respected. There is much cooperation between the Crown and the defence. The court applies the principles set out by our highest court, the Supreme Court of Canada, in the case of *Gladue*. We try to be faithful to those principles in every case.

[7] I admit the case of Jesse Armitage has been a challenge for me. The proper application of those principles has not been easy.

[8] Jesse Armitage is a 29 year old man and single. His Aboriginal ancestry comes from his mother's side. Valerie Armitage is a member of the Anishnawbe community of Dokis First Nation located southeast of Sudbury. Mr. Armitage has found himself in a pattern of minor criminality that he is unable to escape from.

[9] He has come forward and pleaded guilty to many criminal offences. They are mainly property crimes and breaches of court orders. Mr. Armitage committed them over a period of a few months during the end of the year of 2013 and into the spring of the following year. It is not important for my purposes to outline the facts of each offence. There is a sad and bleak repetition to what he does. Mr. Armitage has a plan that he uses. Sometimes it works. Sometimes it does not. He goes into open businesses, sometimes through an open back door, sometimes through the front door. It could be a shop or a restaurant. He heads to the back to see what he can steal. Sometimes he finds a staff change room. There he grabs whatever that is not locked up and of some value. If he is ever stopped by someone, he makes up an excuse like he was looking for a washroom. One time, he threatened someone when confronted. During these offences, he has been on probation or bail. He has been breaching these court orders by doing these crimes.

[10] Jesse Armitage has a criminal record. His offences started while he was still a youth. The crimes are usually the same. He has spent time in jail, received probation, and has been given conditional sentences to be served in the community. The sentences have not rehabilitated him. They have not helped him. They have not deterred him from committing the same offences. They have not stopped his crimes.

[11] When he pleaded guilty to the charges, I had little idea about who Jesse Armitage was and why he did what he did. He is a large man, boyish in his face, a face fringed by dark curly hair, and very quiet. He looks a lot younger than his age.

[12] I know his mother cares for him. His mother has attended court for him. She was supportive. She spoke one time to me in court about him. About her fears and hopes for him. She bailed him out.

[13] Closer to the date of sentence, she did not come for him. This is not surprising because her son did not change much. He continued to re-offend.

[14] Ms. Fineberg, the assistant Crown attorney, and Ms. Kelly, Mr. Armitage's defence lawyer, were incredible. They understood the problem. They worked together to try and get a solution. Although their position regarding the sentence was not the same, they cooperated to get as much information as possible on this Aboriginal offender.

[15] So, as I told Jesse Armitage on his sentencing day, we started this journey together. It was not one without its bumps along the way. It was also long. There were a number of adjournments. There was much investigation. Throughout I tried to reach Jesse Armitage. Sometimes I felt I had some success. There was sometimes a smile of understanding on his face. Other times I just saw frustration in him. I know he did not fully agree with all the delay. I know he did not always agree with what was being done to fully be ready for the sentencing. Some days he just wanted to get on with it.

[16] What was done? The law says for Aboriginal offenders, it is the duty of the sentencing judge to get as much information about the offender. I have, with the help of the lawyers, tried to do so. A pre-sentence report was prepared by probation. A *Gladue* report was prepared by the Aboriginal Legal Services of Toronto. A psychiatric report was prepared by the Center of Addiction and Mental Health.

[17] I will try to summarize what was said in these reports. When the pre-sentence report was ordered by me, I frankly told Ms. Kelly that I expected that it would not be positive. What else could one expect in light of the numerous

convictions for failing to comply with probation that Mr. Armitage has on his criminal record. That expectation turned out to be correct. The report was not positive. The probation officer writing the report has supervised Jesse Armitage on six probation orders. He remains on probation until 2015. The officer conceded that she had tried all available services for him that probation could offer. He had been encouraged, supported and provided with referrals in the areas of education, employment, mental health, substance abuse and personal counselling. To put it simply, in the probation officer's eyes, Jesse Armitage just failed to follow through with any of it. Specifically, the officer provided him with counselling options that was specialized to his Aboriginal heritage. When asked why he did not follow through with these, Jesse Armitage said "I don't know. I don't really like to do those things." In the appointments with the officer, he did not give the probation officer much insight into what he was thinking, feeling, or wanting for himself. He seemed uninterested in changing.

[18] The probation officer did raise the concern that there could be a possible underlying mental health problem that has not been diagnosed. She recommended a mental health assessment. But to date, Mr. Armitage has not been cooperative with any process suggested. At the end of the day, it is fair to say, the probation officer was at a loss as to what could be recommended for him.

[19] The pre-sentence report also outlined Jesse Armitage's background. I will now talk about this more when I turn to the *Gladue* report.

[20] The long and detailed *Gladue* report was very helpful in telling me about this. Jennifer Bolton, the *Gladue* caseworker, has written a very good report. Such reports are very useful in telling a judge about the particular nature of the offender's Aboriginal ancestry and how being an Aboriginal person has affected his or her life circumstance. The report talks about how the offender has been influenced by his or her Aboriginal ancestry, whether specifically in his or her life, systemic factors, or historical reasons. In other words, there are many ways Aboriginal ancestry can affect an offender's life and can be telling as to why he or she committed the crime. It does not have to be a direct cause like clear discrimination. An example of direct discrimination would be the loss of work or opportunities for work because the offender is Aboriginal. It can also affect an offender if being Aboriginal has affected his or her parents or his or her parents' parents. There are many ways that sharing an Aboriginal heritage can be relevant for sentencing. Some of those ways may be unseen and hidden. It is a judge's role in a *Gladue* court to shed light on those ways.

[21] The other way I find these reports very useful is that the information provided by the sources is often quoted word for word. For example, when Valerie Armitage tells Ms. Bolton something, it is sometimes put in quotes. For me, this gives a real sense of what is being said. It is not being filtered or interpreted by the

writer. It gives me a flavour of who the speaker is and what that speaker wants to tell me. The best way to get this is if the speaker was present in court, telling me the story. Telling me in his or her own words. In a voice spoken with feeling. Therefore, a *Gladue* report written in this way is valuable substitute to the speaker coming to court and saying it in person.

[22] I cannot do justice to the detail set out in this 23 page report. I can only highlight the main points. I note that much of this information comes from Jesse Armitage's mother. Although Mr. Armitage was interviewed two times, he had difficult focusing. Sometimes he was not sure. Sometimes he did not reveal much information even to simple questions. This caused Ms. Bolton concern about whether there may be an undiagnosed psychological problem at work.

[23] Jesse Armitage is an Aboriginal person. He is not at present recognized as a "Status Indian" under the law but he could be eligible to do so. He is the youngest of three children born to Ronald Morin and Valerie Armitage. Valerie Armitage herself was born in Sudbury but moved to Toronto when she was six with her parents and her brothers and sisters.

[24] Mr. Armitage is close to his older sister Crystal and Dustin. He also has a younger brother and sister through his mother's common-law relationship with Bob. Jesse Armitage himself has a ten year old son but his son lives with his mother. Mr. Armitage has little contact with either son or mother.

[25] I have already talked about Mr. Armitage's Aboriginal ancestry through his mother's side. His grandmother grew up on a reserve and was an Indian Residential School Survivor. Valerie Armitage said "She went, but she didn't speak about it. She told us stories about what she wanted me to know." Silence is a pattern seen in many survivors. Much has been written about the experience of Aboriginal persons who were forced to go to residential schools as children. This has been said by the Aboriginal Healing Foundation:

> An examination of current commentary on the Canadian residential school system highlights how destructive and damaging the system has been for Aboriginal people, past, present and future. Much of the contemporary discord in Aboriginal communities such as increased prevalence rates of substance abuse, family dysfunction and suicide, have been linked to intergenerational impacts brought about by residential schooling.

[26] The policy of such schools set up by the government was to "kill the Indian in the child". That policy affected many children and many families for many years. That policy was recognized on June 11, 2008, by Prime Minister Stephen Harper to be wrong. He apologized for it in Parliament. He said:

> It was wrong to forcibly remove children from their homes…. It was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities…in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow…the legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

[27] That policy and experience has affected Jesse Armitage's family.

[28] Valerie Armitage although she hesitated to speak about it, talked about her family's history of alcoholism:

> My mom drank. My older sister saw a lot. She took a lot of responsibility being the first child. Having to see my parents drink. Fight. See them with their brothers and sisters, fighting. Partying. As a teen, mom drank here and there. Dad drank. She'd leave him under control. When I was teen, I was old enough to leave the house. I'd be able to just walk out of the house. It did affect my sister. I'm not sure why it didn't affect me. I let it go. I loved my mom and dad no matter what.

[29] Valerie Armitage has struggled with alcohol abuse as well until recently.

[30] When Jesse Armitage was born, his mother and father separated shortly afterwards:

> I left his dad when he was still young. A year and a half old. I had to tell him to leave. He was into drugs. Dustin was three. Crystal was five…He was a quiet child, then he kinda came out of it. He'd walk in the house and go upstairs. He could not look you in the face-anybody in the face. That's when I started to realize something was wrong."

[31] Valerie Armitage raised the kids more or less as a single mom. Jesse Armitage's father was in and out of custody over the years. Jesse Armitage had difficulty at school and at the age of ten he was diagnosed by the school with Attention Deficit Hyperactivity Disorder. He was given Ritalin but Valerie Armitage stopped the treatment as she did not believe in it. She contacted the Children's Aid Society around that time for assistance. He was given support by the Big Brothers of Canada and started to play hockey into his teen years.

[32] Valerie Armitage formed some common law relationships since Mr. Armitage's father. Two children came from one of those. Her relationships with

these men were troubled. She began to drink again in her thirties. She feared she may have been neglectful of her son Jesse Armitage at the time.

[33] Mr. Armitage reported that the last time he attended school was grade 8. He believes his first contact with the criminal justice system was at 14. When asked why, replied "not sure." He left home at 15 and got welfare. He has been on social assistance since that time. Valerie Armitage placed her son in foster care at about the age of 15 when he started to get into trouble:

> I actually didn't know what to do with Jesse at one point in my life [pause]. He was 15. He stole the car, in the middle of the night. Then he started getting himself in trouble and charged. I ended up placing him in foster care-not too long. I felt so guilty. I needed help.

[34] Jesse Armitage returned home from time to time. Until he got another room in a rooming house. There was trouble at home since he did not work. There was a lot of arguing.

[35] When Jesse Armitage was 18 years old, he had a relationship with a woman. At the time, he was working at a warehouse according to his mother. A son was born when he was 19. This relationship lasted for a maximum of three years. There is little contact now between them if at all. The ending of the relationship did not go well as the courts were involved given Mr. Armitage's behaviour.

[36] Jesse Armitage when interviewed often gave answers that were not particularly informative. However, when questioned about substance abuse, he admitted he smoked marijuana since leaving school a couple of times a week. When asked about alcohol, he said he started at 15 or 16 and used it occasionally. He has not been employed. He said he had no past romantic relationships. When asked about friends, he shook his head and said no. He could not reply about how he spent his days. He did not know.

[37] Valerie Armitage also has had concerns about whether her son suffers from a hidden mental illness. She reports that schizophrenia runs in her family and believes he might be suffering from this. She told Ms. Bolton:

> He would have been about 22. He lived with me. He used to come home and be very demanding. He'd be walking around, looking at mirrors, laughing. Giggling. He got very angry. He would be very aggressive with me. He'd never done that. Josh and Brittany were very young. One night, I locked him out. Finally, I called the police. He was saying something – [referring to Valerie] "I'm ugly. I looked like my brother"- I'd never seen anything like that – angry.

[38] Valerie Armitage said that her son had also seen Dr. Hamlet but she did not

know for what. However, she believed he may have been given medication for a mental illness. Ms. Bolton was unable to obtain information from Dr. Hamlet. Valerie

Armitage also noted that within the last five years she took her son to the Dokis First Nation:

> We took him up North, about five years ago, to our reserve, and he got so paranoid. Everyone was around, family, and he had to be driven right home. He started to feel anxious. I offered him, because I, I take a mild dosage of lorazepam- nothing could settle him down. He kept walking and moving, saying "I want to go, I want to go."

Mr. Armitage remembered the visit. But he only said three short things about it: "I visited once, a couple of years ago. It was a nice place. I don't know anybody there."

[39] Jesse Armitage's mother was also concerned her son may have been sexually abused when younger due to some things he has said. This was just a suspicion that she had. Mr. Armitage denied any type of sexual abuse.

[40] Although Jesse Armitage said he only used alcohol occasionally, his mother became concerned about his drinking:

> I've been on my own for the last two years and he lived with me. He drank every day-every night. First, it was beers. He was quiet. He didn't cause problems. Then, he started to like, um, get a little bit, rude. Not listening to me. That's when I said we have to find you a room.
>
> ….
>
> He has a hundred to a hundred and twenty five to get him through the month. That wouldn't last a week for food and alcohol. He was out there stealing. His brother said "anything you need, I'll get for you." He did that for a while. All he knows is he gets a cheque, he can eat and he can drink. When he runs out of money, his mind goes to where can he get it. He got swept up in the lifestyle again, of stealing.
>
> ….
>
> He needs treatment. Definitely treatment. It's the top of my list. Treatment and diagnosis. I know that he doesn't do hard drugs. He doesn't have the money and he's afraid too. He's afraid of anything other than marijuana. It's the drinking. He's very dependent on the

drinking.

[41] At the time of the report, Mr. Armitage was back in custody. He said very little about his circumstances or his offences. When asked why he was trying to take two televisions from a store, he said "To sell them." When asked what he needed the money for he said "Just for the things I need." When asked how he spent the money he took he said "I'm not sure."

[42] Ms. Bolton mentioned something that she felt important to write upon which happened on May 1, 2014, when Jesse Armitage came into contact with his father in the cells of Old City Hall. Joanna Wemigwans, the Aboriginal Criminal Courtworker had spoken with both men that day. She recalled

> I felt sorry for this young man, it is easy to see Jesse struggles with mental health but will not admit anything.
>
> I went to speak with Jesse because I knew it must have been difficult for him to see his father that way. Jesse was mad that his father was trying to lecture him about his lifestyle and making him feel uncomfortable because it was in front of all the other accused persons in the 116 bullpen.

When asked by Ms. Bolton how he felt, if he was upset or angry, when he runs into his father in jail, Mr. Armitage replied "Everything's fine."

[43] Ms. Bolton discussed a number of options, including treatment for drug and alcohol abuse, with Mr. Armitage. He showed some interest in some of them. One program run by the Native Men's Residence with a goal to provide life skills to build strong Aboriginal men was talked about with him. Mr. Armitage was willing to give it a try. But when asked about his own goals, he just said "I'll be alright. I'm okay."

[44] Ms. Bolton did come up with some recommendations despite the lack of any real long or short term goals of Mr. Armitage. She recommended if a non-jail sentence was given: 1. Mr. Armitage attend Aboriginal Legal Services to work with a Gladue Aftercare worker to complete his plan of care; 2. Mr. Armitage complete an intake with Anishnawbe Health Toronto with the ability to access a number of services including an addictions counsellor, traditional counsellor, Elders, psychologists, and psychiatrists; 3. Mr. Armitage consider applying for Sagatay and completing the Apaenmowinneen. Sagatay is a program run by the Native Men's Residence which is a 63 male bed shelter to house and serve the needs of the homeless in this city. The Sagatay's mandate is to build strong Aboriginal men through development of their skills. The first three months of the program requires completion of Apaenmowineen [Having Confidence in Myself] where each man

chooses which learning stream such as education and jobs works for him. Mr. Armitage said that he would be willing to go but became uncertain if mandatory part

was longer than three months. Sagatay does have a waiting list. However, the intake interview can be done online and an assessment appointment is done after this.

[45] Ms. Bolton, the probation officer, and Valerie Armitage all raised the question of whether Mr. Armitage was suffering from a hidden mental illness or emotional problem. This had to be looked into more. So I made an order with everyone's consent for a psychiatric assessment by the Center for Addiction and Mental Health. This took some time to complete.

[46] Dr. MacDonald wrote a lengthy report. It is an interesting report. At the end of the day, it would be fair to say that Dr. MacDonald did not know what to say about Mr. Armitage or what to do with him. The doctor also appeared frustrated with Mr. Armitage. Although he had access to much material, he really did not have Mr. Armitage's help or cooperation. He could not in his mind decide what was true or what was not given the different stories he had about Mr. Armitage and his past. He did not uncover any previous psychiatric or psychological tests done by him although Dr. MacDonald believed they likely existed. The doctor did not feel such testing, either in the past or in the present, could really be accurately done given Mr. Armitage's indifference and lack of motivation.

[47] Dr. MacDonald admitted that his report could only be of limited help. He felt that any treatment would not likely succeed. He was not very optimistic about Mr. Armitage. Mr. Armitage did not seem to have the slightest interest in getting help, changing his life, or obeying any court orders. It lead the doctor to highlight this conclusion:

> Indeed his degree of indifference with respect to so many things in life is so extreme as to cause me to wonder if there might be an insidious psychiatric disorder present of which I am currently unable to find any direct evidence. Certainly, this has been speculated by numerous others who have known him. If he has any psychiatric involvement of which I am unaware, or any treatment that had any degree of success (query antipsychotic medications?), I do not as yet have any evidence of this.

[48] There was one recommendation Dr. MacDonald made that I wish to point out now. I do this because it will figure back in later in my decision. It will do so for reasons apart from the sentence I imposed:

> Should Mr. Armitage serve a sentence of some length, he could be referred to the St. Lawrence Valley Treatment Center for a review of his mental condition, prior to his release from custody. This is a facility with particular expertise in dealing with individuals like Mr. Armitage, and if he does have a prodromal mental disorder that is simply not sufficiently obvious to detect at this point, this might allow for its appropriate identification and open the door to consideration of treatment prospects that currently do not appear to be at all realistic.

[49] So this was some of the information I had about Mr. Armitage at sentencing.

[50] I also had the information about the crimes he committed. I gave him credit for the various time he spent in custody before he was finally sentenced. I carefully listened to the lawyers and what they said the sentence should be.

[51] Ms. Fineberg was very fair. She understands very well the approach to sentencing Aboriginal offenders. She asked for some more jail time beyond the "dead time" Mr. Armitage had done. She could have asked for even more. But she did not.

[52] Ms. Kelly was also very fair. Fair to Mr. Armitage. Fair to concerns I as a sentencing judge would have. She argued that Mr. Armitage needed help. Help that he would not necessarily get in jail. However, she understood why the Crown was asking for some more time.

[53] There are rules that any sentencing judge must follow. Even in cases where Aboriginal offenders are being sentenced. Overall, a sentence must be an individual one. It must respond to the offender. It must recognize the facts of the offences. It has to be a balanced and just sentence. It must protect the community. It must also try to rehabilitate the offender.

[54] In this case, I took account of all that I had to. It is not necessary to spell it all out. In the end, I found Mr. Armitage's case to be challenging. I found it to be different in ways from other cases I have done. I found it in some ways, sadly, very much the same as other cases.

[55] If I could describe Mr. Armitage as a tree, his roots remain hidden beneath the ground. I can see what he is now. I can see the trunk. I can see the leaves. But much of what he is and what has brought him before me, I cannot see. They are still buried. But I am sure that some of those roots involve his Aboriginal heritage and ancestry. They help define who he is. They have been a factor in his offending. They must be taken into account in his sentencing.

[56] It is also obvious that this tree is not healthy. The leaves droop and appear sickly. It does not flourish regardless of the attention paid upon it. The tree needs

healing.

[57] A part of any sentencing for an Aboriginal offender is to see if there is a way to further that healing. Of the offender and of the community he lives in.

[58] One important thing I must consider is the past injustices done to the Aboriginal peoples in this country. How that has affected the present. How that has affected Mr. Armitage. I must also consider the present problem of the over-incarceration of Aboriginal offenders.

[59] I emphasize that being Aboriginal does not mean that jail can be avoided when jail is required. It does mean that I must consider all other reasonable options before imposing it.

[60] Given the pre-trial custody, Mr. Armitage has done jail for these offences. I have concluded that further real jail is not required. I decided this not because he should be treated with mercy. I cannot give him mercy given his past criminal record and how he has behaved while out of custody. A sentence must deter Mr. Armitage. More custody is required for that although he has pleaded guilty to all these charges.

[61] I have come to this conclusion but also have come to the conclusion that this jail can be served in the community. There will be a conditional sentence order. Of course, there is a test under our law before a conditional sentence can be ordered. I have decided Mr. Armitage has met that test. I know there will be some who will say that given all the times he has failed to respect court orders, that this conditional sentence is wrong. The people who say this might well be right. However, while I cannot give this Aboriginal offender mercy or leniency, I can give Mr. Armitage a chance. Some will also criticize that Mr. Armitage has had many chances. And that he has failed each time. I agree with such criticism. But I believe what we must do in order to be a part of the solution rather than the problem, is to not stop offering a chance to an offender when it is the right thing to do. This is the best way to be a part of the solution. This is also the best way to protect the community and maintain respect for our criminal justice system.

[62] I find that Mr. Armitage appears before me as a dispirited man. He has really no self-esteem. He does not think of himself as important. As a result, he does not seem to care about what he does. The harm he has caused to others. The harm he has caused to himself. His spirit has fallen ill. Although I cannot say exactly how or describe it in easy to understand words, it strikes me that Mr. Armitage is a metaphor for what negative effects colonization has had on many First Nations people and communities.

[63] I have given serious thought to restorative justice principles. I had thought that Mr. Armitage may be the right case for a sentencing circle. He does not seem

to understand the harm of his actions. He does not seem to care how his actions affect others or the community. He does not seem to want to connect to the Aboriginal community, the Dokis nation, that defines a part of his identity. I felt that maybe this type of circle sentencing, if done right, could reach him. Could touch him in the right way. Put him on the path to health. But here at Old City Hall in Toronto we are just beginning discussions about having sentencing circles. For a number of practical reasons, such a process could not be put in place for Mr. Armitage in a timely way.

[64] Like everyone else, Aboriginal offenders have a right to justice in their sentence. But justice does not always have to be delivered with a hard sharp edge. Too often in the past, Aboriginal offenders have only felt the steel when something softer could achieve the goals of sentencing. It is with this in mind that I have decided to order a jail sentence but one that can be served in the community.

[65] The conditional sentence that I imposed is not the end of the journey for Mr. Armitage. I am a realist. Neither is it the beginning of the journey. Mr. Armitage has been travelling this road for some time now. Ultimately, he is responsible for the path he takes while on my court order and the path he takes in life. I have made this order so that he can take this path knowing he need not do it alone. He has the support of others if he wants it. He also has mine.

[66] The conditional sentence order was for 14 months in total. This is much longer than the actual jail time asked for by Ms. Fineberg. I will not go into the details of this order. Mr. Armitage knows them. They include house arrest with exceptions, culturally appropriate counselling, conditions to protect specified individuals and the public, to require him to follow his plan of care, to write apologies to his victims, and to make sure he attend to get into the native program. Finally, I required him to reappear in front of me in a couple of weeks. I did that not because the sentence was not given and finished on the date of my decision. I did that because I did care about how Mr. Armitage was doing.

[67] There is a post-script to my decision. Mr. Armitage did not make it to his first attendance with me after his sentence. Within days he was again arrested for doing very much the same thing he has always done.

[68] In writing this part of my decision, I first thought I would say that I was disappointed or that it was with sadness that I had to report this. However, I decided against writing this.

[69] First of all, it was not unexpected to me. How could it be? I was only surprised how quickly this happened. I asked Mr. Armitage about that. He had no money. He had little to do. I don't think he really knows why. Even before I had passed sentence I sensed that Mr. Armitage's path along this journey would not be

straightforward.

[70] More importantly though is what happened when he came back before me on his conditional sentence breach. Mr. Armitage asked that 9 months of the remainder of his conditional sentence order be served in jail. He did this so that he could be sent to St. Lawrence Valley Treatment Center. He asked for this because he wanted to be sure he had enough time in custody to fully make use of the help available. This was not something that came from me or the Crown. It came from Jesse Armitage. I add that Ms. Kelly was very thoughtful and careful in her representation of him. This will be by far the longest jail term he will have done to date. To be frank, I would have considered something less.

[71] Mr. Armitage asked for this because I believe he knew that there was no other way for him to get healthy. I believe that he had come to a point in his life where he was ready. Ready for a chance to change.

[72] When an offender has come to this point, no matter how long, tortuous, or difficult the path taken to get there, there cannot be sadness or disappointment. There can only be hope.

Released: February 11, 2015

Signed: "Justice S. Nakatsuru"

Please provide your feedback for this session.

Julie Clement

Session Survey

EMBRACING WELL-BEING IN LAW

Chief Justice Beth Walker

Chief Justice Elizabeth "Beth" D. Walker was elected to the Supreme Court of Appeals of West Virginia on May 10, 2016, becoming the first Justice elected in a non-partisan race. She took office on January 1, 2017 and served as Chief Justice in 2019. Justice Walker was raised in Huron, Ohio. She is a 1987 summa cum laude graduate of Hillsdale College in Hillsdale, Michigan. She earned her law degree in 1990 from The Ohio State University, where she was Articles Editor for The Ohio State Law Journal.

Embracing Well-Being in Law

Chief Justice Beth Walker

August 2, 2023

Detroit, Michigan

Justice Beth WALKER
WEST VIRGINIA SUPREME COURT

- 7 years on bench
- Chief Justice in 2019, 2023
- Labor and employment lawyer (1990-2016)
- @bethwalkr on Twitter
- @justicebethwalker on IG
- @BethWalkerWV on Facebook


BLICAN GOVERNMENT IS
THE EQUAL RIGHT OF EVERY CITIZEN IN HIS PERSON AND
PROPERTY AND IN THE


MEMBERS ONLY
WV Legislative Photography, Photo by Perry Bennett

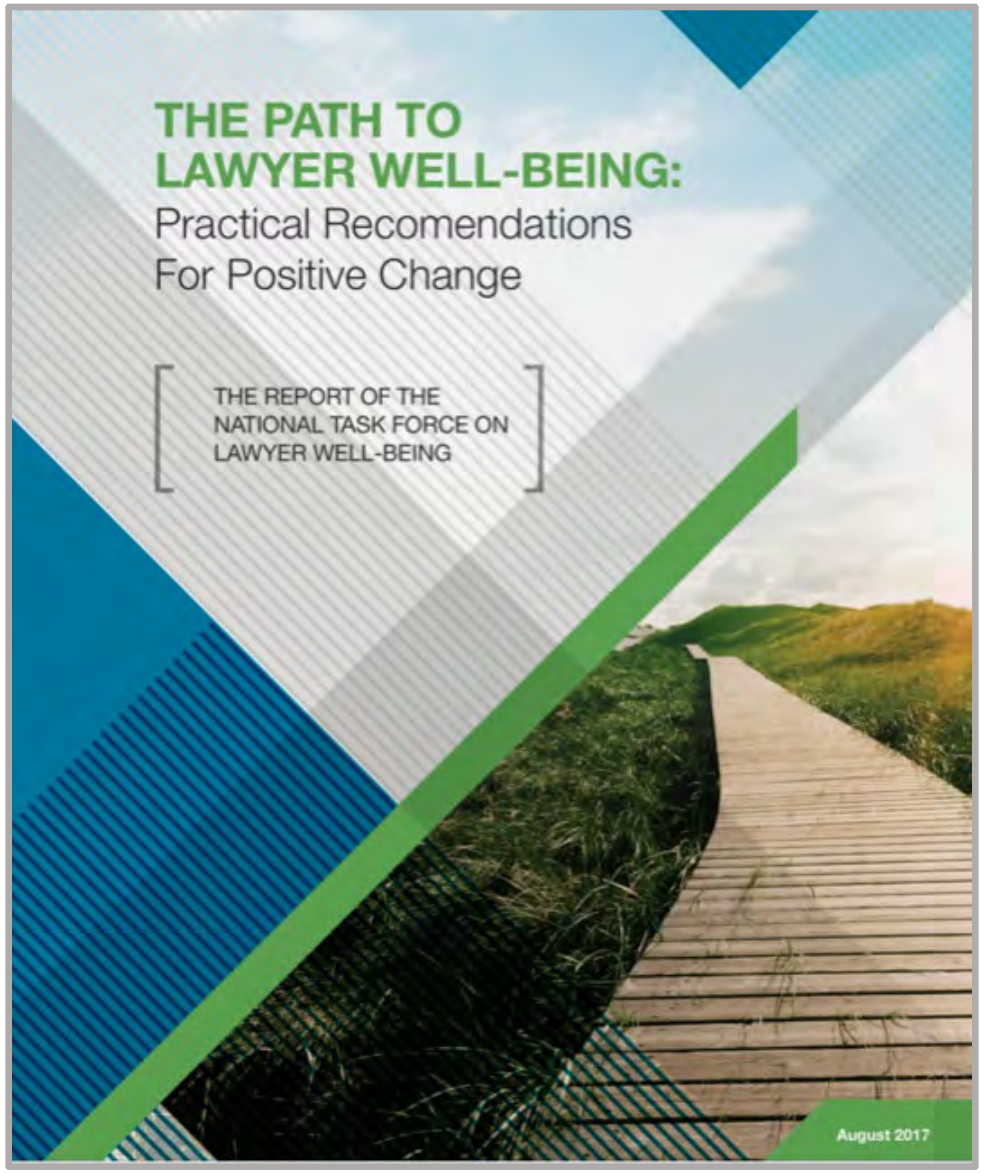

Shall Article XIV Against
Justice Walker Be Sustained
YEA 1 NAY 32 ABS 1 EXC 0
N ARVON
N AZINGER
Y BALDWIN
N BEACH
N BLAIR
N BOLEY
N BOSO
N CLEMENTS
N CLINE
N DRENNAN
N FACEMIRE
N FERNS
N GALINCH
N JEFFRIES
N KARNES
N MANN
N MARONEY
N MAYNARD
N OJEDA
N PALUMBO
N PLYMALE
N PRESLEY
N ROMANO
N RUCKER
N SMITH
N STOLLINGS
N SYPOPE
N SYPOLT
N TAKUBO
N TRUMP
N UNGER
A WELD
N WOELFEL
N MR PRESIDENT

"I swear to tell the truth, the whole truth, and nothing but the truth—unless you ask me how I am, in which case I will say, 'I'm fine,' even though I'm not fine."

Assessing Our Profession

- ***The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*** *(the "Lawyer Study")*
  - P.R. Krill, R. Johnson, & L. Albert
  - 10 J. Addiction Med. 46 (2016)

- ***Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*** *(the "Law Student Survey")*
  - J.M. Organ, D. Jaffe, K. Bender
  - 66 J. Legal Educ. 116 (2016)


THE PATH TO
LAWYER WELL-BEING:
Practical Recomendations
For Positive Change
THE REPORT OF THE
NATIONAL TASK FORCE ON
LAWYER WELL-BEING
August 2017

2017 Report: Legal Employer Recommendations

- Establish organizational infrastructure to promote well-being
  - Form a lawyer well-being committee
  - Assess lawyers' well-being
- Establish policies and practices to support lawyer well-being
  - Monitor for signs of work addiction and poor self-care
  - Actively combat social isolation and encourage interconnectivity
- Provide training and education on well-being, including during new lawyer orientation
  - Emphasize a service-centered mission
  - Create standards, align incentives and give feedback

Making the Business Case for Well-Being

Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being

- Jarrod F. Reich
- 65 Villanova Law Review 321 (2020)

- The Costs
  - Lawyer Discipline: Malpractice and Sanctions
  - Absenteeism and "Presenteeism"
  - Replacement Costs and High Attrition
- Financial Benefits of Lasting and Meaningful Change
  - Performance: Client Demands for Efficiency
  - Retention
  - Recruiting the New Generations (Millennial and Generation Z)

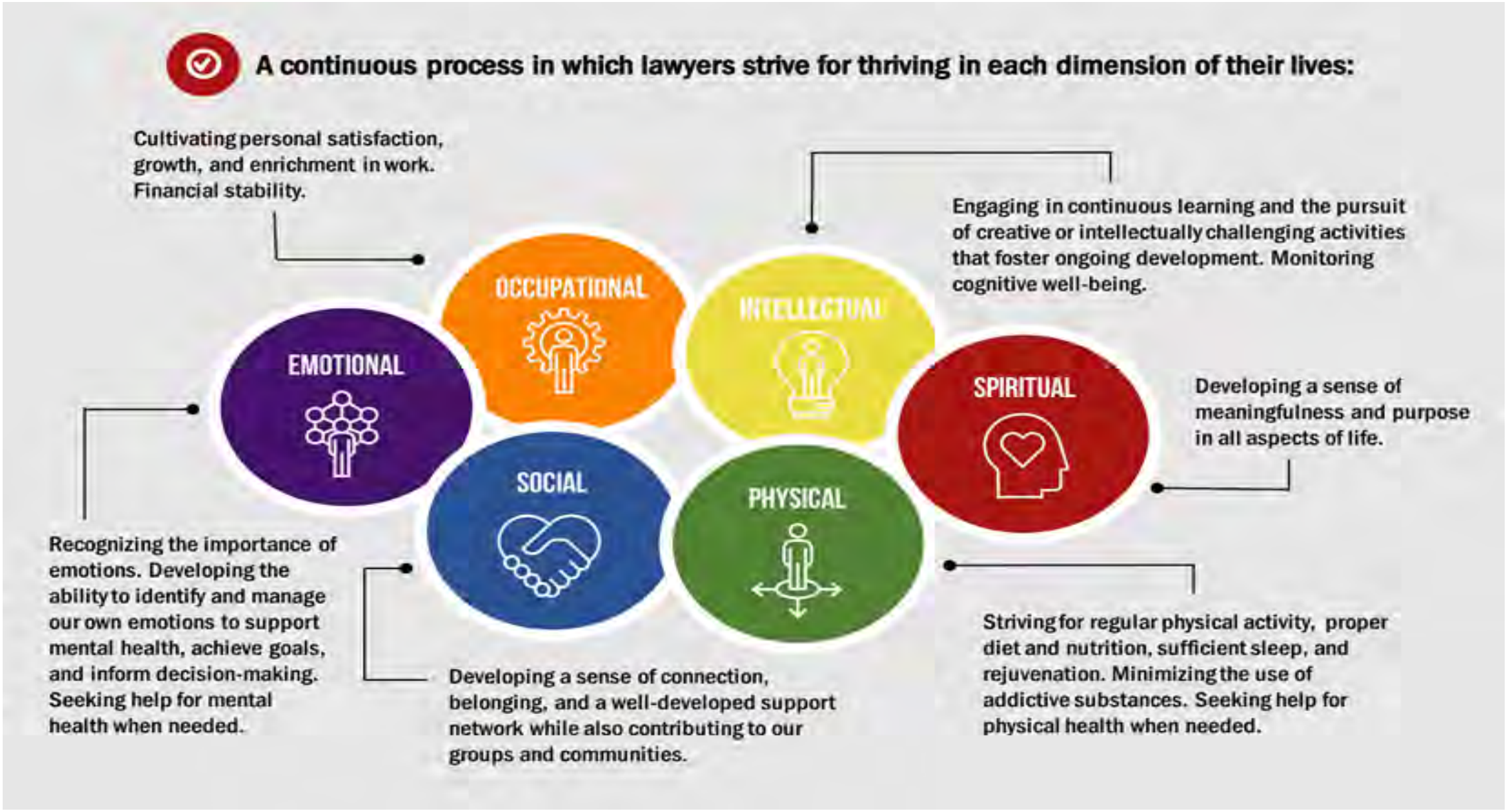
National Developments

Institute For
Well-Being In Law

WV Task Force

- Character and fitness
- Well-being surveys (2018, 2022)
- Law school
- Continuing legal education

What is Lawyer Well-Being?

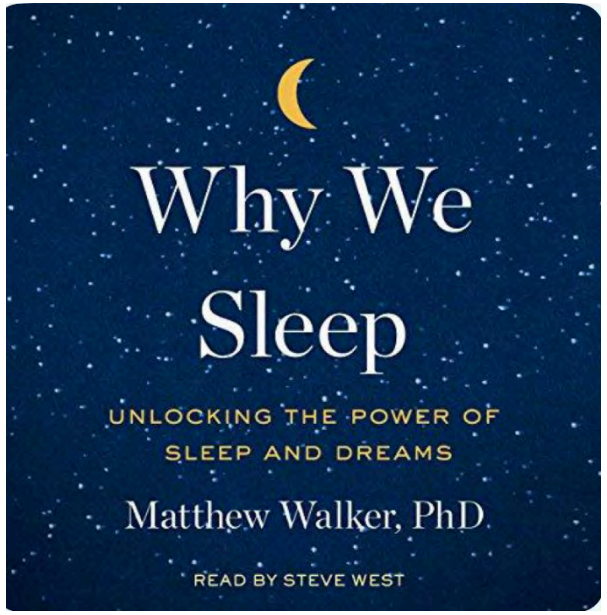


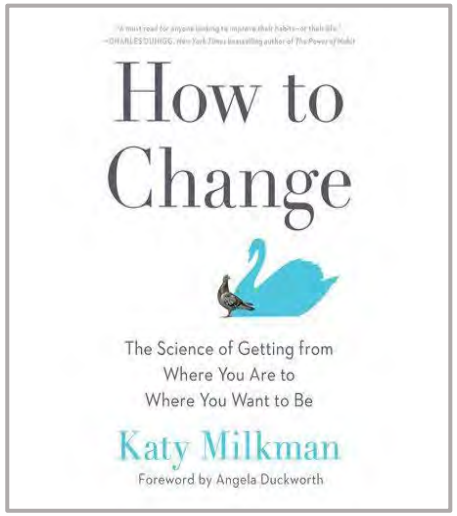
Chief Justice 2019, 2023

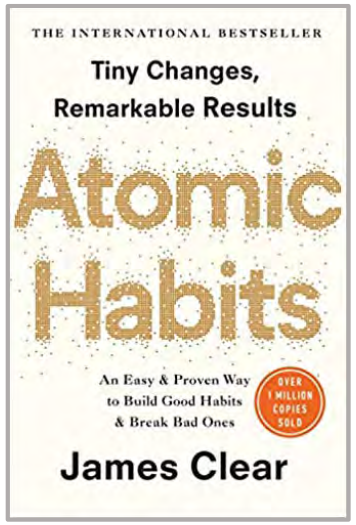

SPORT BEANS
6528

Sleep

- “Sleep is a non-negotiable biological necessity”
- “Sleep deprivation fractures the brain mechanisms that regulate key aspects of our mental health.”
- “Sleep appears to restore our emotional brain circuits, and in doing so prepares us for the next day's challenges and social interactions.”




How to Change
The Science of Getting from Where You Are to Where You Want to Be
Katy Milkman
Foreword by Angela Duckworth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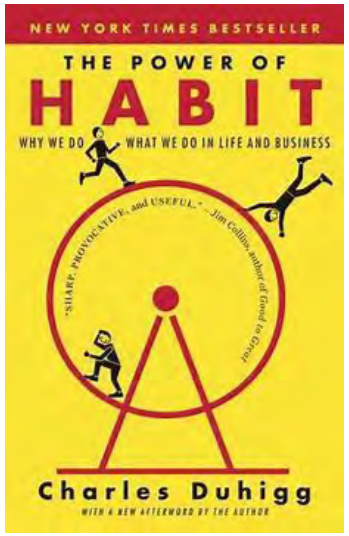
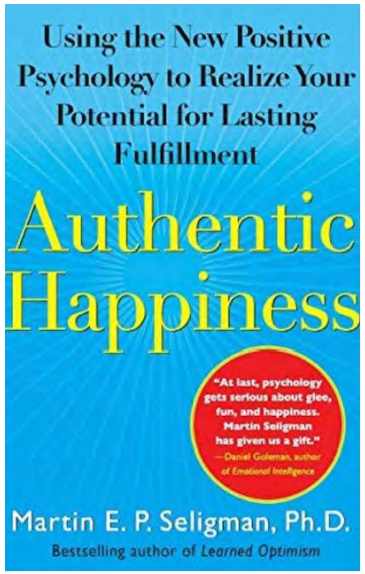

NEW YORK TIMES BESTSELLER
THE POWER OF HABIT
WHY WE DO WHAT WE DO IN LIFE AND BUSINESS
Charles Duhigg
WITH A NEW AFTERWORD BY THE AUTHOR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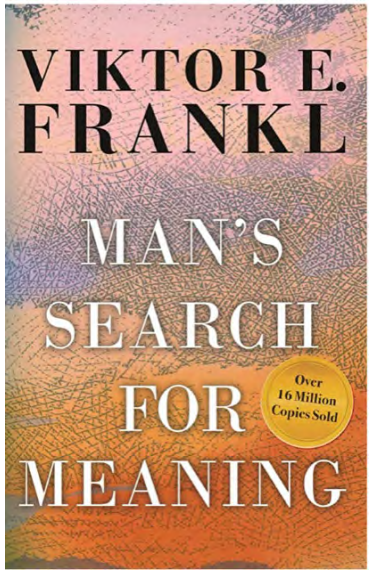
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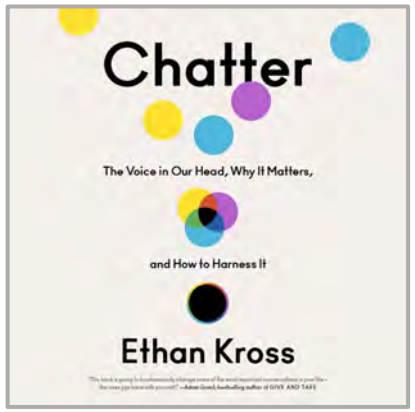
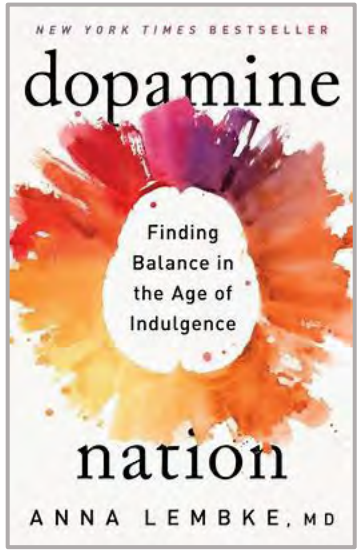

Chatter
The Voice in Our Head, Why It Matters, and How to Harness It
Ethan Kross


NEW YORK TIMES BESTSELLER
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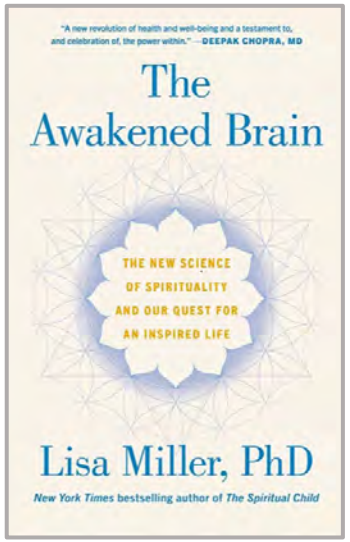
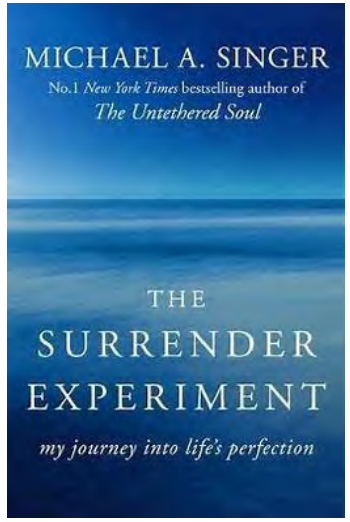
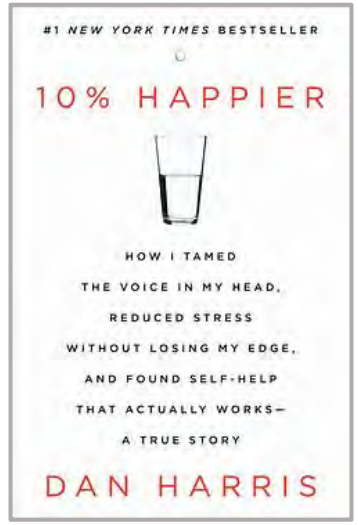
Finding Balance in the Age of Indulgence
nation
ANNA LEMBKE, MD


The Awakened Brain
THE NEW SCIENCE OF SPIRITUALITY AND OUR QUEST FOR AN INSPIRED LIFE
Lisa Miller, PhD
New York Times bestselling author of The Spiritual Child


MICHAEL A. SINGER
No.1 New York Times bestselling author of The Untethered Soul
THE SURRENDER EXPERIMENT
my journey into life's perfection


#1 NEW YORK TIMES BESTSELLER
10% HAPPIER
HOW I TAMED THE VOICE IN MY HEAD, REDUCED STRESS WITHOUT LOSING MY EDGE, AND FOUND SELF-HELP THAT ACTUALLY WORKS— A TRUE STORY
DAN HARRIS


PATH
TO WELL-BEING IN LAW
PODCAST


HAPPIER
WITH
Gretchen
Rubin


THE
LAB
HAPPINESS
PUSHKIN

Selected Links and Resources

- Mindfulness in Law Society https://www.mindfulnessinlawsociety.org/
- Lawyers Depression Project https://www.lawyersdepressionproject.org/
- If you or someone you know needs help, please *call* or *text* the National Suicide Prevention Lifeline, now known as 988 Suicide & Crisis Lifeline, at 988.

THE WEST VIRGINIA LAWYER

The 2023 WVSB ANNUAL MEETING at The Greenbrier

- NEW SEGMENT: Pro Bono Focus
- Meet the WVSB Executive Director
- The Importance of Defending Judges

Winter 2022-23

JOIN the CONVERSATION

Lessons from the West Virginia lawyer well-being surveys

One of the most exciting projects of the West Virginia Task Force on Lawyer Well-Being has been to survey lawyers about their job satisfaction and overall well-being. First in 2018 and again in 2022, hundreds of West Virginia lawyers and judges[1] responded to an invitation to participate in the short, anonymous, online survey.[2] While some results have been encouraging, we learned that many members of our profession now need more support — especially in the wake of the COVID-19 pandemic. The purpose of this article is to highlight key findings in the survey and inspire more conversations about supporting each other.

In 2018, the survey included 17 questions (including those seeking basic demographic information). That original survey asked general questions about well-being but made no specific inquiries about health conditions or alcohol use. When we formulated the 2022 survey, the Task Force included more specific questions to assess the impact of the COVID-19 pandemic. So, in addition to the original 17 questions posed in 2018, the 2022 survey included questions about the impact of the pandemic on mental health, physical health and alcohol use.

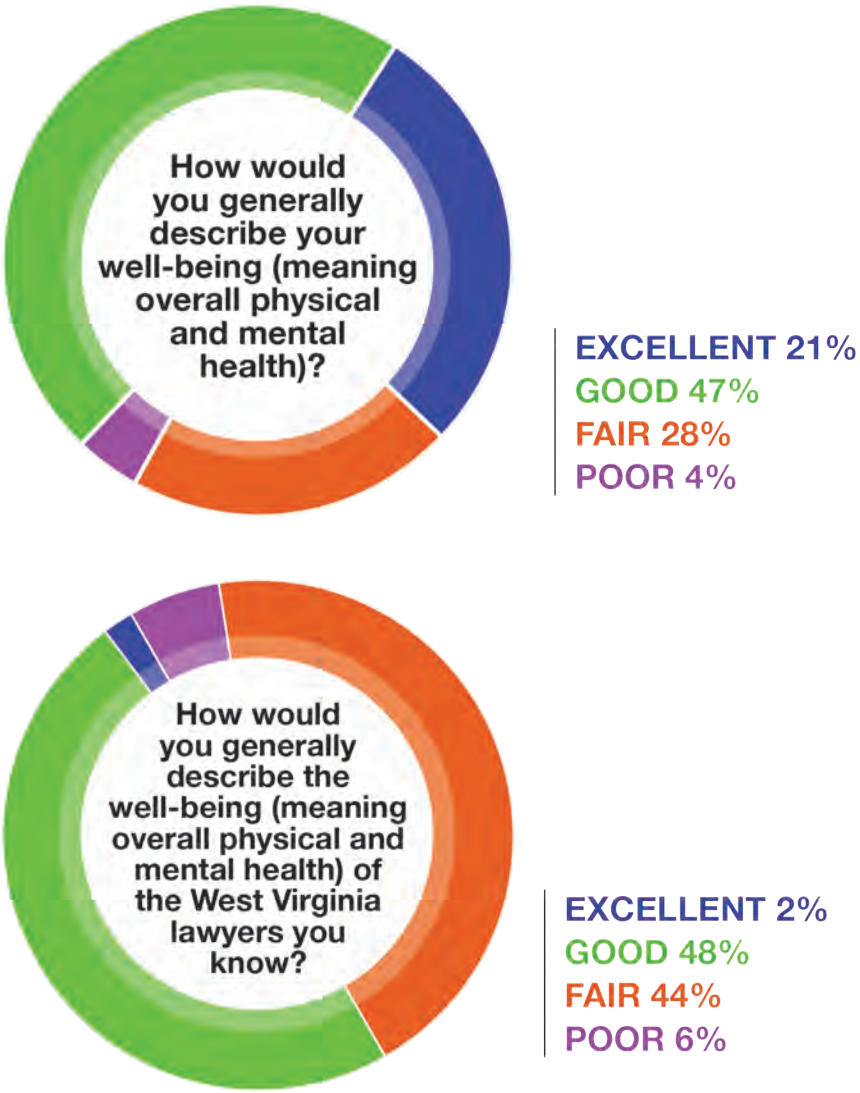
Job Satisfaction and Civility

In 2018 and again in 2022, more than 80% of lawyers reported satisfaction in their current jobs while fewer than 20% described

By Justice Beth Walker

themselves as unsatisfied. Breaking down those results by area of practice, we learn that judges and corporate counsel are more likely to be satisfied than lawyers working in government or private practice, a trend that continued over both studies. But when asked, "If you had to do it all over again, would you become a lawyer?", about 60% in both surveys reported that they would, about 30% that they would not, with the remaining 10% unsure.

A consistent 45% of lawyers responding to both surveys reported that they would encourage others to attend law school if asked for advice. But almost half of the lawyers surveyed reported that their actual work as a lawyer fell short or failed to meet their own expectations before law school of what life would be like as a lawyer. On a positive note, a strong majority of lawyers reported that their interactions with other West Virginia lawyers have been civil and professional. This survey response (90% agreement) was virtually identical in 2018 and 2022.



Well-Being Generally

In the 2018 survey, 74% of lawyers described their own well-being as excellent or good (and the remaining 26% described their own well-being as fair or poor). The 2022 survey showed a very slight decline as to this question, with 68% describing their own well-being as excellent or good and 32% as fair or poor. In both surveys, the term well-being was described as "overall physical and mental health."

But even more interesting information emerged when survey participants were asked to describe the well-being of other lawyers they know (rather than themselves). In the 2018 survey, less than half (45%) described the well-being of those "other lawyers" as excellent or good (and the remaining 55% chose fair, poor or unsure). But in 2022, 50% of the survey respondents described the well-being of their colleagues as excellent or good and 50% chose fair or poor.

Pandemic Impact and Next Steps

Having been one of the few states to conduct a lawyer well-being survey prior to the spring of 2020 when so many aspects of our profession (and life overall) changed, the West Virginia Task Force was in a great position to compare survey results. And since the survey was so well received in 2018, the Task Force decided to ask lawyers directly how the pandemic affected them in the 2022 survey. The results are insightful.

First, one-third of lawyers reported in 2022 that their mental health got worse during the

pandemic (while 58% said it stayed the same and 9% that it got better). Similarly, 36% responded that their physical health got worse during the same time frame (with 48% reporting that it stayed the same and 16% reporting better).

And in the first-ever West Virginia lawyer well-being survey question asking directly about alcohol use, 17% reported they drink more alcohol following the pandemic. On the other hand, 44% reported that their alcohol consumption remains the same and 17% that their alcohol consumption reduced. Twenty-four percent of survey respondents reported that they don't drink alcohol.

These results are concerning and demonstrate that continued work by the Task Force and by the West Virginia Judges and Lawyers Assistance Program is necessary. WVJLAP, which serves members of our profession struggling with substance use, mental health and other concerns, is very well positioned to address these challenges. But the well-being survey results demonstrate that more education and awareness about WVJLAP is needed. Fortunately, 61% of lawyers responding to the 2022 survey stated that they would be likely to contact WVJLAP if they or a family member needed help — up from 51% in 2018. On the other hand, 35% reported in 2022 that they would be unlikely to contact WVJLAP for assistance (down from 41% in 2018).

WVJLAP has already expanded its confidential services, including more targeted support for lawyers who experience mental and physical health challenges that complements its support for lawyers with substance use disorders. WVJLAP's new Clinical Director, Stephanne Thornton, LICSW, MAC, CCTP, CSOTP, is very well qualified to help provide this expanded support. Ms. Thornton recently gave presentations at the State Bar's popular regional meetings to educate and encourage lawyers to seek mental health assistance when needed. And, WVJLAP has added a separate weekly support group specific to mental health and well-being that is rapidly gaining in popularity. This group is entirely separate from WVJLAP's vibrant recovery support group for lawyers with substance use challenges. More details about these groups and other WVJLAP services are available at www.wvjlap.org.

As the 2018 and 2022 surveys demonstrate, the work of the West Virginia Task Force on Lawyer Well-Being needs to continue. The Task Force shares the mission of WVJLAP to support our colleagues and protect the interest of clients, litigants and the general public from harm caused by impaired lawyers and judges. In addition, the Task Force is committed to supporting a collegial and rewarding profession for our West Virginia lawyers. With more communication, education and discussion, the Task Force can strive to normalize discussions of well-being as a necessary element of not just lawyer competence but excellence and sustainability. Ultimately, we are advocating for cultural change in our profession. We hope you join us in these conversations. WVL

> There is a ***notable disparity*** between how lawyers describe their ***own well-being*** versus that of ***their peers***.

Endnotes

1. For ease of reference, this article refers to the lawyers and judges who responded to the surveys generally as "lawyers" or "lawyers responding to the survey."
2. In consultation with an independent opinion research firm, the West Virginia Task Force on Lawyer Well-Being (with administrative support from the West Virginia State Bar) conducted these membership surveys among qualified respondents throughout the State. Those qualified to participate in the surveys were West Virginia state and federal court judges, and lawyers who were current in-state members of the State Bar. The surveys were designed to capture the attitudes, perceptions and opinions of West Virginia judges and lawyers on a host of important topics related to personal and professional qualities of life. Respondents were assured anonymity in this research effort, and at no point were responses associated with any identifying information. The survey was administered by email, which included an introductory letter from Justice Beth Walker explaining the confidentiality and purpose of the study. 1,346 attorneys responded to the survey in 2018, and 810 attorneys responded in 2022. The independent opinion research firm aggregated the results and analyzed the data.

Justice Beth Walker has served on the Supreme Court of Appeals of West Virginia since 2017 and will be Chief Justice in 2023. She chairs the West Virginia Task Force on Lawyer Well-Being.

Selected Documents from the 2018 Impeachment of Justices of the Supreme Court of Appeals of West Virginia

Article I

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $363,000, which sum included the purchase of a $31,924 couch, a $33,750 floor with medallion, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article II

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article III

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to be transported from the State Capitol to his home, and did maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7 (b), prohibiting the removal of original furnishings of the state capitol from the premises; further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Robin Davis, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VI

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did in his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, and continuing thereafter for a period of years, intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a state issued fuel purchase card to travel to the Greenbrier on one or more occasions for book signings and sales, which such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IX

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article X

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment against Justices of the Supreme Court of Appeals of West Virginia, were adopted by the House of Delegates on the Thirteenth day of August, 2018.

In Testimony Whereof, we have signed our names hereunto this Fourteenth day of August, 2018.

John Overington,

Speaker Pro Tempore of the House of Delegates

Stephen J. Harrison,

Clerk of the House of Delegates

IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

In the Matter of Impeachment Proceedings
Against Respondent Justice Elizabeth D. Walker

APPLICATION TO JUSTICE PAUL T. FARRELL, PRESIDING OFFICER:

JUSTICE WALKER'S MOTION TO DISMISS ARTICLE XIV

Justice Beth Walker moves to dismiss Article XIV in order to bring these proceedings against her to an efficient and appropriate conclusion. Although the House of Delegates affirmatively rejected the only article specifically alleging that Justice Walker committed impeachable conduct, Justice Walker has accepted responsibility and expressed remorse for her personal spending decisions and pledged to support legislative oversight efforts.

But the House did not stop there. It also adopted Article XIV, a "catch-all" that purports to hold Justice Walker responsible for *institutional* policies that—as a lone Justice with a single vote—she never had the authority to make. Not only that, but several of the alleged policy failures in Article XIV arose years before Justice Walker took the bench. In short, there is not a single allegation in Article XIV against Justice Walker individually—only generalized allegations against the Court as a collective body. Removal cannot rest on such allegations as a matter of logic or law. This motion should be granted.

BACKGROUND

Justice Walker took office in January 2017, little over a year and a half ago. In that time, Justice Walker never served as Chief Justice or was vested with any other authority as an individual Justice to impose policies on the Court or her colleagues.

The final article of impeachment adopted by the House of Delegates in House Resolution 202 is Article XIV, which is the only article that attempts to place blame on each Justice *individually* for conduct by the Court *collectively*. Unlike all other articles approved by the House, Article XIV makes no individualized allegations against specific Justices.

ARGUMENT

Rule 23(a) provides that motions may be made "by the parties" and "shall be addressed to the Presiding Officer, who shall decide the motion." The Presiding Officer's decision on a motion is final unless "overturn[ed]" by a majority vote of the Senators present following a demand of any Senator sustained by one tenth of the Senators present. Rule 23(a). The vote to overturn the Presiding Officer's decision on "any motion" will be taken "without debate." *Id.*

Article XIV fails to state a removable offense against Justice Walker individually.

Nowhere in the text of Article XIV does the House of Delegates allege individualized conduct against Justice Walker—much less any conduct amounting to a removable offense. *See United States v. Thomas*, 367 F.3d 194, 187 (4th Cir. 2004) (dismissal for failure to state an offense).

First, logic and law dictate that Justice Walker cannot be tried and held responsible as an individual Justice for alleged offenses that could have only been committed collectively by the Court (by majority vote) or by the Chief Justice, the only single Justice with authority to make administrative decisions that can bind the Court. There is no dispute that Justice Walker never served as Chief Justice and was never otherwise imbued with the special administrative powers of that office. And there is no dispute that Justice Walker holds only a single vote. Justice Walker could no more establish or change policies to bind her colleagues with a single vote than she could decide an appeal by herself alone.

Under the relevant standard set out in Article IV, Section 9 of the West Virginia Constitution, there can be no "maladministration" where an *individual* Justice has no authority to "administer" the Court in the first place. Accordingly, Article XIV fails to state a removable offense against Justice Walker individually.

Second, the structure of Article XIV is inconsistent with Rule 19, which requires separate trials for each Respondent—a rule informed by the precedent of the Senate and basic notions of fundamental fairness. Justice Walker is entitled to a separate trial on Article XIV, meaning that her culpability under the article must depend on her actions alone. The decision to sweep-up every then-sitting Justice in the dragnet of Article XIV comes with a cost: the individual Respondents will be unable to adequately prepare a defense against allegations that are cast only against "the Court" as a collective whole—decisions that no single Justice, apart from a Chief Justice, can fairly be made to answer for.

After all, it is conceivable that one Justice could be convicted of Article XIV as written based only on actions by a majority of *other* Justices or the Chief Justice—even if the one Justice was against the majority's decision-making. Just as no single Senator can fairly be held responsible for actions taken by the body as a whole, the allegations of Article XIV cannot support a fair trial of individual Justices in any respect that is consistent with Rule 19 or due process. Article XIV is therefore logically and legally flawed and should be dismissed.

CONCLUSION

For the foregoing reasons, Justice Walker moves the Presiding Officer to dismiss Article XIV.

Dated: September 7, 2018

Respectfully submitted,

Hon. Elizabeth D. Walker

By Counsel

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IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

In the Matter of Impeachment Proceedings
Against Respondent Justice Elizabeth Walker

APPLICATION TO JUSTICE PAUL T. FARRELL, PRESIDING OFFICER:

JUSTICE WALKER'S MOTION IN LIMINE
TO PRECLUDE EVIDENCE OF UNIMPEACHED CONDUCT

Justice Walker cannot be removed by the Senate for conduct that the House of Delegates expressly concluded did not rise to the level of impeachment. Accordingly, evidence related to renovations of Justice Walker's personal office should be inadmissible in these proceedings.

Under our Constitution, the Senate tries impeachments, but the House of Delegates has the sole authority to determine impeachable conduct. W.V. Const. art. IV § 9. The House expresses its determinations by voting on Articles of Impeachment. If an Article is adopted, then the Senate must decide whether to remove the officer based on the conduct described in the Article. If an Article is rejected, then the Senate has no authority to remove the officer based on the content therein.

During days of hearings in the Judiciary Committee and hours of debate on the floor, the House carefully considered the allegations against Justice Walker in Article XII, H.R. 202, concerning the renovation of her chambers. At the end of that deliberate process, Article XII was defeated by a vote of 51 to 44. In other words, the House concluded that the renovation of Justice Walker's chambers did *not* amount to impeachable conduct.

The lone Article pending against Justice Walker—Article XIV—concerns the Justices' alleged collective failure to carry out certain administrative responsibilities. The preamble to Article XIV does contain a reference to alleged "unnecessary and lavish spending," and includes, as an example, a non-specific reference to "remodel[ing] state offices." But this generalized language—making no specific allegation against Justice Walker individually—cannot be read to override the House's express rejection of the spending allegations against Justice Walker in Article XII.

As a result, any attempt to introduce specific evidence related to spending on Justice Walker's chambers would not only be highly prejudicial but would exceed the legitimate Constitutional scope of these proceedings. The motion should be granted.

Dated: September 7, 2018

Respectfully submitted,

Hon. Elizabeth D. Walker

By Counsel

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JOURNAL
OF
THE SENATE
SITTING FOR THE TRIAL OF
THE VARIOUS JUSTICES OF THE
SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA,
UPON ARTICLES OF IMPEACHMENT

TUESDAY, SEPTEMBER 11, 2018

THE STATE OF WEST VIRGINIA

VS

THE VARIOUS JUSTICES OF THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

The Senate, sitting as a Court of Impeachment to consider proceedings against Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia; Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia; Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia; and Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

Upon direction of the President of the Senate, the oath was administered to the Honorable Paul T. Farrell, Acting Chief Justice of the Supreme Court of Appeals of the State of West Virginia, by the Honorable Lee Cassis, Clerk of the West Virginia Senate.

The Acting Chief Justice of the Supreme Court of Appeals of the State of West Virginia assumed the chair and directed the Honorable Lee Cassis, Clerk of the West Virginia Senate, to administer the oath to the following members of the West Virginia Senate:

First Senatorial District: Ryan J. Ferns of the County of Ohio;

First Senatorial District: Ryan W. Weld of the County of Brooke;

Second Senatorial District: Michael J. Maroney of the County of Marshall;

Second Senatorial District: Charles H. Clements of the County of Wetzel;

Third Senatorial District: Donna J. Boley of the County of Pleasants;

Third Senatorial District: Michael T. Azinger of the County of Wood;

Fourth Senatorial District: Mitch Carmichael of the County of Jackson;

Fourth Senatorial District: Mark A. Drennan of the County of Putnam;

Fifth Senatorial District: Robert H. Plymale of the County of Wayne;

Fifth Senatorial District: Michael A. Woelfel of the County of Cabell;

Sixth Senatorial District: Mark R. Maynard of the County of Wayne;

Sixth Senatorial District: Chandler Swope of the County of Mercer;

Seventh Senatorial District: Ron Stollings of the County of Boone;

Seventh Senatorial District: Richard N. Ojeda II of the County of Logan;

Eighth Senatorial District: C. Edward Gaunch of the County of Kanawha;

Eighth Senatorial District: Glenn D. Jeffries of the County of Putnam;

Ninth Senatorial District: Sue Cline of the County of Wyoming;

Ninth Senatorial District: Lynne Carden Arvon of the County of Raleigh;

Tenth Senatorial District: Kenny Mann of the County of Monroe;

Tenth Senatorial District: Stephen Baldwin of the County of Greenbrier;

Eleventh Senatorial District: Robert Karnes of the County of Upshur;

Eleventh Senatorial District: Gregory L. Boso of the County of Nicholas;

Twelfth Senatorial District: Douglas E. Facemire of the County of Braxton;

Twelfth Senatorial District: Michael J. Romano of the County of Harrison;

Thirteenth Senatorial District: Roman W. Prezioso, Jr. of the County of Marion;

Thirteenth Senatorial District: Robert D. Beach of the County of Monongalia;

Fourteenth Senatorial District: Dave Sypolt of the County of Preston;

Fourteenth Senatorial District: Randy E. Smith of the County of Tucker;

Fifteenth Senatorial District: Craig Blair of the County of Berkeley;

Fifteenth Senatorial District: Charles S. Trump IV of the County of Morgan;

Sixteenth Senatorial District: John R. Unger II of the County of Berkeley;

Sixteenth Senatorial District: Patricia Puertas Rucker of the County of Jefferson;

Seventeenth Senatorial District: Corey Palumbo of the County of Kanawha;

Seventeenth Senatorial District: Tom Takubo of the County of Kanawha.

The Presiding Officer then announced that the oath having been administered to all the Senate members present, the Senate was now organized as a Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia, and directed the Sergeant at Arms to make the following proclamation: All persons are commanded to keep silence, on pain of imprisonment, while the Senate is sitting as a Court of Impeachment.

The Presiding Officer then announced that summonses had been issued against and served upon each of the Respondents; that returns of service were made for the same; and that the summonses and returns are available for review.

The Presiding Officer then directed the Sergeant at Arms to summon the Managers, attorneys, and respondents.

The Managers, appointed by the House of Delegates to conduct the trial of impeachment of the various justices of the Supreme Court of Appeals of the State of West Virginia, to wit: Delegates Shott, Hollen, Byrd, and Miller (Delegate Foster, one of the said managers, being absent) entered the Senate Chamber and took the seats assigned them.

Brian Casto, Marsha Kaufmann, and Joe Altizer, counsel for the Managers of the House of Delegates, accompanied said Managers.

Respondent Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, and the respondents' counsel entered the Senate Chamber and took the seats assigned them.

The Presiding Officer recognized John H. Shott, Chair of the Managers appointed by the House of Delegates, for a presentation concerning an agreement between the Managers and Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, and Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

The Presiding Officer then recognized Andrew D. Byrd, one of the Managers appointed by the House of Delegates, to read the *Stipulation and Agreement of the Parties.*

IN THE WEST VIRGINIA SENATE

IN THE MATTER OF IMPEACHMENT PROCEEDINGS AGAINST RESPONDENTS CHIEF JUSTICE MARGARET WORKMAN AND JUSTICE ELIZABETH WALKER

Honorable Paul T. Farrell
Acting Justice of the
Supreme Court of Appeals of West Virginia
Presiding Officer

STIPULATION AND AGREEMENT OF PARTIES

Respondents Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker (the "Respondents"), together with the Board of Managers of the West Virginia House of Delegates for the impeachment trials pending in the West Virginia Senate (the "Board of Managers"), jointly agree and stipulate as follows:

1. The Respondents acknowledge indefensible spending by the Supreme Court of Appeals of West Virginia (the "Court"), as well as the absence of Court policies and practices that likely would have prevented that indefensible spending.

2. The Respondents accept full responsibility for all spending on renovations to their personal offices over which they exercised or should have exercised spending oversight and approval.

3. The Respondents acknowledge the need for changed policies and practices to correct the failures identified in Article XIV of the Articles of Impeachment and rebuild public trust in the Court.

4. The Respondents have begun and will continue to implement reforms to improve the administration of the Court and prevent future inappropriate expenditures, and to ensure compliance with all applicable laws and regulations governing the conduct of the Court.

5. The Respondents and the Board of Managers therefore agree to:

a. Jointly recommend that the Senate adopt a resolution of censure with respect to the Respondents, which is included with this Stipulation and Agreement of Parties; and

b. Upon passage of such a resolution of censure, jointly move to dismiss the Articles of Impeachment with respect to the Respondents.

6. The Respondents and the Board of Managers further agree that if the Senate does not dismiss the Articles of Impeachment with respect to the Respondents, no part of this Stipulation and Agreement of Parties may be used in any trial of the Articles of Impeachment.

Agreed to by:

_____ Dated: 9/11/18
The Hon. John Shott
For: Board of Managers

_____ Dated: 9/11/18
The Hon. Andrew D. Byrd
For: Board of Managers

_____ Dated: 9/11/18
The Hon. Margaret L. Workman

_____ Dated: 9/11/18
The Hon. Elizabeth D. Walker

SENATE RESOLUTION _____

Publicly reprimanding and censuring Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker of the Supreme Court of Appeals of West Virginia.

Whereas, Chief Justice Margaret Workman was named in Articles IV and VI of the Articles of Impeachment, which allege overpayment of senior status judges;

Whereas, Chief Justice Workman and Justice Walker were named in Article of Impeachment XIV, which alleges that the Justices of the Supreme Court of Appeals generally and collectively failed to provide or prepare policies and reasonable supervisory oversight of the operations of the Court and in the absence of such policies and oversight, wasted state funds on unnecessary renovations, travel, computers for home use, lunches, and the framing of personal items, and;

Whereas, the House of Delegates also adopted House Resolution 203 censuring all then-sitting Justices related to their conduct concerning, among other things, the spending on their personal offices;

Whereas, Chief Justice Workman and Justice Walker have accepted full responsibility for all spending on renovations to their personal offices over which they exercised or should've exercised spending oversight and approval;

Whereas, Chief Justice Workman and Justice Walker have previously and publicly acknowledged indefensible spending by the Court and the absence of appropriate policies and practices that likely would have prevented that indefensible spending;

Whereas, Chief Justice Workman and Justice Walker have publicly acknowledged the need for changed policies and practices to rebuild public trust in the Court;

Whereas, Chief Justice Workman and Justice Walker have begun and will continue to implement reforms to improve the administration of the Court and prevent future inappropriate expenditures and to ensure compliance with all applicable laws and regulations governing the conduct of the Court;

Whereas, Justice Walker has not served as Chief Justice over the Court or Judicial Branch in the time that she has served on the Supreme Court of Appeals;

Whereas, Chief Justice Workman and Justice Walker support increased legislative oversight, transparency, and accountability of the Supreme Court of Appeals;

Whereas, Chief Justice Workman and Justice Walker accept personal and institutional responsibility for the Court's failure to enact certain specific policies as described in Article XIV in the Articles of Impeachment; therefore, be it

Resolved by the Senate:

That Chief Justice Workman and Justice Walker be hereby publicly reprimanded and censured for and because of the aforementioned conduct; and be it

Further Resolved, That the Clerk is hereby directed to forward a copy of this resolution to Chief Justice Workman and Justice Walker.

Delegate Byrd then presented the *Stipulation and Agreement of the Parties* document to the Clerk of the Senate.

The Presiding Officer then recognized Ben Bailey, counsel for Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, to address the Court of Impeachment concerning the *Stipulation and Agreement of the Parties.*

The Presiding Officer then recognized Mike Hissam, counsel for Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, to address the Court of Impeachment concerning the *Stipulation and Agreement of the Parties.*

On motion of Senator Ferns, at 10:54 a.m., the Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia adjourned until 2:30 p.m. today.

The Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature and the Articles of Impeachment Against the Various Justices of the Supreme Court of Appeals of the State of West Virginia are as follows:

RULES OF THE WEST VIRGINIA SENATE WHILE SITTING AS A COURT OF IMPEACHMENT DURING THE EIGHTY-THIRD LEGISLATURE

1. Definitions

(a) “Articles of Impeachment” or “Articles” means one or more charges adopted by the House of Delegates against a public official and communicated to the Senate to initiate a trial of impeachment pursuant to Article IV, Section 9 of the Constitution of West Virginia.

(b) “Board of Managers” or “Managers” means a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment.

(c) “Conference of Senators” means a private meeting of the Court of Impeachment, including an executive session authorized by W. Va. Code §6-9A-4.

(d) “Counsel” means a member of the Board of Managers or an attorney, licensed to practice law in this state, representing the Board of Managers or a Respondent in a trial of impeachment.

(e) “Court of Impeachment” or “Court” means all Senators participating in a trial of impeachment.

(f) “Parties” means the Board of Managers and its counsel and the Respondent and his or her counsel.

(g) “Presiding Officer” means the Chief Justice of the West Virginia Supreme Court of Appeals or other Justice, pursuant to the provisions of Article IV, Section 9 or Article VIII, Section 8 of the Constitution of West Virginia.

(h) “Respondent” means a person against whom the House of Delegates has adopted and communicated Articles of Impeachment to the Senate.

(i) “Trial” means the trial of impeachment.

(j) “Two thirds of the Senators elected” means at least 23 Senators.

2. Pre-Trial Proceedings

(a) Whenever the Senate receives notice from the House of Delegates that Managers have been appointed by the House of Delegates to prosecute a trial of impeachment against a person or persons and are directed to carry Articles of Impeachment to the Senate, the Clerk of the Senate shall immediately inform the House of Delegates that the Senate is ready to receive the Managers for the reporting of such Articles.

(b) When the Board of Managers for the House of Delegates is introduced at the bar of the Senate and signifies that the Managers are ready to communicate Articles of Impeachment, the President of the Senate shall direct the Sergeant at Arms to make the following proclamation: “All persons are commanded to keep silence, on pain of imprisonment, while the House of Delegates is reporting to the Senate Articles of Impeachment”; after which the Board of Managers shall report the Articles. Thereupon, the President of the Senate shall inform the Managers that the Senate will notify the House of Delegates of the date and time on which the Senate will proceed to consider the Articles.

(c) Upon the reporting of Articles of Impeachment to the Senate, the Senate shall adjourn until a date and time directed by the President of the Senate when the Senate will proceed to consider the Articles and shall notify the House of Delegates and the Supreme Court of Appeals of the same. Before proceeding to consider evidence, the Clerk shall administer the oaths provided in these Rules to the Presiding Officer; to the members of the Senate then present; and to any other members of the Senate as they shall appear.

(d) If the Board of Managers reports Articles of Impeachment against more than one person, the Senate shall conduct a separate trial of each Respondent individually as required by Rule 19 of these Rules.

3. Pre-Trial Conference

The Presiding Officer shall hold a pre-trial conference with the parties in the presence of the Court to stipulate to facts and exhibits and address procedural issues.

4. Clerk of the Court of Impeachment; Duties

The Clerk of the Senate, or his or her designee, shall serve as the Clerk of the Court of Impeachment, administer all oaths, keep the Journal of the Court of Impeachment, and perform all other duties usually performed by the clerk of a court of record in this state. The Clerk of the Senate may designate other Senate personnel to assist in carrying out the Clerk’s duties. The Clerk shall promulgate all forms necessary to carry out the requirements of these Rules.

5. Marshal of the Court of Impeachment; Duties

The Sergeant at Arms of the Senate, or other person designated by the President of the Senate, shall serve as the Marshal of the Court of Impeachment. The Marshal of the Court of Impeachment shall keep order in accordance with these Rules under the direction of the Presiding Officer.

6. Trial to be Recorded in Journal of the Court of Impeachment

(a) All trial proceedings, not including transcripts of the trial and copies of documentary evidence required to be appended to the bound Journal of the Court of Impeachment by section (c) of this Rule, shall be recorded in the Journal of the Court of Impeachment. The Journal of the Court of Impeachment shall be read, corrected, and approved the succeeding day. It shall be published under the supervision of the Clerk and made available to the members without undue delay.

(b) After the Journal of the Court of Impeachment has been approved and fully marked for corrections, the Journal of the Court of Impeachment so corrected shall be bound in the Journal of the Senate. The bound volume shall, in addition to the imprint required by Rule 49 of the Rules of the Senate, 2017, reflect the inclusion of the official Journal of the Court of Impeachment.

(c) When available, transcripts of the trial and copies of any documentary evidence presented therein shall be printed and bound as an appendix to the Journal of the Court of Impeachment.

7. Site of Trial

The trial shall be held in the Senate Chamber of the West Virginia State Capitol Complex. All necessary preparations in the Senate Chamber shall be made under the direction of the President of the Senate.

8. Floor Privileges

Only the following persons may enter the floor of the Senate Chamber during the trial: Members of the Court of Impeachment; designated personnel of the Court of Impeachment; the parties; the Presiding Officer; a law clerk of the Presiding Officer; witnesses and their counsel while testifying; and authorized media, who shall be located in an area of the chamber designated by the Clerk.

9. Representation of Parties

The House of Delegates shall be represented by its Board of Managers and its counsel. The Respondent may appear in person or by counsel.

10. Method of Address

Senators shall address the Presiding Officer as “Madam (or Mr.) Chief Justice” or “Madam (or Mr.) Justice”.

11. Oaths

(a) The following oath, or affirmation, shall be taken and subscribed by the Presiding Officer: “Do you solemnly swear [or affirm] that you will support the Constitution of the United States and the Constitution of the State of West Virginia and that you will faithfully discharge the duties of

Presiding Officer of the Court of Impeachment in all matters that come before this Court to the best of your skill and judgment?"

(b) The following oath, or affirmation, shall be taken and subscribed by every Senator before sitting as a Court of Impeachment: "Do each of you solemnly swear [or affirm] that you will do justice according to law and evidence while sitting as a Court of Impeachment?"

(c) The following oath, or affirmation, shall be taken and subscribed by every witness before providing testimony: "Do you solemnly swear [or affirm] that the testimony you shall give shall be the truth, the whole truth, and nothing but the truth?"

12. Service of Process

(a) The Respondent shall be served with a summons for the appearance of the Respondent or his or her counsel before the Court of Impeachment and provided with a copy of the Articles of Impeachment and a copy of these Rules. The summons shall be signed by the Clerk of the Court of Impeachment, bear the Seal of the Senate, identify the nature of proceedings and the parties, and be directed to the Respondent. It shall also state the date and time at which the Respondent shall appear to answer the Articles of Impeachment and notify the Respondent that if he or she fails to appear without good cause, the allegations contained in the Articles of Impeachment shall be uncontested and that the Senate shall proceed to vote on whether to sustain such Articles pursuant to Rule 15 of these Rules.

(b) The notice required by this Rule shall be served on the Respondent in the manner required by Rule 4 of the West Virginia Rules of Civil Procedure. All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the President of the Senate. A copy of the summons to the Respondent, upon its issuance, along with a copy of the Articles of Impeachment and a copy of these Rules, shall be provided by the Clerk of the Court of Impeachment to the Clerk of the West Virginia House of Delegates. Upon service of the same upon the Respondent, a copy of the return of service shall be provided by the Clerk of the Court of Impeachment to the Clerk of the West Virginia House of Delegates.

13. Dismissal of Articles Upon Resignation of Respondent; Termination of Trial

(a) Any Senator may move to dismiss the Articles of Impeachment against a Respondent if at any time before the presentation of evidence commences in his or her trial of impeachment the Respondent has resigned or retired from his or her public office. Upon motion of any Senator to dismiss the Articles pursuant to this Rule, all Senators not excused shall vote on the question of whether to dismiss the Articles against the Respondent. If a majority of Senators elected vote to dismiss the Articles against the Respondent, a judgment of dismissal shall be pronounced and entered upon the Journal of the Court of Impeachment or the Journal of the Senate, whichever is convened at the time such vote is taken.

(b) A vote pursuant to this Rule shall be taken by yeas and nays.

(c) Upon dismissal of the Articles of Impeachment against a Respondent pursuant to this Rule, all pre-trial and trial proceedings regarding said Respondent shall immediately cease.

(d) If the House of Delegates adopts and communicates Articles of Impeachment that name more than one Respondent in one or more of the Articles, a dismissal pursuant to this Rule shall not dismiss the articles as to any Respondent who has not resigned or retired.

14. Commencement of Trial; Answer to Articles of Impeachment

At the time and date fixed and upon proof of service of the summons directed to the Respondent, the Respondent shall be called to answer the Articles of Impeachment. If the Respondent appears in person or by counsel, the appearance shall be recorded. If the Respondent does not appear, either personally or by counsel, then the failure of the Respondent to appear shall be recorded. While the Court of Impeachment is in session, the business of the Senate shall be suspended except as otherwise ordered by the President of the Senate.

15. Failure of Respondent to Appear and Contest

(a) If the Respondent fails to appear personally or by counsel without good cause at the time and date specified in the notice required by Rule 12 of these Rules, the allegations contained in the Articles of Impeachment shall be uncontested.

(b) If the allegations contained in the Articles of Impeachment are determined to be uncontested under section (a) of this Rule, the Presiding Officer shall then call upon the Board of Managers to deliver a summary of the evidence of the allegations contained in such Articles.

(c) After the summary of evidence delivered by the Managers, the Court of Impeachment shall vote on the question of whether to sustain one or more of the Articles of Impeachment in accordance with the requirements of Rule 31 of these Rules.

16. Entry of Plea or Pleas; Procedures Based on Plea or Pleas

If the Respondent appears and pleads not guilty to each article, the trial shall proceed. If the Respondent appears and pleads guilty to one or more articles, the Court of Impeachment shall immediately vote on the question of whether to sustain the Articles of Impeachment to which a plea of guilty has been entered in accordance with the requirements of Rule 31 of these Rules.

17. Subpoenas

A subpoena shall be issued by the Clerk of the Court of Impeachment for a witness on application of a party.

18. Procedure in a Contested Matter

(a) After preliminary motions are heard and decided, the Board of Managers or its counsel may make an opening statement. Following the opening statement by the Managers, the Respondent or his or her counsel may then make an opening statement.

(b) The trial shall be a daily special order of business following the Third Order of Business of the Senate, unless otherwise ordered by the President of the Senate. When the hour shall arrive for the special order of business, the President of the Senate shall so announce. The Presiding Officer shall cause proclamation to be made, and the business of the trial shall proceed. The trial may be recessed or adjourned and continued from day to day, or to specific dates and times, by

majority vote of the Senators present and voting. The adjournment of the trial shall not operate as an adjournment of the Senate, but upon such adjournment, the Senate shall resume.

(c) After the presentation of all evidence to the Court of Impeachment, the Board of Managers shall present a closing argument, after which the Respondent shall present a closing argument. Following the Respondent's closing argument, the Board of Managers may offer a rebuttal.

(d) The Board of Managers shall have the burden of proof as to all factual allegations. The Presiding Officer shall direct the order of the presentation of evidence.

19. Separate Trials of Multiple Respondents; Order of Trials

(a) If the House of Delegates communicates Articles of Impeachment against more than one Respondent, the Senate shall schedule and conduct a separate trial of each Respondent.

(b) The Presiding Officer, in consultation with the parties, shall determine the order in which multiple Respondents shall be tried.

20. Witnesses

(a) All witnesses shall be examined by the party producing them and shall be subject to cross-examination by the opposing party. Only one designee of each party may examine each witness. The Presiding Officer may permit redirect examination and recross-examination.

(b) After completion of questioning by the parties, any Senator desiring to question a witness shall reduce his or her question to writing and present it to the Presiding Officer who shall pose the question to the witness without indicating the name of the Senator presenting the question. If objection to a Senator's question is raised by a party, the objection shall be decided in the manner provided in Rule 23 of these Rules.

(c) It shall not be in order for any Senator to directly question a witness.

21. Discovery Procedures

(a) Within five days after service upon the Respondent of the Articles of Impeachment, the Respondent may request, and the Board of Managers shall disclose to the Respondent and make available for inspection, copy, or photograph, the following:

(1) Any written or recorded statement of the Respondent in the Managers' possession which the Managers intend to introduce into evidence in their case-in-chief during the trial;

(2) Any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of portions of such items in the Managers' possession that the Managers intend to use in their case-in-chief as to one or more Articles of Impeachment;

(3) A list of the persons the Board of Managers intends to call as witnesses in its case-in-chief during the trial; and

(4) A written summary of any expert testimony the Managers intend to use during their case-in-chief. Any summary provided must describe the witness' opinions, the bases and reasons for the opinions, and the witness's qualifications.

(b) The Board of Managers shall make its response to the Respondent's written requests within 10 days of service of the requests.

(c) If the Respondent makes a request pursuant to this Rule, he or she shall be required to provide the same information to the Managers, reciprocally, within 10 days following his or her request.

(d) A copy of all requests pursuant to this section shall be provided to the Clerk. The parties shall provide to the Clerk, in a format or in formats directed by the Clerk, copies of all items disclosed pursuant to this Rule.

(e) The Clerk may require parties to number or Bates stamp any trial exhibits or other information provided to the Clerk. The Clerk may hold a meeting with the parties to organize trial exhibits.

22. Court Reporters; Transcripts

(a) All proceedings shall be reported by an official court reporter or certified court reporter: *Provided*, That if the services of an official court reporter or certified court reporter are unavailable on one or more days of the trial, the proceedings shall be digitally recorded and copies of the recording made available to the parties.

(b) Upon request of a party, the Presiding Officer, or any Senator, the Clerk shall provide a copy of the transcript of any portion of the trial, when such transcripts are available.

23. Motions, Objections, and Procedural Questions

(a) All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer, who shall decide the motion, objection, or procedural question: *Provided,* That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question.

(b) On the demand of any Senator or at the direction of the Presiding Officer, the movant shall reduce the motion to writing.

24. Qualification to Sit as Court of Impeachment

Every Senator is qualified to participate on the Court of Impeachment, unless he or she has been excused pursuant to Rule 43 of the Rules of the Senate, 2017.

25. Members as Witnesses

The parties may not call as witnesses, nor subpoena the personal records of, the Senators, members of the Board of Managers, personnel of the Court of Impeachment, the Presiding Officer, or counsel for the parties.

26. Attendance of Members

Every Senator is required to attend the trial unless he or she has been granted a leave of absence, pursuant to Rule 50 of the Rules of the Senate, 2017, or has been excused from voting on the Articles, pursuant to Rule 43 of the Rules of the Senate, 2017. Any Senator who has been granted a leave of absence shall be provided an opportunity to review the exhibits, video or audio recordings, and transcripts for the date or dates he or she is absent and may participate in the vote on verdict and judgment as provided in Rule 31 of these Rules.

27. Notetaking

Senators may take notes during the trial and such notes are not subject to the provisions of W. Va. Code §29B-1-1 *et seq.*

28. Applicability of Rules of the Senate

Except as otherwise provided herein, the Rules of the Senate shall apply to proceedings of the trial and the President of the Senate retains the authority to invoke such rules.

29. Applicability of Rules of Evidence

When not in conflict with these Rules or the Rules of the Senate, the Presiding Officer shall rule on the admissibility of evidence in accordance with West Virginia Rules of Evidence: *Provided*, That a vote to overturn the Presiding Officer's ruling on the admissibility of evidence shall be taken, without debate, on demand of any Senator sustained by one tenth of the members present, and an affirmative vote of the majority of Senators present shall overturn the ruling.

30. Instruction

At any time, the Presiding Officer may, sua sponte, or on motion of a party or upon request of a Senator, instruct the Senators on procedural or legal matters.

31. Verdict and Judgment

(a) After closing arguments, the Court may enter into a Conference of Senators for deliberation. After conclusion of said conference and return to open proceedings, or pursuant to Rule 15 or Rule 16 of these Rules, all Senators not excused shall vote on the question of whether to sustain one or more Articles of Impeachment: *Provided,* That any vote of the Senators on the question of whether or not to sustain an Article of Impeachment shall decide only that Article, and no single vote of the Senate shall sustain more than one Article of Impeachment. The Presiding Officer shall have no vote in the verdict or judgment of the Court of Impeachment.

(b) If two thirds of the Senators elected vote to sustain one or more Articles of Impeachment, a judgment of conviction and removal from office shall be pronounced and entered upon the Journal of the Court of Impeachment. If the Respondent is acquitted of any Article of Impeachment, a judgment of acquittal as to such Article or Articles shall be pronounced and entered upon the Journal.

(c) If two thirds of the Senators elected vote to sustain one or more Article of Impeachment, a vote shall then be taken on the question of whether the Respondent shall also be disqualified to hold any office of honor, trust, or profit under the state. If two thirds of the Senators elected vote to disqualify, a judgment of disqualification to hold any office of honor, trust, or profit under the state shall be pronounced and entered upon the Journal of the Court of Impeachment.

(d) Each vote pursuant to this Rule shall be taken by yeas and nays.

(e) A copy of all judgments entered shall be deposited in the office of the Secretary of State.

32. Conference of Senators

(a) On motion of any Senator and by a vote of the majority of the members present and voting, there shall be an immediate Conference of Senators. No Senator or any other person may photograph, record, or broadcast a Conference of Senators. Any motion made pursuant to this Rule shall be nondebatable.

(b) The President of the Senate, or his or her designee, shall preside over a Conference of Senators and the Rules of the Senate shall apply during said conference except as otherwise provided herein.

33. Contempt; Powers of Presiding Officer

The following powers shall be exercised by the Presiding Officer:

(1) The power to compel the attendance of witnesses subpoenaed by the parties;

(2) The power to enforce obedience to the Court's orders;

(3) The power to preserve order;

(4) The power to punish contempt of the Court's authority; and

(5) The power to make all orders that may be necessary and that are not inconsistent with these Rules or the laws of this state.

34. Prohibited Conduct; Sanctions

The Court of Impeachment shall have the power to provide for its own safety and the undisturbed transaction of its business, as provided in Article VI, Section 26 of the Constitution of West Virginia.

ARTICLES OF IMPEACHMENT AGAINST THE VARIOUS JUSTICES OF THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Article I

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $363,000, which sum included the purchase of a $31,924 couch, a $33,750 floor with medallion, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article II

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article III

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to be transported from the State Capitol to his home, and did maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7 (b), prohibiting the removal of original furnishings of the state capitol from the premises; further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Robin Davis, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VI

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did in his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, and continuing thereafter for a period of years, intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a state issued fuel purchase card to travel to the Greenbrier on one or more occasions for book signings and sales, which such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IX

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article X

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment against Justices of the Supreme Court of Appeals of West Virginia, were adopted by the House of Delegates on the Thirteenth day of August, 2018.

In Testimony Whereof, we have signed our names hereunto this Fourteenth day of August, 2018.

John Overington,

Speaker Pro Tempore of the House of Delegates

Stephen J. Harrison,

Clerk of the House of Delegates

The following letter from the Honorable Lee Cassis, Clerk of the West Virginia Senate, is inserted into the Journal of the Court of Impeachment:

The Senate of West Virginia
Charleston

September 11, 2018

The Honorable Mitch B. Carmichael
President of the Senate
And
The Honorable Members of the West Virginia Senate

Dear Mr. President and Members:

Pursuant to Rule 4 of the Rules of the Senate While Sitting as a Court of Impeachment, I have this day designated Kristin Canterbury, the Assistant Clerk of the Senate, to serve as Clerk of the Court of Impeachment in my absence. This designation will be filed in the Journal of the Senate and the Journal of the Court of Impeachment.

Sincerely,

Lee Cassis
Clerk of the Senate

The Senate, sitting as a Court of Impeachment to consider proceedings against Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia; Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia; Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia; and Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, met on Tuesday, September 11, 2018, at 2:57 p.m.

The Honorable Paul T. Farrell, Acting Chief Justice of the Supreme Court of Appeals of the State of West Virginia, assumed the chair and presided over the Court of Impeachment.

The Presiding Officer then directed the Sergeant at Arms to summon the Managers, attorneys, and respondents.

Without objection, the Journal of the Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia was considered as having been read and approved.

The Managers, appointed by the House of Delegates to conduct the trial of impeachment of the various justices of the Supreme Court of Appeals of the State of West Virginia, to wit: Delegates Shott, Hollen, Byrd, and Miller (Delegate Foster, one of the said managers, being absent) entered the Senate Chamber and took the seats assigned them.

Brian Casto, Marsha Kaufmann, and Joe Altizer, counsel for the Managers of the House of Delegates, accompanied said Managers.

Respondent Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, and the respondents' counsel entered the Senate Chamber and took the seats assigned them.

The Presiding Officer informed the Managers, attorneys, and Respondents that the Court of Impeachment had not adopted a resolution publicly reprimanding and censuring Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker and that the trials would move forward.

The Presiding Officer then directed Mike Hissam, counsel for Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, to approach the podium.

The Presiding Officer stated that Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Article XIV of the Articles of Impeachment and asked if Justice Walker admitted or denied the same. Mike Hissam, counsel for Justice Walker, responded that Justice Walker denied the charge.

The Presiding Officer then set the trial date for Justice Walker for Monday, October 1, 2018, at 9 a.m.

The Presiding Officer then directed Steven R. Ruby, counsel for Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, to approach the podium.

The Presiding Officer stated that Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Articles IV, VI, and XIV of the Articles of Impeachment and asked if Chief Justice Workman admitted or denied the same. Steven R. Ruby, counsel for Chief Justice Workman, responded that Chief Justice Workman denied the charges.

The Presiding Officer then set the trial date for Chief Justice Workman for Monday, October 15, 2018. The Presiding Officer stated that pre-trial motions would be taken up at that time.

The Presiding Officer then directed Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, and John A. Carr, counsel to Justice Loughry, to approach the podium.

The Presiding Officer then asked Mike Hissam, counsel for Justice Walker, and Steven R. Ruby, counsel for Chief Justice Workman, if the Respondents formally waive the reading of the Articles of Impeachment. Mike Hissam, counsel for Justice Walker, and Steven R. Ruby, counsel for Chief Justice Workman, responded that Justice Walker and Chief Justice Workman waived the reading of the Articles.

The Presiding Officer then asked Justice Loughry if he formally waived the reading of the Articles of Impeachment. John A. Carr, counsel for Justice Loughry, responded that Justice Loughry waived the reading of the Articles.

The Presiding Officer stated that Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Articles I, III, VII, VIII, IX, X, and XIV of the Articles of Impeachment and asked if Justice Loughry admitted or denied the same. Allen H. Loughry II responded that he denied the charges.

The Presiding Officer then set the trial date for Justice Loughry for Monday, November 12, 2018, at 9 a.m.

The Presiding Officer then directed the counsel for Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia, to approach the podium.

The Presiding Officer stated a motion for *pro hac vice* admission of James M. Cole had been filed for James M. Cole to appear as counsel on behalf of Retired Justice Davis during the Court of Impeachment. The Presiding Officer then stated the motion was granted.

The Presiding Officer then asked James M. Cole, counsel for Retired Justice Davis, if the Respondent formally waives the reading of the Articles of Impeachment. James M. Cole, counsel for Retired Justice Davis, responded that Retired Justice Davis waived the reading of the Articles.

The Presiding Officer stated that Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Articles II, IV, V, and XIV of the Articles of Impeachment and asked if Retired Justice Davis admitted or denied the same. James M. Cole, counsel for Retired Justice Davis, responded that Retired Justice Davis denied the charges.

The Presiding Officer then set the trial date for Retired Justice Davis for Monday, October 29, 2018.

James M. Cole, counsel for Retired Justice Davis, stated a motion for continuance for filing motions and reciprocal discovery had been filed, to which the House Managers did not oppose.

The Presiding Officer noted that Robin Jean Davis had retired from the office of Justice of the Supreme Court of Appeals of the State of West Virginia and there were provisions relating to this matter contained in the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature and that the Constitution of West Virginia states, in part, that the removal from office is the only punishment in an impeachment [Art. IV, Sec. 9].

Senator Trump then moved that, pursuant to Rule 13 of the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature, Articles II, IV, V, and XIV of the Articles of Impeachment adopted by the House of Delegates be dismissed in so far as they relate to Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of West Virginia.

Following extended discussion,

The question being on the adoption of Senator Trump’s aforestated motion,

The roll being taken, the yeas were: Arvon, Baldwin, Boley, Drennan, Facemire, Gaunch, Jeffries, Palumbo, Plymale, Prezioso, Romano, Stollings, Swope, Trump, and Carmichael (Mr. President)—15.

The nays were: Azinger, Beach, Blair, Boso, Clements, Cline, Ferns, Karnes, Mann, Maroney, Maynard, Ojeda, Rucker, Smith, Sypolt, Takubo, Unger, Weld, and Woelfel—19.

Absent: None.

So, a majority of those present and voting not having voted in the affirmative, the Presiding Officer declared Senator Trump’s aforestated motion had not prevailed.

Whereupon, the Presiding Officer stated the trial date for Retired Justice Davis would be Monday, October 29, 2018.

Steven R. Ruby, counsel for Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, stated a motion had been filed to set a trial date and a briefing schedule. He also stated a motion had been filed to set a Bill of Particulars.

John H. Shott, Chair of the Managers appointed by the House of Delegates, stated one of the dates in the proposed briefing schedule had already passed and the House Managers questioned the validity of certain motions under the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature. Chairman Shott then stated the House Managers objected to Chief Justice Workman's motion for a Bill of Particulars.

The Presiding Officer stated a Bill of Particulars was a criminal type motion and this was not a criminal trial; therefore, the motion for a Bill of Particulars was denied.

The Presiding Officer recognized John H. Shott, Chair of the Managers appointed by the House of Delegates, to address the Court of Impeachment.

Following a point of inquiry to the Presiding Officer, with resultant response thereto,

At 3:29 p.m., the Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia adjourned until Monday, October 1, 2018, at 9 a.m.

West Virginia Senate
Roll Call

Shall Article XIV Against Justice Walker Be Sustained

Yea: 1 Nay: 32 Absent: 1 Excused: 0

N	ARVON	N	GAUNCH	N	RUCKER
N	AZINGER	N	JEFFRIES	N	SMITH
Y	BALDWIN	N	KARNES	N	STOLLINGS
N	BEACH	N	MANN	N	SWOPE
N	BLAIR	N	MARONEY	N	SYPOLT
N	BOLEY	N	MAYNARD	N	TAKUBO
N	BOSO	N	OJEDA	N	TRUMP
N	CLEMENTS	N	PALUMBO	N	UNGER
N	CLINE	N	PLYMALE	A	WELD
N	DRENNAN	N	PREZIOSO	N	WOELFEL
N	FACEMIRE	N	ROMANO	N	MR PRESIDENT
N	FERNS				

SEQ. NO. 0006. RCS # 6

241 W.Va. 105
Supreme Court of Appeals of West Virginia.

STATE of West Virginia EX REL.
Margaret L. WORKMAN, Petitioner
v.
Mitch CARMICHAEL, as President of the Senate; Donna J. Boley, as President Pro Tempore of the Senate; Ryan Ferns, as Senate Majority Leader, Lee Cassis, Clerk of the Senate; and the West Virginia Senate, Respondents

No. 18-0816
|
Filed: October 11, 2018

Synopsis

Background: Chief Justice of the Supreme Court of Appeals filed petition for a writ of mandamus, seeking to halt impeachment proceedings pending against her.

Holdings: The Supreme Court of Appeals, Matish, Acting C.J., held that:

the Supreme Court of Appeals does not have jurisdiction over an appeal of a final decision by the Senate in its role as the Court of Impeachment;

as a matter of first impression, an impeached official may seek redress in the Supreme Court of Appeals for an alleged violation of his or her constitutional rights in impeachment proceedings;

the Supreme Court of Appeals has constitutional authority to issue an extraordinary writ against the Legislature when the law requires, disapproving *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611;

statute limiting payment to senior-status judges violated Separation of Powers Clause of state constitution;

Senate officials were prohibited from further prosecuting Chief Justice on Articles of Impeachment alleging violation of the unconstitutional statute;

alleged or established violations of the Code of Judicial Conduct could not form a basis for impeachment of Chief Justice;

Articles of Impeachment that failed to comply with provisions of House Resolution violated Chief Justice's right to procedural due process.

Writ granted.

Bloom and Reger, Acting Justices, concurred in part and dissented in part, with opinion.

Procedural Posture(s): Original Jurisdiction.

West Codenotes

Prior Version Recognized as Invalid

W. Va. Code Ann. §§ 3-7-3, 57-3-1, 51-2-10

Prior Version Recognized as Unconstitutional

W. Va. Code Ann. §§ 30-2-1, 55-7B-6d

Limitation Recognized

W. Va. Code Ann. § 56-1-1(a)(7), 56-10-1, 57-2-1, 55-7B-7, 60A-7-705(d), 62-9-1

Prior Version's Limitation Recognized

W. Va. Code Ann. §§ 50-4-7, 51-2-9, 51-2-10

Recognized as Invalid

W. Va. Code Ann. §§ 30-2-1, 30-2-7, 56-9-2

Held Unconstitutional

W. Va. Code Ann. § 51-9-10

Syllabus by the Court

1. In the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

2. An officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia,

may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.

3. To the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

4. West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.

5. This Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

6. The Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

Attorneys and Law Firms

****258** Marc E. Williams, Melissa Foster Bird, Thomas M. Hancock, Christopher D. Smith, Nelson Mullins Riley & Scarborough, Huntington, West Virginia, Attorneys for Petitioner

J. Mark Adkins, Floyd E. Boone, Jr., Richard R. Heath, Jr., Lara Brandfass, Bowles Rice, Charleston, West Virginia, Attorneys for Respondents

Opinion

Matish, Acting Chief Justice:

****259** ***113** The Petitioner, the Honorable Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of West Virginia, brought this proceeding under the original jurisdiction of this Court as a petition for a writ of mandamus that seeks to halt impeachment proceedings against her. The Respondents named in the petition are the Honorable Mitch Carmichael, President of the Senate; the Honorable Donna J. Boley, President Pro Tempore of the Senate; the Honorable Ryan Ferns, Senate Majority Leader; the Honorable Lee Cassis, Clerk of the Senate; and the West Virginia Senate.[1] The Petitioner seeks to have this Court prohibit the Respondents from prosecuting her under ****260** ***114** three Articles of Impeachment returned against her by the West Virginia House of Delegates. The Petitioner has briefed the following issues to support her contention that she is entitled to the relief sought. The Petitioner has alleged several issues which we have distilled to the essence as alleging that the Articles of Impeachment against her violate the Constitution of West Virginia because (1) an administrative rule promulgated by the Supreme Court supersede statutes in conflict with them; (2) the determination of a violation of the West Virginia Code of Judicial Conduct rests exclusively with the Supreme Court; (3) the Articles of Impeachment were filed in violation of provisions of House Resolution 201. Upon careful review of the briefs, the appendix record, and the applicable legal authority, we grant relief as outlined in this opinion.[2]

INTRODUCTION

Although the Petitioner in this matter requested oral argument under Rule 20 of the Rules of Appellate Procedure, and even though this case presents issues of first impression, raises constitutional issues, and is of fundamental public importance, the Respondents, however, waived that right as follows:

> Oral argument is unnecessary because no rule to show cause is warranted. This case presents the straightforward application of unambiguous provisions of the

> Constitution of West Virginia that, under governing precedent of this Court, the Supreme Court of the United States and courts across the nation unquestionably affirm the West Virginia Senate's role as the Court of Impeachment.

This Court further notes that the Respondents declined to address the merits of the Petitioner's arguments. The Respondents stated the following:

> At the outset, it important to note that Respondents take no position with respect to facts as laid out by Petitioner, or the substantive merits of the legal arguments raised in the Petition. In fact, it is constitutionally impermissible for Respondents to do so, as they are currently sitting as a Court of Impeachment in judgment of Petitioner for the allegations made in the Articles adopted by the House.

The Respondents have not cited to any constitutional provision which prevents them from responding directly or through the Board of Managers (the prosecutors), to the merits of the Petitioner's arguments. It is expressly provided in Rule 16(g) of the Rules of Appellate Procedure that "[i]f the response does not contain an argument in response to a question presented by the petition, the Court will assume that the respondent agrees with the petitioner's view of the issue." In light of the Respondent's waiver of oral argument and refusal to address the merits of the Petitioner's arguments, this Court exercises its discretion to not require oral argument and will rule upon the written Petition, Response, Reply, and various appendices. [3]

Our forefathers in establishing this Country, as well as the leaders who established the framework for our State, had the forethought to put a procedure in place to address issues that could arise in the future; in the ensuing years that system has served us well. What our forefathers did not envision is the fact that subsequent leaders would not have the ability or willingness to read, understand, or to follow those guidelines. The problem we have today is that people do not bother to read the rules, or if they read ****261** ***115** them, they decide the rules do not apply to them.

There is no question that a governor, if duly qualified and serving, can call a special session of the Legislature. There is no question that the House of Delegates has the right to adopt a Resolution and Articles of a Bill of Impeachment. There is no question that the Senate is the body which conducts the trial of impeachment and can establish its own rules for that trial and that it must be presided over by a member of this Court. This Court should not intervene with any of those proceedings because of the separation of powers doctrine, and no one branch may usurp the power of any other coequal branch of government. However, when our constitutional process is violated, this Court must act when called upon.

Fundamental fairness requires this Court to review what has happened in this state over the last several months when all of the procedural safeguards that are built into this system have not been followed. In this case, there has been a rush to judgment to get to a certain point without following all of the necessary rules. This case is not about whether or not a Justice of the Supreme Court of Appeals of West Virginia can or should be impeached; but rather it is about the fact that to do so, it must be done correctly and constitutionally with due process. We are a nation of laws and not of men, and the rule of law must be followed.

By the same token, the separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts. So the Legislature should not be dealing with the Code of Judicial Conduct, which authority is limited to the Supreme Court of Appeals.

The greatest fear we should have in this country today is ourselves. If we do not stop the infighting, work together, and follow the rules; if we do not use social media for good rather than use it to destroy; then in the process, we will destroy ourselves.

I.

FACTUAL AND PROCEDURAL HISTORY

The Petitioner was appointed as a judge to the Circuit Court of Kanawha County, by former Governor John D. Rockefeller,

IV, on November 16, 1981. She was later elected in 1982 by the voters to fill out the remainder of the unexpired term of her appointment. She was subsequently elected again in 1984 for a full term. In 1988, the Petitioner was elected by the voters to fill a vacancy on the West Virginia Supreme Court of Appeals. She served a full term and left office in 2000. The Petitioner ran again for a position on the Supreme Court in 2008 and won.

In late 2017, the local media began publicizing reports of their investigations into the costs for renovating the offices of the Supreme Court Justices. Those publicized reports led to an investigation by the Legislative Auditor into the spending practices of the Supreme Court in general. The Auditor's office issued a report in April of 2018. This report was focused on the conduct of Justice Allen Loughry and Justice Menis Ketchum. The report concluded that both Justices may have used state property for personal gain in violation of the state Ethics Act. The report indicated that the matter was referred to the West Virginia Ethics Commission for further investigation. [4] In June of 2018 the Judicial Investigation Commission charged Justice Loughry with 32 violations of the Code of Judicial Conduct and the Rules of Professional Conduct. Justice Loughry was subsequently indicted by the federal government on 22 charges. [5]

On June 25, 2018, Governor Jim Justice issued a Proclamation calling the Legislature to convene in a second extraordinary session to consider the following:

> First: Matters relating to the removal of one or more Justices of the Supreme Court ****262 *116** of Appeals of West Virginia, including, but not limited to, censure, impeachment, trial, conviction, and disqualification; and
>
> Second: Legislation authorizing and appropriating the expenditure of public funds to pay the expenses for the Extraordinary Session.

Pursuant to this Proclamation, the Legislature convened on June 26, 2018, to carry out the task outlined therein.

The record indicates that on June 26, 2018, the House of Delegates adopted House Resolution 201. This Resolution empowered the House Committee on the Judiciary to investigate impeachable offenses against the Petitioner and the other four Justices of the Supreme Court. [6] Under the Resolution, the Judiciary Committee was required to report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact; and, if the recommendation was that of impeachment of any of the Justices, the Committee had to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment. Upon receipt of a proposed Resolution of Impeachment and Articles of Impeachment by the House of Delegates, Resolution 201 authorized the House to adopt a Resolution of Impeachment and formal articles of impeachment as prepared by the Judiciary Committee, and deliver the same to the Senate for consideration.

The Judiciary Committee conducted impeachment hearings between July 12, 2018 and August 6, 2018. On August 7, 2018, the Judiciary Committee adopted fourteen Articles of Impeachment. The Petitioner was named in four of the Articles of Impeachment. On August 13, 2013, the House of Delegates voted to approve only eleven of the Articles of Impeachment. The Petitioner was impeached on three of the Articles of Impeachment. [7] First, the Petitioner and Justice Davis were named in Article IV, [8] which alleged that they improperly authorized the overpayment of senior-status judges. [9] Second, the Petitioner was named exclusively in Article VI, which alleged that she improperly authorized the overpayment of senior-status judges. [10] Third, the Petitioner was named, along with three other justices, in Article XIV, which set out numerous allegations against them which included charges that they failed to implement various administrative policies and procedures. [11]

Subsequent to the House of Delegates' adoption of the Articles of Impeachment they were submitted to the Senate for the purpose of conducting a trial. On August 20, 2018 the Senate adopted Senate Resolution 203, which set forth the rules of procedure for the impeachment trial. A pre-trial conference was held on September 11, 2018. At that conference the Petitioner, Justice Walker, and the Board of Managers submitted a "Proposed Stipulation and Agreement of Parties" that would have required the charges against both of them be dismissed. [12] The Senate voted to reject the settlement offer. Thereafter Acting Chief Justice Farrell set a separate trial date for the Petitioner on October 15, 2018. The Petitioner subsequently filed this proceeding to have the Articles of Impeachment against her dismissed.

II.

THIS COURT'S JURISDICTION TO ADDRESS CONSTITUTIONAL ISSUES ARISING FROM THE COURT OF IMPEACHMENT

Before we examine the merits of the issues presented we must first determine ****263** ***117** whether this Court has jurisdiction over issues arising out of a legislative impeachment proceeding. The Respondents contend that this Court does not have jurisdiction over the impeachment proceeding.[13] This is an issue of first impression for this Court.

Resolution of this issue requires an analysis of constitutional principles. In undertaking our analysis we are reminded that the United States Supreme Court stated in *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962), that the determination of whether a matter is exclusively committed by the constitution to another branch of government "is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution." We are also guided by the principle that

> A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law.

State ex rel. Smith v. Gore, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965). Further,

> It is axiomatic that our Constitution is a living document that must be viewed in light of modern realities. Reasonable construction of our Constitution ... permits evolution and adjustment to changing conditions as well as to a varied set of facts.... The solution [to problems of constitutional interpretation] must be found in a study of the specific provision of the Constitution and the best method [under current conditions] to further advance the goals of the framers in adopting such a provision.

State ex rel. McGraw v. Burton, 212 W. Va. 23, 36, 569 S.E.2d 99, 112 (2002) (internal quotation marks and citation omitted).

As an initial matter, we observe that "[q]uestions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, *Winkler v. State Sch. Bldg. Auth.*, 189 W.Va. 748, 434 S.E.2d 420 (1993). We have held that "[t]he object of construction, as applied to written constitutions, is to give effect to the intent of the people in adopting it." Syl. pt. 3, *Diamond v. Parkersburg–Aetna Corp.*, 146 W.Va. 543, 122 S.E.2d 436 (1961). This Court held in syllabus point 3 of *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965) that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Therefore, "[i]f a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision." Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953). On the other hand, "if the language of the constitutional provision is ambiguous, then the ordinary principles employed in statutory construction must be applied to ascertain such intent." *State ex rel. Forbes v. Caperton*, 198 W.Va. 474, 480, 481 S.E.2d 780, 786 (1996) (internal quotations and citations omitted). An ambiguous provision in a ****264** ***118** constitution "requires interpretation consistent with the intent of both the drafters and the electorate." *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 127, 207 S.E.2d 421, 436-437 (1973). Although we are empowered with the authority "to construe, interpret and apply provisions of the Constitution, ... [we] may not add to, distort or ignore the plain mandates thereof." *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 643, 246 S.E.2d 99, 107 (1978).

It is axiomatic that "in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself."

State ex rel. Mountaineer Park, Inc. v. Polan, 190 W.Va. 276, 283, 438 S.E.2d 308, 315 (1993). The framework for impeaching and removing an officer of the state is set out under Article IV, § 9 of the Constitution of West Virginia. The full text of Section 9 provides as follows:

> Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court, [14] to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the Legislature, for the trial of impeachments.

Pursuant to Section 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). To facilitate the trial of an impeachment proceeding Section 9 created a Court of Impeachment.

It is clear from the text of Section 9 that it does not provide this Court with jurisdiction over an appeal of a final decision by the Court of Impeachment. [15] Consequently, and we so hold, in the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

Although it is clear that an appeal is not authorized from a decision by the Court of Impeachment, we do find under the plain language of Section 9, the actions or inactions of the Court of Impeachment may be subject to a proceeding under the original jurisdiction of this Court. [16] The authority for this proposition is contained in the Law and Evidence Clause found in Section 9, which states: "the senators shall ... do justice according to law and evidence." The Law and Evidence Clause of Section 9 uses the word "shall" in requiring the Court of Impeachment to follow the law. We have recognized that "[t]he word 'shall,' ... should be afforded a mandatory connotation[,] and when used in constitutions and statutes, [it] leaves no way open for the substitution of discretion." *Silveti v. Ohio Valley Nursing Home, Inc.*, 240 W. Va. 468, 813 S.E.2d 121, 125 (2018) ****265 *119** (internal quotation marks and citations omitted). See Syl. pt. 3, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense."). Insofar as the Law and Evidence Clause imposes a mandatory duty on the Court of Impeachment to follow the law, there is an implicit right of an impeached official to have access to the courts to seek redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law. [17]

The implicit right of redress in the courts found in the Law and Evidence Clause, is expressly provided for in Article III, § 17 of the Constitution of West Virginia. Section 17 provides as follows:

> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

The Certain Remedy Clause of Section 17 has been found to mean that "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system." *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 204, 640 S.E.2d 540, 554 (2006) (Starcher, J., dissenting). See *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) ("[T]he concept of American justice ... pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]"); *Gardner v. Buckeye Sav. & Loan Co.*, 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy."); *Lambert v. Brewster*, 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924) ("As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."). In the leading treatise on the Constitution of West Virginia, the following is said,

> The second clause of section 17, providing that all persons "shall have remedy by due course of law" ... limits ... the ability of the government to constrict an individual's right to invoke the judicial process[.]

Robert M. Bastress, *The West Virginia State Constitution*, at 124 (2011).

This Court has held that "enforcement of rights secured by the Constitution of ****266** ***120** this great State is engrained in this Court's inherent duty to neutrally and impartially interpret and apply the law." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 544, 782 S.E.2d 223, 239 (2016). That is, "[c]ourts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. pt. 3, *State ex rel. Casey v. Pauley*, 158 W.Va. 298, 210 S.E.2d 649 (1975).

Insofar as an officer of the state facing impeachment in the Court of Impeachment has a constitutional right to seek redress for an alleged violation of his or her rights by that court, we now hold that an officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.[18] See *Kinsella v. Jaekle*, 192 Conn. 704, 723, 475 A.2d 243, 253 (1984) ("A court acting under the judicial power of ... the constitution may exercise jurisdiction over a controversy arising out of impeachment proceedings only if the legislature's action is clearly outside the confines of its constitutional jurisdiction to impeach any executive or judicial officer; or egregious and otherwise irreparable violations of state or federal constitutional guarantees are being or have been committed by such proceedings."); *Smith v. Brantley*, 400 So.2d 443, 449 (Fla. 1981) ("The issue of subject matter jurisdiction for impeachment is properly determined by the judiciary, of course. Our conclusion on this question is that one must be such an officer to be impeachable."); *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) ("the courts have no jurisdiction in impeachment proceedings, and no control over their conduct, *so long as actions taken are within constitutional lines*.") (emphasis added); *People ex rel. Robin v. Hayes*, 82 Misc. 165, 172–73, 143 N.Y.S. 325, 330 (Sup. Ct. 1913) ("[A court] has no jurisdiction to inquire into the sufficiency of charges for which a Governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, *unless at their foundation, in their exercise, constitutional guaranties are broken down or limitations ignored*.") (emphasis added).[19]

It will be noted that this Court held in syllabus point 3 of ****267** ***121** *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) that "[u]nder the Separation of Powers doctrine, Article V, Section 1 of the Constitution of West Virginia, courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." This holding is not applicable to the issue under consideration in the instant matter.[20] In *Holmes* the Court was called upon to address the issue of a circuit court issuing an order that required the Clerk of the Senate and the Clerk of the House of Delegates remove references to a pardon by the Governor in the official journals of the Senate and the House of Delegates. When the Clerks refused to obey the order, the circuit court issued a rule to show cause as to why they should not be held in contempt. This Court determined that the judicial order encroached on the exclusive authority of the Legislature to maintain journals:

> [T]he Clerks argue that it is beyond the authority of a circuit court to compel them to alter the Journals, whether

in their printed form or in their electronic form published on the internet. The Clerks generally assert that the circuit court exceeded its jurisdiction, because the Journals are a protected legislative function under the Constitution of West Virginia. The Constitution of West Virginia vests the State's legislative power in a Senate and a House of Delegates. W.Va. Const., Art. VI, § 1. Each house of the Legislature is charged with determining its own internal rules for its proceedings and with choosing its own officers. W.Va. Const., Art. VI, § 24.

The Constitution mandates that each house must keep and publish a "journal of its proceedings." Article VI, Section 41 states:

> Each house shall keep a journal of its proceedings, and cause the same to be published from time to time, and all bills and joint resolutions shall be described therein, as well by their title as their number, and the yeas and nays on any question, if called for by one tenth of those present shall be entered on the journal.

A variation of this mandate has been in our Constitution since the founding of our State in 1863. The founding fathers indicated during the constitutional convention that there are two goals underlying this provision: to ensure that the votes of legislators are correctly recorded, and to make a public record of the actions of legislators.

Holmes, 226 W. Va. at 483–84, 702 S.E.2d at 615–16. The facts giving rise to syllabus point 3 in *Holmes* clearly establish the limitations of that syllabus point. That is, the facts of the case concerned a trial court interfering in legislative administrative matters when no legal authority permitted such interference. Neither the opinion nor syllabus point 3 were intended to limit the authority of this Court to entertain an extraordinary writ against the Legislature when the law permits. For example, the case of *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) involved several consolidated actions for prohibition and mandamus against the Speaker of the House of Delegates and government officials concerning the constitutionality of redistricting. This Court denied the writs and in doing so held that

> In the absence of constitutional infirmity, as the precedent evaluated above irrefutably establishes, the development and implementation of a legislative redistricting plan in the State of West Virginia are entirely within the province of the Legislature. The role of this Court is limited to a determination of whether the Legislature's actions have violated the West Virginia Constitution.

Cooper, 229 W. Va. at 614, 730 S.E.2d at 397. See *State ex rel. W. Virginia Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 715 S.E.2d 36 (2011) (granting mandamus in part against the Governor, Speaker of the House of Delegates and other government officials requiring a special election be called); *State ex rel. League of Women Voters of W. Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E.2d 355, 368 (2001) (finding that mandamus would be issued against the President of the ****268 *122** Senate, Speaker of the House of Delegates and other government officials that required "the Legislature to only include as part of the budget digest information that has been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill."); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 19, 462 S.E.2d 586, 594 (1995) granting mandamus against the President of the Senate and Speaker of the House of Delegates that required "the Legislature to promptly draft legislation to replace the unconstitutional section of article 29A and additionally, to consider passage of legislation that would exempt certain administrative regulations from conformance with APA implementation requirements, such as where compliance with federal law is mandated."). In view of the foregoing, we hold that to the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

The Respondents have cited to the decision in *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) as authority for the proposition that the judiciary does not have jurisdiction over impeachment proceedings. In *Nixon*, a federal district judge was impeached and removed from office, in a proceeding in which the United States Senate allowed a committee to take testimony and gather evidence.

The former judge filed a declaratory judgment action in a district court seeking a ruling that the Senate's failure to hold a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments. The District Court denied relief and dismissed the case. The Court of Appeals affirmed. The United States Supreme Court granted certiorari to determine whether the constitutional requirement that the Senate "try" cases of impeachment precludes the use of a committee to hear evidence. The opinion held that the issue presented could not be brought in federal court. The Court reasoned as follows:

> We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Nixon, 506 U.S. at 236, 113 S.Ct. at 739.

The decision in *Nixon* is not controlling and is distinguishable. See *Peters v. Narick*, 165 W. Va. 622, 628 n.13, 270 S.E.2d 760, 764 n.13 (1980), modified on other grounds by *Israel by Israel v. W. Virginia Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("States have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees."). The narrowly crafted text of the impeachment provision found in the Constitution of the United States prevented the Supreme Court from finding a basis for allowing a constitutional challenge to the impeachment procedure adopted by the Senate. The text of the federal impeachment provision is found in Article I, § 3 of the Constitution of the United States and provides the following:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
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> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy ****269** ***123** any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is clear that Article 1, § 3 does not contain the Law and Evidence Clause that is found in Article IV, § 9 of the Constitution of West Virginia. Therefore, our constitution provides greater impeachment protections than the Constitution of the United States.[21] See *State ex rel. K.M. v. W. Virginia Dep't of Health & Human Res.*, 212 W. Va. 783, 794 n.15, 575 S.E.2d 393, 404 n.15 (2002) ("it is clear that our Constitution may offer greater protections than its federal counterpart."); *State ex rel. Carper v. W. Virginia Parole Bd.*, 203 W. Va. 583, 590 n.6, 509 S.E.2d 864, 871 n.6 (1998) ("This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart."); *State v. Bonham*, 173 W. Va. 416, 418, 317 S.E.2d 501, 503 (1984) ("[T]he United States Supreme Court has also recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution. There are a number of cases where state supreme courts have set a higher level of protection under their own constitutions."); Syl. pt.2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."). Moreover, *Nixon* was not called upon to address the substantive type of issues presented in this case. The case was focused upon the right of the Senate to craft rules of procedure for impeachment.

The Respondents have cited to the decision in *In re Judicial Conduct Comm.*, 145 N.H. 108, 111, 751 A.2d 514, 516 (2000). In that case the New Hampshire House Judiciary Committee began an impeachment investigation into conduct by the state Supreme Court chief justice and other members

of that court. The state Supreme Court Committee on Judicial Conduct filed a motion seeking an order requiring the House Committee to allow it to attend any House Committee deposition of any Judicial Conduct member or employee. The state Supreme Court held that the issue presented was a nonjusticiable political question and therefore denied relief. However, the opinion was clear in holding that the judiciary had authority to intervene in an impeachment proceeding:

> The [House Judiciary Committee] first argues that the judicial branch lacks jurisdiction over any matter related to a legislative impeachment investigation. We disagree.
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> > The investigative power of the Legislature, however penetrating and persuasive its scope, is not an absolute right but, like any right, is "limited by the neighborhood of principles of policy which are other than those on which [that] right is founded, and which become strong enough to hold their own when a certain point is reached." United States v. Rumely, 345 U.S. 41, 44, [73 S.Ct. 543, 97 L.Ed. 770 (1953)]; Hudson Water Co. v. McCarter, 209 U.S. 349, 355, [28 S.Ct. 529, 52 L.Ed. 828 (1908)]. The contending principles involved here are those underlying the power of the Legislature to investigate on the one hand and those upon which are based certain individual rights guaranteed to our citizens by the State and National Constitutions.
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> *Nelson v. Wyman*, 99 N.H. 33, 41, 105 A.2d 756, 764 (1954).
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> * * *
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> The court system is available for adjudication of issues of constitutional or other fundamental rights.... In such circumstances, Part I, Article 17 of the New Hampshire ConstitutionPart I, Article 17 of the New Hampshire Constitution does not deprive persons whose rights are violated from seeking judicial redress simply because the violation occurs in the course of an impeachment investigation.
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> * * *
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> The constitutional authority of the House of Representatives to conduct impeachment proceedings without interference **270 *124 from the judicial branch is extensive, but not so extensive as to preclude this court's jurisdiction to hear matters arising from legislative impeachment proceedings. "It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it." *Petition of Mone*, 143 N.H. [128,] at 133, 719 A.2d [626,] at 631 [(1998)] (quoting *Monier [v. Gallen]*, 122 N.H. [474,] at 476, 446 A.2d [454,] at 455 [(1982)]; citing *Merrill v. Sherburne*, 1 N.H. 199, 201-02 (1818)). However, upon briefing and argument, it is apparent that the specific issue raised by the JCC is nonjusticiable. Accordingly, the JCC's request for its special counsel to attend HJC depositions of JCC members and employees is denied.

In re Judicial Conduct, 145 N.H. at 110-113, 751 A.2d at 515. Although the Respondents cited to the decision in *In re Judicial Conduct*, it is clear that the constitutional principles of law discussed in the case are consistent with this Court's ruling, i.e., the judiciary may intervene in an impeachment proceeding to protect constitutional rights.

The Respondents cited to the decision in *Larsen v. Senate of Pennsylvania*, 166 Pa. Cmwlth. 472, 646 A.2d 694 (1994) without any discussion. In *Larsen* a former justice on the state Supreme Court was sentenced to removal from office by a trial court after he was found guilty of an infamous crime. The former justice filed for a preliminary injunction to prevent a senate impeachment trial and asserted numerous grounds for relief, that included: (1) he was no longer in office and could not be removed by the senate, (2) senate rules were unconstitutional, (3) the senate could not permit a committee to hear the case, and (4) he was denied sufficient time to prepare. The court, relying on the decision in *Nixon*, found that the state's impeachment clause was similar to the federal clause and therefore denied relief. However, the opinion noted that the decision by the state Supreme Court decision in *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) held that "the courts have no jurisdiction in impeachment proceedings and no control over their conduct, so long as actions taken are within constitutional lines...." *Larsen*, 166 Pa. Cmwlth. at 482, 646 A.2d at 699. The opinion limited *Dauphin's* qualification on judicial intervention to impeachment proceedings that had ended. The decision in *Larsen* is distinguishable because that state's impeachment clause was aligned with the federal impeachment clause, and did not have a Law and Evidence

Clause like the Constitution of West Virginia. Moreover, Larsen recognized that it could not overrule the state Supreme Court's ruling in *Dauphin*, which left open the door for intervention in an impeachment proceeding for "actions [not] taken within constitutional lines." *Larsen* limited intervention to post-impeachment.

The Respondents have also cited to the decision in *Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988). In that case the state Governor filed a petition for injunctive relief with the state Supreme Court, to prevent the state senate from conducting an impeachment trial against him until his criminal trial was over. The Governor also challenged the impeachment procedures. The state Supreme Court denied relief as follows:

> [W]e can only conclude that the power of impeachment is exclusively vested in the House of Representatives and the power of trial on articles of impeachment belongs solely to the Senate. The Senate's task is to determine if the Governor should be removed from office. Aside from disqualification from holding any other state position of "honor, trust, or profit," the Senate can impose no greater or lesser penalty than removal and can impose no criminal punishment. Trial in the Senate is a uniquely legislative and political function. It is not judicial.

Mecham, 156 Ariz. at 302, 751 P.2d at 962. The decision in *Mecham* is factually distinguishable because it did not involve allegations of a violation of substantive constitutional rights. More importantly, even though the court in *Mecham* denied the requested relief, it made clear that the judiciary could intervene in an impeachment proceeding to protect the constitutional rights of an impeached official:

> ****271** ***125** This Court does have power to ensure that the legislature follows the constitutional rules on impeachment. For instance, should the Senate attempt to try a state officer without the House first voting articles of impeachment, we would not hesitate to invalidate the results.

Mecham, 156 Ariz. at 302-303, 751 P.2d at 962-963. See *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 782 P.2d 1160 (1989) (declining to review impeachment of state Governor because constitutional requirements were met).

In the instant proceeding the Petitioner has alleged that the impeachment charges brought against her are unlawful and violate her constitutional rights. In view of the above analysis, we have jurisdiction to consider the validity of these allegations. [22]

III.

STANDARD OF REVIEW

The Petitioner filed this matter seeking a writ of mandamus to prohibit enforcement of the Articles of Impeachment filed against her. This Court has explained that the function of mandamus is "the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). It was held in syllabus point two of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) that

> A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

In our review of the type of relief the Petitioner seeks we do not believe that mandamus is the appropriate remedy. "In appropriate situations, this Court has chosen to treat petitions for extraordinary relief according to the nature of the relief sought rather than the type of writ pursued." *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 699, 619 S.E.2d 209, 212 (2005). See *State ex rel. Potter v. Office of Disciplinary Counsel of State*, 226 W. Va. 1, 2 n.1, 697 S.E.2d 37, 38 n.1 (2010) ("this Court has, in past cases, treated a request for relief in prohibition as a petition for writ of mandamus if so warranted by the facts. Accordingly, we consider the present petition as a request for mandamus relief."); *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 774, 591 S.E.2d 329, 332 (2003) ("Although Mr. Bradley brought his case as a petition for a writ of prohibition, while Mr. Beirne requested a writ of mandamus, we choose to treat each as a petition for a writ of mandamus, because both petitioners wish to compel the Commissioner to do an affirmative act, i.e., pay benefits."); *State ex rel. Wyant v. Brotherton*, 214 W. Va. 434, 437, 589 S.E.2d 812, 815 (2003) ("Because we find this case to be in the nature of prohibition as opposed to mandamus, we will henceforth treat it as a petition for writ of prohibition."); *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 771–72, 575 S.E.2d 377, 381–82 (2002) ("This case was initially brought as a petition for writ of habeas corpus and/or mandamus. We granted the writ of habeas corpus, leaving for resolution only issues related to mandamus. ****272 *126** Upon further consideration of the issues herein raised, however, we choose (as we have done in many appropriate cases) to treat this matter as a writ of prohibition."); *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 346, 571 S.E.2d 333, 336 (2002) ("Although this case was brought and granted as a petition for a writ of prohibition, we choose to treat it as a writ of mandamus action."); *State ex rel. Conley v. Hill*, 199 W.Va. 686, 687 n. 1, 487 S.E.2d 344, 345 n. 1 (1997) ("Although this case was brought and granted as a petition for mandamus, we choose to treat this matter as a writ of prohibition.").

In light of the issues raised by the Petitioner, we find that the more appropriate relief lies in a writ of prohibition. As a quasi-judicial body the Court of Impeachment is subject to the writ of prohibition. See *State ex rel. York v. W. Virginia Office of Disciplinary Counsel*, 231 W. Va. 183, 187 n.5, 744 S.E.2d 293, 297 n.5 (2013) ("prohibition lies against only judicial and 'quasi-judicial tribunals'[.]"); *Lewis v. Ho-Chunk Nation Election Bd.*, 7 Am. Tribal Law 84 (Ho-Chunk Trial Ct. 2007) ("Therefore, the House may institute a case against a sitting president after determining probable cause of official wrongdoing, and, through designated managers, present the matter before the Senate, which assumes a quasi-judicial role in hearing and deliberating the charges."); *Mayor & City Council of Baltimore ex rel. Bd. of Police of City of Baltimore*, 1860 WL 3363, 15 Md. 376, 459 (1860) ("the present Constitution, invested the Legislature with quasi judicial functions, in exercising the power of impeachment and punishment, as therein provided."). The purpose of the writ is "to restrain inferior courts from *proceeding in causes over which they have no jurisdiction*[.]" Syl. pt. 1, in part, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) (emphasis added). "The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 394, 655 S.E.2d 137, 140 (2007) (internal citation and quotation marks omitted). See W. Va. Code § 53-1-1 (1923) ("The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.").

In syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we set forth the following guideline for issuance of a writ of prohibition that does not involve lack of jurisdiction:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's

> order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With the foregoing in mind, we turn to the merits of the case.

IV.

DISCUSSION

The Petitioner has presented several issues that she contends ultimately require the dismissal of the impeachment charges against her.[23] All of the arguments presented ****273 *127** by the Petitioner have one common thread: they expressly or implicitly contend that the charges are brought in violation of the separation of powers doctrine. Because this common theme permeates all of her arguments, we will provide a separate discussion of that doctrine before we address the merits of each individual issue.

A.

The Separation of Powers Doctrine

"[T]he separation of powers doctrine [is] set forth in our State Constitution." *Erie Ins. Prop. & Cas. Co. v. King*, 236 W. Va. 323, 329, 779 S.E.2d 591, 597 (2015). The doctrine is set out in Article V, § 1 of the Constitution of West Virginia as follows:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.[24]

With regard to this provision, this Court has stated:

> The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.

State ex rel. W. Virginia Citizen Action Grp. v. Tomblin, 227 W. Va. 687, 695, 715 S.E.2d 36, 44 (2011), quoting *State v. Huber*, 129 W.Va. 198, 209, 40 S.E.2d 11, 18 (1946). It has been held that "Article V, section 1 of the Constitution ... is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. pt. 1, in part, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). We have observed that

> The separation of powers doctrine implies that each branch of government has inherent power to "keep its own house in order," absent a specific grant of power to another branch.... This theory recognizes that each branch of government must have sufficient power to carry out its assigned tasks and that these constitutionally assigned tasks will be performed properly within the governmental branch itself.

State v. Clark, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013). Further, the "separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them." *Simpson v. W.*

Virginia Office of Ins. Com'r, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009). It has also been observed that

> The Separation of Powers Clause is not self-executing. Standing alone the doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine.

State ex rel. Affiliated Constr. Trades Found. v. Vieweg, 205 W.Va. 687, 702, 520 S.E.2d 854, 869 (1999) (Davis, J., concurring). Professor Bastress has pointed out the purpose and application of the separation of powers doctrine as follows:

> ****274 *128** A system of divided powers advances several purposes. First, it helps to prevent government tyranny. By allocating the powers among the three branches and establishing a system of checks and balances, the constitution ensures that no one person or institution will become too powerful and allow ambition to supersede the public good....
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> * * *
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> Thus, under the current doctrine, the court's role is to apply Article V to ensure that the system of government in the state remains balanced and that no one branch assumes powers specifically delegated to another, or imposes burdens on another, or passes on its own responsibilities to another branch in such a manner as to threaten the balance of power, facilitate tyranny, or weaken the system of government.

Bastress, *West Virginia State Constitution*, at 141-144. See Syl. pt. 2, *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution.").

The decision in *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973) summarized the development of the separation of powers doctrine as follows:

> From the time of its adherence to by Montesquieu, the author or at least an early supporter of the concept of separation of powers, the political merit of that design of government has not been seriously questioned. Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834 [(1931)]; Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377 [(1880)]. That concept was invoked in the early consideration of the formulation of our federal Constitution. Reflecting the import which he attributed to the concept of separation of powers in government, James Madison, in support of the proposed Constitution, wrote: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. * * * where the Whole power of one department is exercised by the same hands which possess the Whole *114 power of another department, the fundamental principles of a free constitution are subverted.' Speaking of the judiciary, Madison, quoting Montesquieu, wrote: "Were it (judicial power) joined to the executive power, The judge might behave with all the violence of An oppressor." The Federalist Papers, Hamilton, Madison and Jay (Rossiter, 1961). Commenting on the relationship between the three recognized branches of government and the urgency of maintaining a wholly independent judiciary, Alexander Hamilton, in Essay No. 78 of The Federalist Papers, noted: 'The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.' With the real affirmative powers of government reposing in the hands of the executive and legislative branches, it becomes urgent that the judiciary department, one function of which under our fundamental law is to prevent encroachment by the other two branches, remains free and completely independent. As noted by

> Montesquieu in Spirit of Laws, Vol. 1, page 181: '* * * there is no liberty if the power of judging be not separated from the legislative and executive powers.' Thus, judicial independence is essential to liberty—lest the executive sword become a 'Sword of Damocles', precariously and intimidatingly suspended over the judicial head and the legislative law making power be used to usurp the ****275** ***129** rights granted by the Constitution to the people.

Brotherton, 157 W. Va. at 113–14, 207 S.E.2d at 430.

We have recognized that "[t]he system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." Syl. pt. 1, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994). We have also determined that "the role of this Court is vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983). See *State ex rel. W. Virginia Citizens Action Grp. v. W. Virginia Econ. Dev. Grant Comm.*, 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003) ("Underlying any encroachment of power by one branch of government is the paramount concern that such action will impermissibly foster[ ] ... dominance and expansion of power."). Moreover, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government." *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982). See, e.g., *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003) (finding statute that gave legislature a role in appointing members of the West Virginia Economic Grant Committee violated Separation of Powers Clause); *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995) (finding statute which permitted administrative regulations to die if legislature failed to take action violated Separation of Powers Clause); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding statute naming legislative officers to State Building Commission violated Separation of Powers Clause).

The United States Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933) articulated the need for separating the powers of government into three distinct branches:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Government of Philippine Islands*, 277 U.S. 189, 201, 48 S.Ct. 480, 72 L.Ed. 845 [(1928)]; namely, to preclude a commingling of these essentially different powers of government in the same hands....
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> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, *but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments*. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." 1 Andrews, The Works of James Wilson (1896), Vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." 1 Story on the Constitution, 4th ed. s 530.

****276** ***130** *O'Donoghue*, 289 U.S. at 530–31, 53 S.Ct. at 743 (emphasis added). [25]

It must also been understood that this Court "has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatsoever." *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 341, 151 S.E.2d 870, 873 (1966), overruled in part by *State ex rel. Hill v. Smith*, 172 W.

Va. 413, 305 S.E.2d 771 (1983). See *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982) ("we have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government[.]"). "While the Constitution contemplates the independent operation of the three fields of government as to all matters within their respective fields, there can be no doubt that the people, through their Constitution, may authorize one of the departments to exercise powers otherwise rightfully belonging to another department." *State ex rel. Thompson v. Morton*, 140 W.Va. 207, 223, 84 S.E.2d 791, 800–801 (1954).

With these general principles of the separation of powers doctrine guiding our analysis, we now turn to the merits of the issues presented.

B.

An Administrative Rule Promulgated by the Supreme Court Supersede Statutes in Conflict with Them

The first issue we address is the Petitioner's contention that two of the Articles of Impeachment against her are invalid, because they can only be maintained by violating the constitutional authority of the Supreme Court to promulgate rules that have the force of law and supersede any statute that conflicts with them. The two Articles of Impeachment in question are Article IV[26] and Article VI.[27] Both of those Articles ****277** ***131** charge the Petitioner with improperly overpaying senior-status judges. The Petitioner argues that the statute relied upon by Article IV and Article VI is in conflict with an administrative order promulgated by the Chief Justice.

We begin by observing that the 1974 Judicial Reorganization Amendment of the Constitution of West Virginia centralized the administration of the state's judicial system and placed the administrative authority of the courts in the hands of this Court.[28] See *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 300, 210 S.E.2d 649, 651 (1975) ("The Judicial Reorganization Amendment was ratified by a large majority throughout the state."). The Amendment rewrote Article VIII, substituting §§ 1 to 15 for former §§ 1 to 30, amended § 13 of Article III, and added §§ 9 to 13 to Article IX. Justice Cleckley made the following observations regarding the changes:

> These changes include the entirety of the Reorganization Amendment and its concept of a unified court system administered by this Court and not the legislature. More specifically, that same amendment altered Section 1 of Article VIII to provide that the judicial power of the State "shall be vested solely " in this Court and its inferior courts. The predecessor provision to Section 1, though similarly worded, did not include the limiting adverb "solely." In addition, the Modern Budget Amendment insulated the judiciary from political retaliation by preventing the governor and legislature from reducing the judiciary's budget submissions. W.Va. Const., art. V, § 51; *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978); *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973). Taken together, these amendments create a strong and independent judiciary that can concentrate on delivering a high quality, fair, and efficient system of justice to the citizens of West Virginia. Such measures are particularly useful in a State such as ours that continues, and appropriately so, to elect judges to fixed terms of office. That is, because judges remain ultimately beholden to the electorate, the need is even greater to insulate the judiciary from the more routine politics of the annual budget process and legislative or executive manipulation.
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> [A]ltering the administrative structure did not negate all prior laws that are tangentially related to administrative matters. To the contrary, the Reorganization Amendment provides us with a hierarchy to be used in resolving administrative conflicts and problems. As we explained in *Rutledge [v. Workman]*, this Court's "exclusive authority over the administration, and primary responsibility for establishing rules of practice and procedure, secures businesslike management for the courts and promotes simplified and more economical judicial procedures." 175 W.Va. [375,] at 379, 332 S.E.2d [831,] at 834 [(1985)]. Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel. The judicial system was revised, among other things, to simplify the administrative process and to complement prior nonconflicting statutory and case law. Clearly, the administrative structure requires that if there is a conflict,

> we must not only consider the concerns of the parties, but also look ****278** ***132** at the hierarchy of the court system. The administration of the court is very important to the unobstructed flow of court proceedings and business. Court actions are complicated enough without adding to their complexity a struggle over every administrative decision to be made. The purpose of judicial administrative authority is to enhance and simplify our court system and not to burden it.

State ex rel. Frazier v. Meadows, 193 W. Va. 20, 26-28, 454 S.E.2d 65, 71-73 (1994). Professor Bastress has compared the general authority of the Supreme Court before and after the Reorganization Amendment as follows:

> The third and fourth paragraphs, added by the Judicial Reorganization Amendment of 1974, establish the unitary judicial system in West Virginia. The first of those grants the court the power to promulgate rules of procedure relating to all aspects of judicial proceedings in the state. Although the court had previously asserted that as an inherent power, it also conceded that the legislature retained the ultimate authority. After the 1974 amendment, however, the court has ruled, in justifiable reliance on the language of section 3, that the court's rules supersede any legislation in conflict with a court-promulgated rule.

Bastress, *West Virginia State Constitution*, at 227. See *Foster v. Sakhai*, 210 W. Va. 716, 724 n.3, 559 S.E.2d 53, 61 n.3 (2001) ("the constitutional power and inherent power of the judiciary prevent another branch of government from usurping the Court's authority.").

One of the most important changes that the Reorganization Amendment made was to provide this Court with the exclusive constitutional authority to promulgate administrative rules for the effective management of the judicial system, that "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl. pt. 1, in part, *Stern Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977). This authority is found in Article VIII, § 3 of the Constitution of West Virginia. We will address the relevant text of both provisions separately. [29]

To begin, we will look at the Rule-Making Clause of Section 3. The relevant text of the Rule-Making Clause of Section 3 provides as follows:

> The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.

Section 3 unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law. See Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."); Syl. pt. 10, *Teter v. Old Colony Co.*, 190 W. Va. 711, 714, 441 S.E.2d 728, 731 (1994) "Under Article VIII, ... Section 3 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988), superseded by statute as stated in *Miller v. Allman*, 240 W. Va. 438, 813 S.E.2d 91 (2018) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.").

The responsibility imposed on this Court by Section 3 was articulated in *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978):

> **279 *133 The Judicial Reorganization Amendment, Article VIII, Section 3, of the Constitution, placed heavy responsibilities on this Court for administration of the state's entire court system. The mandate of the people, so expressed, commands the members of the Court to be alert to the needs and requirements of the court system throughout the state.

Bagley, 161 W.Va. at 644–45, 246 S.E.2d at 107. "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016) ("The provision in W. Va. Code § 3-7-3 (1963) requiring oral argument to be held in an appeal of a contested election, is invalid because it is in conflict with the oral argument criteria of Rule 18 of the West Virginia Rules of Appellate Procedure."); Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013) ("Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule–Making Clause, Article VIII, § 3 of the West Virginia Constitution, West Virginia Code § 57–3–1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."); Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005) ("The provisions contained in W. Va. Code § 55–7B–6d (2001) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule–Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code § 55–7B–6d, in its entirety, is unconstitutional and unenforceable."); *Games-Neely ex rel. W. Virginia State Police v. Real Property*, 211 W. Va. 236, 245, 565 S.E.2d 358, 367 (2002) ("Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes West Virginia Code § 60A–7–705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order."); *Oak Cas. Ins. Co. v. Lechliter*, 206 W. Va. 349, 351 n.3, 524 S.E.2d 704, 706 n.3 (1999) ("We note, however, that to any extent that W. Va. Code § 56–10–1 may be in conflict with W. Va. R. Civ. P. Rule 22, it has been superseded."); *W. Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 150, 516 S.E.2d 769, 773 (1999) ("if W.Va. Code § 37–14–1 et seq., unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to article eight, section three of our Constitution, and, thus, the prohibition would be void."); *State v. Jenkins*, 195 W. Va. 620, 625 n.5, 466 S.E.2d 471, 476 n.5 (1995) (finding W.Va. R. Evid. Rule 901 superseded W.Va. Code § 57-2-1); Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370, 445 S.E.2d 757 (1994) ("West Virginia Code § 56-1-1(a)(7) provides that venue may be obtained in an adjoining county '[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court....' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of judges."); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (finding W.Va. Code, 55-7B-7, which outlined the qualifications of an expert in a medical malpractice case, was superseded by W.Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) ("a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid."); Syl. pt. 2, *State ex rel. Gains v. Bradley*, 199 W. Va. 412, 484 S.E.2d 921 (1997) ("Rule 1B of the Administrative Rules for Magistrate Courts supersedes W.Va. Code § 50-4-7 (1992), and prospectively **280 *134 provides there is no automatic mandatory right of a party to have a magistrate disqualified."); *Gilman v. Choi*, 185 W. Va. 177, 178, 406 S.E.2d 200, 201 (1990), overruled on other grounds by *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("W.Va. Code, 55–7B–7 [1986], being

concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence."); Syl. pt. 2, *State v. Davis*, 178 W. Va. 87, 88, 357 S.E.2d 769, 770 (1987), overruled on other grounds *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994) ("Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure supersedes the provisions of W.Va. Code, 62-9-1, to the extent that the indorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such indorsement and attestation are sufficient if they appear on the face of the indictment."); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute in part that was in conflict with W. Va. R.App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 425, 306 S.E.2d 233, 236 (1983) ("W.Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State."); Syl. pt. 2, in part, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982) "(West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by ... the Judicial Reorganization Amendment of our Constitution, Article VIII."); *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 567, 295 S.E.2d 271, 276 (1982) (holding that to the extent W.Va. Code § 30-2-1 required security from attorneys to insure their good behavior, it "conflicts with the rules promulgated by this Court [and] must fall.").

Before we address the issue of overpayment of senior-status judges, we must examine the text of the Senior-Status Clause found in Article VIII, § 8 of the Constitution of West Virginia provides as follows:

> A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

The issue of the authority of the Chief Justice to appoint judges for temporary service has been addressed in two cases by this Court. First, in *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 376 S.E.2d 631 (1988) the judge for the Fifth Judicial Circuit (consisting of Calhoun, Jackson and Roane counties) retired from office. A special judge was elected and appointed to fill the vacancy by several members of the Jackson County Bar Association, pursuant to W.Va. Code § 51-2-10. [30] The Administrative Director of this Court filed a writ of prohibition to prevent the newly appointed judge from holding office. The opinion succinctly held that the statute was void as follows:

> W.Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W.Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals with the sole power to appoint a judge for temporary service in any situation which requires such an appointment.
>
> * * *
>
> Any election conducted pursuant to W.Va. Code, 51-2-10 [1931] is void as the constitutional power to assign judges for temporary service rests with the Chief Justice of the West Virginia Supreme Court of Appeals.

Crabtree, 180 W. Va. at 428, 376 S.E.2d at 634. In a footnote in *Crabtree* this Court made further observations relevant to this proceeding:

> W.Va. Const. art. VIII, governing the judiciary, has only been amended twice in the State's history, in 1880 and 1974. Prior to 1974, the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the legislature had substantial ****281** ***135** authority, including the power to create laws concerning special judges. W.Va. Const. art. VIII, § 15 (repealed) stated: "The legislature shall provide by law for holding regular and special terms of the circuit courts, where from any cause the judge shall fail to attend, or, if in attendance, cannot properly preside."
>
> The upshot of this authority was W.Va. Code, 51-2-10 [1931]. By virtue of former art. VIII, § 15, this Court had no constitutional authority to act in such matters.
>
> However, as a result of the Judicial Reorganization Amendment of 1974, the legislature was divested of all administrative powers over state court judges. No provision

> similar to former art. VIII, § 15 exists. Instead, this Court was given "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and the Chief Justice, as "administrative head of all the courts," was specifically given the power of temporary assignment of circuit judges.

Crabtree, 180 W. Va. at 427 n.3, 376 S.E.2d at 633 n.3 (internal citations omitted).

The decision in *Stern Bros. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977) addressed the issue of statutes that attempted to control assignments of judges, but were in conflict with an administrative rule of this Court. In *Stern* the defendants filed a writ of prohibition with this Court to have a substitute trial judge removed from their case. The trial judge was appointed by the Chief Justice of this Court because the original judge was disqualified. The defendants argued that the manner in which the substitute judge was appointed was inconsistent with the statutory scheme for appointing a substitute judge when the original judge is disqualified. This Court found that the administrative rule adopted by this Court for the appointment of a substitute judge invalidated the statutes. The opinion reasoned as follows:

> Procedures for appointment of a substitute judge were promulgated by this Court on May 29, 1975, in an administrative rule dealing with the temporary assignment of circuit court judges where a particular judge is disqualified from handling a case....
>
> The power to promulgate administrative rules is expressly conferred upon this Court under the Judicial Reorganization Amendment, and under Section 8 explicit recognition is made of the inherent rulemaking power of the Court, which prior to the Judicial Reorganization Amendment had been utilized by this Court to adopt judicial rules.
>
> Such rules have the force and effect of statutory law by virtue of Article VIII, Section 8 of the Judicial Reorganization Amendment.... Prior to the adoption of the Judicial Reorganization Amendment, there may have been some question as to this Court's supervisory powers over lower courts. It is now quite clear under the Judicial Reorganization Amendment that considerable supervisory powers have been conferred upon this Court. There was also some confusion prior to the Judicial Reorganization Amendment as to what further action a disqualified judge could take in the case. This arose partly out of the fact that there was no clear authority in the Supreme Court to temporarily assign judges in such situations.
>
> Consequently, the disqualified judge had either to initiate the election of a special judge pursuant to W.Va. Code, 51-2-10, or to attempt to transfer the case to another circuit court in accordance with W.Va. Code, 56-9-2.
>
> The statute relating to disqualification of judges contained a proviso permitting the judge "... to enter a formal order designed merely to advance the cause towards a final hearing and not requiring judicial action involving the merits of the case." W.Va. Code, 51-2-8....
>
> Undoubtedly, one of the reasons behind the Judicial Reorganization Amendment was to provide a more simplified system of handling the problem of securing a replacement judge where the original judge is disqualified. The former procedures were cumbersome at best. Special judge elections were constantly attacked and in many instances overturned because of some technical failure to follow W.Va. Code, 51-2-10.
>
> ****282** ***136** The administrative rule promulgated by this Court now controls the procedure for selection of a temporary judge where a disqualification exists as to a circuit court judge. Under Article VIII, Section 8 of the West Virginia Constitution, it operates to supersede the existing statutory provisions found in W.Va. Code, 51-2-9 and -10, and W.Va. Code, 56-9-2, insofar as they relate to the selection of special judges or the assignment of the case to another circuit judge when a circuit judge is disqualified.

Stern, 160 W. Va. at 572-575, 236 S.E.2d at 225-227. [31]

In the final analysis, the foregoing discussion instructs this Court that statutory laws that are repugnant to the constitutionally promulgated rules of this Court are void. With these legal principles in full view, we turn to the merits of the issue presented.

Two of the Articles of Impeachment brought against the Petitioner, Article IV and Article VI, charge her with overpaying senior-status judges in violation of the maximum payment allowed under W.Va. Code § 51-9-10. The Articles of Impeachment also state that the overpayments

violated W.Va. Code § 51-2-13, W.Va. Const. Art. VIII, § 7, an administrative order of the Supreme Court and Canon I and II of the West Virginia Code of Judicial Conduct. The Articles also allege that the overpayments "potentially" violate two criminal statutes: W.Va. Code § 61-3-22 (falsification of accounts) and W.Va. Code § 61-3-24 (obtaining money by false pretenses).[32] The viability of all of the alleged violations in the two Articles hinge upon whether the Petitioner overpaid senior-status judges. The determination of overpayment is controlled by W.Va. Code § 51-9-10, which limits the payment to senior-status judges. The full text of W.Va. Code § 51-9-10 provides as follows:

> The West Virginia supreme court of appeals is authorized and empowered to create a panel of senior judges to utilize the talent and experience of former circuit court judges and supreme court justices of this state. The supreme court of appeals shall promulgate rules providing for said judges and justices to be assigned duties as needed and as feasible toward the objective of reducing caseloads and providing speedier trials to litigants throughout the state: Provided, That reasonable payment shall be made to said judges and justices on a per diem basis: Provided, however, That *the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge*, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter.[33] (Emphasis added.)

The Petitioner does not dispute that she authorized the payment of senior-status judges, when necessary, in excess of the limitation imposed by the statute. Although the Petitioner has advanced several arguments as to why her conduct was valid, we need only address one of her arguments. That argument centers on an administrative order promulgated by the Chief Justice on May 17, 2017.[34] The order expressly authorized the payment of senior-status judges in excess of the limitation imposed by W.Va. Code § 51-9-10. The order stated that it was being promulgated under the authority of Article III, §§ 3, 8, and 17. The order also stated the reason for the decision to authorize payment in excess of the statutory limitation:

> In the vast majority of instances, the statutory proviso [W.Va. Code § 51-9-10] does not interfere with providing essential services. However, in certain exigent circumstances involving protracted illness, lengthy suspensions due to ethical violations, ****283** ***137** or other extraordinary circumstances, it is impossible to assure statewide continuity of judicial services without exceeding the payment limitation imposed by the statutory proviso.

The Petitioner provided an illustration of a situation where it was necessary to pay a senior-status judge in excess of the statutory limitation:

> For example, in 2017, the Supreme Court of Appeals suspended a newly elected circuit court judge of Nicholas County for two years because of violations of the code of judicial ethics in certain campaign advertisements. *In re Callaghan*, 238 W.Va. 495, 503, 796 S.E.2d 604, 612, cert. denied sub. nom., *Callaghan v. W. Virginia Judicial Investigation Comm'n*, —— U.S. ——, 138 S.Ct. 211, 199 L.Ed.2d 118 (2017). Because the newly elected Judge was suspended for two years, and because Nicholas County is a single judge judicial circuit, an extraordinary need for temporary judicial services arose in order to provide the people of Nicholas

> County with court services and to avoid the unconstitutional denial of access to the speedy administration of justice. The Chief Justice appointed senior status Judge James J. Rowe to serve as the temporary circuit judge of Nicholas County. Judge Rowe travels from his home in Lewisburg each day to perform this service. Judge Rowe serves the people of Nicholas County effectively, attending to the cases on the circuit court's docket. Using one senior status judge, rather than parading multiple judges through the courthouse, allows for the efficient and consistent adjudication of the matters pending in Nicholas County.

Prior to the Reorganization Amendment, "the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the Legislature had substantial authority, including the power to create laws concerning special judges." *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 427, 376 S.E.2d 631, 633 (1988). This authority is evident in W.Va. Code § 51-9-10 which, as noted, was enacted in 1949. We have observed as a general matter that "[t]he 1974 Judicial Reorganization Amendment to our State Constitution also recognized that previously enacted laws repugnant to it were voided." *Carey v. Dostert*, 170 W. Va. 334, 336, 294 S.E.2d 137, 139 (1982). See W.Va. Const. Art. VIII, § 13 ("Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article *and are not repugnant thereto*, shall be and continue the law of this state until altered or repealed by the Legislature.") (emphasis added). West Virginia Code § 51-9-10, in its entirety, is repugnant to Article VIII, § 3 and § 8. The statute seeks to control a function of the judicial system, appointing senior-status judges for temporary service, when Article VIII, § 8 has expressly given that function exclusively to the Supreme Court. Moreover, the statute's limitation on payment to senior-status judges is void and unenforceable, because of the administrative order promulgated on May 17, 2017. [35] See Syl. pt. 4, *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973) ("The judiciary department has the inherent power to determine what funds are necessary for its efficient and effective operation."). Finally, as we have long held, "[l]egislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). To be clear, and we so hold, West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and ****284** § 8 of the West Virginia Constitution. ***138** Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable. [36]

In light of our holding, the Petitioner did not overpay any senior-status judge as alleged in Article IV and Article VI of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under those Articles.

C.

The Supreme Court has Exclusive Jurisdiction to Determine whether a Judicial Officer's Conduct Violates a Canon of the Code of Judicial Conduct

The Petitioner next contends that Article XIV of the Impeachment Articles is invalid because it is based upon alleged violations of the West Virginia Code of Judicial Conduct, which, she contends, is constitutionally regulated by the Supreme Court. [37] To be ****285** ***139** blunt, Article XIV is an unwieldy compilation of allegations that culminate with the accusation that the Petitioner's conduct, with respect to the allegations, violated Canon I [38] and Canon II [39] of the Code of Judicial Conduct. [40] We agree with the Petitioner that this Court has exclusive constitutional jurisdiction over conduct alleged to be in violation of the Code of Judicial Conduct.

The controlling constitutional authority is set out under Article VIII, § 8 of the Constitution of West Virginia. We have held that "[p]ursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to 'prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of

regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof [.]' " Syl. pt. 5, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994). The relevant text of Section 8 provides as follows:

> Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this state) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.
>
> * * *
>
> When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

This Court's express constitutional authority to adopt rules of judicial conduct and discipline is obvious from the language of Section 8. Pursuant to this express authority, we have adopted the Code of Judicial Conduct and the Rules of Judicial Disciplinary Procedure. Under Rule 4.10 and Rule 4.11 of the Rules of Judicial Disciplinary Procedure, this Court has the exclusive authority to determine whether a justice, judge, or magistrate violated the Code of Judicial Conduct. The record does not disclose that this Court has found that the Petitioner violated Canon I or Canon II, based upon the allegations alleged in Article XIV of the Articles of Impeachment. Moreover, even if the record had disclosed that the Petitioner was previously found to have violated the Canons in question, those violations could not have formed the basis of an impeachment charge. This is because of the ****286 *140** limitations imposed upon the scope of a Canon violation that is found by this Court. The following is provided in Item 7 of the Scope of the Code of Judicial Conduct:

> The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

It is quite clear that Item 7 prohibits a Canon violation from being used as the "basis" of a civil or criminal charge and, thus, could not be used as a basis for impeaching the Petitioner.[41] This Court observed in *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013):

> Just as the legislative branch has the power to examine the qualifications of its own members and to discipline them, this Court has the implicit power to discipline members of the judicial branch. The Court has this power because it is solely responsible for the protection of the judicial branch, and because the power has not been constitutionally granted to either of the other two branches.

Watkins, 233 W. Va. at 177, 757 S.E.2d at 601.

It is quite evident to this Court that the impeachment proceedings under Article XIV of the Articles of Impeachment requires the Court of Impeachment to make a determination that the Petitioner violated Canon I and Canon II. Such a determination in that forum violates the separation of powers doctrine, because pursuant to Article VIII, § 8 of the Constitution of West Virginia, this Court has the exclusive authority to determine whether the Petitioner violated either of those Canons. In other words, and we so hold, this Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct.

Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

The Respondents have argued that "to hold that the Legislature cannot consider the Code of Judicial Conduct in its deliberation of impeachment proceedings against a judicial officer would have the absurd result of prohibiting removal from office for any violations of the Code of Judicial Conduct." This argument misses the point. Unquestionably, the Legislature can consider in its deliberations whether there was evidence showing that this Court found a judicial officer violated a Canon. However, the Canon violation itself cannot be the basis of the impeachment charge—at most it could only act as further evidence for removal based upon other valid charges of wrongful conduct.

In light of our holding, the Court of Impeachment does not have jurisdiction over the alleged violations set out in Article XIV of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under that Article as written. [42]

**287 *141 D.

The Articles of Impeachment were Filed in Violation of Provisions of House Resolution 201

Although we have determined that the Petitioner is entitled to relief based upon the foregoing, we believe that the remaining issues involving the failure to comply with two provisions of House Resolution 201 are not moot. This Court set forth a three-prong test to determine whether we should rule on the merits of technically moot issues in syllabus point 1 of *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989):

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

We believe that there may be collateral consequences in failing to address the issues, the issues are of great public importance, and the issues may present themselves again. *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 297, 569 S.E.2d 809, 818 (2002) ("Because of the possibility that the Division's continued utilization of this system may escape review at the appellate level, we address the merits of this case under the ... exception to the mootness doctrine.").

The Petitioner has argued that House Resolution 201 required the House Committee on the Judiciary to set out findings of fact in the Articles of Impeachment and required the House of Delegates adopt a resolution of impeachment. The Petitioner contends that neither of these required tasks were performed and that her right to due process was violated as a consequence. We agree.

We begin by noting that "[t]he threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 709, 279 S.E.2d 169, 175 (1981). [43] See Syl. Pt. 1, *Waite v. Civ. Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against state action which affects a liberty or property interest."). We have held as a general matter that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *State ex rel. Wilson v. Truby*, 167 W. Va. 179, 188, 281 S.E.2d 231, 236 (1981). The Petitioner has both a liberty [44] and property [45] interest in

having the impeachment rules followed. ****288** ***142** The Petitioner has a liberty interest in not having her reputation destroyed in the legal community and public at-large by being impeached and removed from office; and she has a property interest in obtaining her pension when she chooses to retire.

We begin by noting the record supports the Petitioner's contention that House Resolution 201 required the Judiciary Committee to set out findings of fact, and that this was not done. Rule 3 and 4 of Resolution 201 required the Judiciary Committee to do the following:

> 3. To make findings of fact based upon such investigation and hearing(s);
>
> 4. To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper.

The record demonstrates that the Judiciary Committee was aware that it failed to carry out the above duties, but refused to correct the error. The following exchange occurred during the proceedings in the House regarding the failure to follow Rules 3 and 4:

> MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman. Counsel, I was going through these Articles. Where are the findings of fact?
>
> MR. CASTO: Well, there—there are no findings of fact there. The Committee—
>
> MINORITY VICE CHAIR FLUHARTY: Where?
>
> MR. CASTO: I said, sir, there are no findings of fact.
>
> MINORITY VICE CHAIR FLUHARTY: There are no findings of fact? All right. Have you read House Resolution 201?
>
> MR. CASTO: I have sir, but I have not read it today.
>
> MINORITY VICE CHAIR FLUHARTY: Well, do you know that we're required to have findings of fact?
>
> MR. CASTO: I think, sir, that my understanding is—based upon the Manchin Articles—that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed equivalent to a findings of fact. The—but that, again, is your interpretation, sir.
>
> MINORITY VICE CHAIR FLUHARTY: So based upon the clear wording of House Resolution 201, it says we're "To make findings of fact based upon such investigation and hearings;" and "To report to the Legislature its findings of facts and any recommendations consistent with those findings of facts which the Committee may deem proper." I mean, you're—you're aware how this works in the legal system. You draft separate findings of fact. I'm just wondering why we haven't done that.
>
> MR. CASTO: Because, sir, that is not the manner in which impeachment is done.
>
> MINORITY VICE CHAIR FLUHARTY: Well, findings of fact in House Resolution 201 are referenced separate from proposed Articles of Impeachment. Am I wrong in that observation?
>
> MR. CASTO. I don't believe that you're wrong in that.

The record also discloses that the Judiciary Committee was warned by one of its members of the consequences of its failure to follow its own rules:

> MINORITY CHAIR FLEISCHAUER: Thank you, Mr.—thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it—it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.
>
> * * *
>
> And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.
>
> * * *
>
> So I think we—if there—there would be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and—in this case, it's not conclusions of law, but it's recommendations—that we should follow that.

****289** ***143** As previously stated, the Petitioner has also asserted that the House of Delegates failed to adopt a resolution of impeachment. Rule 2 of the last Further Resolved section of Resolution 201 provides as follows:

> Further resolved ... that the House of Delegates adopt a resolution of impeachment and formal articles of impeachment as prepared by the Committee; and that the House of Delegates deliver the same to the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law.

A review of the Articles of Impeachment that were submitted to the Senate unquestionably shows that the House of Delegates failed to include language indicating that the Articles were adopted by the House.

We are gravely concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for the purpose of imposing sanctions against public officials. This right to due process is heightened when the Legislature attempts to impeach a public official. Therefore we hold, in the strongest of terms, that the Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

We must also point out that the Petitioner was denied due process because none of the Articles of Impeachment returned against her contained a statement that her alleged wrongful conduct amounted to maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor, as required by Article IV, § 9 of the Constitution of West Virginia. This is the equivalent of an indictment failing to allege the essential elements of wrongful conduct. See Syl. pt. 1, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966) ("In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.").

V.

CONCLUSION

We have determined that prosecution of Petitioner for the allegations set out in Article IV, Article VI and Article XIV of the Articles of Impeachment violates the separation of powers doctrine. The Respondents do not have jurisdiction over the alleged violations in Article IV and Article VI. The Respondents also do not have jurisdiction over the alleged violation in Article XIV as drafted. In addition, we have determined that the failure to set out findings of fact, and to pass a resolution adopting the Articles of Impeachment violated due process principles. Consequently, the Respondents are prohibited from proceeding against the Petitioner for the conduct alleged in Article IV and Article VI, and in Article XIV as drafted. The Writ of Prohibition is granted. The Clerk is hereby directed to issue the mandate contemporaneously forthwith.

Writ granted.

ACTING JUSTICE LOUIS H. BLOOM concurs in part and dissents in part and reserves the right to file a separate opinion.

ACTING JUSTICE JACOB E. REGER concurs in part and dissents in part and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN is disqualified.

JUSTICE ALLEN H. LOUGHRY II suspended, therefore not participating

JUSTICE ELIZABETH WALKER is disqualified.

JUSTICE PAUL T. FARRELL sitting by temporary assignment is disqualified.

JUSTICE TIM ARMSTEAD did not participate.

JUSTICE EVAN JENKINS did not participate.

ACTING JUSTICE RUDOLPH J. MURENSKY, II, and ACTING JUSTICE RONALD E. WILSON sitting by temporary assignment.

Bloom, J. and Reger, J., concurring in part and dissenting in part:

**290 *144 In this proceeding the Court was called upon to decide whether three Articles of Impeachment against the Petitioner, Article IV, Article VI, and Article XIV, were constitutionally valid. The majority opinion concluded that all three Articles of Impeachment were constitutionally invalid and therefore prohibited the Respondents from prosecuting the Petitioner on those charges. We concur in the resolution of those three Articles of Impeachment. Even though the dispositive issues in this case were resolved when it was determined that all three Articles of Impeachment were invalid, the majority opinion chose to address another issue that was not necessary for the resolution of the case. For the reasons set out below, we dissent from the majority decision to address that issue. [1]

Prefatory Remarks

Before we address the substantive issues of our concurring opinion, we feel that it is imperative that we make clear that it is our belief that the Legislature has absolute authority to impeach a judicial officer or any State public officer for wrongful conduct. Through the State Constitution the people of West Virginia provided that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others...." W.Va. Const. Art. 5, § 1. It has been observed that "[t]he doctrine of separation of powers 'is at the heart of our Constitution.' " *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982). The objective of that doctrine has been eloquently and concisely stated as follows:

> The doctrine of the separation of powers was adopted ... not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 84, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).

The State Constitution, Article IV, § 9, invests absolute authority in the Legislature to bring impeachment charges against a public officer and to prosecute those charges. Pursuant to Article IV, § 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). Courts around the country have long recognized that the Legislature has "exclusive jurisdiction in impeachment matters or matters pertaining to impeachment of impeachable officers[.]" *State v. Chambers*, 220 P. 890, 892 (Okla. 1923). Of course "that authority is not unbounded and legislative encroachment upon other constitutional principles may, in an appropriate case, be subject to judicial review." *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 574, 858 A.2d 709, 730 (2004). Even so, judicial intervention in an impeachment proceeding should be extremely rare, and only in the limited situation where an impeachment charge is prohibited by the Constitution.

Courts have observed that the "political question doctrine" is part of the separation of powers doctrine. "[T]he political question doctrine is essentially a function of the separation of powers, ... existing to restrain courts from inappropriate interference in the business of the other branches of Government, ... and deriving in large part from prudential concerns about the respect we owe the political departments." *Nixon v. United States*, 506 U.S. 224, 252-253, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring) (internal quotation marks and citations omitted). The United States Supreme Court has summarized the political question doctrine as follows:

> **291 *145 Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of

> a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L.Ed. 2d 663 (1962). In the final analysis, "if the text of the constitution has demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the powers and functions of that branch." *Horton v. McLaughlin*, 149 N.H. 141, 143, 821 A.2d 947, 949 (2003). See *Smith v. Reagan*, 637 F. Supp. 964, 968 (E.D.N.C. 1986), rev'd on other grounds, 844 F.2d 195 (4th Cir. 1988) ("The courts have often recognized that this doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate branch of government.").

As we demonstrate below, the political question doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding.

1.

Resolution of the Procedural Flaws in the Impeachment Proceeding Should have been Resolved by the Court of Impeachment

The majority opinion correctly determined that the judiciary has a limited role in impeachment proceedings, that extend to protecting the constitutional rights of an impeached official. However, the majority opinion went beyond that limited role. Specifically, the majority opinion determined that it had authority to decide that two alleged procedural errors invalidated the entire impeachment proceedings. Those alleged errors involved the House of Delegates failure to include findings of fact in the Articles of Impeachment, and in failing to pass a resolution adopting the Articles of Impeachment.

The United States Supreme Court has observed, and we agree, that there should not be "judicial review to the procedures used by the [Legislature] in trying impeachments[.]" *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 739, 122 L.Ed. 2d 1 (1993). It is the exclusive province of the Legislature to determine what, if any, consequences should follow from its failure to adhere to an impeachment procedure. In this case, as we mentioned, the House of Delegates are alleged to have failed to make findings of facts and to adopt a resolution of impeachment. The impact of both of those alleged errors on the impeachment proceedings was a matter for the House of Delegates to resolve and, in the absence of the matter being resolved by the House, it should have been presented to the Court of Impeachment for the Senate to resolve. See *Hastings v. United States*, 837 F. Supp. 3, 5 (D.D.C. 1993) ("Thus, the Senate's procedures for trying an impeached individual cannot be subject to review by the judiciary."); *Alabama House of Representatives Judiciary Comm. v. Office of the Governor of Alabama*, 213 So. 3d 579 (Ala. 2017) ("[T]he method of impeachment of the governor rests in the legislature, courts are required to refrain from exercising judicial power over this matter. The exercise of such power would infringe upon the exercise of clearly defined legislative power."); *Mecham v. Gordon*, 156 Ariz. 297, 303, 751 P.2d 957, 963 (1988) ("[T]he Constitution gives the Senate, rather than this Court, the power to determine what rules and procedures should be followed in the impeachment trial."). Ultimately, the House or the Senate could have determined that the alleged errors were harmless and did not affect the substantial rights of the Petitioner. See *State v. Swims*, 212 W.Va. 263, 270, 569 S.E.2d 784, 791 (2002) ("Error is harmless when it is trivial, ****292** ***146** formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the outcome of the trial."); Syl. pt. 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998) ("Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.").

Even if we agreed that the procedural issues were properly before this Court, the longstanding practice of this Court is not to address an issue that is not necessary in order to grant the litigant the relief he or she seeks. See *State ex rel. Am. Elec. Power Co. v. Swope*, 239 W. Va. 470, 476 n.9, 801 S.E.2d

485, 491 n.9 (2017) ("Because this case can be resolved on the first issue presented, the applicability of the public policy exception, we need not address the remaining issues presented by Petitioners."); *Littell v. Mullins*, No. 15-0364, 2016 WL 1735234, at *5 n.6 (W. Va. 2016) ("Because our resolution of the first issue raised by Mr. Littell is dispositive of the case sub judice, we need not address his remaining assignments of error[.]"); *State v. Stewart*, 228 W. Va. 406, 419 n.13, 719 S.E.2d 876, 889 n.13 (2011) ("Because we have found the issues discussed dispositive, we need not address the defendant's remaining assignments of error."); *Gibson v. McBride*, 222 W. Va. 194, 199 n.17, 663 S.E.2d 648, 653 n.17 (2008) ("Because we affirm the granting of the writ on the issue of prison garb and shackles, we need not address the remaining issues[.]"); State ex rel. Pritt v. Vickers, 214 W. Va. 221, 227 n.21, 588 S.E.2d 210, 216 n.21 (2003) ("Because of our resolution of the scheduling order motion, we need not address the remaining issues presented by Ms. Pritt."); *Am. Tower Corp. v. Common Council of City of Beckley*, 210 W. Va. 345, 350 n.14, 557 S.E.2d 752, 757 n.14 (2001) ("As a result of our resolution of this issue, we need not address further the Council's remaining assignments of error."). It is clear that when the majority opinion resolved the substantive issues in Article IV, Article VI, and Article XIV, the Petitioner had obtained the relief she sought. Thus, there was no need to address the remaining issues raised.

By addressing the non-dispositive procedural issues, the majority decision is rendering an advisory opinion on those issues. It is a fundamental principle that "this Court is not authorized to issue advisory opinions[.]" *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 891, 207 S.E.2d 113, 122 (1973) (Haden, J., dissenting). The Court has observed that "[s]ince President Washington, in 1793, sought and was refused legal advice from the Justices of the United States Supreme Court, courts—state and federal—have continuously maintained that they will not give 'advisory opinions.' " *Harshbarger v. Gainer*, 184 W.Va. 656, 659, 403 S.E.2d 399, 402 (1991). See *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185, 27 S.E.2d 486, 487-488 (1943) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes."). Specifically, this Court has expressly held "that the writ of prohibition cannot be invoked[ ] to secure from th[is] Court ... an advisory opinion [.]" *F.S.T., Inc. v. Hancock Cty. Comm'n*, No. 17-0016, 2017 WL 4711427, at *3 (W. Va. 2017) (internal quotation marks and citation omitted). More importantly, the advisory opinion on the two issues has a lethal consequence—it has invalidated the impeachment trials of the two remaining judicial officers.

2.

The Legislature May Seek to Impeach the Petitioner again Based upon Some of the Allegations in Article XIV of the Articles of Impeachment

It is clear that the Legislature cannot seek to impeach the Petitioner once again on the charges set out in Article IV and Article VI. However, we believe the Legislature has the right to seek to institute new impeachment proceedings to craft a constitutionally acceptable impeachment charge based upon the allegations set out in Article XIV.

It has been recognized that "[i]mpeachment is in the nature of an indictment by a grand jury." *State v. Leese*, 55 N.W. 798, 799 (Neb. 1893). See *Brumbaugh v. Rehnquist*, 2001 WL 376477, at *1 (N.D. Tex. Apr. 13, 2001) ("This process produces articles of impeachment ****293** ***147** resembling an indictment which trigger the 'sole Power' of the Senate to 'try all Impeachments.' "); *Ferguson v. Wilcox*, 119 Tex. 280, 297, 28 S.W.2d 526, 534 (Tex. 1930) ("The House of Representatives first acts in the capacity of a grand jury, and it must, in effect, return the indictment, to wit, the articles of impeachment."); *State v. Buckley*, 54 Ala. 599, 618 (1875) (recognizing "articles of impeachment are a kind of bill of indictment."). The law in this State is clear in holding that a defective indictment may be amended by a court in limited circumstances, and may be resubmitted to a grand jury to correct a defect. This principle of law was set out in syllabus point 3 of *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995) as follows:

> Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An "amendment of form" which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is

> not subjected to any added burden of proof, and is not otherwise prejudiced.

Consistent with *Adams*, we believe that the Legislature has absolute discretion in seeking to re-impeach the Petitioner on the allegations contained in Article XIV.

In view of the foregoing, we concur in part and dissent in part.

All Citations

241 W.Va. 105, 819 S.E.2d 251

Footnotes

1 It will be noted that the Petitioner failed to name as a respondent the Acting Chief Justice, the Honorable Justice Paul T. Farrell, that is presiding over the impeachment proceeding that she seeks to halt. Ordinarily the judicial officer presiding over a proceeding that is being challenged is named as a party in a proceeding in this Court. However, the omission of Acting Chief Justice Farrell as a named party in this matter is not fatal to the relief that is being requested. Pursuant to rules adopted by the Senate to govern the impeachment proceedings, the Acting Chief Justice was stripped of his judicial authority over motions, objections and procedural questions. This authority was removed under Rule 23(a) of Senate Resolution 203 as follows:

> All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer [Acting Chief Justice], who shall decide the motion, objection, or procedural question: Provided, That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question.

As a result of Rule 23(a) Acting Chief Justice Farrell is not an indispensable party to this proceeding.

2 We are compelled at the outset to note that this Court takes umbrage with the tone of the Respondents brief, insofar as it asserts "that a constitutional crisis over the separation of powers between the Legislature and Judicial Branches" would occur if this Court ruled against them. This Court is the arbiter of the law. Our function is to keep the scales of justice balanced, not tilted in favor of a party out of fear of retribution by that party. We resolve disputes based upon an unbiased application of the law.

3 This Court is aware that transparency is important. However, the Respondents have closed the door on themselves by declining to have oral arguments and taking the untenable position of not responding to the merits of the arguments. This Court would have appreciated well-researched arguments from the Respondents on the merits of the issues.

4 The Auditor's office issued a second report involving the Petitioner, Justice Robin Davis and Justice Elizabeth Walker. That report did not recommend an ethics investigation of those Justices.

5 Additional charges were later brought against Justice Loughry. He was suspended from office.

6 On July 11, 2018 Justice Ketchum resigned/retired effective July 27, 2018. As a result of his decision the Judiciary Committee did not consider impeachment offenses against him.

7 Justice Walker was named in 1 Article; Justice Davis was named in 4 Articles; and Justice Loughry was named in 7 Articles.

8 Justice Davis retired from office on August 13.

9 The text of the Article is set out in the Discussion section of the opinion.

10 The text of the Article is set out in the Discussion section of the opinion.

11 The text of the Article is set out in the Discussion section of the opinion.

12 The Board of Managers are "a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment." Rule 1, Senate Resolution 203.

13 One of the arguments made by the Respondents is that this Court should not address the merits of the Petitioner's arguments, because she has raised a similar challenge to the Articles of Impeachment in the proceeding pending before them that has not been ruled upon. Ordinarily this Court would defer to a lower tribunals ruling on a matter before this Court will address it. However, we have carved out a narrow exception to this general rule. In this regard, we have held that "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. pt. 2, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005). See *Simpson v. W. Virginia Office of Ins. Com'r*, 223 W. Va. 495, 504, 678 S.E.2d 1, 10 (2009) ("Nevertheless, we may consider this constitutional issue for the first time on appeal because it is central to our resolution of this case."); *State v. Allen*, 208 W. Va. 144, 151 n.12, 539 S.E.2d 87, 94 n.12 (1999) ("this Court may, under the appropriate circumstances, consider an issue initially presented for consideration on appeal."). We exercise our discretion to address the merits of the constitutional issues presented in this matter. See also, *State ex rel. Bd. of Educ. of Kanawha Cty. v. Casey*, 176 W. Va. 733, 735, 349 S.E.2d 436, 438 (1986) (recognizing that exhaustion of an alternative remedy is not required "where resort to available procedures would be an exercise in futility.").

14 "Prior to the Judicial Reorganization Amendment [of 1974], the Justices of the Court were referred to as 'Judges' and the Chief Justice was referred to as 'President.' " *State v. McKinley*, 234 W. Va. 143, 150 n.3, 764 S.E.2d 303, 310 n.3 (2014).

15 The Constitution of West Virginia grants authority to the Legislature to provide appellate jurisdiction to this Court for areas of law that are not set out in the constitution. See W.Va. Const. Art. VIII, § 3 ([The Supreme Court] "shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.").

16 Article VIII, § 3 of the Constitution of West Virginia provides that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."

17 It must be clearly understood that the Law and Evidence Clause is not superfluous language. Under the 1863 Constitution of West Virginia the impeachment provision was set out in Article III, § 10. The original version of the impeachment provision did not contain a Law and Evidence Clause. The 1863 version of the impeachment provision read as follows:

> Any officer of the State may be impeached for maladministration, corruption, incompetence, neglect of duty, or any high crime or misdemeanor. The house of delegates shall have the sole power of impeachment. The senate shall have the sole power to try impeachments. When sitting for that purpose, the senators shall be on oath or affirmation; and no persons shall be convicted without the concurrence of two-thirds of

> the members present. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold any office of honor, trust or profit, under the State; but the party convicted shall, nevertheless, be liable and subject to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the legislature, for the trial of impeachments.

The Law and Evidence Clause was specifically added to the impeachment provision in the constitution of 1872. The affirmative creation and placement of the Law and Evidence Clause in the new constitution supports the significance this Court has given to that clause. A similar Law and Evidence Clause appears in the impeachment laws of 11 states. See Ariz. Const. Art. VIII, Pt. 2 § 1 (1910); Colo. Const. Art. XIII, § 1 (1876); Kan. Const. Art. II, § 27 (1861); Md. Const. Art. III, § 26 (1867); Miss. Const. Art. 4, § 49 (1890); Nev. Const. Art. VII, § 1 (1864); N.D. Cent. Code Ann. § 44-09-02 (1943); Ohio Const. Art. II, § 23 (1851); Utah Const. Art. VI, § 18 (1953); Wash. Const. Art. V, § 1 (1889); Wyo. Const. Art. III, § 17 (2016). There does not appear to be any judicial decisions from those jurisdictions addressing the application of the Law and Evidence Clause. It is also worth noting that under the 1863 Constitution of West Virginia there was no provision for a presiding judicial officer. The 1872 Constitution of West Virginia added the provision requiring a judicial officer preside over an impeachment proceeding. This requirement is further evidence that an impeachment proceeding was not beyond the jurisdiction of this Court, insofar as it solidified the quasi-judicial nature of the proceeding.

18 The Respondents have argued in a footnote of their brief that "the Impeachment Clause vests absolute discretion in the context of impeachment in the Legislature." The Respondents cite to the decision in *Goff v. Wilson*, 32 W. Va. 393, 9 S.E. 26 (1889) as support for that proposition. *Goff* does not support the proposition and is not remotely relevant to this case. In *Goff* the petitioner wanted this Court to declare that he received the highest number of votes for the office of governor, before the Legislature carried out its duties in certifying the results of the election. We declined to intervene because no authority permitted this Court to intervene. Contrary to the Respondents' assertion, that the Legislature has absolute discretion in impeachment matters, the Law and Evidence Clause of the constitution strips the Legislature of "absolute" discretion in such matters.

19 This is not the first time that we have permitted access to this Court, under our original jurisdiction, when no right of appeal existed from a quasi-judicial proceeding. For example, a litigant in the former Court of Claims had no right to appeal a decision from that tribunal. However, this Court found that constitutional principles permitted access to this Court under our original jurisdiction:

> [T]his Court obviously may review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2 of our Constitution, through proceedings in mandamus, prohibition, or certiorari. Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect basic principles of separation of powers.

G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents, 177 W. Va. 539, 541 n.3, 355 S.E.2d 32, 33 n.3 (1987). See Syl. pt. 3, *City of Morgantown v. Ducker*, 153 W. Va. 121, 121, 168 S.E.2d 298, 299 (1969) ("Mandamus is the proper remedy to require the State Court of Claims to assume jurisdiction of a monetary claim against the Board of Governors of West Virginia University."). The Court of Claims was renamed in 2017 and is now called the "West Virginia Legislative Claims Commission." See W. Va. Code § 14-2-4 (2017).

20 The Respondents cited to this case three times in their brief, but did not provide any discussion of the case.

21 Even the Respondents have conceded in their brief that "West Virginia's Impeachment Clause is significantly broader than its counterpart in the United States Constitution."

22 The Respondents have argued that intervention in the impeachment proceeding violates the Guarantee Clause of the federal constitution. This clause provides as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Conts. Art. IV, § 4. The Respondents contend that the Guarantee Clause requires that a state have "separate and coequal branches" of government. In a convoluted manner the Respondents contend that this Court's intervention in this matter would destroy the "separate and coequal branches" of government. The Respondents have not cited to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause. See *New York v. United States*, 505 U.S. 144, 184, 112 S.Ct. 2408, 2432, 120 L.Ed.2d 120 (1992) ("In most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."). We find no merit in the contention. Further, the issue of the separation of powers doctrine is fully addressed in the Discussion section of this opinion.

23 It was previously noted in this opinion that the Respondents chose not to address the merits of the issues presented. Even though the Respondents have not presented any sufficiently briefed legal arguments against the merits of Petitioner's arguments, they have referenced in general as to why certain claims by the Petitioner are not valid.

24 Under the 1863 Constitution of West Virginia the separation of powers doctrine was found in Article I, § 4. The doctrine was worded slightly differently in its original form as follows:

> The legislative, executive and judicial departments of the government shall be separate and distinct. Neither shall exercise the powers properly belonging to either of the others. No person shall be invested with or exercise the powers of more than one of them at the same time.

The 1872 Constitution of West Virginia rewrote the separation of powers doctrine and placed it in its present location.

25 Although federal courts recognize the separation of powers doctrine, "the federal Constitution has no specific provision analogous to [Article V, § I]." Bastress, *West Virginia State Constitution*, at 141.

26 The text of Article IV was set out as follows:

> That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-1 0, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of 15 the provisions of W.Va. Code § 61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code § 61-3-24,

relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

27 The text of Article VI was set out as follows:

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code § 61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code § 61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

28 "The Judicial Reorganization Amendment was ratified on November 5, 1974." *State ex rel. Dunbar v. Stone*, 159 W. Va. 331, 333, 221 S.E.2d 791, 792 (1976).

29 The authority of the Court to promulgate rules is also contained in Article VIII, § 8. This provision is discussed in the next section of this opinion.

30 This statute was subsequently repealed.

31 It will be noted that the Legislature repealed W.Va. Code §§ 51-2-9 and 10 in 1992. Although W.Va. Code § 56-9-2, which was enacted in 1868 and last amended 1923, was invalidated by *Stern* the Legislature has not repealed it.

32 We must note that "potentially" violating a criminal statute is not wrongful impeachable conduct. Therefore the language in the Articles of Impeachment that state that W.Va. Code § 61-3-22 and W.Va. Code § 61-3-24 were "potentially" violated are meaningless allegations.

33 This statute was originally enacted in 1949 and was amended in 1975 and 1991.

34 The Chief Justice at that time was Justice Loughry.

35 It is not relevant that the administrative order was entered several years after the Petitioner's authorized payments. The statute was void at the time in which the Respondents sought to impeach her.

36 We summarily dispense with the Articles of Impeachment's reference to the Salary Clause of Article VIII, § 7 as a source of legislative authority for regulating payments to senior-status judges. This clause does not provide such authority. The Salary Clause provides as follows:

> Justices, judges and magistrates shall receive the salaries fixed by law, which shall be paid entirely out of the state treasury, and which may be increased but shall not be diminished during their term of office, and they shall receive expenses as provided by law. The salary of a circuit judge shall also not be diminished during his term of office by virtue of the statutory courts of record of limited jurisdiction of his circuit becoming a part of such circuit as provided in section five of this article.

It is clear from the plain text of the Salary Clause that it only applies to salaries of judges "during their term of office." See Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision."). Senior-status judges are retired judges and do not hold an office. Therefore, the Salary Clause does not provide the Legislature with authority to regulate the per diem payment of senior-status judges.

37 The text of Article XIV was set out as follows:

> That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets-including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:
>
> A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;
>
> B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;
>
> C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;
>
> D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

38 Canon I states the following:

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

39 Canon II states the following:

A judge shall perform the duties of judicial office impartially, competently, and diligently.

40 We will note that Article IV and Article VI of the Articles of Impeachment also contained allegations that Canon I and Canon II were violated.

41 It has long been recognized that an impeachment proceeding is civil in nature. See *Skeen v. Craig*, 31 Utah 20, 86 P. 487, 487-488 (1906) ("The question as to whether [impeachment] proceedings of this kind to remove from office a public official are civil or criminal has been before the courts of other states, and, while the decisions are not harmonious, yet the great weight of authority, and as we think the better reasoned cases hold that such actions are civil.").

42 We must also note that even if Article XIV of the Articles of Impeachment had set out a valid basis for impeachment, it would still not pass constitutional muster on due process grounds, because it is vague and ambiguous. See *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998) ("Claims of unconstitutional vagueness in [charging instruments] are grounded in the constitutional due process clauses, U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, Sec. 10."). As drafted, the Article failed to specify which Justice committed any of the myriad of conduct allegations. The Petitioner had a constitutional right to be "adequately informed of the nature of the charge[.]" *State v. Hall*, 172 W. Va. 138, 144, 304 S.E.2d 43, 48 (1983). See Single Syllabus, *Myers v. Nichols*, 98 W. Va. 37, 126 S.E. 351 (1925) ("While charges for the removal of a public officer need not be set out in the strict form of an indictment, they should be sufficiently explicit to give the defendant notice of what he is required to answer.").

43 Article III, § 10 of the Constitution of West Virginia provides as follows:

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

44 See Syl. pt. 2, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The 'liberty interest' includes an individual's right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities.").

45 See Syl. pt. 3, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.").

1 It will also be noted that we believe the Court should have exercised its authority and set the case for oral argument, even though the Respondents waived oral argument. Many of the issues presented are related to transparency. Not having oral argument eliminates the opportunity for a more thoughtful discussion with the parties and perhaps greater illumination of the issues for the Court. Also in a case both constitutionally and politically charged, transparency better serves the parties, the court and the public interest.

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Professional Perspective

Why Lawyers are the Most Impaired Professionals

Corey Rabin, Caron Treatment Centers

Why Lawyers are the Most Impaired Professionals

Contributed by Corey Rabin, Caron Treatment Centers

Lawyers are under a great deal of pressure. From the first days of law school, we are conditioned to endure difficult schedules that require working more than 70 hours a week. We traditionally receive no training about how to handle stress in healthy ways. For many, decompressing often translates into drinking afterwards to relax. Then the cycle repeats. The high level of stress and unhealthy attempts to cope become normalized—leading lawyers to accept and often minimize destructive behavior as if it does not matter.

Except it does matter. Is it so surprising that lawyers are more likely to abuse alcohol and other substances than any other profession? A recent study of nearly 13,000 practicing lawyers conducted by the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation presented the issue quite clearly: 36% of lawyers in the survey were classified as active problem drinkers, and between 19% and 28% were struggling with stress, anxiety, or depression. These results are far higher than those seen in other professions—including doctors, whose addiction rates top off at 15%—as well as the general public.

Generally speaking, lawyers are on a treadmill of hourly billings. Unless we are equipped with the skills to step back and create a healthy balance in our lives, the stress will eventually take its toll on our health and result in higher likelihood of substance use.

The Pressures We Put on Ourselves

Our workload can be brutal, the competition fierce, and the work adversarial. Unlike most other professions, there are always winners and losers in the practice of law. In litigation, the stakes are high, the consequences frightening, and someone is guaranteed to suffer. These are external stressors, many of which we cannot control, but worse still is the pressure we put on ourselves. We obsess about competition, compensation, our clients, and fears of losing them. We like the intellectual challenges, but the combative demands of our work may be at odds with our own nature.

Clients depend on us, and we don't want to let them or anyone else down. Yet experience has taught us that we cannot anticipate everything. This drives many lawyers to become perfectionists, demanding the impossible of ourselves and others. No one can manage everything that happens in this world, but that doesn't stop lawyers from feeling responsible for poor outcomes. The stress and guilt can become overwhelming.

Additionally, personal values and ethics are often challenged in our work. Many times, what we do while advocating on behalf of our clients may not align with our own moral code. Harsh circumstances may demand that we compromise our personal values, which creates a significant internal struggle. We may not be able to discuss this with anyone, whether because of attorney-client privilege or our own guilty feelings. How then should we cope with those negative feelings about ourselves and our actions? Unfortunately, we may numb ourselves with alcohol or other substances to quiet the critical voices in our heads and to take the edge off.

Hesitant to Seek Help

It is challenging to live up to the expectations of the profession. People look to us to solve complicated, life-changing problems they can't fix themselves. And we get used to doing this for our clients and our friends. As the perceived authority in so many areas, we don't want to disappoint people. We also come to feel superior because we often know more than the people asking us questions.

The practice of law is fundamentally a caregiving profession, which makes it hard for us to ask for help when we ourselves are in trouble. With our profession having conditioned us to think we know it all, reality can be a cold slap in the face.

Lawyers are especially hesitant to seek help for mental health or substance use problems. We are a risk averse lot, with a multitude of fears. In many cases these fears are quite reasonable. Some of our institutions were set up to punish us for our imperfections and vulnerabilities. Underlying these fears are concerns about harming our professional reputation or jeopardizing our licenses. We also may think we don't need anyone's help and that we can fix the problem ourselves, or we may even deny there is a problem in the first place.

A New Culture is Emerging

The good news is that it doesn't have to be this way. We are beginning to see changes in the legal profession focused on instilling greater well-being in the profession. For example, the University of Miami established a first of its kind Mindfulness and Law Program designed to teach balancing work/life and stress in the profession. Their webinar series has been well-recognized. The Penn Law administration recently put forward policies and programs seeking to increase awareness of well-being. Morgan Lewis established its first-ever position of Director of Employee Well-Being and the American Bar Association created a well-being pledge.

In the past, a stigma was associated with help-seeking actions. Fortunately, that stigma is slowly dissipating. Many states have or are considering eliminating questions on state bar applications regarding past treatment for mental health and substance use. There is a growing recognition that well-being is a critical component of capable lawyering.

Taking Action

Balancing work and life are not easy. There comes a time when you must evaluate your priorities. What is most important—your ego, your reputation, your financial position, your health or your family life?

Asking for help is not a weakness, nor does it mean the end of our careers. My late colleague, Link Christin, who was an ardent advocate for wellness in the legal profession, would often tell me that successful lawyers are the hardest to get into treatment for substance use disorders, but once in treatment, their success ratio is very high.

I encourage all lawyers to educate themselves about the signs and symptoms of substance use disorder and create a strategy for their own wellness. If a lawyer is struggling, it's important not to let fear of repercussions impair the ability to ask for support.

Lawyers and law students can get anonymous help in many ways. There are a wide variety of inpatient and outpatient substance use disorder treatment programs built specially for legal professionals to provide support in achieving wellness. These services are designed to accommodate professional needs and to minimize business disruption. Programs offer post-treatment aftercare and family support that is critical to achieving success.

Twelve step programs provide tried and true connection to others seeking to live a life of sobriety. Many lawyer assistance programs hold 12 Step meetings at their more private bar association headquarters, specifically for lawyers in recovery.

Law firms have begun to partner with lawyer assistance programs which provide confidential services to support lawyers and law students facing substance use disorders or mental health issues. Some firms have also begun mentoring and sponsorship programs and replaced boozy firm outings with yoga, meditation, and other healthy lifestyle support.

From Impaired to Repaired It is exciting to see our profession take these important steps, but there is still much work to do. In these especially trying times, it is more important than ever that we come together as a guild to create even more meaningful change to enrich, and in some cases save, the lives of our colleagues. We need to further prioritize education and recovery services and strive to make asking for help a badge of honor, not a stigma.

2020

Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being

Jarrod F. Reich

CAPITALIZING ON HEALTHY LAWYERS: THE BUSINESS CASE FOR LAW FIRMS TO PROMOTE AND PRIORITIZE LAWYER WELL-BEING

JARROD F. REICH*

This Article is the first to make the business case for firms to promote and prioritize lawyer well-being. For more than three decades, quantitative research has demonstrated that lawyers suffer from depression, anxiety, and addiction far in excess of the general population. Since that time, there have been many calls within and outside the profession for changes to be made to promote, prioritize, and improve lawyer well-being, particularly because many aspects of the current law school and law firm models exacerbate mental health and addiction issues, as well as overall law student and lawyer distress. These calls for change, made on moral and humanitarian grounds, largely have been ignored; in fact, over the years the pervasiveness of mental health and addiction issues within the profession have persisted, if not increased. This Article argues that these moral- and humanitarian-based calls for change have gone unheeded because law firms have not had financial incentives to respond to them.

In making the business case for change, this Article argues that systemic changes designed to support and resources to lawyers will avoid costs associated with lawyer mental health and addiction issues and, more importantly, create efficiencies that will increase firms' long-term financial stability and growth. It demonstrates that this business case is especially strong now in light of not only societal and generational factors, but also changes within the profession itself well. As firms have begun to take incremental steps to promote lawyer well-being, lasting and meaningful change will further benefit firms' collective bottom lines as it will improve: (1) performance, as clients are demanding efficiency in the way their matters are staffed and billed; (2) retention, as that creates efficiencies and the continuous relationships demanded by clients; and (3) recruitment, particularly as younger millennial and Generation Z lawyers—who prioritize mental health and well-being—enter the profession.

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INTRODUCTION

GABRIEL MacConaill was a partner in the bankruptcy group of the international law firm Sidley Austin LLP.[1] Resident in the firm's Los Angeles office, "he felt like he was doing the work of three people" and worked so hard on a bankruptcy filing that "he was in distress and . . . work[ed] himself to exhaustion"; however, he refused to go to the emergency room, because, as he told his wife: "You know, if we go, this is the end of my career."[2] Then, on the morning of Sunday, October 14, 2018, he received an email and "had to go" to the office to "put something together."[3] He drove to his office, "taking his gun with him, and shot himself in the head in the sterile, concrete parking structure of his high-rise office building."[4] He was forty-two.

In an open letter written one month after his death, his wife wrote simply: "'Big Law' killed my husband."[5]

In July 2015, Peter, a partner at the Silicon Valley office of the law firm Wilson Sonsini Goodrich & Rosati LLP, "died a drug addict, felled by a systemic bacterial infection common to intravenous users."[6] He "lived in a state of heavy stress," as he "obsessed about the competition, about his compensation, about the clients, their demands, and his fear of losing them. He loved the intellectual challenge of his work but hated the combative nature of the profession, because it was at odds with his own nature."[7] His last phone call was for work: "vomiting, unable to sit up, slipping in and out of consciousness, [he] had managed, somehow, to dial into a conference call."[8]

As he was being eulogized during his memorial service, "[q]uite a few" of his colleagues "were bent over their phones, reading and tapping

1. Joanna Litt, *'Big Law Killed My Husband': An Open Letter from a Sidley Partner's Widow*, AM. LAW. (Nov. 12, 2018, 9:00 AM), https://www.law.com/americanlawyer/2018/11/12/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow/ [https://perma.cc/6PD5-RZNQ].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* While MacConaill's wife acknowledged that "Big Law" did not directly kill him, as he "had a deep, hereditary mental health disorder and lacked essential coping mechanisms," she observed that "these influences, coupled with a high-pressure job and a culture where it's shameful to ask for help, shameful to be vulnerable, and shameful not to be perfect, created a perfect storm." *Id.*

6. Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html [https://perma.cc/B7MA-SDSH]. Ms. Zimmerman, Peter's ex-wife, declined to use Peter's surname in her article to "protect the privacy of [their] children and Peter's extended family." *Id.*

7. *Id.*

8. *Id.*

out emails. Their friend and colleague was dead, and yet they couldn't stop working long enough to listen to what was being said about him."[9]

These two harrowing stories are hardly unique. Indeed, for more than thirty years, a significant number of studies, articles, and reports have demonstrated the prevalence of depression, anxiety, and addiction in the legal profession.[10] Throughout this time, there have been just as many calls for the profession to make changes to promote, prioritize, and improve lawyer well-being,[11] particularly as many aspects of the current law firm model exacerbate mental health and addiction issues,[12] as well as overall lawyer unhappiness and dissatisfaction.[13]

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9. *Id.*; *see also generally* EILENE ZIMMERMAN, SMACKED: A STORY OF WHITE-COLLAR AMBITION, ADDICTION, AND TRAGEDY (2020).

10. *See, e.g.*, Connie J.A. Beck, et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233 (1990) [hereinafter Benjamin et al., The *Prevalence of Depression*]; Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016); *see also* William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1085 tbl.3 (1990). Similar scholarship over this time period also demonstrates the widespread mental health and addiction issues among law students. *See infra* Section II.B.

11. *See, e.g.*, Benjamin et al., *The Prevalence of Depression*, *supra* note 10, at 245 ("The national United States and the regional state Bar Associations should avoid the phenomenon of institutional denial and attempt to reach their members before symptoms lead to malpractice or unethical practice."); *see also, e.g.*, Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265 (1997); Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008).

12. *See infra* Section II.C.

13. There is a myriad of scholarship that refers to "happiness" (or, more particularly, a lack thereof) within the legal profession. *See, e.g.*, NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015) [hereinafter Krieger & Sheldon, *What Makes Lawyers Happy?*]; Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001). This scholarship, to which this Article cites, examines "happiness" in the context of lawyer mental health, addiction, distress, or a deeper level of lawyer satisfaction (such as subjective well-being as that is understood under the tenets of self-determination theory—see *infra* notes 123–127 and accompanying text) rather than mere notions of transient happiness or job "satisfaction."

Empirical studies demonstrate the distinctions between the former and the latter. With respect to the latter, studies assessing levels of abstract "happiness" and job "satisfaction" suggest that "[a]s a general matter, lawyers are relatively satisfied with their job/careers." *See* Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 225, 261–62 (2011); *see also id.* at 261 (concluding that, upon an analysis of studies from the prior twenty-five years, an average of 78.8% of lawyers describe themselves as "satisfied"). As one example, in a thirty-

Despite these calls for change, the pervasiveness of mental health and addiction issues among lawyers has persisted, if not increased.[14] Recognizing that this pervasiveness "can no longer be ignored,"[15] in a 2017 report entitled *The Path to Lawyer Well-Being*, the American Bar Association's National Task Force on Lawyer Well-Being issued a "call to action" for the profession to "get serious about the substance use and mental health of ourselves and those around us."[16] Partially in response to the report, the profession has made some inroads in addressing these problems. For example, some law firms have begun to take proactive steps to improve their lawyers' well-being,[17] and as of May 2020, 133 law firms signed a pledge to support the ABA's campaign to address mental health and addiction issues in the profession—which the ABA hoped that "all legal employers" would sign by January 1, 2019.[18]

Notwithstanding the recognized need and these calls for change, the majority of firms have "turned a blind eye to widespread health problems" that pervade the profession.[19] This Article argues that this "blind eye" exists in large part because firms have not had a financial incentive to address the problem. Law firms have increasingly moved from being "central players in a noble profession to a collection of profit-maximizing enterprises," and this pursuit of profits has come at the expense of the well-

year longitudinal study of 1990 University of Virginia Law School graduates, 77.4% of respondents reported being satisfied with their decision to become a lawyer and nearly 91% reported being satisfied with their lives generally. John Monahan & Jeffrey Swanson, *Lawyers at the Peak of Their Careers: A 30-Year Longitudinal Study of Job and Life Satisfaction*, 16 J. LEGAL EMPIRICAL STUD. 4, 19, 21–22 (2019). However, the results of these studies, while helpful, do not speak to and are not inconsistent with the empirical, scientifically validated evidence of widespread lawyer mental health and addiction issues. *See* David L. Chambers, *Overstating the Satisfaction of Lawyers*, 39 L. & SOC. INQUIRY 313, 315, 330 (2014) ("[O]nly a small proportion of attorneys hold negative views overall about their jobs or careers . . . [but] to the extent that the negative literature reports large numbers of beleaguered lawyers who feel unhappy or ambivalent about many aspects of their work, nothing in the survey literature, properly viewed, should be seen as inconsistent."); *cf.* LEVIT & LINDER, *supra*, at 32 ("Claiming that you're happy . . . appears to be nearly universal, as long as you're not living in a war zone, on the street, or in extreme emotional or physical pain." (internal quotation marks omitted) (quoting Sue M. Halperin, *Are You Happy?*, N.Y. REV. BOOKS (Apr. 3, 2008), https://www.nybooks.com/articles/2008/04/03/are-you-happy/ [https://perma.cc/PS6D-CMQV])).

14. *Compare infra* notes 25–43 and accompanying text, *with infra* notes 59–67 and accompanying text.

15. NAT'L TASK FORCE ON LAWYER WELL-BEING, AM. BAR ASS'N, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 11 (2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf [https://perma.cc/B3WH-DDTF] [hereinafter THE PATH TO LAWYER WELL-BEING].

16. *Id.* at 10.

17. *See infra* notes 298–303 and accompanying text.

18. *See infra* notes 292–297 and accompanying text.

19. The PATH TO LAWYER WELL-BEING, *supra* note 15, at 12.

being of the lawyers who generate them.[20] As firms' short-term goal of maximizing annual profits has become their principal long-term goal, lawyer distress has risen along with partner profits. Put differently, the commodification of the legal profession is an "unambiguous contributor" to the pervasiveness of lawyer distress.[21] Additionally, many law firms also are reticent to change in part because of the stigma surrounding mental health or addiction issues—all of which can affect the bottom line.[22]

Since the moral- and humanitarian-based cases for firms to promote and prioritize lawyer well-being in the literature largely have been ignored, this Article is the first to make the business case to do so. In particular, this Article argues that systemic changes designed to provide support and resources to firm lawyers will avoid costs associated with lawyer mental health and addiction issues and, more importantly, create efficiencies that will increase firms' long-term financial stability and growth. Further, this Article argues that, given a confluence of societal, industrial, and generational factors, now is the time for firms to focus on the health and well-being of their lawyers.

Part I of this Article provides an overview of the studies of the last three-plus decades demonstrating the prevalence of depression, anxiety, and other mental health concerns as well as substance abuse in the legal profession. It shows that lawyers have consistently suffered from these issues in much greater proportion than the general population. It also demonstrates that the profession has long understood the need to change the paradigm to support lawyers struggling with mental illness and addiction, but it has largely remained silent in the face of calls for such change.

Part II examines the personal and professional risk factors that negatively affect mental health and addiction as well as lawyer distress generally. In particular, it addresses whether and to what extent there exists a lawyer "personality" that is inherently predisposed to mental illness and addiction. Further, relying largely on self-determination theory and related research, this Part explores how both law school and law practice can contribute to and exacerbate lawyer mental illness, addiction, and mental distress.

Part III sets out why law firms have turned a "blind eye" to lawyer well-being. Appeals to law firms—made largely on moral and humanitarian grounds—to provide support and resources to their lawyers and to make systemic changes to their practices largely have not resulted in meaningful change, and this Part analyzes why firms have had little incentive—both financial and cultural—to change their models.

Finally, Part IV makes the business case for law firms to promote and prioritize lawyer well-being. This Part first analyzes the different direct

20. STEVEN J. HARPER, THE LAWYER BUBBLE: A PROFESSION IN CRISIS 70 (2013).

21. *Id.* at 96–97; *see also generally infra* notes 200–232 and accompanying text.

22. Sara Randazzo, *Law Firms Tackle a Taboo—On-Site Psychologists for Lawyers Become More Common; Some Bristle at the Idea*, WALL ST. J., May 22, 2017, at B2.

and indirect costs that firms face in failing to address lawyer mental health and addiction issues, from a rise in malpractice claims and sanctions to a decline in productivity to costs associated with high lawyer attrition. This Part also argues that now is the time for the law firm paradigm to shift to one that prioritizes lawyer well-being.

I. MENTAL ILLNESS AND ADDICTION IN THE LEGAL PROFESSION: AN EMPIRICAL OVERVIEW

The first major studies identifying lawyer mental health and substance abuse problems were conducted thirty years ago.[23] These studies showed "significant elevated levels of depression" and a high percentage of "problem drinkers" among lawyers, particularly as compared with both members of other professions and the general population.[24] In the three decades since, not much has changed.

In 1990, Andrew Benjamin, Elaine Darling, and Bruce Sales published an empirical study about lawyers in the State of Washington who suffered from depression, alcoholism, and cocaine abuse.[25] This study followed a 1986 study of Arizona law students by Benjamin, Sales, and others, which found that "law students and lawyers suffered from depression at a rate twice to four times what would be expected in the general population."[26]

Confirming the findings of the 1986 study, the 1990 study found "no statistical differences" between the levels of depression among Arizona law students, young lawyers, and Washington lawyers.[27] Specifically, the Washington study found that 19% of lawyers "suffered from statistically significant elevated levels of depression," with "most . . . experiencing suicidal ideation."[28] The study also found that 18% of lawyers were "problem drinkers"—approximately twice the alcohol abuse or dependency rates for

23. *See* Benjamin et al., *The Prevalence of Depression*, *supra* note 10; Eaton et al., *supra* note 10.

24. Benjamin et al., *The Prevalence of Depression*, *supra* note 10, at 240–41; *see also* Eaton et al., *supra* note 10, at 1085 tbl.3 (demonstrating that lawyers have the highest odds ratio for major depressive disorder among 104 professions at a rate of 3.6 times the general population).

25. Benjamin et al., The *Prevalence of Depression*, *supra* note 10, at 235–36.

26. *Id.* at 234 (citing G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 AM. B. FOUND. RES. J. 225 (1986) [hereinafter Benjamin et al., *Role of Legal Education*]); *see also id.* at 247 (finding that "17-40% of law students and alumni in [the] study suffered from depression, while 20-45% of the same subjects suffered from other elevated symptoms"). For a detailed discussion of this study, *see infra* notes 118–121 and accompanying text.

27. Benjamin et al., The *Prevalence of Depression*, *supra* note 10, at 240.

28. *Id.* at 240–41.

adults in the United States.[29] Depression rates remained the same across lawyers' length of practice, but the rate of problem drinkers increased.[30]

Also in 1990, researchers at Johns Hopkins University studied the rates of major depressive disorder[31] among individuals across 104 professions.[32] While 3%–5% of the adult population suffers from major depressive disorder, these researchers found that 10% of lawyers do so.[33] Moreover, when adjusted for sex, race, education, and current employment, lawyers have the highest odds ratio for major depressive disorder among the professions studied—at a rate 3.6 times the general population.[34]

Five years later, Benjamin, Sales, and Connie Beck published results of a study returning to the data and subjects of Benjamin and Sales's 1990 study.[35] They further analyzed the earlier data by: (1) considering additional demographic variables and analyzing how they may correlate with levels of distress and alcohol use; (2) analyzing all types of distress; and (3) "using sequential canonical analysis," determining "the degree of relationship of the predictor variables to the different categories of psychological distress, a global measure of psychological distress, and current and lifetime alcohol-related problems."[36]

Their in-depth analysis yielded findings that further supported Benjamin and Sales's earlier studies as well as the Hopkins study. For instance, they concluded that 20% of female lawyers were above the clinical cutoff

29. *Id.* at 241 (citation omitted). For purposes of the study, "problem drinkers" are defined as those "likely [to be] abusive of or dependent on alcohol." *Id.* at 237.

30. *Id.* Specifically, the rate of problem drinkers rose from approximately 18% of those who practiced between two and twenty years to 25% of those who practiced twenty years or more. *Id.* The study notes that this likely is because "[a]lcohol abuse and dependency is a chronic and progressive disease[, and] it can take years to become evident in some cases. As a result, those who have practiced longer appear to be more susceptible to developing problem drinking." *Id.*

31. A person has "major depressive disorder" if: (a) they have five or more of the following symptoms over the same two-week period: (i) "[d]epressed mood"; (ii) "[m]arkedly diminished interest or pleasure in all, or almost all, activities most of the day"; (iii) "[s]ignificant weight loss . . . or weight gain"; (iv) "[i]nsomnia or hyperinsomnia"; (v) "[p]sychomotor agitation or retardation"; (vi) "fatigue or loss of energy"; (vii) "[f]eelings of worthlessness or excessive or inappropriate guilt . . . nearly every day"; (viii) "[d]iminished ability to think or concentrate, or indecisiveness, nearly every day"; and (ix) "[r]ecurrent thoughts of death . . . or suicidal ideation"; (b) "[their] symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of function"; and (c) the symptoms are not attributable to effects of a substance or another medical or psychological condition. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 160–61 (5th ed. 2013).

32. Eaton et al., *supra* note 10, at 1079.

33. *Id.* at 1081–82 tbl.2.

34. *Id.* at 1085 tbl.3.

35. Beck et al., *supra* note 10.

36. *Id.* at 12.

for anxiety and 16% were above the clinical cutoff for depression,[37] and male lawyers were above the clinical cutoffs for these distresses at 28% and 20%, respectively.[38] As they observe: "The percentage of lawyers scoring above the cutoff is alarming in that the expected percentage of people scoring above the benchmark is only 2.27%."[39] Further, these numbers do not change markedly over the course of a lawyer's career.[40] Similarly, they report an "astounding number of lawyers [have] a high likelihood of developing alcohol-related problems,"[41] with "[a]pproximately 70% of lawyers . . . likely to develop alcohol problems over their lifetime," a figure that both is "consistent across all years," and is more than five times greater than the 13.7% rate of lifetime prevalence of alcohol abuse or dependence for the general population.[42] As a result of their study, they ultimately conclude that "psychological distress, in its many forms, is likely to affect newly practicing lawyers in a similar manner regardless of the state in which they practice," and that "throughout their career span, a large percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected in a normal population."[43]

Other studies reached similarly striking conclusions. For instance, a 1987 study performed as part of a doctoral dissertation found that 32% of Florida lawyers "reported feeling depressed at least once a week,"[44] and a

37. *Id.* at 23 tbl.4 & 25. They also concluded that approximately 27% of female lawyers scored above the clinical cutoff for interpersonal sensitivity, 20% for social alienation and isolation, 15% for obsessive-compulsiveness, and 11% for hostility. *Id.*

38. *Id.* at 23 & tbl.4. They also concluded that approximately 30% of male lawyers scored above the clinical cutoff for interpersonal insensitivity, 25% for social alienation and isolation, 20% for obsessive-compulsiveness, 14% for paranoid ideation, 7% for phobic anxiety, and 7% for hostility. *Id.* at 23 tbl.4.

39. *Id.* at 23.

40. *See id.* at 46–48 & tbls.12 & 13.

41. *Id.* at 50–51.

42. *Id.* at 51.

43. *Id.* at 57. They also conclude:

> A picture emerges that does not bode well for harmonious family life. Lawyers have been slowly increasing the number of hours they work over time and taking only two weeks or less of annual vacation. The percentage of lawyers who report that they do not have enough time for themselves or their families has increased 33% from 1984 to 1990. Although this study's findings indicate limited differences in feelings of stress between lawyers and the general population, another researcher has found that 32.5% of his sample of lawyers indicate that they use alcohol regularly as a coping mechanism to reduce stress. That a critical member of the family is working more, taking less time off, spending less time with the family, and potentially using alcohol to cope with high degrees of psychological distress suggests an impending major crisis for lawyers' family life.

Id. at 58–59 (footnotes omitted).

44. G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) [hereinafter Benjamin et al., *Comprehensive Lawyer Assistance Programs*] (citing Allan McPeak, Lawyer

1988 study performed as part of another doctoral dissertation found that 79% of lawyers in Wisconsin "used alcohol regularly or sometimes to reduce stress."[45] Further, a 1991 report by the North Carolina Bar Association reported that over 24% of that state's lawyers suffer from depression, more than 25% display "anxiety symptoms," and over 22% have been diagnosed with a "stress-related disease" such as ulcers, hypertension, or coronary artery disease.[46] Shockingly, 11% of North Carolina lawyers surveyed "admitted they consider taking their lives once a month."[47]

Additionally, studies published during this time have found a correlation between substance abuse and lawyer discipline, concluding that a disproportionate number of "major attorney disciplinary cases" were a result of lawyer substance abuse.[48] For instance, a report cited by the American Association of Law Schools in its 1993 *Report on Problems of Substance Abuse in Law Schools* found that substance abuse was "involved" in 50% to 75% of such cases.[49] An earlier survey conducted by the American Bar Association in New York and California found that "50-70 percent of all disciplinary cases involved alcoholism."[50]

Occupational Stress (1987) (unpublished Ph.D. dissertation, Florida State University)).

45. *Id.* at 115 (citing Dennis W. Kozich, An Analysis of Stress Levels and Stress Management Choices of Attorneys in the State of Wisconsin (1988) (unpublished Ph.D. dissertation, University of Wisconsin-Madison)).

46. N.C. BAR ASS'N, REPORT OF THE QUALITY OF LIFE TASK FORCE AND RECOMMENDATIONS 4 (1991), https://www.nclap.org/wp-content/uploads/2014/07/1991_QoL_summary.pdf [https://perma.cc/F9R2-X7B9].

47. SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 8 (2004) (internal quotation marks omitted) (citation omitted).

48. AM. ASS'N OF LAW SCHOOLS, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 36 (1994).

49. *Id.* Additionally, Benjamin and his colleagues noted in their 1990 report that the ABA determined that "27 percent of the discipline cases in the United States involved alcohol abuse." Benjamin et al., *The Prevalence of Depression*, *supra* note 10, at 243. However, they opine that the actual figure "may actually be much higher, however, because not all state and county bar associations report their disciplinary cases. In addition, under-reporting has occurred because state bar associations were unable to identify alcohol abusing lawyers who became part of the disciplinary process. Until very recently, very few bar associations considered the causes for the lawyer infractions." *Id.* at 244.

50. Benjamin et al., *Comprehensive Lawyer Assistance Programs*, *supra* note 44, at 118.

In response to the pervasiveness of mental distress and addiction in the legal profession, many practitioners[51] and scholars[52] have called for changes to the profession. Among the largest changes was the development and expansion of lawyer assistance programs.[53] These programs generally provide support services to lawyers and legal professionals with mental health and substance abuse issues.[54] Currently, all fifty states and the District of Columbia have some sort of lawyers assistance program,[55] most of which were established in the last thirty years.[56]

Notwithstanding these calls for change, such change has been hard to come by. In the intervening years, articles and books have highlighted lawyers' struggles with unhappiness and mental health and addiction issues,[57] with one such article asking simply: "Why are lawyers killing themselves?"[58]

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51. *See, e.g.*, J. Nick Badgerow, *Apocalypse at Law: The Four Horsemen of the Modern Bar—Drugs, Alcohol, Gambling and Depression*, 18 PROF. L. 2, 2 (2007); G. Andrew H. Benjamin, *Reclaim Your Practice, Reclaim Your Life*, TRIAL, Dec. 2008, at 30, https://depts.washington.edu/petp/Reclaim_Your_Practice_%20Reclaim_Your_Life.pdf [https://perma.cc/QJ8G-FUAA]; Ted David, *Can Lawyers Learn to Be Happy?*, PRACTICAL LAW., Aug. 2011, at 29; Linda M. Rao, *Time for an Ideality Check: If You Had Your Ideal Job, Would You Be Satisfied?*, 22 BARRISTER 13 (1995).

52. *See, e.g.*, Allan, *supra* note 11; Ariram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205 (1995); Schiltz, *supra* note 13.

53. *See* AM. BAR ASS'N, COMM'N ON LAWYER ASSISTANCE PROGRAMS, 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS (2015), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/is/colap_2014_comprehensive_survey_of_laps.authcheckdam.pdf [https://perma.cc/R36Y-Z3HF] [hereinafter ABA SURVEY OF LAWYER ASSISTANCE PROGRAMS].

54. *See generally id.*

55. *Id.* at 1–2, A-3, A-4. The ABA's report only identifies forty-eight states and the District of Columbia in its survey, as programs from neither Nevada nor North Dakota replied. However, Nevada's Lawyer Assistance Program was established in 2013, see STATE BAR OF NEVADA, NEVADA LAWYERS ASSISTANCE PROGRAM (NLAP), http://www.nvbar.org/member-services-3895/nlap/ [https://perma.cc/G3TY-E89Z] (last visited May 7, 2020), and North Dakota's in 2004, see N.D. ADMIN CODE 49 (2004).

56. Although the first few Lawyers Assistance Programs (LAPs) were founded in the mid-1970s, thirty-two LAPs were founded since 1990. *See* ABA SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 53, at 3 fig.1; *see also* N.D. ADMIN. CODE 49; NEVADA LAWYERS ASSISTANCE PROGRAM (NLAP), *supra* note 55.

57. *See, e.g.*, BRIAN CUBAN, THE ADDICTED LAWYER: TALES OF THE BAR, BOOZE, BLOW, AND REDEMPTION (2017); HARPER, *supra* note 20; DOUGLAS LITOWITZ, THE DESTRUCTION OF YOUNG LAWYERS: BEYOND ONE L (2006); JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005); Patrick Krill, *Why Lawyers Are Prone to Suicide*, CNN (Jan. 21, 2014, 10:15 AM), https://www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/index.html [https://perma.cc/RLF5-C45T]; Zimmerman, *supra* note 6.

58. Rosa Flores & Rose Marie Acre, *Why Are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014), http://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html [https://perma.cc/7HZW-9KT3]. Among other things, Flores and Acre noted that Kentucky had fifteen known lawyer suicides over a four-year period, South Carolina had six known lawyer suicides over an eighteen-month period in 2007–2008, and Oklahoma had one known lawyer suicide per month in 2004. *Id.*

A comprehensive 2016 study confirmed that not much, if anything, has changed in a quarter-century. This study, conducted by Patrick R. Krill, Ryan Johnson, and Linda Albert for the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation (the Krill Study),[59] found numbers consistent with—and in some cases, more troubling than—the earlier studies. The Krill Study surveyed nearly 13,000 practicing lawyers across the country and across varying demographics and types of legal practice.[60] It found that "rates of problematic drinking" were "generally consistent" with those reported in Benjamin, Sales, and Beck's 1990 study, with 20.6% to 36.4% of those surveyed qualifying as problem drinkers.[61]

However, the Krill Study found "considerably higher rates of mental health distress" than those found in the earlier studies.[62] In particular, it found 28.3% of lawyers surveyed suffer from some level of depression, 19.3% suffer from some level of anxiety, and 22.7% suffer from some level of stress.[63] Further, 45.7% of surveyed lawyers reported concerns with depression at some point in their career, and 61.1% reported concerned with anxiety at some point in their career.[64] An additional 11.5% of participants reported suicidal thoughts at some point during their career.[65] Moreover, the study found that lawyers have the highest rates of both problem drinking and depression in their first ten years of practice as compared with later years, and those working in private practice also have higher rates of both than those in other work environments.[66] In particu-

59. Krill et al., *supra* note 10.

60. *See id.* at 47 & tbl.1, 48 tbl.2.

61. *Id.* at 51; *see also id.* at 49 tbl.3. The Krill Study evaluated alcohol use using the Alcohol Use Disorders Identification Test, a ten-item "self-report developed by the World Health Organization (WHO) to screen for hazardous use, harmful use, and the potential for alcohol dependence." *Id.* at 47.

62. *Id.* at 51. The Krill Study evaluated depression, anxiety, and stress by utilizing the Depression Anxiety Stress Scales-31, a "self-report instrument consisting of three 7-item subscales assessing symptoms" of each. *Id.* at 48.

63. *Id.* at 50 tbl.4. These findings are not unique to American lawyers. For example, a 2014 study of Australian lawyers found that 37% of those sampled experienced moderate to extremely severe depressive symptoms, 31% experienced moderate to extremely severe anxiety symptoms, and 49% experienced moderate to extremely severe stress symptoms; further 35% of those lawyers sampled qualified as hazardous or harmful drinkers. Adele J. Bergin & Nerina L. Jimmieson, *Australian Lawyer Well-Being: Workplace Demands, Resources & the Impact of Time-Billing Targets*, 21 PSYCHIATRY, PSYCHOL. & L. 427, 434 (2014). Additionally, a 2009 study of over 900 Australian solicitors and over 750 Australian barristers found that 31% of solicitors and 16.7% of barristers suffer from high or very high distress, as compared with 13% of the general population. NORM KELK ET AL., BRAIN & MIND RESEARCH INST., U. SYDNEY, COURTING THE BLUES: ATTITUDES TOWARDS DEPRESSION IN AUSTRALIAN LAW STUDENTS AND LEGAL PROFESSIONALS 12 (2009), https://law.uq.edu.au/files/32510Courting-the-Blues.pdf [https://perma.cc/GV7M-GARN].

64. Krill et al., *supra* note 10, at 50.

65. *Id.*

66. *Id.* at 51.

lar, the study found that 32% of lawyers under thirty are problem drinkers.[67]

In light of, among other things, the Krill Study and a similar 2016 study of law students,[68] in August 2016, entities within and outside the ABA created the National Task Force on Lawyer Well-Being (the Task Force).[69] The Task Force recognized that the prevalence of mental health and addiction issues in the profession "are incompatible with a sustainable legal profession," and argued that "[t]o maintain confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now."[70]

To that end, the Task Force issued a report in August 2017, concluding that "lawyer well-being issues can no longer be ignored."[71] The report, entitled *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, issued a "call to action" for the profession to "get serious about the substance use and mental health of ourselves and those around us."[72] It provided "three reasons to take action": (1) "organizational effectiveness"; (2) "ethical integrity"; and (3) "humanitarian concerns."[73] First, the report concludes (as this Article demonstrates)[74] that "lawyer well-being contributes to organizational success," as "lawyer health is an important form of human capital that can provide a competitive advantage."[75] Second, the report concludes that "lawyer well-being influences ethics and professionalism," with "40 to 70 percent of disciplinary proceedings and

67. *Id.* at 49 tbl.3; *id.* at 51.

68. *See* Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016). This study, resulting from a survey of over 3,300 law students, found that "consumption of alcohol among law students appears to have become more prevalent than two decades ago," *id.* at 127, and 32% of respondents have used illegal drugs or prescription drugs without a prescription in the prior twelve months. *Id.* at 145. Further, the study found that 17% of law students experienced some level of depression, 37% reported some level of anxiety, and 6% reported suicidal ideation within the last twelve months. *Id.* at 136–39.

69. The Task Force is a "collection of entities within and outside the ABA"; it was "conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers," and created in August 2016. Bree Buchanan & James C. Coyle, *National Task Force on Lawyer Well-Being: Creating a Movement to Improve Well-Being in the Profession*, AM. B. ASS'N (Aug. 14, 2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathTo LawyerWellBeingReportFINAL.pdf [https://perma.cc/W8ES-NRUB].

70. THE PATH TO LAWYER WELL-BEING, *supra* note 15.

71. *Id.* at 7.

72. *Id.* at 10.

73. *Id.* at 8.

74. *See infra* Section IV.C.

75. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 8 (footnote omitted); *see also id.* at 1 ("To be a good lawyer, one has to be a healthy lawyer.").

malpractice claims against lawyers involv[ing] substance use or depression, and often both."[76] Finally, the report concludes that "from a humanitarian perspective, promoting well-being is the right thing to do."[77]

The report goes on to make various recommendations for a series of "stakeholders"—judges,[78] regulators,[79] legal employers,[80] law schools,[81] bar associations,[82] lawyers' professional liability carriers,[83] and lawyers assistance programs[84]—to combat the "blind eye" that the legal profession has turned "to widespread health problems."[85] The recommendations to all stakeholders include "buy-in and role modeling" from the top down and taking steps to minimize the stigma of mental health and substance abuse disorders and to facilitate and encourage employees to seek and attain appropriate help.[86]

By its own admission, the report "makes a compelling case that the legal profession is at a crossroads," as the "current course" of "widespread disregard for lawyer well-being and its effects[] is not sustainable."[87] It concludes that the profession has "ignored this state of affairs long enough," and that "[a]s a profession, we have the capacity to face these challenges and create a better future for our lawyers" that is both "sustainable" and in pursuit of "the highest professional standards, business practices, and ethical ideals."[88]

II. WHY THIS HAPPENS: PROFESSIONAL RISK FACTORS AFFECTING MENTAL HEALTH AND ADDICTION

There is no one answer for why lawyers disproportionately suffer from mental health and addiction problems compared to the general population. Yet the fact remains that they do. This Article does not minimize the existence of biological, chemical, and genetic conditions that predispose individuals to mental illness or addiction. These cannot, and should not, be discounted or overlooked by individuals with such predispositions. Nevertheless, what this Article does argue, and what is beyond dispute, is that lawyer distress is systemic—that there exists a strong correlation between the legal profession and lawyer distress that can no longer be ig-

76. *Id.* at 8 (footnote omitted).
77. *Id.* at 9.
78. *Id.* at 22–24.
79. *Id.* at 25–30.
80. *Id.* at 31–34.
81. *Id.* at 35–40.
82. *Id.* at 41–42.
83. *Id.* at 43–44.
84. *Id.* at 45–46.
85. *Id.* at 12.
86. *Id.* at 12–13.
87. *Id.* at 47.
88. *Id.*

nored.[89] Some of the potential systemic sources of lawyer distress include: (1) the possible existence of an inherent "lawyer personality"; (2) the law school experience; and (3) several aspects of law practice.[90]

A. *"Lawyer Personality"*

It has long been assumed that the legal profession is composed of individuals who are inherently predisposed to being "pessimistic, unhappy, and more prone to destructive addictions than other occupational groups."[91] Indeed, accounts of the "depressing character of legal study" date back to at least the Middle Ages.[92] Yet the question of whether lawyers as a group are inherently prone to struggles with mental illness and addiction is far from settled, and the most recent research suggests that the stereotypical "lawyer personality" does not exist.

Early studies support the view that there are inherent qualities in individuals who seek to become or who are successful lawyers. These studies conclude that "personality traits most common among lawyers are not those associated with happy people,"[93] and that lawyers exhibit "several personality traits which tend to intensify lawyers' stress levels," such as low self-esteem, egotism, inflexibility, workaholism, cynicism, and aggression.[94]

For instance, in an influential 2001 article, Martin Seligman, Paul Verkuil, and Terry Kang argue that lawyers are more successful when they

89. *See* LITOWITZ, *supra* note 57, at 19.

> Let us be very clear on the question of causality: the legal profession makes lawyers unhappy. We must reject any suggestion that lawyers are unhappy *prior* to their immersion in the legal system, that these unhappy people somehow self-select their own unhappiness by subconsciously placing themselves in a depressing profession. . . . We did not bring a cloud of depression to the profession; we discovered the cloud when we got here. In other words, the problems affecting young lawyers are predominately systemic, not personal.

Id.

90. When discussing these as factors that affect lawyer mental health and addiction issues, that is only to suggest, as noted above, the existence of correlations between these factors and such issues and not scientific conclusions of cause and effect. Rather, the studies and other works discussed in this section establish correlations and apparent effects of these factors on lawyer distress. *Cf.* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 559 n.8 (explaining how their findings "provide substantial confidence in apparent causal relationships" despite the limitation of its study focusing on correlations, particularly because of "the large sample sizes and the consistency of [their] findings with similar findings in previous related studies").

91. Margaret L. Kern & Daniel S. Bowling III, *Character Strengths and Academic Performance in Law Students*, 55 J. RES. IN PERSONALITY 25, 25 (2014).

92. *See* PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW 1–7 (1995).

93. LEVIT & LINDER, *supra* note 13, at 75.

94. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1417 (1997) (discussing AMIRAM ELWORK, STRESS MANAGEMENT FOR LAWYERS 15 (1995)).

have a "pessimistic 'explanatory style,'"[95] meaning they have a "tendency to interpret the causes of negative events in stable, global, and internal ways."[96] Also known as "prudence," this perspective "requires caution, skepticism, and 'reality-appreciation,'" and "enables a good lawyer to see snares and catastrophes that might conceivably occur in any given transaction."[97] This ability to anticipate problems and "issue-spot" is an essential quality for effective lawyering.[98]

Although this kind of pessimism is a quality of a good lawyer, it also correlates to mental distress, as it is well-documented as a major factor for depression and distress.[99] Lawyers who are pessimistic in practice often have that pessimism spill into their personal lives. For instance, lawyers who spend their working hours searching for, anticipating, and agonizing over problems tend to see the worst for themselves both inside and outside of the office.[100] They may also have a more negative or pessimistic view of their work and their lives and can focus on, or even catastrophize, problems in both.[101] Accordingly, as Seligman, Verkuil, and Yang conclude, "pessimism that might be adaptive in the profession also carries the risk of depression and anxiety in the lawyer's personal life."[102]

Beyond this penchant for pessimism, Susan Daicoff has attempted to quantify the "lawyer personality."[103] In reviewing studies done on lawyer characteristics, she concluded that on the Myers-Briggs Type Indicator personality assessment measure, lawyers disproportionately represent the "Thinking" rather than the "Feeling" type when compared to the general population.[104] She concluded further that, in contrast to most of the pop-

95. Seligman et al., *supra* note 13, at 39; *see also* Jason M. Satterfield et al., *Law School Performance Predicted by Explanatory Style*, 15 BEHAV. SCI. & L. 95, 100–04 (1995) (determining, in a study of nearly 400 University of Virginia Law School students, that pessimistic students were more successful in law school than optimistic ones).

96. Seligman et al., *supra* note 13, at 39.

97. *Id.* at 41.

98. *See id.* ("The ability to anticipate a whole range of problems that nonlawyers do not see is highly adaptive for the practicing lawyer.").

99. *See id.*; *cf.* Beck et al., *supra* note 10, at 57 ("[T]he basic pattern of distress may represent the traits necessary to be a successful lawyer (obsessive-compulsiveness, interpersonal sensitivity, and anxiety) and the costs associated with those success (depression and social alienation and isolation).").

100. Seligman et al., *supra* note 13, at 41.

101. *See, e.g.*, Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 358, 400 (2009); *see also* SHAWN ACHOR, THE HAPPINESS ADVANTAGE: HOW A POSITIVE BRAIN FUELS SUCCESS IN WORK AND LIFE 92–93 (2010).

102. Seligman et al., *supra* note 13, at 41.

103. *See, e.g.*, SUSAN SWAIM DAICOFF, LAWYER KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (2004).

104. *See id.* at 32–36.

> Thinkers prefer "logical analysis, principles and impersonal reasoning and cost/benefit analyses" and are "more tolerant of conflict and criticism" . . . [while] [f]eelers prefer "harmonizing, building relationships,

ulation,[105] a majority of lawyers are introverts rather than extroverts;[106] intuitors rather than sensors;[107] and judgers rather than perceivers.[108] Based on her analysis, Daicoff contends that the "definable lawyer personality" is one

> conceptually coalesced into two groups of five traits: (a) a drive to achieve . . . ; (b) dominance, aggression, competitiveness, and masculinity; (c) emphasis on rights and obligations over emotions, interpersonal harmony, and relationships; (d) materialistic, pragmatic values over altruistic goals; and (e) higher than normal psychological distress.[109]

However, a 2014 empirical study by Margaret Kern and Daniel Bowling casts doubt on whether there are personality traits inherent within those in and choosing to enter the legal profession. Challenging the notion that there is some inherent "lawyer personality,"[110] they recognize that early studies support the vicious cycle of lawyers' success coming from pessimism, which leads to unhappiness in life, but note that those studies have not been replicated.[111] Their study revisited lawyer personalities by assessing twenty-four positive characteristics from the Values in Action Classification of Character Strengths (VIA-IS), because the selected traits "were seen as relatively universal, fulfilling to the individual, morally valued by individuals and societies, trait-like, distinctive, and measurable."[112] The study measured the strengths of nearly 300 law students against a sample of U.S. lawyers and six samples of non-lawyers.[113] They found that the

> pleasing people, making decisions on the basis of [their own] . . . personal likes and dislikes, and being attentive to the personal needs of others" and like to avoid conflict and criticism.

Id. at 33.

105. *Id.* at 32–36; *see also id.* at 34 tbl.2.1.

106. *Id.* at 32–33. Introverts are those who "focus on their inner world and [who] often feel drained if they spend too much time with other people," whereas extroverts are those who "focus on the outer world and feel energized by contacts with other people." *Id.*

107. *Id.* at 33. Intuitors are those who "would rather think about the big picture, abstract ideas, and global themes, learn new things, and solve complex problems," whereas sensors are those who "attend to concrete, real world things and enjoy working with real facts and details." *Id.*

108. *Id.* at 32–36; *see also id.* at 34 tbl.2.1. Judgers are those who "prefer structure, schedules, closure on decisions, planning, follow through, and a 'cut-to-the-chase' approach," whereas perceivers are those who "prefer a 'go with the flow and see what develops' approach." *Id.*

109. *Id.* at 41 & exh. 2.1.

110. Kern & Bowling, *supra* note 91, at 29.

111. *Id.* at 25 (citing, *inter alia*, Seligman et al., *supra* note 13).

112. *Id.* These characteristics are: "appreciation of beauty, authenticity, bravery, creativity, curiosity, fairness, forgiveness, gratitude, hope, humor, kindness, leadership, capacity for love, love of learning, modesty, open-mindedness, persistence, perspective, prudence, self-regulation, social intelligence, spirituality, teamwork, and zest." *Id.*

113. *Id.* at 26–27 tbl.1.

law students surveyed "demonstrated a normal range of characteristics, similar to other intelligent, highly educated samples."[114] Consequently, they conclude "that the supposed presence of a negative 'lawyer personality' might be overstated."[115]

If it is true that there is no such "negative 'lawyer personality'"[116]—that it is untrue that "lawyers are . . . unhappy people [who] somehow self-select their own unhappiness by subconsciously placing themselves in a depressing profession," but rather it is "the legal profession [that] makes lawyers unhappy"[117]—a question remains whether and to what extent law school and the profession itself contributes to lawyer distress. These are discussed in turn below.

B. *Law School*

A significant, decades-long body of scholarship demonstrates that law school poisons the well of prospective lawyers' well-being. For instance, in a 1986 empirical study of law students in Arizona, Andrew Benjamin and his colleagues found that law students were as psychologically healthy as the general population when they enter law school, but within six months "average scores on *all* symptom indices changed from initial values within the normal range to scores two standard deviations above normative expectation."[118] These elevated symptoms "significantly worsened" throughout law school, and they "did not lessen significantly between the spring of third year and the next two years of legal practice."[119] They found that, depending on the group, 17%–40% of the student-subjects "suffered significant levels of depression," with 20%–40% reporting "other significantly elevated symptoms, including obsessive-compulsive, interpersonal sensitivity, anxiety, hostility, paranoid ideation, and psychoticism (social alienation and isolation)."[120] These elevated symptoms were not dependent on

114. *Id.* at 28.

115. *Id.* at 29; *see also* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 621 ("Simply stated, there is nothing . . . to suggest that attorneys differ from other people with regard to their prerequisites for feeling good and feeling satisfied with life. . . . In order to thrive, we need the same authenticity, autonomy, close relationships, supportive teaching and supervision, altruistic values, and focus on self-understanding and growth that promotes thriving in others.").

116. Kern & Bowling, *supra* note 91, at 29. Daicoff argues that "evidence suggests that humanistic, people-oriented individuals do not fare well, psychologically or academically, in law school or in the legal profession." Daicoff, *supra* note 94, at 1405. However, evidence exists to the contrary—i.e., that students and lawyers who rely on their strengths and act according to their own intrinsic motivations and values perform better and are less distressed. *See, e.g.*, Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 576–85; Peterson & Peterson, *supra* note 101, at 412–16; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAVIORAL SCI. & L. 261, 281 (2004) [hereinafter Sheldon & Krieger, *Undermining Effects*].

117. LITOWITZ, *supra* note 57, at 19.

118. Benjamin et al., *The Role of Legal Education*, *supra* note 26, at 240.

119. *Id.* at 241.

120. *Id.* at 236.

any demographic or descriptive differences, including undergraduate or law school GPA; hours devoted to undergraduate or law school studies or to work after graduation; bar examination passage; or size of law practice.[121]

In the mid-2000s, Lawrence Krieger and Kennon Sheldon authored two influential studies of the negative effect law school has on the subjective well-being of law students.[122] Krieger and Sheldon based their research on the "self-determination theory of optimal motivation and human thriving," or "SDT," which "focuses on the contextual and personality factors that cause positive and negative motivation, with corresponding positive and negative performance and subjective well-being (SWB) outcomes."[123] As Krieger and Sheldon describe elsewhere, there are essentially three central tenets of SDT relevant here. First is "that all human beings have certain basic psychological needs—to feel competent/effective, autonomous/authentic, and related/connected with others"; these experiences produce well-being, while their absence correlates to distress.[124] Second, SDT posits that an individual's "values, goals, and motivations" form the basis of their behavior, and "intrinsic values and internal motivations are more predictive of well-being than their extrinsic and external counterparts."[125] Finally, SDT posits that supervisors, teachers or

121. *Id.* at 246.

122. Sheldon & Krieger, *Undermining Effects*, *supra* note 116; Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007) [hereinafter Sheldon & Krieger, *Longitudinal Test of Self-Determination Theory*]. Elsewhere, Krieger and Sheldon define "subjective well-being" as "the sum of life satisfaction and positive affect, or mood (after subtracting negative affect), utilizing established instruments for each factor." Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 562. They continue:

> These affect and satisfaction factors provide data on complementary aspects of personal experience. Although moods are experienced as transient, they have been found to persist over time in stable ways. Positive and negative affect are purely subjective, straightforward experiences of "feeling good" or "feeling bad" that many people would interpret as happiness or its opposite. Life satisfaction, on the other hand, includes a personal (subjective) evaluation of objective circumstances—such as one's work, home, relationships, possessions, income, and leisure opportunities. Th[is] measure of life satisfaction . . . is validated by its use in previous social science research and is broader than the concept of career or job satisfaction . . . .

Id. at 562–63.

123. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 263.

124. Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 564.

125. *Id.* at 564–65. As Krieger and Sheldon explain "[v]alues or goals such as personal growth, love, helping others, and building community are considered 'intrinsic,' while 'extrinsic' values include affluence, beauty, status, and power." *Id.* at 564. Additionally, "motivation for behavior is distinguished based on the locus of its source, either 'internal' (the behavior is inherently interesting and enjoyable, or it is meaningful because it furthers one's own values) or 'external' (behavior is compelled by guilt, fear, or pressure, or chosen to please or impress others)." *Id.* at 564–65.

mentors who provide "autonomy support" to their subordinates "enhance[] their [subordinates'] ability to perform maximally, fulfill their psychological needs, and experience well-being."[126] Put simply, SDT research posits that: (1) why a person acts—i.e., for internal satisfaction or external factors; (2) what a person seeks through their actions—i.e., intrinsic goals such as personal growth and community or extrinsic goals such as fame and money; and (3) the level of autonomy support one has from their superiors, all have "significant consequences for [their] satisfaction and performance," as well as their overall SWB.[127]

In their first study, Krieger and Sheldon found that law students enter law school with a higher positive SWB compared with undergraduates.[128] Yet, one year into law school, students suffered a decline in SWB and an increase in physical and mental health problems.[129] These declines in well-being and increases in health problems continued throughout law school.[130]

In particular, they found that these increases in mental and physical distress corresponded with decreases in positive affect and overall life satisfaction.[131] They found further that these increases in distress also corresponded with shifts in their reasons for becoming lawyers—from internal purposes (such as interest and meaning) to external ones (such as money and recognition)[132]—as well as decreases in values of all kinds after the first year.[133]

Krieger and Sheldon conclude that students' "endorsement of intrinsic values" declined over the first year, with a shift toward the extrinsic "appearance and image values."[134] Additionally, students' goals and motivations moved from the internal—"reasons of interest and enjoyment"—to the external, notably "pleasing or impressing others."[135] Strikingly, Krieger and Sheldon also found that this shift was not limited to the first year, as "neither the losses in SWB nor in relative intrinsic value orienta-

126. *Id.* at 565. Krieger and Sheldon describe "autonomy support" as when authorities or superiors "support and acknowledge their subordinates' initiative and self-directness." Sheldon & Krieger, *Longitudinal Test of Self-Determination Theory*, *supra* note 122, at 884. When they do so, "those subordinates discover, retain, and enhance their intrinsic motivations and at least internalize nonenjoyable but important extrinsic motivations. In contrast, when authorities are controlling or deny self-agency of subordinates, intrinsic motivations are undermined and internalization is forestalled." *Id.*

127. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 264; Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 565.

128. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 271.

129. *Id.* at 272.

130. *Id.* at 280.

131. *Id.* at 270–72.

132. *Id.* at 272 tbl.3.

133. *Id.* at 273.

134. *Id.* at 281.

135. *Id.*

tion rebounded" during law school;[136] in fact, during the second and third years of law school, all types of valuing decreased.[137]

Krieger and Sheldon did find, however, that students who acted "for intrinsic and self-determined reasons" tended to "perform more persistently, flexibly, creatively, and effectively," and therefore attained a higher GPA.[138] However, they note the "potential irony" to this finding, because although such students with intrinsic motivations and values performed well academically, such high-performing students "tended to shift toward more lucrative, high-prestige career preferences."[139] And, as discussed below,[140] the values associated with these positions "tend to contribute to decreased health, SWB, and career satisfaction over time."[141]

In a 2007 study, Krieger and Sheldon further investigated the negative effects of law school on students' SWB.[142] It adds to the first study by examining the more nuanced components of SDT—the level of satisfaction of the students' psychological needs for autonomy, competence, and relatedness to others[143]—as well as the autonomy support students receive from faculty at two different schools, one whose faculty has a "traditional," scholarly focus, and one whose faculty is "less traditional" and focused more on teaching and practical skills for students.[144] As is relevant here, the study confirmed the findings of their first study, particularly that students' SWB and internal motivation decreased and their distress increased throughout law school.[145] In particular, they found that these negative outcomes resulted from decreases in students' satisfaction in their needs for autonomy, competence, and relatedness since entering law school.[146]

Thus, these studies, among others,[147] have demonstrated that law students suffer disproportionately high levels of distress and suggest that this

136. *Id.*

137. *Id.* at 282. Krieger and Sheldon observe that this finding is "consistent with the common stereotype that lawyers 'have no values'—that they are hired guns willing to represent any position that promises to pay." *Id.*

138. *Id.* at 281; *cf.* Peterson & Peterson, *supra* note 101, at 411 (reporting results of survey of George Washington University Law School students that revealed "students who use their strengths on a regular basis report higher satisfaction with life and lower levels of stress and depression.").

139. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 281.

140. *See infra* Section II.C.

141. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 281.

142. Sheldon & Krieger, *Longitudinal Test of Self-Determination Theory*, *supra* note 122.

143. *Id.* at 886–87.

144. *Id.*

145. *Id.* at 889.

146. *See id.* at 893–94. Additionally, students at the law school with the "less traditional" faculty reported a more autonomy-supportive environment and fared better in all other measured outcomes—well-being, grade performance, and career motivation—than students at the school with the "traditional," and less autonomy-supportive, faculty. *Id.* at 890–91 & tbls.2 & 3.

147. *See, e.g.*, AM. ASS'N OF LAW SCHOOLS, *supra* note 48; JESSIE AGATSTEIN ET AL., FALLING THROUGH THE CRACKS: A REPORT ON MENTAL HEALTH AT YALE LAW

distress correlates to law school itself. These elevated levels of mental health and addiction issues among law students remain high today. In 2014, Jerome Organ, David Jaffe, and Katherine Bender surveyed more than 3,300 students across fifteen law schools to assess mental health and substance abuse issues among students as well as whether and to what extent students seek help for these issues.[148] They found that 17% of respondents screened positive for depression,[149] 37% screened positive for anxiety,[150] 43% reported binge-drinking at least once in the prior two weeks,[151] 25% were at risk for alcoholism,[152] and 35% used illicit street drugs or prescription drugs without a prescription.[153] Additionally, a 2014 non-empirically validated survey of students at Yale Law School found that up to 70% of its students suffer from some form of self-identified mental distress while in school.[154]

The reasons why law school causes such declines in well-being and rises in mental health and substance abuse among its students is beyond the scope of this Article, but suffice it to say that as a result of the law school model, students experience many of the same distress, mental health, and addiction issues that pervade the legal profession,[155] and it may lay the groundwork for that very pervasiveness.[156]

C. *Law Practice*

In 2015, Krieger and Sheldon conducted an empirical study of nearly 8,000 lawyers throughout the United States across all areas of practice to determine the contributors to lawyer well-being and life satisfaction, as well as distress and dissatisfaction.[157] In designing their study, they mea-

SCHOOL (2014), https://law.yale.edu/sites/default/files/area/department/studentaffairs/document/falling_through_the_cracks.pdf [https://perma.cc/38N2-9B8N]; Mathew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 L. & HUM. BEHAVIOR 55 (1999); Lawrence Silver, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201 (1968).

148. Organ et al., *supra* note 68, at 122–26. For a discussion of the barriers to treatment, see *infra* Section II.B.

149. Organ et al., *supra* note 68, at 136.

150. *Id.* at 137–38.

151. *Id.* at 128–29 & tbl.2.

152. *Id.* at 131–32 & tbl.5. Further, the authors noted that "consumption of alcohol among law students appears to have become more prevalent than two decades ago." *Id.* at 127.

153. *Id.* at 133–36.

154. AGATSTEIN ET AL., *supra* note 147.

155. *See, e.g.*, STEFANCIC & DELGADO, *supra* note 57, at 62–63; *see also, e.g.*, LITOWITZ, *supra* note 57, at 29–51 (discussing "the trouble with law school"); Dammeyer & Nunez, *supra* note 147, at 61; Peterson & Peterson, *supra* note 101, at 358.

156. Debra S. Austin, *Killing Them Softly: Neuroscience and Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 793–94 (2013) ("Stress in legal education may . . . set the stage for abnormally high rates of anxiety and depression among lawyers.").

157. Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13.

sured the SWB metrics (need satisfaction, values, and motivations) as well as depression and alcohol consumption.[158]

Consistent with their prior studies of law students, Krieger and Sheldon found that internal values and motivations—the very factors that erode during law school—and psychological need satisfaction were most strongly predictive of lawyer well-being, whereas "the external factors emphasized in law school and by many legal employers were, at best, only modestly associated with lawyer well-being."[159] The strongest predictors of well-being were the psychological needs of autonomy, relatedness to others, and competence, as well as motivation.[160] They determined that the correlations between psychological needs and lawyer well-being were "exceptionally strong," and that these needs were strongly inversely correlated with depression[161] as well as inversely correlated with quantity of drinking.[162]

Accordingly, aspects of the profession that inhibit these psychological needs, and foster external values and motivations, can contribute to lawyer mental health and addiction issues. While a myriad of such aspects certainly exists, three critical areas are: (1) lack of autonomy; (2) lack of relatedness; and (3) extrinsic values and motivation.

1. *Lack of Autonomy*

Autonomy is one of the key metrics for lawyer happiness,[163] and its absence in "high-pressure, low decision latitude" positions of law firm associates render associates "likely candidates for negative health effects"[164] such as depression.[165] While there are many areas of the profession that engender a lack of autonomy, this Article focuses on two: the reliance on the billable hour as a measure of productivity and compensation and the low decision latitude of particularly junior lawyers.

a. Reliance on the Billable Hour

The prevailing business model for law firms over the last several decades is the billable hour, by which they charge their clients an hourly rate

158. *Id.* at 569.

159. *Id.* at 585; *see id.* at 583 fig.1, 584–85.

160. *Id.* at 585. In fact, psychological need satisfaction measured "relationships to well-being approximately . . . 3.5 times stronger than that of income." *Id.* at 579.

161. *Id.* at 579.

162. *Id.* at 586–87.

163. *Id.* at 582–84 & figs.1 & 2; *see also* Eaton et al., *supra* note 10, at 1086 ("[P]eople in occupations that involve individual autonomy, control over the environment, and direction and planning of the flow of work will be protected against depression.")

164. Seligman et al., *supra* note 13, at 42.

165. Eaton et al., *supra* note 10, at 1086 ("Occupations involving little or no direction or control contribute to a relatively stable personality configuration linked to learned helplessness, which has been implicated in depression.").

for each hour each lawyer works. As law firms have commodified over the last thirty-five years,[166] hour expectations have increased. For instance, in the early 1980s, few law firms had minimum billable hour requirements, but in recent years "most large law firms expressly set them at 1,900 to 2,000,"[167] with some firms expecting much more.[168]

Billable hours as a benchmark of productivity is counterintuitive, as "the behavior that maximizes hours is antithetical to true productivity."[169] While "[p]roductivity [generally] is the 'relative measure of the efficiency of a person . . . in converting inputs into useful outputs,'" the general benchmark of lawyer productivity—the total time spent on a task without regard to the quality or utility of the work product—is a measure of anything but productivity.[170] Indeed, more hours spent on a task is an indication of unproductivity, as workers are less productive and efficient the longer they toil on a task.[171] Put differently, the billable hour system rewards unproductivity and inefficiency.

Notwithstanding this inherent inefficiency, billable hours are the standard measure of work, and law firm associates understand that their futures depend on this measure of output, and their success at the firm requires them to bill much more than the firm's stated billable hour target.[172] Moreover, a lawyer must "work" many more hours to hit their billable target.[173] For instance, Yale Law School calculated that a lawyer must

166. *See generally* HARPER, *supra* note 20. Although billable hours can bear on autonomy and relatedness satisfaction (as well as motivation), see Krieger & Sheldon, *supra* note 13, at 596, but is included as related to "competence" because it rewards inefficiency. *Cf.* DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 13 (2015) ("[T]he hourly billing system pegs profits more to the quantity of time spent than to the efficiency of its use, and profits have become the dominant concern. High billable hour quotas also screen out individuals with competing values. A willingness to work long hours functions as a proxy for commitment.").

167. HARPER, *supra* note 20, at 79; *Update on Associate Hours Worked*, NALP BULL. (2016), https://www.nalp.org/0516research [https://perma.cc/7499-TKEQ] (reporting that nearly 60% of law firms require that lawyers bill at least 1,900 hours). *But see* CTR. FOR THE STUDY OF THE LEGAL PROFESSION, GEORGETOWN LAW & LEGAL EXEC. INST., 2019 REPORT ON THE STATE OF THE LEGAL MARKET 7 fig.8 (2019), http://ask.legalsolutions.thomsonreuters.info/LEI_2019-State_of_Legal_Mkt [https://perma.cc/MDQ6-V9F8] (reporting that the average lawyer at 161 U.S.-based law firms surveyed billed 122 hours per month in 2018, or 1,464 hours per year).

168. *See, e.g.*, Ingo Forstenlechner & Fiona Lettice, *Well Paid but Undervalued and Overworked: The Highs and Lows of Being a Junior Lawyer in a Leading Law Firm*, 30 EMP. REL. 640, 642 (2008) (noting that although the international law firm studied had no official billable hour target, "there [was] an unofficial target of 2,400 hours").

169. HARPER, *supra* note 20, at 77.

170. *Id.* at 78–79.

171. *Id.* (noting the effort spent "on the fourteenth hour of a day can't be as valuable as that exerted during hour six").

172. *Id.* at 79.

173. *See, e.g.*, *DLA Piper LLP–U.S. Firmwide: Hours and Work Arrangements*, NALP DIRECTORY OF LEGAL EMP'RS (2019), http://nalpdirectory.com/employer_profile?FormID=11656&QuestionTabID=39&SearchCondJSSe=%7B%22SearchEmployer

be at work 2,420 hours to bill 1,800, and that 2,200 billable hours requires an lawyer be "at work" 3,048 hours.[174]

It is no wonder, then, as the ABA's Commission on Women in the Profession warned nearly twenty years ago, that "[e]xcessive workloads are a leading cause of lawyers' disproportionately high rates of reproductive dysfunction, stress, substance abuse, and mental health difficulties."[175] As one lawyer put it, billable hours are "the biggest reason lawyers are so depressed."[176]

b. Low Decision Latitude

Beyond the number of hours worked, many lawyers—particularly junior lawyers[177]—experience distress because they lack autonomy in the work that they do. Associates have little say over their work, limited inter-

Name%22%3A%22dla%20piper%22%7D [https://perma.cc/TTJ9-ZNM5] (last visited May 7, 2020) (noting that, on average, associates firm-wide in 2018 billed 1,860 hours yet worked 2,343).

174. *The Truth About the Billable Hour*, YALE L. SCH. (July 2017), https://law.yale.edu/sites/default/files/area/department/cdo/document/billable_hour.pdf [https://perma.cc/ZF2E-2LWF]; *see also* Colin James, *Legal Practice on Time: The Ethical Risk and Inefficiency of the Six-Minute Unit*, 42 ALT. L.J. 61, 62 (2017) (finding, that for Australian solicitors, "time-billing may record 50 to 70 per cent of the actual hours worked").

175. DEBORAH L. RHODE, AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 12 (2001); *cf.* Debra Austin & Rob Durr, *Emotion Regulation for Lawyers: A Mind Is a Challenging Thing to Tame*, 16 WYO. L. REV. 387, 401 (2016) ("A lawyer subjected to chronic stress can experience emotional disorders such as anxiety, panic attacks, or depression, and physical problems such as irritability, breathlessness, dizziness, abdominal discomfort, muscle tension, sweating, chills, heart palpitations, chest pain, and/or increased blood pressure.").

176. Joshua E. Perry, *The Ethical Costs of Commercializing the Professions: First-Person Narratives from the Legal and Medical Trenches*, 13 PENN. J.L. & SOC. CHANGE 169, 184 n.57 (2009). *But see* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 596 (finding that while "important psychological predictors of well-being decreased" with increased billable hours, such increases only led to "slightly less happiness"); Bergin & Jimmieson, *supra* note 63, at 437 (finding that high billing lawyers "experienced greater anxiety, more stress, more job dissatisfaction and less work/life balance," but that their study "did not provide evidence that having high billing targets was related to greater levels of depression and drinking, compared with lawyers with low-to-moderate billing targets or no billing targets").

177. However, despite their higher status and 62% greater pay than senior associates, junior partners "experience[] no greater happiness than the associates." Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 597–98; *cf.* Jonathan Koltai et al., *The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-Being in the Legal Profession*, 59 J. HEALTH & SOC. BEHAVIOR 20, 31 (2018) (finding that "higher status lawyers have a mental health disadvantage relative to their peers in the public sector, and are no better off in terms of health"). In the words of one law firm partner: "[T]he hours don't get any better for partners; partners have even more pressure than associates do." Kimberly Kirkland, *Ethics in Large Law Firms: The Principles of Pragmatism*, 35 U. MEM. L. REV. 631, 683 (2005).

action with senior partners, and little to no client contact.[178] With this lack of autonomy also comes isolation, as firms have "little mentoring, training, or firm citizenship behaviors," and there is little institutional incentive to engage in them.[179] Consequently, lawyers feel alienated from their work and cannot see how it matters beyond being a billable deliverable.[180] As an illustration, in one survey of associates at an international law firm, approximately 86% said they have non-interesting work, approximately 88% said they do not have interaction with partners, and approximately 77% said they are not "being shown appreciation for their work" by senior associates or partners.[181]

Junior lawyers have expressed "angst over pressures to bill exorbitant amounts of money to clients to whom they felt no meaningful connection."[182] They also have expressed frustration over the conflict between "their presumed role as autonomous professionals who" establish and maintain client relationships "and their more subservient role as employees who" exist to generate partner revenue.[183]

Additionally, with advances in technology, lawyers are increasingly on-demand around the clock. Lawyers are expected to be reachable at all times, and in effect are constantly on call.[184] With this, lawyers have less autonomy support—that is, superiors do not acknowledge the lawyers' perspective or preferences, or provide them with meaningful choices about when and where to work and how to balance their lives. While technology makes it possible for lawyers to work from home, it also makes it virtually impossible *not* to work from home; consequently, "[p]ersonal lives get lost in the shuffle."[185] This "effective monitoring" of lawyer work at all times is true not only of junior lawyers, but also for senior lawyers who fear losing clients for being unresponsive on demand.[186]

178. Seligman et al., *supra* note 13, at 42.

179. Anne M. Brafford, Building a Positive Law Firm: The Legal Profession at Its Best 13 (Apr. 1, 2014) (unpublished Master of Applied Positive Psychology (MAPP) thesis, University of Pennsylvania), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=mapp_capstone [https://perma.cc/2TTX-L435]; *see also* Schiltz, *supra* note 13, at 934–38 (discussing how "the vaunted training of big firms does not exist").

180. LEVIT & LINDER, *supra* note 13, at 63 ("Lawyers become alienated from the nature of their work, and they do not see how their work matters.").

181. Forstenlechner & Lettice, *supra* note 168, at 647 & tbl.v.

182. Perry, *supra* note 176, at 198.

183. *Id.*

184. Forstenlechner & Lettice, *supra* note 168, at 643; *see also* RHODE, *supra* note 166, at 13 ("In some ways, technology has made a bad situation worse by accelerating the pace of practice and placing lawyers perpetually on call.").

185. RHODE, *supra* note 166, at 13.

186. Forstenlechner & Lettice, *supra* note 168, at 643; *see also* RHODE, *supra* note 166, at 13 ("It is not uncommon to hear of a client who e-mails on New Year's Eve and fires a firm for being insufficiently responsive on a Sunday morning."); Caroline Spiezio, *Constantly on Call: The Client's Role in the Legal Profession's Mental Health Crisis*, CORP. COUN. (July 14, 2019), https://www.law.com/corpcounsel/2019/07/14/constantly-on-call-the-clients-role-in-the-legal-professions-mental-health-

2. *Lack of Relatedness: Adversarial System*

The practice of law is inherently adversarial, which itself is inherently stressful by nature.[187] To thrive in the adversarial system, lawyers are trained to be competitive and aggressive because the goal is to "win."[188] Such training is "fueled by negative emotions," and as a consequence "can be a source of lawyer demoralization, even if it fulfills a social function."[189] Consequently, when the practice of law is reduced to many zero-sum disputes, it can "produce predictable emotional consequences for the practitioner, who will be anxious, angry, and sad much of [their] professional life."[190] Moreover, dealing with difficult opponents, clients, and colleagues can often leave lawyers feeling "emotionally shattered."[191]

3. *Extrinsic Values and Motivations*

Lawyers often enter a firm culture "that is hostile to [their] values."[192] As Judge (then-Professor) Patrick Schiltz observed:

> The system does not want you to apply the same values in the workplace that you do outside of work . . . ; it wants you to replace those values with the system's values. The system is obsessed with money, and it wants you to be, too. The system wants you—it needs you—to play the game.[193]

As a result of this "game," law is no longer seen by many as a calling,[194] but as "just a job with ridiculous hours, stress, and unpaid law

crisis/ [https://perma.cc/5S9D-PSVR] ("Client demands for fast turnaround times, even on non-urgent matters, can leave outside counsel in constant crisis mode. That stress can lead to . . . mental health issues such as depression, addiction, and anxiety . . . .").

187. Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 599.

188. *See* Seligman et al., *supra* note 13, at 47. A recent study of American and Canadian lawyers revealed that lawyers at large firms experience higher rates of "depressive symptoms and risk of poor health" than those in smaller firms or the public sector, including because such lawyers have "higher levels of overwork" and work-life conflict. Koltai et al., *supra* note 177, at 31–32.

189. Seligman et al., *supra* note 13, at 47.

190. *Id.*

191. ANGUS LYON, LAWYER'S GUIDE TO WELLBEING AND MANAGING STRESS 97 (2015).

192. Schiltz, *supra* note 13, at 912.

193. *Id.*

194. There are essentially three different mindsets people have about their work: jobs, careers, and callings. *See, e.g.*, Amy Wrzesniewski et al., *Jobs, Careers, and Callings: People's Relations to Their Work*, 31 J. RES. PERSONALITY 21, 22 (1997). Briefly, a job "is a means that allows individuals to acquire the resources needed to enjoy their time away from" it. *Id.* A career is a position in which one has "a deeper personal investment in their work and mark their achievements not only though monetary gain, but through advancement within the occupational structure," which "often brings higher social standing, increased power within the scope of one's occupation, and higher self-esteem for the worker." *Id.* A calling is a position one "works not for financial gain or [c]areer advancement, but instead for the

school debt,"[195] and a primary focus on generating revenue for the firm. This "loss of purpose beyond making money" contributes greatly to lawyer dissatisfaction,[196] and it should come as no surprise that along with well-being, lawyers believe legal professionalism is in decline as well.[197] As a consequence, there has been a call for a return to more traditional notions of law practice, ones that prioritizes integrity, civility, and community.[198] More generally, if lawyers "re-discover *why* they became lawyers in the first place and rededicate themselves to those intrinsic goals" and motivations that initially led them to law school, it will lead to a "happier, healthier, and more ethical profession."[199]

III. IGNORING THE MORAL CASE FOR LAWYER WELL-BEING

Notwithstanding the existence and the profession's knowledge of the widespread prevalence of lawyer mental health and addiction issues, as well as some obvious costs associated with them, law firms (and the profession at large) have ignored the pleas for change. These pleas, largely resting on moral grounds, have gone unheeded largely for two reasons: (1) firms have cared primarily about their bottom lines; and (2) the stigma associated with mental health and addiction issues, as well as other barri-

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fulfillment that doing the work brings for the individual." *Id.* Individuals who view their work as callings generally have "greater life, health, and job satisfaction and . . . better health" than those who view their work as mere jobs or careers. *See id.* at 29, 30–31; *see also id.* at 27 tbl.3. A person can find their calling within any occupation. *See id.* at 22; *cf. id.* at 31 (finding each mindset represented in nearly equal thirds among sample administrative assistants, concluding that "[s]atisfaction with life and with work may be more dependent on how an employee sees his or her work than on income or occupational prestige").

195. Daniel S. Bowling, III, *Lawyers and Their Elusive Pursuit of Happiness: Does It Matter?*, 7 DUKE F. L. & SOC. CHANGE 37, 49 (2015) (footnotes omitted).

196. BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 216–17 (2010). Moreover, increased compensation does not contribute to lawyer subjective well-being. *See* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 583 fig.1, 597–98. In fact, public interest lawyers responding to Krieger and Sheldon's survey reported greater subjective well-being than their highly-paid "elite" and "prestige" lawyers at private firms. *Id.* at 590–91, 593 tbl.1.

197. Bowling, *supra* note 195, at 48; *see also* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 612 (noting that survey respondents "has a positive view of neither the justice in the justice system nor the professional behavior of professionals in the system").

198. Susan Daicoff, *Asking Lawyers to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 582 (1998) (noting the call for a "return to more traditional, gentlemanly law practice," in which lawyers "abandon these [financial and competitive] motivations and instead adopt a moral system that values integrity, honesty, community service, pro bono work, courteousness, civility, cooperation with others, and sensitivity to interpersonal concerns").

199. Bowling, *supra* note 195, at 49–50.

ers to treatment. As set forth below, each inhibits, undermines, and puts at risk, lawyer well-being.

A. *The Profit-Centered Practice: Commodification of Law Firms*

Over the past thirty-plus years, firms have moved from the idea of the "noble profession" and toward the profit-maximizing "business model" dominating private practice today.[200] As a result of the *American Lawyer* first publishing its annual list of firms' revenues and profits-per-partner in 1985, lawyers were able to discover how much their colleagues were making elsewhere, and earning a high spot on the "Am Law 100," or firms with the top 100 revenues nationwide, was a coveted honor.[201] In response, firms adopted management techniques aimed at moving them up in the annual rankings.[202] As a consequence, total gross revenue for Am Law 100 firms has gone from $7 billion in 1985 to $71 billion in 2010—a 9.71% compound annual growth rate[203]—to $98.75 billion in 2018.[204]

Moreover, "[m]anaging partners admit publicly that they run their firms to maximize instant profits for the relatively few"—the partners.[205] And, to that end, their practices have been successful: while in 1985 the average profits-per-partner for the top fifty firms on AmLaw's inaugural list was $300,000, that figure for the top fifty firms in the Am Law 100 in 2011 had risen to $1.6 million,"[206] and to $2.54 million in 2018.[207]

Partner profits are maximized through the so-called "Cravath model,"[208] which focuses on high leverage, high hourly rates, and high billable hours.[209] Taking each in turn, first, a firm's leverage refers to the ratio of its salaried lawyers (i.e., associates, counsel, and non-equity partners) to equity partners.[210] The higher the leverage, the more money the firm's equity partners make.[211] To achieve higher leverage, firms hire

200. HARPER, *supra* note 20, at 70.

201. *Id.* at 72.

202. *Id.*

203. BRUCE MACEWEN, GROWTH IS DEAD: NOW WHAT? LAW FIRMS ON THE BRINK 15 (2013).

204. *The Am Law 100 2019*, AM. LAW. (May 2019).

205. HARPER, *supra* note 20, at 76.

206. *Id.* at 72.

207. *The Am Law 100 2019*, *supra* note 204. Average profits-per-partner was calculated using data listed for the top fifty firms by total revenue.

208. Under the "Cravath model," firms "hire a large number of associates . . . so that only the most brilliant legal minds ascended to its partnership. (Historically, about one in twelve associates make partner.). . . . [Meanwhile,] the firm ma[kes] a killing by billing [associates] out at top-of-the-market rates." Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC, https://newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries [https://perma.cc/TC96-P5BA].

209. *See* HARPER, *supra* note 20, at 76–79. Harper refers to leverage, hourly rates, and billable hours as a "three-legged stool." *See id.*

210. *Id.* at 77.

211. *Id.*

many more associates than they expect will be promoted to equity partnership (or even remain with the firm beyond a few years).[212] Put simply, it is in firms' interest to hire many associates with the expectation to make few, if any, partner, because more associates means more profits for partners, and fewer partners means a larger share for each.[213] This practice has yielded considerable results. Since the creation of the Am Law 100, leverage ratios have grown considerably: in 1985, the average leverage ratio for the top fifty Am Law-ranked firms was 1.76; it doubled to 3.54 in 2010,[214] and it rose to 4.47 in 2018,[215] with, as noted above, the average profits per equity partner at $2.54 million.[216]

Second, firms' hourly rates have risen steadily both before and after the Great Recession of the late 2000s, with many firms raising their billing rates by 5% annually after the recession, and the top twelve firms raising rates more than 7%.[217] Finally, the third component of the Cravath model is high billable hour expectations. As discussed in Section II.C.1.a above, as law firms have commodified over the last thirty-five years, hour expectations have increased from no minimum billable hour requirements in the early 1980s to at or above 2,000 hours today.[218]

Thus, as a result of the Cravath model, a firm achieves its success—i.e., maximizing revenue and profits per partner—by hiring large classes of associates each year and requiring them to work long hours for the years preceding their eligibility for partnership.[219] This model not only keeps equity partner wealth growing by the continuous influx of new junior associates but also leads to significant attrition such that few associates last long enough even to be considered for equity partner.[220] As firms have adopted the Cravath model, they have reinvented themselves as profit-generating businesses by which only a few partners at the top truly benefit.[221]

Even though firms produce considerable revenue, partners are not content with their existing wealth; they think they should be making more

212. *Id.*

213. Schiltz, *supra* note 13, at 901 (citing Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 584 (1989)).

214. HARPER, *supra* note 20, at 82.

215. *Am Law 100 2019*, *supra* note 204 (average leverage ratio of top fifty firms by total revenue).

216. *Id.*

217. HARPER, *supra* note 20, at 77.

218. *See supra* notes 166–168 and accompanying text.

219. HARPER, *supra* note 20, at 85–86; *cf. id.* at 90 (noting that the Cravath model "create[s] conditions that decrease opportunities for advancement and are hostile to any attorney's search for a balanced life").

220. *Id.*

221. *Id.*

money.[222] Consequently, firms' short-run focus on the maximization of annual profits has also become their "most important long-run goal."[223]

As partner profits and firm revenue have increased so too has lawyer distress and dissatisfaction. While firms and their equity partners have achieved staggering wealth, it has come at considerable costs as lawyer mental health and addiction issues have become pervasive.[224] The added income (as well as the client expectations arising from higher billing rates) brings an assumed obligation to work longer hours, often at the expense of lawyers' health and personal lives.[225] In other words, as set out in Section II.C above, law firms in general are undermining their lawyers' internal values and motivations that foster subjective well-being in favor of prioritizing the external values and motivations that correlate to emotional distress.[226]

It is likely that a "disturbingly large number" of Big Law lawyers would acknowledge that their exorbitant salaries have not brought them happiness.[227] In fact, some likely would be willing to take less salary if it meant a more balanced life.[228]

Since money—profit generation and maximization—is at the heart of much of the distress and dissatisfaction within the profession,[229] the answer to addressing such distress and dissatisfaction is not to provide addi-

222. MACEWEN, *supra* note 203, at 21 ("Partners of all classes and genders [are] united on one front: They all think they should be making more money."). In one survey, "[f]ifty-eight percent of all partners said they should be better paid, and among that group, an overwhelming majority wants something more than a token raise. Ninety percent of the survey's respondents thought that their compensation should be increased by more than 10 percent, while 1 percent thought their pay should be doubled." *Id.* *But see* AM. BAR ASS'N COMM'N ON BILLABLE HOURS, ABA COMMISSION ON BILLABLE HOURS REPORT 2001–2002, at ix (2002), http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf [https://perma.cc/MQ7D-248D] (finding an increasing number of lawyers would prefer a pay cut to increase quality of life rather than continuing to rely on the billable hour).

223. HARPER, *supra* note 20, at 96.

224. *Id.* ("[P]artner profits and attorney [depression and job] dissatisfaction have risen in tandem as big firms' lawyers make more money and enjoy it less. Those twin developments are not coincidental.").

225. *Id.* at 97.

226. *See supra* Section II.C.

227. HARPER, *supra* note 20, at 97.

228. *Id.* (arguing lawyers would accept a lower salary because "their work remains a persistently depressing experience, largely because it seems unfulfilling, unrelenting, or both"). *But see* Schiltz, *supra* note 13, at 904–05 ("Lawyers could enjoy a lot more life outside of work if they were willing to accept relatively modest reductions in their incomes. . . . But many of them do take the money. [They] choose to give up a healthy, happy, well-balanced life for a less healthy, less happy life dominated by work. And they do so merely to be able to make seven or eight times the national median income instead of five or six times the national income.").

229. *See* Schiltz, *supra* note 13, at 903 ("Money is at the root of virtually everything that lawyers don't like about their profession: the long hours, the commercialization, the tremendous pressure to attract and retain clients, the fiercely

tional financial incentives.[230] Studies abound demonstrating that money, at a certain level below the median lawyer salary, does not increase happiness.[231] Nevertheless, firms have done just that: they have responded in recent years to increased lawyer distress, dissatisfaction, and attrition by increasing salaries. This has continued even in the wake of the Krill Study and the ABA's *The Path to Lawyer Well-Being*: in Summer 2018, many firms began to raise their starting salary for a first-year associate to $190,000 (if not higher), with an eighth-year associate's salary far exceeding $300,000.[232]

B. *Stigma and Barriers to Treatment*

Although awareness and understanding of mental illness have increased in recent years, it is still not often treated legitimately or seriously "either by businesses, by the health care system, or by our society."[233] This is true in the legal profession, in which "mental health 'is not talked about openly'" and, for years, has been kept "underground."[234]

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competitive marketplace, the lack of collegiality and loyalty among partners, the poor public image of the profession, and even the lack of civility.").

230. Indeed,

> [l]ife satisfaction in the United States has been flat for fifty years even though GDP has tripled. Even scarier, measures of ill-being have not declined as gross domestic product has increased; they have gotten much worse. Depression rates have increased tenfold over the last fifty years in the United States. . . . Rates of anxiety have also risen.

MARTIN E.P. SELIGMAN, FLOURISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING 223 (1st ed. 2011).

231. *See* LEVIT & LINDER, *supra* note 13, at 10–11.

232. Stacy Zaretsky, *Salary Wars Scorecard: Which Firms Have Announced Raises and Bonuses*, ABOVE L. (June 5, 2018, 1:46 PM), http://abovethelaw.com/2018/06/salary-wars-scorecard-which-firms-have-announced-raises-2018/ [https://perma.cc/TU8X-83XQ]; *see also* Christine Simmons, *Milbank Boosts Associate Salaries with $190k Starting Pay*, AM. LAW. (June 4, 2018), http://www,law.com/americanlawyer/2018/06/04/milbank-boosts-associate-salaries-with-190k-starting-pay/ [https://perma.cc/HZN2-GLHE].

233. Stewart Friedman, *The Hidden Business Cost of Mental Illness*, HARV. BUS. REV. (Dec. 3, 2009), http://hbr.org/2009/12/the-hidden-business-cost-of-me.html# [https://perma.cc/J24U-59DL].

234. William Roberts, *When Counsel Needs Counseling*, WASH. LAW., Jan. 2018, at 20, http://washingtonlawyer.dcbar.org/january2018/index.php?startid=16#/p/16 [https://perma.cc/74CM-Z852] (quoting Arent Fox LLP partner David Dubrow); *see also* Zimmerman, *supra* note 5 ("'Law firms have a culture of keeping things underground, a conspiracy of silence,' [Dr. Daniel Angres, an associate professor of psychiatry at Northwestern University Feinberg School of Medicine] said. 'There is a desire not to embarrass people, and as long as they are performing, it's easier to just avoid it. And there's a lack of understanding that addiction is a disease.'"). In a 2017 *New Yorker* profile, former Acting Attorney General Sally Yates discussed her father's suicide in 1986, for which she said: "'Tragically, the fear of stigma then associated with depression prevented him from getting the treatment he needed.'" Ryan Lizza, *Why Sally Yates Stood up to Trump*, NEW YORKER (May 29, 2017), http://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump [https://perma.cc/35ND-B9X7].

The profession recognizes that this stigma exists. A 2018 survey of managing partners and human resources personnel at Am Law 200 law firms revealed that stigma associated with mental illness and substance abuse is prevalent in the profession.[235] In particular, 81% of those surveyed believe a stigma exists against those suffering from depression, and 75% believe a stigma exists against those suffering from anxiety.[236] The numbers are even starker for those with substance abuse problems, with 94% of those surveyed believing a stigma exists against both those suffering from alcohol addiction and drug addiction.[237]

The stigma pervades the profession in a variety of ways. First, there is fear that lawyers struggling with mental health or addiction disorders are incompetent, incapable, or undesirable. This is succinctly captured by the comments of the chairman of an Am Law 100 law firm, who expressed reticence to follow other firms in having an on-site psychologist because of the fear that "our competitors will say we have crazy lawyers."[238]

Second, the overwhelming majority of state bars ask questions relating to applicants' mental health or substance use. Many states have historically asked bar applicants whether they had any history of mental health treatment. Even after a 2014 Department of Justice settlement with the Louisiana Supreme Court in which the State of Louisiana agreed to remove questions from its bar application about an applicant's mental health history, several states still ask whether applicants have any such history.[239]

As of March 2020, out of the fifty states, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands,[240]

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235. ALM INTELLIGENCE, 2018 MENTAL HEALTH AND SUBSTANCE ABUSE SURVEY (2018).

236. *Id.*

237. *Id.* Additionally, the stigma for drug use may be further internalized; in the Krill Study, less than 27% of participants responded to questions concerning drug use, compared with approximately 90% for questions relating both to mental health and alcohol use. Krill et al., *supra* note 10, at 48–50; *see also id.* at 52 ("Because the questions in the survey asked about intimate issues, including issues that could jeopardize participants' legal careers if asked in other contexts (e.g., illicit drug use), the participants may have withheld information or responded in a way that made them seem more favorable.").

238. Randazzo, *supra* note 22 (internal quotation marks omitted).

239. *See* Alyssa Dragnich, *Have You Ever . . . ?: How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 677 (2015).

240. Applications are on file with the author; the following information is based on the most recent attainable applications. For additional, summary information about U.S. bar applications, see generally *Bar Admission Questions Pertaining to Mental Health, School/Criminal History, and Financial Issues*, JUDGE DAVID L. BAZELON CTR. MENTAL HEALTH L., http://bazelon.org/wp-content/uploads/2019/12/50-State-Survey-To-Post.pdf [https://perma.cc/N9BF-7BP8] (last updated Feb. 2019); David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 PROF. LAW. 3 (2020).

all but nine jurisdictions ask some question related to the bar applicant's mental health or substance use.[241] In particular, twenty-eight ask questions about the applicant's current mental health or substance abuse,[242] with an additional nine asking about the applicant's past as well as current mental health or substance abuse.[243] Four states ask questions regarding past and current substance use but ask only about current mental health issues.[244] Two states have questions about current substance abuse but do not have any questions regarding mental health,[245] and an additional state asks about substance abuse treatment but not about mental health.[246] Finally, two states ask about past and current instances of mental illness but only current instances of substance abuse.[247]

As one example, the Michigan bar application asks the following questions of its applicants:

> Have you ever used, or been addicted to or dependent upon, intoxicating liquor or narcotic or other drug substances . . . [or h]ave you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life[; . . . or] which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?[248]

Given the stigma within the profession, as well as the "unduly intrusive" questions in state bar applications that "likely . . . deter" treatment,[249] it is no surprise that lawyers are reticent to seek treatment. Lawyers with mental health and addiction issues have "pervasive fears surrounding their

241. Arizona, California, Connecticut, Illinois, Massachusetts, New York, Tennessee, Virginia, and Washington.

242. Alabama, Alaska, Colorado, Delaware, District of Columbia, Guam, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Northern Mariana Islands, Oklahoma, Puerto Rico, Rhode Island, South Carolina, South Dakota, Vermont, Virgin Islands, and Wyoming.

243. Florida, Georgia, Maine, Michigan, Minnesota, Missouri, Nevada, Oregon, and Utah.

244. Arkansas, Iowa, New Jersey, and Texas.

245. California, Hawaii, and Pennsylvania.

246. Wisconsin.

247. Ohio and West Virginia.

248. STATE BAR OF MICH., CHARACTER & FITNESS APPLICATION PREVIEW, https://www.michbar.org/file/professional/pdfs/preview-app.pdf [https://perma.cc/EBB5-6V8F] (last visited May 7, 2020).

249. Conf. of Chief Justices, Res. 5 (Feb. 13, 2019), https://www.ncsc.org/__data/assets/pdf_file/0027/23589/07312019-implementation-clear-communications-streamlined-procedures.pdf [https://perma.cc/2TTV-QDGA].

reputation" that prevent them from availing themselves of the help that they need.[250] Accordingly, the two most common barriers for treatment for substance abuse are: (1) "not wanting others to find out they needed help"; and (2) "concerns regarding privacy or confidentiality."[251]

The statistics demonstrate that these are real barriers to meaningful treatment: only 6.8% of lawyers surveyed in the Krill study reported seeking treatment for substance use; the two most common barriers—among those who sought and have not sought treatment—are "not wanting others to find out they needed help" and "concerns regarding privacy or confidentiality."[252] The results are even starker for law students. Only 4% of respondents ever sought help for alcohol or substance use.[253] And while 42% of respondents indicated that they thought they needed help for mental health issues, only approximately half have done so.[254] Further, the greatest reported barriers to seeking treatment include "potential threat to job or academic status," "potential threat to bar admission," and "social stigma."[255]

IV. THE BUSINESS CASE FOR PROMOTING AND PRIORITIZING LAWYER WELL-BEING

As discussed in Part I above, calls have been made to humanize the legal profession for decades. However, throughout most of that time, as *The Path to Lawyer Well-Being* acknowledged, the profession at large generally has "turned a blind eye" to the pervasiveness of and not done enough to address mental health and addiction issues among its members.[256] As discussed in Section II.C above, many aspects of the law firm model negatively impact lawyer subjective well-being, which inversely correlates to depression and mental distress. And, as argued in Part III above, law firms and the profession in general have turned such a "blind eye" and ignored the moral case for promoting lawyer well-being because they have not had the financial incentives to change the existing law firm model.

This Part demonstrates how and why it is in law firms' business interest to promote and prioritize their lawyers' well-being.[257] First, this Sec-

250. Krill et al., *supra* note 10, at 51.

251. *Id.* at 50.

252. *Id.*

253. Organ et al., *supra* note 68, at 140. As noted in the text accompanying notes 151–153 above, a significant plurality of law students reported binge drinking, were at risk for alcoholism, or used illicit street drugs or prescription drugs without a prescription.

254. *Id.*

255. *Id.* at 141 Help-Seeking tbl.1.

256. *See generally* THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 11–12 (observing that the profession has "not done enough to help, encourage, or require lawyers to be, get, or stay well").

257. To date, no study has been done to monetize the cost to the legal profession attributable to untreated mental health and addiction disorders, or the corresponding financial gains to the profession by prioritizing lawyer well-being.

tion argues that law firms incur significant direct and indirect costs related to untreated lawyer mental health and addiction issues. Second, this Section summarizes some of the initial steps taken by firms in recent years to begin to acknowledge and address lawyer well-being issues. Finally, this Section argues that while current efforts are important first steps, the time is ripe for firms to benefit financially from enacting lasting and meaningful change to promote and prioritize lawyer well-being.

A. *The Costs of Undermining Lawyer Well-Being*

All professions incur significant costs due to untreated employee mental health and addiction issues. Mental health disorders are by far the most burdensome illnesses to United States employers, costing over $200 billion each year—well exceeding the cost burden of heart disease, cancer, stroke, and obesity.[258] Further, the cost of alcohol abuse in the United States is $249 billion, with 72% of that total cost—or over $179 billion—resulting from losses in workplace productivity.[259]

As recognized by the World Health Organization, the "consequences of mental health problems in the workplace" include, among other things: poor work performance (including "reduction in productivity and output," "increase in error rates," and "poor decision-making") as well as an "increase in disciplinary problems"; absenteeism as well as "loss of motivation and commitment"; "burnout . . . [and] diminishing returns"; and turnover.[260] That is no different in law firms, where the costs that firms experience due to untreated lawyer mental health and addiction issues include: (1) lawyer disciplinary actions; (2) absenteeism and presenteeism; and (3) costs associated with high attrition. Each is discussed in turn below.

Accordingly, this Section will look to as instructive studies in other and across professions.

258. *See* Ron Z. Goetzel et al., *Mental Health in the Workplace: A Call to Action Proceedings from the Mental Health in the Workplace—Public Health Summit*, 60 J. OCCUPATIONAL & ENVTL. MED. 322, 323 (2018) (noting that mental health disorders cost American employers over $200 billion a year); *cf.* Matthew Jones, *How Mental Health Can Save Businesses $225 Billion Each Year*, INC. (June 16, 2016), http://www.inc.com/matthew-jones/how-mental-health-can-save-businesses-225-billion-each-year.html [https://perma.cc/S2M9-JYFK]. The World Health Organization estimates that depression and anxiety disorders cost the global economy over $1 trillion annually. *See* Dan Chisholm et al., *Scaling-up Treatment of Depression and Anxiety: A Global Return on Investment Analysis*, 3 LANCET PSYCH. 415, 419 (2016).

259. *Excessive Drinking Is Draining the U.S. Economy*, CTR. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/features/costsofdrinking/index.html [https://perma.cc/4B6P-DVYB] (last visited May 7, 2020).

260. NATIONS FOR MENTAL HEALTH, WORLD HEALTH ORG., MENTAL HEALTH AND WORK: IMPACT, ISSUES AND GOOD PRACTICES 8–9 (2000), https://www.who.int/mental_health/media/en/712.pdf [https://perma.cc/84WJ-YRQR].

1. *Lawyer Discipline: Malpractice and Sanctions*

There can be no question that lawyers who have untreated mental health of addiction disorders can engage in conduct that gives rise to lawyer discipline or malpractice actions.[261] For instance, according to the ABA, "40%–70% of disciplinary proceedings and malpractice claims against lawyers involve substance use, depression, or both."[262] Further, a separate ABA survey covering New York and California found that "50 to 70 percent of all disciplinary cases involved alcoholism."[263] Reports from other states find similar percentages.[264]

2. *Absenteeism and "Presenteeism"*

In addition to the direct costs of health care and, for lawyers, malpractice and sanctions, firms suffer indirect costs from lawyers struggling with mental health issues. According to one study, businesses suffer over $102 billion in indirect costs annually due to the absenteeism and "presenteeism" of their depressed employees.[265] Absenteeism is the amount of work (in hours or days) an employee loses due to illness or otherwise being absent from work.[266] Presenteeism, as the name suggests, is the amount

261. *See, e.g.*, Badgerow, *supra* note 51, at 2 (noting that an "alarming number" of complaints against lawyers for ethics violations "involve lawyers' use of and dependence upon drugs and alcohol . . . and descent into depression").

262. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 8.

263. Carol Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 902 (2005) (citing Allan, *supra* note 11, at 268).

264. *See, e.g.*, ATTORNEY ATT'Y REGISTRATION & DISCIPLINARY COMM'N, SUPREME COURT OF ILL., ANNUAL REPORT OF 2016, at 35 (2017), https://www.iardc.org/AnnualReport2016.pdf [https://perma.cc/FN2K-XH6V] (indicating that "thirty-three of the 107 lawyers disciplined, or 30.8%, had at least one substance abuse or mental impairment issue"); LAWYERS' FUND FOR THE STATE OF N.Y., ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR CALENDAR YEAR 2016, at 14 (2017), http://www.nylawfund.org/AR2016%20.pdf [https://perma.cc/8SBC-V95B] (noting that "causes of [lawyer] misconduct are often traced to alcohol, drug abuse, and gambling"); *cf. Indiana Judges & Lawyers Assistance Program, About JLAP*, STATE IND., https://www.in.gov/judiciary/ijlap/2361.htm [https://perma.cc/BY5H-NFF9] (last visited May 7, 2020) (noting that 85% of calls are about addiction or mental health issues).

265. Paul E. Greenberg et al., *The Economic Burden of Adults with Major Depressive Disorder in the United States (2005 and 2010)*, 76 J. CLINICAL PSYCHIATRY 155, 159 tbl.2 (2015) (finding that over $23 billion of such costs is attributable to absenteeism and nearly $79 billion attributable to presenteeism); *cf.* Sameer Kumar et al., *Operational Impact of Employee Wellness Programs: A Business Case Study*, 58 INT'L J. PRODUCTIVITY & PERFORMANCE MGMT. 581, 583 (2009) (finding that "[d]epressed employees" indirectly cost employers $52 billion each year, including $37 billion attributable to absenteeism and $15 billion attributable to presenteeism. Moreover, active disengagement by employees is estimated to cost businesses more than $500 billion annually. *See* SHAWN ACHOR, BIG POTENTIAL: HOW TRANSFORMING THE PURSUIT OF SUCCESS RAISES OUR ACHIEVEMENT, HAPPINESS, AND WELL-BEING 102 (2018) [hereinafter, ACHOR, BIG POTENTIAL]).

266. *See, e.g.*, Kathryn Rost et al., *The Effect of Improving Primary Care Depression Management on Employee Absenteeism and Productivity: A Randomized Trial*, 42 MED. CARE 1202, 1204 (2004).

of work an employee loses while at work because they are unproductive or under-productive.[267] Mental health and substance abuse issues affect both.

Indeed, studies overwhelmingly demonstrate that "[d]epression substantially reduces an employee's ability to work," as it increases both absenteeism and presenteeism.[268] According to one study, depression doubles the annual sickness days among employees and results in 2.3 days per month of lost productivity.[269] Another study found that employees with mental illness reported losing 4.3–5.5 days of productive work in the prior thirty days.[270] On average, workers with depression have 3.7 times more unproductive time at work per week than those without depression,[271] and depressed employees generally have "trouble concentrating, greater difficulty in making decisions, and decreased interest in work."[272]

In addition to lost workdays and lost productivity, the cost of absenteeism and presenteeism to employers can be monetized. For example, a 2003 study found worker absenteeism and presenteeism due to depression results in costs of $44 billion in 2002 dollars to employers.[273] Additionally, according to another study, 71% of employer expenditures on employee mental health issues are for lost productivity due to presenteeism.[274]

Moreover, the combination of long hours and all-day availability invariably leads to a lack of sleep.[275] Not only does fatigue compromise effectiveness, but sustained lack of sleep both leads to cognitive impairment

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267. *See, e.g.*, *id.*

268. *Id.* at 1202.

269. Philip S. Wang et al., *Effects of Major Depression on Moment-in-Time Work Performance*, 161 AM. J. PSYCHIATRY 1885, 1888 (2004).

270. Ronald S. Kessler et al., *The Effects of Chronic Medical Conditions on Work Loss and Work Cutback*, 43 J. OCCUPATIONAL & ENVTL. MED. 218, 220 tbl.2 (2001); *see also* Gregory E. Simon et al., *Recovery from Depression, Work Productivity, and Health Care Costs Among Primary Care Patients*, 22 GEN. HOSP. PSYCHIATRY 153, 153 (2000) (noting that "current depression is associated with an increase of 2 to 4 disability days per month"); *see also id.* at 154 ("[D]epression is responsible for a tremendous economic burden on employers and insurers.").

271. Walter F. Stewart et al., *Cost of Lost Productive Work Time Among US Workers with Depression*, 289 JAMA 3135, 3140 (2003).

272. *See* Kumar et al., *supra* note 265, at 583; *see also* Wang et al., *supra* note 269, at 1887 (finding that major depression "was associated with decrements of approximately 12 points in task focus and approximately 5 points in productivity on their 0-100 scales . . . equivalent to a 0.4 standard deviation increase in task focus and a 0.3 standard deviation decrease in productivity").

273. Stewart et al., *supra* note 271, at 3141 tbl.4.

274. Ron Z. Goetzel et al., *Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers*, 46 J. OCCUPATIONAL & ENVTL. MED. 398, 408 tbl.4B (2004).

275. Lack of sleep is a natural outgrowth of long hours and total accessibility, and lack of sleep is seen as the cost of exceptional client service. *See, e.g.*, Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2211 (2002) ("A common assumption is that client service requires total accessibility."); *cf.* Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 182 (2005) (reporting on survey finding 35.7%

and can lead to or exacerbate depression.[276] With respect to the compromising effectiveness, fatigue "impair[s] judgment and decision making."[277] For instance, a person who averages four hours of sleep a night for four or five nights will be as cognitively impaired as someone who is legally intoxicated or who has been awake for twenty-four straight hours.[278] "Within ten days, the level of impairment is the same as . . . going forty-eight straight hours without sleep," which significantly "impedes judgment, interferes with problem-solving," and delays reaction times.[279]

As for causing or exacerbating depression, lack of sleep is a "major risk factor in the onset, recurrence, chronicity, and severity" of major depressive episodes.[280] Accordingly, sleep habits are important and modifiable risk factors to help prevent depression or achieve and maintain depression remission.[281]

Given law firms' reliance on the billable hour as the measure of both lawyer productivity and firm profitability, presenteeism could be seen as a way to maximize profits—after all, a lawyer who can bill more for a task will make more for the firm. However, as discussed below, clients are demanding that firms increase efficiency—both in their services and the methods for which they bill them—thus making presenteeism costly for firms.

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of lawyers reported sleeping an average of five-to-six hours per night and 3% reported sleeping an average of less than five hours per night).

276. JEAN M. TWENGE, IGEN: WHY TODAY'S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD—AND WHAT THAT MEANS FOR THE REST OF US 116 (2017) ("Sleep deprivation is linked to myriad issues, including compromised thinking and reasoning, susceptibility to illness, increased weight gain, and high blood pressure. Sleep deprivation also has a significant effect on mood: people who don't sleep enough are prone to depression and anxiety.").

277. RHODE, *supra* note, at 166; *see also* Austin, *supra* note 156, at 837 (arguing that since "sleep deprivation causes loss in cognitive skill—diminished attention, working memory capacity, executive function, quantitative skills, logical reasoning ability, mood, and both fine and gross motor control—law students . . . and lawyers should make adequate regular sleep a priority").

278. Bronwyn Fryer, *Sleep Deficit: The Performance Killer*, HARV. BUS. REV. (Oct. 2006), https://hbr.org/2006/10/sleep-deficit-the-performance-killer [https://perma.cc/TU23-D7NK].

279. *Id.*

280. Jean Twenge et al., *Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide-Related Outcomes in a Nationally Representative Dataset, 2005–2017*, 128 J. ABNORMAL PSYCHOL. 185, 197 (2019); *see also* Peter L. Franzen & Daniel J. Buysse, *Sleep Disturbances and Depression: Risk Relationships for Subsequent Depression and Therapeutic Implications*, 10 DIALOGUES CLINICAL NEUROSCI. 473, 479 (2008); *see also* Charlotte Fritz et al., *Embracing Work Breaks: Recovering from Work Stress*, 42 ORG. DYNAMICS 274, 275 (2013) ("Employees who do not completely recover during the weekend (i.e., they feel that a free weekend is not enough time to recover from the work week) over time are at an increased risk for depressive symptoms, fatigue, energy loss, and cardiovascular disease.").

281. Franzen & Buysse, *supra* note 280, at 479.

3. *Replacement Costs and High Attrition*

Mental health and addiction issues can contribute to lawyer attrition. In general, attrition rates among lawyers are high. In 2016, law firms lost an average of 16% of associates.[282] As a general matter, 44% of associates depart within three years of being hired, and 75% depart within five years.[283] Moreover, a 2016 survey found that 40% of lawyers surveyed were "likely" or "very likely" to be looking for a new job within the next twelve months.[284] According to one estimate, the cost of replacing a departing associate ranges from $200,000 to $500,000—roughly one-and-a-half to two times the annual salary of that lawyer.[285] This cost—which could include advertising, recruiters' time and salary, interviewing expenses, and training—does not account for implicit costs. Such costs, including lost productivity time, covering the work of the departing lawyer, and disrupted intrafirm and client relationships, "can dwarf the explicit expenses."[286] Thus, taking the midpoint and ignoring the implicit cost of attrition, associate attrition costs a firm with 100 associates $5.6 million and a firm with 500 $28 million annually.[287]

B. *Incremental Efforts to Address Lawyer Well-Being*

In the wake of the Task Force's 2017 call to action in its *The Path to Lawyer Well-Being* report, some law firms and other legal employers have

282. NALP FOUND., UPDATE ON ASSOCIATE ATTRITION 12 tbl.6 (2017).

283. *Id.* at 11 tbl.5.

284. *2016 Lawyer Satisfaction Survey: By the Numbers*, LAW360 (Sept. 2, 2016), https://www.law360.com/articles/833246/law360-s-2016-lawyer-satisfaction-survey-by-the-numbers [https://perma.cc/X35K-52N8].

285. LEVIT & LINDER, *supra* note 13, at 162 (citation omitted); *see also* Leslie Larkin Cooney, *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law*, 478 S.D. L. REV. 421, 427 (2010) ("The average cost to a law firm when an associate leaves has been documented at $315,000; while others estimate that it costs a firm 150% of a person's annual salary when she quits.").

286. LEVIT & LINDER, *supra* note 13, at 162 (citation omitted); *see also* RHODE, *supra* note 166, at 15; Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYR. L. REV. 335, 336 (2008) ("Attrition of associates is costly to law firms, in terms of money, morale, reputation, and time."); Seligman et al., *supra* note 13, at 33 ("Unhappy associates fail to achieve their full potential at a cost to them, their firms, their clients, and even their families.").

287. 100 lawyers x 16% = 16; 16 x $350,000 = $5,600,000. 500 lawyers x 16% = 80; 80 x $350,000 = $28,000,000.

Further, firms that fail to adequately promote the well-being of their lawyers may face the cost of attrition when that failure is seemingly most acute. For example, after Gabe McConaill's death (see *supra* notes 1–4 and accompanying text), "a number of employees" reportedly left his firm's Los Angeles office, purportedly because "they thought that the firm's leadership did not respond sufficiently in the wake of [his] death," and that "there was no clear commitment to support employees who . . . found [the firm's] demanding corporate culture an unwelcome environment in which to raise a hand" to seek help. Lilah Raptopoulos & James Fontanella Khan, *The Trillion-Dollar Taboo: Why It's Time to Stop Ignoring Mental Health at Work*, FIN. TIMES (July 10, 2019), https://www.ft.com/content/1e8293f4-a1db-11e9-974c-ad1c6ab5efd1 [https://perma.cc/P3PL-MHN7].

begun to, at least, recognize the mental health and addiction issues in the profession, and some have taken incremental steps to promote the well-being of their lawyers. While first steps are helpful toward addressing the crisis, there is still a long way for the profession to go to enact meaningful and lasting change.[288]

As an initial step, some firms have at least begun to acknowledge that mental health and addiction problems exist in the profession. For instance, in a Summer 2018 survey of managing partners and human resources officials at Am Law 200 law firms on mental health and substance abuse, 86% of those surveyed either agreed or strongly agreed that depression occurs at their firm, and 93% agreed or strongly agreed that anxiety occurs at the firm.[289] Further, 90% agreed or strongly agreed that alcohol abuse occurs at the firm, and 48% agreed or strongly agreed that drug abuse occurs at the firm.[290] And these firms recognize that their cultures contribute to these problems: when asked to rank the "causes of substance abuse and mental health problems in the law firm environment," 79% of respondents listed "stress and workload" as the principle cause.[291]

As an additional step, in September 2018 the ABA launched a campaign seeking to "raise awareness, facilitate a reduction in the incidence of problematic substance use and mental health distress and improve lawyer well-being."[292] To that end, the ABA developed a "seven-point framework for building a better future" for lawyer well-being[293] and requested firms

288. Patrick Krill, *Progress, Not Perfection, Is Key to Law Firms' Mental Health Programs*, LAW.COM (June 12, 2019), https://www.law.com/2019/06/12/progress-not-perfection-is-key-to-law-firms-mental-health-programs/ [https://perma.cc/GH6A-WR23] [hereinafter Krill, *Progress, Not Perfection*] (noting the "huge canyon between where the profession is now and where we might otherwise want it to be").

289. ALM INTELLIGENCE, *supra* note 235.

290. *Id.*

291. *Id.* In conducting the survey, the surveyors "noted that 'discussing substance abuse and mental health issues has often been considered taboo in the legal industry.'" Patrick Krill, *ALM Survey on Mental Health and Substance Abuse: Big Law's Pervasive Problem*, LAW.COM (Sept. 14, 2018), https://www.law.com/2018/09/14/alm-survey-on-mental-health-and-substance-abuse-big-laws-pervasive-problem/ [https://perma.cc/CRX4-RBZY]. The survey yielded a response rate of only 15%, which "would seem to suggest that the taboo is alive and well." *Id.*; *see also supra* notes 235–237 and accompanying text.

292. *See ABA Launches Pledge Campaign to Improve Mental Health and Well-Being of Lawyers*, AM. B. ASS'N (Sept. 10, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/aba-launches-pledge-campaign-to-improve-mental-health-and-well-b/ [https://perma.cc/SL3P-QERD] [hereinafter *ABA Launches Pledge Campaign*].

293. These seven points are: (1) "Provide enhanced and robust education to lawyers and staff on topics related to well-being, mental health, and substance use disorders"; (2) Disrupt the status quo of drinking-based events"; (3) "Develop visible partnerships with outside resources committed to reducing substance use disorders and mental health distress in the profession . . ."; (4) "Provide confidential access to addiction and mental health experts and resources, including free, in-house, self-assessment tools"; (5) "Develop proactive policies and protocols to support assessment and treatment of substance use and mental health problems, in-

sign a pledge of support for the ABA's campaign. The pledge provides as follows:

> Recognizing that substance use and mental health problems represent a significant challenge for the legal profession, and acknowledging that more can and should be done to improve the health and well-being of lawyers, we the attorneys of [FIRM] hereby pledge our support for this innovative campaign and will work to adopt and prioritize its seven-point framework for building a better future.[294]

Thirteen law firms initially signed the pledge upon its September 2018 issuance.[295] The ABA called upon "all legal employers" to take the pledge by January, 1, 2019;[296] through May 2020, only 133 law firms (and fifty other organizations) had done so.[297]

In addition to acknowledging mental health and addiction issues and pledging to take theoretical steps to improve lawyer well-being, firms have

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cluding a defined back-to-work policy following treatment"; (6) "Actively and consistently demonstrate that help-seeking and self-care are core cultural values, by regularly supporting programs to improve physical, mental[,] and emotional well-being"; and (7) "Highlight the adoption of this well-being framework to attract and retain the best lawyers and staff." *See Presentation, Challenging the Status Quo: A Campaign of Innovation to Improve the Substance Use and Mental Health Landscape of the Legal Profession*, AM. B. ASS'N, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_group_pledge_and_campaign.authcheckdam.PDF [https://perma.cc/WF7X-P7FT] (last visited May 7, 2020).

294. AM. BAR ASS'N, PLEDGE COMMITMENT FORM 1, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_group_pledge_commitment_form.authcheckdam.pdf [https://perma.cc/M67S-VJ6S] (last visited May 7, 2020).

295. The law firms are:

> Akin Gump Strauss Hauer & Feld LLP; Corette Black Carlson & Mickelson P.C.; Duane Morris LLP; Honigman Miller Schwartz & Cohn LLP; Latham & Watkins LLP; Morgan, Lewis & Bockius LLP; Nixon Peabody LLP; Perkins Coie LLP; Reed Smith LLP; Schiff Hardin LLP; Seyfarth Shaw LLP; Snell & Wilmer LLP; and Wiley Rein LLP.

ABA Launches Pledge Campaign, *supra* note 292.

296. *Id.*

297. *Working Group to Advance Well-Being in the Legal Profession*, AM. B. ASS'N, https://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession/ [https://perma.cc/Y4ST-4G6Q] (last visited June 1, 2020). Interestingly, perhaps in a sign of a change of the times, the firm whose chairman warned of client perception of employing "crazy lawyers" is one of the signatories to the ABA's pledge. *Id.; cf. OnAir with Akin Gump: Mental Health & Well-Being in the Legal Industry with Kim Koopersmith, Patrick Krill*, AKIN GUMP (June 18, 2019), https://www.akingump.com/en/news-insights/mental-health-well-being-in-the-legal-industry-with-kim.html [https://perma.cc/6GQW-ZKAJ] (in an interview with the chairman of an Am Law 100 firm, the creator of the well-being pledge describes how he "was essentially laughed off the stage as being a well-intentioned idiot" when he first proposed it to a group of lawyers a few years prior to its launch).

been beginning to take concrete steps to address them,[298] with some efforts even predating the formal call to action in *The Path to Lawyer Well-Being*. These programs include continuing education courses, visiting speakers, online resources, and social opportunities promoting healthy lifestyles, as well as employee assistance programs and direct access to professional services.[299] For instance, since 2016, Kirkland & Ellis has offered yoga, meditation, and wellness training to its lawyers.[300] In 2017, the New York and Washington, D.C. offices of Hogan Lovells started offering on-site psychologists to their employees;[301] also in 2017, Akin Gump Strauss Hauer & Feld began offering its lawyers the services of on-site behavioral assistance counselors as part of its overall "Be Well" program, which it started the year before.[302] Further, in 2019, Morgan Lewis launched an employee well-being program entitled "ML Well," and created a "Director of Employee Well-Being" position.[303]

Moreover, beyond firms themselves, some state bars have taken action to eliminate questions on bar applications relating to an applicant's mental health history. In February 2019, the Conference of Chief Justices, in recognition that questions about mental health history, diagnoses, or treatment are "unduly intrusive" and "likely to deter individuals from seeking mental health counseling and treatment," passed a resolution urging state and territorial bar authorities to eliminate such questions from bar applications.[304] The conference resolved that it is reasonable to ask about an applicant's mental health history "only . . . if the applicant has engaged in conduct or behavior and a mental health condition has been offered or shown to be an explanation for such conduct or behavior."[305] Consistent

298. *See generally* Dan Packel, *Law Firms Tackle Mental Health, One Initiative at a Time*, AM. LAW. (June 17, 2019), https://www.law.com/americanlawyer/2019/06/17/law-firms-tackle-mental-health-one-initiative-at-a-time/ [https://perma.cc/ZEG6-VZC6] (summarizing law firms' programs and other steps to improve lawyer and staff mental health and wellness).

299. *See id.*

300. Claire Bushey, *Kirkland & Ellis to Offer Wellness Training to All U.S. Lawyers*, CRAIN'S CHI. BUS. (May 2, 2016), https://www.chicagobusiness.com/article/20160502/NEWS04/160509972/kirkland-ellis-to-offer-wellness-training-to-all-u-s-lawyers [https://perma.cc/TB8X-SQAM].

301. Randazzo, *supra* note 22.

302. Ryan Lovelace, *Akin Gump Adds On-Site Counseling as Firms Fret over Mental Health*, NAT'L L.J. (May 15, 2017), http://www.law.com/nationalawjournal/2018/05/15/akin-gump-adds-on-site-counseling-as-firms-fret-over-mental-health/ [https://perma.cc/7AY8-5YMX].

303. *Morgan Lewis Launches ML Well Program*, MORGAN LEWIS (Mar. 18, 2019), https://www.morganlewis.com/news/morgan-lewis-launches-ml-well-program [https://perma.cc/V48C-SE5T].

304. Conf. of Chief Justices, Res. 5, *supra* note 249.

305. *Id.* In August 2015, the ABA adopted a similar resolution, which called upon state bars to "eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner." Am. B. Ass'n Res. 102 (Aug. 3, 2015).

with the conference's resolution, in 2019 three states—Connecticut,[306] Virginia,[307] and Wisconsin[308]—removed questions relating to applicants' mental health history (except when offered as a defense to conduct). Further, California and New York began examining whether they should remove such questions from their respective bar applications.[309] As a consequence of these examinations, in July 2019 California enacted legislation prohibiting its state bar from seeking applicants' mental health records beginning on January 1, 2020,[310] and on March 1, 2020, New York Court of Appeals Chief Justice Janet DiFiore announced that mental health-related questions would be removed from bar applications effective immediately.[311]

These pioneering steps are a helpful—and much needed—start to addressing lawyer mental health and addiction issues and well-being issues more generally.[312] However, more firms and legal employers need to take

306. *See* Connecticut Bar Examining Committee, CONN. JUD. BRANCH, https://www.jud.ct.gov/cbec/instadmisap.htm#Forms [https://perma.cc/EKF5-4QKQ] (last visited May 7, 2020). *See generally* Editorial, *Long Overdue Step Taken to Remove Mental Health Stigma in Law*, CONN. L. TRIB. (Apr. 12, 2019), https://www.law.com/ctlawtribune/2019/04/12/long-overdue-step-taken-to-remove-mental-health-stigma-in-law/ [https://perma.cc/9FXM-WDZT].

307. *Sample Forms*, VA. BD. B. EXAMINERS, http://barexam.virginia.gov/misc/resources/samples.html [https://perma.cc/49YH-AGEY] (last visited May 7, 2020). The Virginia State Bar removed questions relating to mental health history and treatment in response to organized law student effort for it to do so. Justin Mattingly, *Virginia Panel Scraps Mental Health Question After Law School Student Push*, RICHMOND TIMES-DISPATCH (Feb. 8, 2019), https://www.richmond.com/news/local/education/virginia-panel-scraps-mental-health-question-after-law-school-student/article_36ece9b3-078c-5e12-b748-762555b8f081.html [https://perma.cc/T8H7-WA3N].

308. *See generally For Attorneys: Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS., https://www.wicourts.gov/services/attorney/bar.htm [https://perma.cc/Q9S4-5BQE] (last visited May 7, 2020).

309. Susan DeSantis, *Momentum Builds for Allowing NY Bar Applicants to Keep Mental Health History Secret*, N.Y.L.J. (June 10, 2019), https://www.law.com/newyorklawjournal/2019/06/10/momentum-builds-for-allowing-ny-bar-applicants-to-keep-mental-health-history-secret/ [https://perma.cc/AY3F-3CLH].

310. *See* Cal. Bus. & Prof. Code § 6060(b)(2) (2020).

311. Christian Nolan, *Law School Grads in NY Won't Face Mental Health Inquiry*, N.Y.S. BAR ASS'N (Mar. 1, 2020), https://nysba.org/mentalhealthinquiry/#:~:text=in%20a%20major%20victory%20for,state%20bar%20application%20effective%20immediately.&text=%E2%80%9CToday%20marks%20a%20historic%20step,said%20NYSBA%20President%20Hank%20Greenberg. [https://perma.cc/3UDS-NLCX].

312. Additionally, legal trade publications are speaking more to mental health and addiction issues in the profession. For instance, in May 2019, the website *Law.com* and its affiliate websites launched "Minds over Matters," a year-long "examination into mental health, stress, addiction, and overall well-being in the profession," which includes "articles, analysis, data, expert advice, personal stories of triumph, a resource center . . . and much more." Gina Passarella Cipriani & Leigh Jones, *Introducing Minds over Matters: A Yearlong Examination of Mental Health in the Legal Profession*, LAW.COM (May 12, 2019), https://www.law.com/2019/05/12/introducing-minds-over-matters-a-yearlong-examination-of-mental-health-in-the-profession/ [https://perma.cc/6R4X-KWP9]. *See generally* MIND OVER MAT-

action to enable meaningful, profession-wide change. And, of the efforts currently being made by firms, there is some concern that, however well-meaning, they "lack the teeth to address the toughest of the issues,"[313] or are "little more than window dressing-a way for firms to check a box and show they are making a difference while avoiding the more complex process of a true reckoning."[314] As one associate put it, "the fixes being offered [by firms] are 'like a band-aid over a bullet wound.'"[315]

Indeed, a 2020 study by ALM, which is based on the results of a survey of nearly 4,000 lawyers, demonstrates that more work needs to be done.[316] The study found that 41.2% of respondents feel that mental health and addiction problems in the legal profession have reached a "crisis level."[317] In particular, that study reported that:

- 31.2% of respondents reported feeling depressed;
- 64% reported feeling anxiety;
- 32.7% reported increasing their drug or alcohol use as a result of work;
- 17.9% reported that they have contemplated suicide over the course of their legal career;
- 67% reported that their personal relationships have suffered as a result of their being in the legal profession; and
- 74.1% reported feeling that the legal profession has had a negative effect on their mental health.[318]

Although not scientifically validated, this study's findings suggest the prevalence of mental distress and addiction issues at the same or greater levels than those reported in the Krill Study.[319]

Nevertheless, it would be counterproductive to reject this progress as less than the complete culture change or paradigm shift needed to ad-

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TERS: AN EXAMINATION OF MENTAL HEALTH IN THE LEGAL PROFESSION, LAW.COM, https://www.law.com/special-reports/minds-over-matters-an-examination-of-mental-health-in-the-legal-profession/ [https://perma.cc/manage/create?folder=8393-84673] (last visited May 7, 2020).

313. Gina Passarella Cipriani, '*Like a Band-Aid over a Bullet Wound': The Disconnect Between Firms and Lawyers on Wellbeing Efforts*, LAW.COM INT'L (June 30, 2019, 7:00 PM), https://www.law.com/international-edition/2019/06/30/like-a-band-aid-over-a-bullet-wound-the-disconnect-between-firms-and-lawyers-on-well-being-efforts-378-112902/ [https://perma.cc/GVA2-XPTF].

314. Packel, *supra* note 298.

315. Passarella Cipriani, *supra* note 313.

316. *See* Lizzy McLellan, *Lawyers Reveal True Depth of Mental Health Struggles*, LAW.COM (Feb. 19, 2020, 11:00 AM), https://www.law.com/2020/02/19/lawyers-reveal-true-depth-of-the-mental-health-struggles/ [https://perma.cc/933E-72UD].

317. *Id.*

318. *Id.*; *see also By the Numbers: The State of Mental Health in the Legal Industry*, LAW.COM (Feb. 19, 2020), https://www.law.com/2020/02/19/by-the-numbers-the-state-of-mental-health-in-the-legal-industry/ [https://perma.cc/XRN5-5LAH] (featuring key data points from survey).

319. Krill et al., *supra* note 10; *see also supra* notes 58–66 and accompanying text.

dress lawyer mental health and addiction issues in meaningful ways.[320] Incremental progress could allow the profession to build the bridge toward the systemic changes the profession needs.[321] However, the systemic changes needed may come about more quickly if firms recognize not just the social good in prioritizing their lawyers' well-being (which has long been one of the principal justifications in calls for systemic change), but the benefits that will inure to firms' bottom lines and profit margins. The next section explains why the time is right for these systemic changes, and why it is in firms' financial interests to make them.

C. *The Financial Benefits of Lasting and Meaningful Change*

The time is right for firms to prioritize lawyer well-being in part because we are at a tipping point in mental health awareness. While stigma about mental health certainly still exists—particularly in law firms[322]—people involved in entertainment,[323] sports,[324] and politics[325] have all

320. Krill, *Progress, Not Perfection*, *supra* note 288 ("Standing on the edge [of the canyon] while complaining about the width of the chasm won't do anything to narrow its yawn.").

321. *Id.*

322. *See supra* notes 235–237 and accompanying text.

323. *See, e.g.*, Sandra Gonzalez, *Emma Stone Opens up About Ongoing Battle with Anxiety*, CNN (Oct. 2, 2018, 3:00 PM), https://www.cnn.com/2018/10/02/entertainment/emma-stone-anxiety/index.html [https://perma.cc/ZGQ6-PEWB]; Cydney Henderson, *Chris Evans Reveals He Almost Turned Down "Captain America" over Anxiety*, USA TODAY (May 26, 2020, 11:44 PM), https://www.usatoday.com/story/entertainment/celebrities/2020/05/26/chris-evans-almost-turned-down-captain-america-over-anxiety/5264260002/ [https://perma.cc/9CPT-ALSD?type=image]; *see also Wale Says Record Deals Should Include Mental Health Assistance*, VIBE (Oct. 11, 2019, 10:07 PM), https://www.vibe.com/2019/10/wale-says-record-deals-include-mental-health-assistance [https://perma.cc/LPU6-J7KF].

324. *See, e.g.*, Kevin Love, *Everyone Is Going Through Something*, PLAYERS' TRIB. (Mar. 6, 2018), https://www.theplayerstribune.com/en-us/articles/kevin-love-everyone-is-going-through-something [https://perma.cc/99M3-B3ZB]; *see also, e.g.*, Jackie MacMullan, *The Courageous Fight to Fix the NBA's Mental Health Problem*, ESPN (Aug. 20, 2018), http://www.espn.com/nba/story/_/id/24382693/jackie-macmullan-kevin-love-paul-pierce-state-mental-health-nba [https://perma.cc/NCH9-BZDK]. Professional hockey player Robin Lehner won the National Hockey League's Masterton Trophy as the "player who best exemplifies the qualities of perseverance, sportsmanship, and dedication to ice hockey" for the 2018–2019 season after going public with his battle with addiction and mental illness. Dan Rosen, *Lehner Uses Masterton Trophy to Continue Mental-Health Message*, NHL (June 20, 2019), https://www.nhl.com/news/lehner-uses-masterton-to-continue-message/c-307928992?tid=280503612 [https://perma.cc/C2GM-REEZ]. In his speech accepting the award, he proclaimed: "I'm not ashamed to say I'm mentally ill, but that doesn't mean [I'm] mentally weak." *Id.* (internal quotation marks omitted).

325. *See, e.g.*, Jason Kander, *I Suffer from Depression and Have PTSD Symptoms*, MEDIUM (Oct. 2, 2018), https://medium.com/@JasonKander/about-four-months-ago-i-contacted-the-va-to-get-help-2dc6006804c1 [https://perma.cc/L7FA-9F6D]; Tina Smith, *U.S. Senator Tina Smith in Senate Speech: "Why I'm Sharing My Experience with Depression,"* SENATOR TINA SMITH (May 15, 2019), https://smith.senate.gov/us-senator-tina-smith-senate-speech-why-im-sharing-my-experience-depression [https://perma.cc/VH3B-UT74].

raised awareness of mental health and addiction issues by coming forward to share stories of their personal struggles. Further, many other industries have taken steps to prioritize mental health.[326] And, while "law firms remain 20 years behind corporate America when it comes to taking measures to improve mental health,"[327] it is in firms' interest to catch up to other professions and industries as prioritizing lawyer well-being will help firms recruit and retain the best talent.

As noted above, the profession has made progress and both recognizing the problems and taking incremental steps to address them are positive steps. This should be acknowledged and applauded. But making lasting, meaningful change in the profession requires a shift in the paradigm within which firms operate at both the organizational and profession-wide levels. After all, as one law firm consultant observed, "the mixed messages sent when a firm says 'go use our meditation room but make sure you bill 2,000 hours or you won't get your bonus' need a broader fix that may require more people in the room than those focused purely on mental health."[328] As the ABA recognized in *The Path the Lawyer Well-Being*, "[b]road-scale change requires buy-in and role modeling from top leadership."[329]

That buy-in from firm leadership—i.e., those that have helped create and perpetuate the commodification of the legal profession as well as the stigma attached to lawyers with mental health and addiction issues—will not come unless and until that leadership sees a potential return on such an investment.

As explained in Section IV.A above, law firms and legal employers experience costs when lawyer mental health and addiction issues are unaddressed. A number of interventions can significantly lessen the burden of depression or anxiety in the workplace, and specifically work-related interventions can have a positive role in maintaining mental health and facilitating recovery from depression or anxiety.[330] Primary and secondary prevention approaches demonstrate "either moderate or strong efficacy in terms of reducing symptom severity."[331] Thus, workplace interventions

326. *See generally infra* notes 340–345 and accompanying text.

327. Packel, *supra* note 298.

328. *Id.*

329. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 11–12. At least one senior partner at an international law firm has publicly advocated for such broad-scale change, penning an open letter calling for firms to rethink billing and compensation practices—specifically "de-emphasiz[ing] the billable hour or [doing] away with it completely"—in response to the profession's "mental health crisis." Jane Cohen Barbe, *Open Letter from Dentons Partner: Mental Health Crisis Requires Rethinking Firm Business Models*, LAW.COM (July 31, 2019), https://www.law.com/2019/07/31/open-letter-from-dentons-partner-the-mental-health-crisis-requires-rethinking-firm-business-models/ [https://perma.cc/C3QM-Y6GD].

330. S. Joyce et al., *Workplace Interventions for Common Mental Disorders: A Systemic Meta-Review*, 46 PSYCHOL. MED. 683, 692 (2016).

331. *Id.*

and treatment initiatives can help obviate the costs discussed above. Moreover, these interventions lead to reductions in health care costs (and therefore insurance premiums). The costs associated with promoting wellness are significantly outweighed by the financial benefits. According to one study, for every dollar a company spends on employee wellness programs, medical costs fall by $3.27 and increased costs attributed to employee absenteeism fall by $2.73.[332] Further, more generally, a 2016 study estimated that every dollar spent to "scale up" treatment for mental illness between 2016 and 2030 within the thirty-six largest nations will yield $4.00 in increased productivity and the ability to work.[333]

In addition to these financial savings, healthier workers are more productive, and prioritizing lawyer well-being will likely help with lawyer retention and recruitment.[334] This is especially true now, with the growth of alternative fee arrangements as opposed to traditional hourly fee structures and the increasing importance millennial and now Generation Z lawyers and law students place on mental health and work-life balance.

As set forth below, firms that prioritize lawyer health and well-being similarly will see the indirect benefits of: (1) better performance from their lawyers and staff; (2) better retention; and (3) better yield of incoming lawyers through recruitment.

1. *Performance: Client Demands for Efficiency*

As discussed in Section IV.A.2 above, mental health and addiction disorders result in increased absenteeism and presenteeism. Indeed, the stress faced by lawyers results not only in a decline in their well-being and rise in anxiety, panic attacks, depression, substance abuse, and suicide, but

332. Katherine Baicker et al., *Workplace Wellness Programs Can Generate Savings*, 29 HEALTH AFF. 304, 308 (2010); *see also* RHODE, *supra* note 166, at 23 ("Some estimates suggest that every dollar invested in policies concerning quality of life results in two dollars saved in other costs."). As one example, Coors Brewing Company reported a $6.15 return in profitability for every dollar spent on its corporate fitness program. ACHOR, HAPPINESS ADVANTAGE, *supra* note 101, at 57–58 (citing JIM LOEHR & TONY SCHWARTZ, THE POWER OF FULL ENGAGEMENT: ENERGY, NOT TIME, IS THE KEY TO HIGH PERFORMANCE AND PERSONAL RENEWAL 65 (2003)).

333. Chisholm et al., *supra* note 258, at 415, 420–21. Specifically, the study estimated that while net present value (NPV) of this "scale-up" cost is $147 billion, the NPV of the resulting increased productivity in the workforce is $399 billion, with an additional $310 billion in additional "healthy life-years." *Id.*

334. *See* Baicker et al., *supra* note 332, at 304; *see also id.* at 310 ("Although these benefits surely accrue in part to the employee, it is also likely that they accrue in part to the employer—in the form of either lower replacement costs for absent workers or an advantage in attracting workers to the firm."). Data from a survey published in March 2018 of nearly 65,000 federal government employees provided "strong evidence of the positive association between employee use of work-life programs and high organizational performance, retention, and job satisfaction." U.S. OFF. OF PERS. MGMT., FEDERAL WORK-LIFE SURVEY GOVERNMENTWIDE REPORT 5 (2018), https://www.opm.gov/policy-data-oversight/worklife/federal-work-life-survey/2018-federal-work-life-survey-report.pdf [https://perma.cc/4CX7-DBTR].

also in diminished cognitive capacity.[335] It is no surprise, then, that treatment for depression "significantly improve[s] productivity" and improves absenteeism,[336] and substance abuse treatment similarly greatly reduces both presenteeism and absenteeism.[337] Consequently, as a practical matter, more engaged employees generate higher business incomes.[338] And, as recognized by a study of federal employees, employees are "significantly more likely" to receive high performance ratings if they participate in wellness programs, employee assistance programs, or similar wellness-based policies.[339]

Recognizing this, several companies outside the legal profession have engaged in what Whole Foods founder John Mackey and economist Raj Sisodia have termed "conscious capitalism"—a system whereby businesses "simultaneously create[] multiple kinds of value and well-being for all stakeholders: financial, intellectual, physical, ecological, social, cultural, emotional, ethical, and even spiritual."[340] As they explain, conscious businesses "place a huge emphasis on improving the health and well-being of [their] team members," under the belief that when employees are healthy, the company not only generates higher revenue (because the employees do better work and provide better services to customers) but it also spends less money on health care.[341] As a consequence, such businesses "enhance the[ir] bottom line" through programs that promote employee health and well-being, including onsite gyms, nutrition programs, work-life balance programs, mindfulness training, and stress management classes.[342] These businesses take their employees' physical and mental health

335. Austin, *supra* note 156, at 796–97.

336. Rost et al., *supra* note 266, at 1206; *see also id.* at 1208 ("The improvements in absenteeism and productivity we observed in the total cohort were largely due to the improvements consistently employed workers realized from intervention.").

337. Eli Jordan et al., *Economic Benefit of Chemical Dependency Treatment to Employers*, 34 J. SUBSTANCE ABUSE TREATMENT 311, 315–17 (2008).

338. James K. Harter et al., *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCHOL. 268, 275 (2002) (noting "the correlation between employee engagement and business outcomes, even conservatively expressed, is meaningful from a practical perspective"); *see also id.* ("On average, business units in the top quartile on the employee engagement measure produced 1 to 4 percentage points higher profitability."); Sonja Lyubomirsky et al., *The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?*, 131 PSYCHOL. BULL. 803, 803, 840 (2005) (noting the correlation between happiness among employees and business success because "positive affect engenders success," and it also "affect[s] . . . the following resources, skills, and behaviors: sociability and activity . . . , altruism . . . , liking of self and others . . . , strong bodies and immune systems . . . , and effective conflict resolution skills").

339. FEDERAL WORK-LIFE SURVEY GOVERNMENTWIDE REPORT, *supra* note 334, at 9. *See generally id.* at 36–41.

340. JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM 32 (2013).

341. *Id.* at 96.

342. Austin, *supra* note 156, at 798.

seriously, and they "encourage positive emotional energy in the workplace to promote intellectual vigor and enhance productivity."[343]

Unsurprisingly, conscious businesses perform exceptionally well financially. For instance, a sample of conscious businesses outperformed the overall stock market by a ratio of 10.5:1 over a fifteen-year period from 1996–2011.[344] These businesses delivered more than 1,646% returns when the market was up only 157% over that period.[345]

Moreover, research on mindfulness and happiness generally is instructive on the benefits of well-being to employee performance. First, beyond formal wellness programs, firms that promote mindfulness can help to manage and reduce lawyer distress and also enable their lawyers to provide exceptional client service.[346] Practicing mindfulness can help lawyers feel and perform better,[347] improve lawyer decision-making,[348] ethics,[349] and even active listening and negotiation skills.[350] In fact, lawyers at an international law firm reported a 45% increase in focus, a 35% decrease in stress, and a 35% increase in effectiveness after completing a firm-sponsored mindfulness program.[351]

Second, happiness research has demonstrated that happiness correlates to successful outcomes because "positive affect engenders success."[352] Happiness is inextricably linked to work satisfaction, as "[t]he number one determinant of happiness is 'a good job': work that is meaningful and

343. EDWARD M. HALLOWELL, SHINE: USING BRAIN SCIENCE TO GET THE BEST FROM YOUR PEOPLE 31 (2011). Moreover, corporations have increasingly recognized their commitment to all stakeholders beyond shareholders. For instance, in August 2019, the Business Roundtable—an association of CEOs of America's leading companies—issued a "Statement on the Purpose of a Corporation," in which it announced their respective corporations are committed to, among other things, "[i]nvesting in our employees." BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/4SPY-JVUR].

344. MACKEY & SISODIA, *supra* note 340, at 278.

345. *See id.* at 278 tbl.A-1; *id.* at 35–36.

346. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 8 (2002).

347. *Id.* at 46–48.

348. Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 HOUS. L. REV. 63, 79–80 (2017).

349. *Id.* at 101.

350. Riskin, *supra* note 346, at 48–60.

351. Felicity Nelson, *Mindfulness Training an Antidote to Lawyers' Toxic Lives*, LAW. WKLY. (Dec. 18, 2015), https://www.lawyersweekly.com.au/news/17721-mindfulness-training-an-antidote-in-lawyers-toxic-lives [https://perma.cc/FT9N-GY4E]. As an additional example, insurance company Aetna found that its fifteen-thousand employees that took part in a training program designed to teach them meditation and yoga found an average gain of "62 minutes of productivity [per] week." Shawn Achor & Michelle Gielan, *The Busier You Are, the More You Need Mindfulness*, HARV. BUS. REV. (Dec. 18, 2015), https://hbr.org/2015/12/the-busier-you-are-the-more-you-need-mindfulness [https://perma.cc/GMH9-TSKN].

352. Lyubomirsky et al., *supra* note 338, at 803.

done in the company of people we care about."[353] In a word, happiness is actually the cause of success, not merely the result.[354]

In fact, studies have found a strong correlation between happy employees and objective and subjective measures of productivity,[355] and as a general matter positive affect can improve not only skills important for effective lawyering (such as sociability, altruism, and conflict resolution), but physical health as well.[356] Engaged workers perform better because they often "experience positive emotions, including happiness, joy, and enthusiasm; experience better health; create their own job and personal resources; and transfer their engagement to others."[357]

Just as a negative environment can impact employees negatively, a positive environment can impact them positively. Research demonstrates that we can "pick up negativity, stress, and apathy" from others; simply observing a co-worker's stress "can have an immediate effect upon our own nervous systems, raising our levels of the stress hormone cortisol by as much as 26 percent."[358] By contrast, "the presence of even one positive person in a community can actually 'infect' everyone in it with positivity."[359] Put differently, working with positive, engaged, motivated people enhances our own positivity, engagement, motivation, and creativity.[360] Thus, in creating an environment that cultivates lawyer well-being, the improved well-being of one or some lawyers will affect positively those around them, thus making teams, departments, and firms more productive and successful.

That healthier employees perform better is critical in the legal profession for several reasons, but notably because of recent client demands for lawyer efficiency. As explained in Section III.B.1 above, firms could avoid addressing lawyer well-being issues on performance-related grounds because their business model was one that thrived on and financially re-

353. MACKEY & SISODIA, *supra* note 340, at 86.

354. ACHOR, HAPPINESS ADVANTAGE, *supra* note 101, at 2–4 ("[H]appiness and optimism fuel performance and achievement.").

355. Huang & Swedloff, *supra* note 286, at 337 (citations omitted); ACHOR, HAPPINESS ADVANTAGE, *supra* note 101, at 41 ("Data abounds showing that happy workers have higher levels of productivity, produce higher sales, perform better in leadership positions, and receive higher performance ratings and higher pay. They also enjoy more job security and are less likely to take sick days, to quit, or to become burned out."); EMMA SEPPÄLÄ, THE HAPPINESS TRACK 7–11, 152–61 (2016).

356. Lyubomirsky et al., *supra* note 338, at 840 ("[P]ositive affect fosters the following resources, skills, and behaviors: sociability and activity . . . , altruism . . . , liking of self and others . . . , strong bodies and immune systems . . . , and effective conflict resolution skills . . . .").

357. Arnold B. Bakker & Evangelia Demerouti, *Towards a Model of Work Engagement*, 13 CAREER DEV. INT'L 209, 215 (2008). Work engagement is not to be confused with workaholism, as work engagement is positively related to performance, while workaholism is not. *Id.* at 214.

358. ACHOR, BIG POTENTIAL, *supra* note 265, at 149.

359. *Id.* at 148–49; *see also id.* at 59–86.

360. *Id.* at 70.

warded inefficiency—the billable hour. Over the last few years, however, clients have caused law firms to move away from the traditional hourly-billing model and toward "alternative fee arrangements," or a "mutual agreement between a law firm and [client] for billing and payment of outside legal services that does not rely on straight hourly billing by the firm."[361] Such arrangements include fixed price agreements, success fee agreements, contingency pricing, and other alternatives to the traditional billable hour.[362]

The rise of nontraditional billing is "[o]ne of the most potentially significant" changes to the profession in recent years, as it portends the "effective death of the traditional billable hour . . . in most law firms."[363] As of 2017, alternative fee arrangements account for 15%–20% of law firm revenues; however, when combined with budget-based pricing, such alternatives to the billable hour "may well account for 80 or 90 percent of all revenues."[364] Nearly 68% of all firms are working with clients to create alternative fee arrangements, and nearly 77% of firms with more than 250 lawyers are doing so.[365]

Large companies are seeking to change the billing model for their outside counsel and are insisting on alternative fee arrangements. For instance, Microsoft enacted a "Strategic Partner Program" on July 1, 2017, which "plac[ed] a stronger focus on alternative fee arrangements, retainer payments, diversity and developing relationships with outside counsel that go beyond the billable hour."[366] At that time, approximately 55%–60% of its outside counsel matters were billed on a non-hourly, alternative-fee basis, with the hope of raising that figure to "a very robust 90 percent" by mid-2019.[367] Additionally, pharmaceutical company GlaxoSmithKline had 80% of outside legal work in 2017 done through an alternative fee arrangement, compared with just 3% in 2008.[368]

361. ALM LEGAL INTELLIGENCE, SPEAKING DIFFERENT LANGUAGES: ALTERNATIVE FEE ARRANGEMENTS FOR LAW FIRMS AND LEGAL DEPARTMENTS 10 (2012).

362. For a list of examples of alternative fee arrangements, see *id.*

363. CTR. FOR THE STUDY OF THE LEGAL PROFESSION, GEORGETOWN LAW & LEGAL EXEC. INST., THOMPSON REUTERS, 2017 REPORT ON THE STATE OF THE LEGAL MARKET 9 (2017), https://www.legalexecutiveinstitute.com/wp-content/uploads/2017/01/2017-Report-on-the-State-of-the-Legal-Market.pdf [https://perma.cc/E8QH-ARN2].

364. *Id.* at 10.

365. ALTMAN WEIL, INC., 2018 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 62 (2018), http://www.altmanweil.com//dir_docs/resource/45F5B3DD-5889-4BA3-9D05-C8F86CDB8223_document.pdf [https://perma.cc/5XPE-WBL3].

366. David Ruiz, *Microsoft Deputy GC: In New Outside Counsel Program, AFAs Plus Competition Equals Success*, LAW.COM (Aug. 7, 2017), https://www.law.com/2017/08/07/microsoft-deputy-gc-in-new-outside-counsel-program-afas-plus-competition-equals-success/ [https://perma.cc/VLK8-59D7].

367. *Id.*

368. Randall Colburn, *How Brennan Torregrossa and GlaxoSmithKline are Moving Beyond the Billable Hour*, MODERN COUNSEL (Mar. 15, 2018), https://modern-counsel.com/2018/glaxosmithkline/ [https://perma.cc/DD98-HTHF].

In all, since 2008, clients have asserted more control over decisions regarding their legal representation and are "insisting on more value for their legal spend"—i.e., "higher levels of predictability, efficiency, and cost effectiveness in the delivery of legal services, quality being assumed."[369] Moreover, a 2019 survey revealed that 82% of in-house corporate counsel are seeking to cut their company's legal spend over the next two years.[370] Thus, since the billable hour model is one that is antithetical to productivity and efficiency[371]—why finish a task efficiently in four hours when it could billed over six?—clients are now demanding firms move away from this model, and instead will award their business to firms that demonstrate they can perform the work productively, efficiently, predictably, and cost-effectively.[372] Accordingly, firms that prioritize lawyers' well-being will be better equipped to meet client demands for exceptional yet efficient service.

2. *Retention*

As discussed in Section III.A.3 above, mental health and addiction issues can lead to high attrition rates. By contrast, firms that promote lawyer well-being will see improved retention rates. This is borne out by experiences in other industries; for example, conscious businesses typically operate with much lower levels of employee turnover, which avoids the replacement cost of new employee hiring and training.[373]

Moreover, general counsel at major corporations have begun to understand that balance in the lives of their outside lawyers can be an important factor in their companies' bottom line.[374] In fact, general counsel will consider lawyer attrition as well as the quality-of-life issues that affect

369. 2019 REPORT ON THE STATE OF THE LEGAL MARKET, *supra* note 167, at 13.

370. ERNST & YOUNG, REIMAGINING THE LEGAL FUNCTION REPORT 2019, at 4, 7–8 (2019), https://www.ey.com/en_gl/tax/why-the-legal-function-must-be-reimagined-for-the-digital-age [https://perma.cc/FW3G-P439].

371. HARPER, *supra* note 20, at 78 ("Total elapsed time without regard to the quality or usefulness of the result reveals nothing about a worker's value. More hours often mean the opposite of real productivity. No one inside most big firms questions this perversion because leadership's primary goal is increasing equity partner wealth. More is better, and the misnomer 'productivity' persists.")

372. 2019 REPORT ON THE STATE OF THE LEGAL MARKET, *supra* note 167, at 13.

373. MACKEY & SISODIA, *supra* note 340, at 287. For instance, at the conscious business The Container Store, "turnover is less than 10 percent per year, in an industry that's over 100 percent." *Id.* at 89–90 (internal quotation marks omitted). Additionally, Jet Blue enacted a peer-to-peer recognition program in which one employee could nominate a coworker to be acknowledged for their performance; not only did this program lead to "significantly higher levels of employee performance and engagement," it also led to an increase in retention. ACHOR, BIG POTENTIAL, *supra* note 265, at 136–37.

374. HARPER, *supra* note 20, at 174 ("No other company would treat its most important commodity poorly enough to cause a turnover rate of 85 percent for first year lawyers who are gone by the sixth year. Why are you doing it? How can you get away with that?").

attrition when making decisions of which outside firms to retain.[375] These corporate clients recognize "that the absence of balance contributes to high associate attrition rates in large law firms and that attrition, in turn, imposes costs that result from the loss of institutional knowledge and continuity."[376] As the former senior vice president and general counsel of the Association of Corporate Counsel recognized more generally, the "greatest investment in any new lawyer" is in "developing the culture, support mechanisms and leadership initiatives that will ensure [that] lawyer's success," because firms will not only receive the "returns" generated by that lawyer, but the "larger benefits of cultivating a better work environment will rain down on everyone in the firm."[377] Indeed, in August 2019, 3M—whose legal department is itself a signatory to the ABA Wellness Pledge—has incorporated the pledge into its requests for proposals from outside counsel by asking "law firms if they have signed the pledge and what specific action they have taken to promote well-being among the lawyers and other legal professionals in their firm."[378]

Thus, firms that make efforts to retain their lawyers will not only avoid turnover costs and lose institutional knowledge about matters and clients as well as client relationships generally, it will help to foster and retain clients in the first place. And firms will be better equipped to retain their lawyers by taking steps to promote and prioritize their wellness and well-being.

3. *Recruiting Younger Lawyers: Choices for the New Generations*[379]

The third area in which law firms will benefit will be in recruitment, particularly with respect to millennial and, as they enter the profession, Generation Z lawyers.[380] People in these younger generations suffer from "higher levels of depression, anxiety, and suicide ideation than they did a

375. *Id.* at 189–90; *see also id.* (quoting one general counsel as saying they look to "retention issues, training, and flex time" when selecting outside counsel, as those issues "are all creeping into the alternative fee discussion").

376. *Id.* at 174.

377. *Id.* at 175.

378. Kristen Rasmussen, *Making Mental Health a Money Matter: 3M Uses ABA Wellness Pledge in Outside Counsel Search*, CORP. COUNS., https://www.law.com/corpcounsel/2019/08/25/making-mental-health-a-money-matter-3m-uses-aba-wellness-pledge-in-outside-counsel-search/ [https://perma.cc/WD4E-8QAX].

379. The author notes the anachronism in, and perhaps showing his age by, paraphrasing a corporate slogan from the Generation-X era as a title for a section discussing millennials and Generation Z lawyers. *Pepsi, the Choice of a New Generation*, DUKE UNIV. DIGITAL REPOSITORY, RESOURCE OF OUTDOOR ADVERTISING DESCRIPTIONS, https://idn.duke.edu/ark:/87924/r3fb4x59j [https://perma.cc/5WEL-X2GK] (last visited May 7, 2020).

380. Millennials are those born, roughly, in the 1980s and early 1990s. COREY SEEMILLER & MEGHAN GRACE, GENERATION Z GOES TO COLLEGE 4 (2016). Generation Z "refers to those born between 1995 and 2010." *Id.* at 6.

decade ago."[381] Indeed, in 2009, the average age of individuals diagnosed with depression was fourteen and a half, compared to twenty-nine in 1978.[382]

Younger millennials are now entering the profession, with older millennials having as much as ten years or more in practice. That latter age cohort has increased a spike in mental health issues. A recent study by BlueCross BlueShield revealed that the prevalence of depression among millennials has increased by 31% from 2014 to 2017, and is the top condition affecting millennials by adverse health impact.[383] Depression is 18% more prevalent for older millennials than Generation X'ers at the same age.[384]

The trend is more concerning for the next generation. Generation Z'ers are "on the verge of the most severe mental health crisis for young people in decades."[385] Depression of middle- and high school-aged Generation Z children has "skyrocketed" between 2012 and 2015, a trend that exists across all demographic and socioeconomic classes.[386] In fact, a 2015 study by the U.S. Department of Health and Human Services found that "56% more teens experienced a major depressive episode in 2015 than in 2010, and 60% more experienced severe impairment."[387]

This trend has continued as Generation Z'ers have gotten older. They are increasingly entering college with mental health issues,[388] with nearly twice the number of incoming students in 2016 indicating they feel depressed than those who entered college in 2009.[389] They are more likely to report feeling "overwhelming anxiety" and that they feel "so depressed they [can] not function."[390] Additionally, a 2019 study revealed that current twenty to twenty-one-year-olds were 78% more likely to have experienced serious psychological distress in the last month than twenty to

381. Thomas Curran & Andrew P. Hill, *Perfectionisim Is Increasing over Time: A Meta-Analysis of Birth Cohort Differences from 1989 to 2016*, 145 PSYCHOL. BULL. 410, 420 (2019).

382. ACHOR, BIG POTENTIAL, *supra* note 265, at 22.

383. BLUE CROSS BLUE SHIELD, THE HEALTH OF AMERICA REPORT: THE HEALTH OF MILLENNIALS 2 (2019), https://www.bcbs.com/sites/default/files/file-attachments/health-of-america-report/HOA-Millennial_Health_0.pdf [https://perma.cc/WKG7-YFUD]. Substance use and alcohol use disorders were the second and third conditions affecting millennials by adverse health impact. *Id.*

384. *Id.* at 3.

385. Twenge et al., *supra* note 280, at 93.

386. *Id.* at 102–03; *see also id.* (observing that "more and more teens [say] they don't enjoy life").

387. *Id.* at 108; *see also* DEP'T OF HEALTH & HUM. SERVS., SUBS. ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH 38 (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.pdf [https://perma.cc/2WZU-H5TL].

388. SEEMILLER & GRACE, *supra* note 380, at 196–97.

389. Twenge et al., *supra* note 280, at 103.

390. *Id.*

twenty-one-year-olds in 2008, and current eighteen to twenty-five-year-olds are 71% more likely to experience such distress than eighteen to twenty-five-year-olds in 2008.[391] In all, Generation Z'ers are 49% more likely than millennials to have reported serious psychological distress in the past month.[392]

Perhaps not surprisingly, then, millennials prioritize work-life balance when choosing employment, even more than salary.[393] As a general matter, millennials seek meaning and purpose in their work, as well as supportive and nurturing work environments.[394] In fact, a 2016 survey of millennials revealed that, salary excluded, work-life balance is the most important characteristic millennials search for when choosing a job.[395] Other top considerations include leadership opportunities, a sense of meaning or purpose in their work, training, and the impact the work has on society[396]—that is, the types of motivations and values that enhance one's subjective well-being and, in turn, inversely correlate to depression.[397] Thus, millennials respond best to employers who convey "you matter to us"—that is, employers who see their employees' humanity and well-being is integral to the company and its success.[398]

With Generation Z beginning to enter law school and the profession, firms that address mental health and addiction issues and that foster a

391. *Id.* at 188.

392. *Id.*

393. JOANNE G. SUJANSKY & JAN FERRI-REED, KEEPING THE MILLENNIALS: WHY COMPANIES ARE LOSING BILLIONS IN TURNOVER TO THIS GENERATION—AND WHAT TO DO ABOUT IT 5 (2009); *see also id.* at 11, 51 (citing a study finding that salary was only the fourth-most important "determinant of an attractive workplace," following health benefits, work-life balance, and promotional opportunities); Leslie Larkin Cooney *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law*, 47 SAN DIEGO L. REV. 421, 450 (2010) ("Millennials undoubtedly seek more work-life balance . . . ."); Eddy S.W. Ng et al., *New Generation, Great Expectations: A Field of Study of the Millennial Generation*, 25 J. BUS. PSYCHOL. 281, 289 (2010) ("The need for work-life balance . . . remains an important factor in [millennials'] job choice decisions, despite an expectation for rapid advancement and pay increases."); Katie French, *Millennials Prioritising Work-Life Balance over Job Security, Study Finds*, TELEGRAPH (UK) (Nov. 19, 2018), https://www.telegraph.co.uk/news/2018/11/19/millennials-prioritising-work-life-balance-job-security-applying/ [https://perma.cc/S7C8-YQDY] (reporting on a survey finding that one third of millennials believe that work-life balance is the "most important factor" in choosing a job).

394. *See* Ng et al., *supra* note 393, at 282–83, 288–89.

395. DELOITTE, THE 2016 DELOITTE MILLENNIAL SURVEY: WINNING OVER THE NEXT GENERATION OF LEADERS 20 & fig.11 (2016), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millenial-survey-2016-exec-summary.pdf [https://perma.cc/9WTN-MB9V].

396. *Id.*

397. *See supra* notes 123–127 and accompanying text; *cf.* Brafford, *supra* note 179, at 99–102 (arguing that law firms that promote and foster positive psychology will be "recruiting magnets for law firms").

398. Brafford, *supra* note 179, at 102 ("The common theme to the Millennial profile is that they respond best to employers that convey 'you matter to us'; your well-being and enthusiasm are important to our success.").

healthy environment will help attract these incoming interns and associates. They experience mental health issues in greater frequency than millennials, and they are more likely to talk about[399] and seek help for them.[400]

In fact, law students on the millennial/Generation Z cusp have made clear that mental health is a priority to them as they enter the legal profession. In its *2019 Summer Associates Survey*, *The American Lawyer* reported that 42% of respondents said they are concerned about their mental health, including because of the "structure of the legal industry."[401] Further, when asked to list their top three factors in considering an employment offer from a law firm, work-life balance was the most important factor among the respondents.[402]

This prioritization of mental health and work-life balance is not an anomaly in this one survey, as young millennial and Generation Z students are engaging in activism to promote and mental health in the profession. For instance, in 2019 the Virginia State Bar removed questions relating to mental health history and treatment in response to a student-led movement for it to do so,[403] and several well-being-related programs at law schools are led by students.[404] Younger Generation Z students are also campaigning for greater mental health awareness and treatment; for instance, in June 2019, in response to student activism, Oregon enacted a law that will allow students to take "mental health days" from school as an excused absence, just as they would a sick day.[405] Thus, as they enter the workforce, these students certainly will prioritize their mental health and well-being in choosing among employers.[406]

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399. Sue Shellenbarger, *The Most Anxious Generation Goes to Work*, WALL ST. J. (May 9, 2019, 12:22 PM), https://www.wsj.com/articles/the-most-anxious-generation-goes-to-work-11557418951 [https://perma.cc/QX5C-X6UP].

400. *See* AM. PSYCHOL. ASS'N, STRESS IN AMERICA: GENERATION Z 4 (2018), https://www.apa.org/news/press/releases/stress/2018/stress-gen-z.pdf [https://perma.cc/6F36-N7EN].

401. Dylan Jackson, *The 2019 Summer Associates Survey: Wined, Dined and Worried*, AM. LAW. (Sept. 23, 2019), https://www.law.com/2019/09/23/the-2019-summer-associates-survey-wined-dined-and-worried/ [https://perma.cc/Y6LH-5D7H].

402. *Id.*

403. Mattingly, *supra* note 307.

404. *See* Jordana Alter Confino, *Where Are We on the Road to Law Student Well-Being?: Report on the ABA CoLAP Law Student Assistance Committee Law School Wellness Survey*, 68 J. LEGAL EDUC. 650, 693–98 (2020); Karen Sloan, *'Law School Was Kind of a Shock:' Students Take the Lead in Mental Health Initiatives*, LAW.COM (Aug. 5, 2019), https://www.law.com/2019/08/05/law-school-was-kind-of-a-shock-students-take-the-lead-with-mental-health-initiatives/ [https://perma.cc/6Z45-VGV3].

405. Sarah Zimmerman, *Teen Activists Score Mental Health Days for Oregon Students*, ASSOCIATED PRESS (July 21, 2019), https://apnews.com/b2ce8f6a019846f7844f59af449ad567 [https://perma.cc/W7EM-JB5Z].

406. Human resources software company Zenefits found that "Gen Z-ers recognize that mental health in the workplace is important, and they are demanding benefits and workplace policies that acknowledge this reality." Nicole Roder, *Young Workers Demand Emphasis on Mental Health in the Workplace*, ZENEFITS (Jan. 3,

Consequently, firms that prioritize lawyer health and well-being will be attractive both to lateral lawyers who seek better balance as well as to younger and future lawyers who prioritize their own well-being.

CONCLUSION

The legal profession has known for decades that its members suffer from mental illness and addiction in staggering numbers, and firms largely have been unmoved by the moral case for change. As the practice of law has become more of a business, firms can and will make changes to reduce costs, increase efficiencies, and improve profit margins. This Article argues not only that the profession should and should want to create a "better future for our lawyers"[407] by making such changes, but that it is in its interest to do so. Since firms have not wanted to make changes on moral grounds, they can and should at least make them on business ones, and lawyers and the profession itself will benefit as a result. Put differently, *why* firms make these changes is not as important so long as they *are made*, and if it takes a cost-benefit analysis for firms and the profession to prioritize lawyer well-being, so be it.

2019), https://www.zenefits.com/blog/young-workers-demand-emphasis-on-mental-health-in-the-workplace/ [https://perma.cc/RPA9-A84T].

407. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 47.

Please provide your feedback for this session.

Chief Justice Beth Walker

Session Survey

CONNECTIONS, DEVELOPMENT, AND TEAMBUILDING

Angelia Meaux Caron

Angelia Meaux Caron is the Leadership Development Administrator for Colorado Judicial Department. Originally from Lafayette, Louisiana she graduated from the University of West Florida with a degree in Interdisciplinary Social Sciences. She is a certified practitioner in both MBTI and DiSC assessments. Holds both yellow and green Six-Sigma certifications and is a Certified Government Meeting Professional. In her current role with Colorado Judicial, Angelia works on developing intensive leadership curriculum, middle manager trainings, soft skills trainings and resources to support employees throughout their career with the branch. She is passionate about connecting with employees and creating paths for development and long-term career growth.

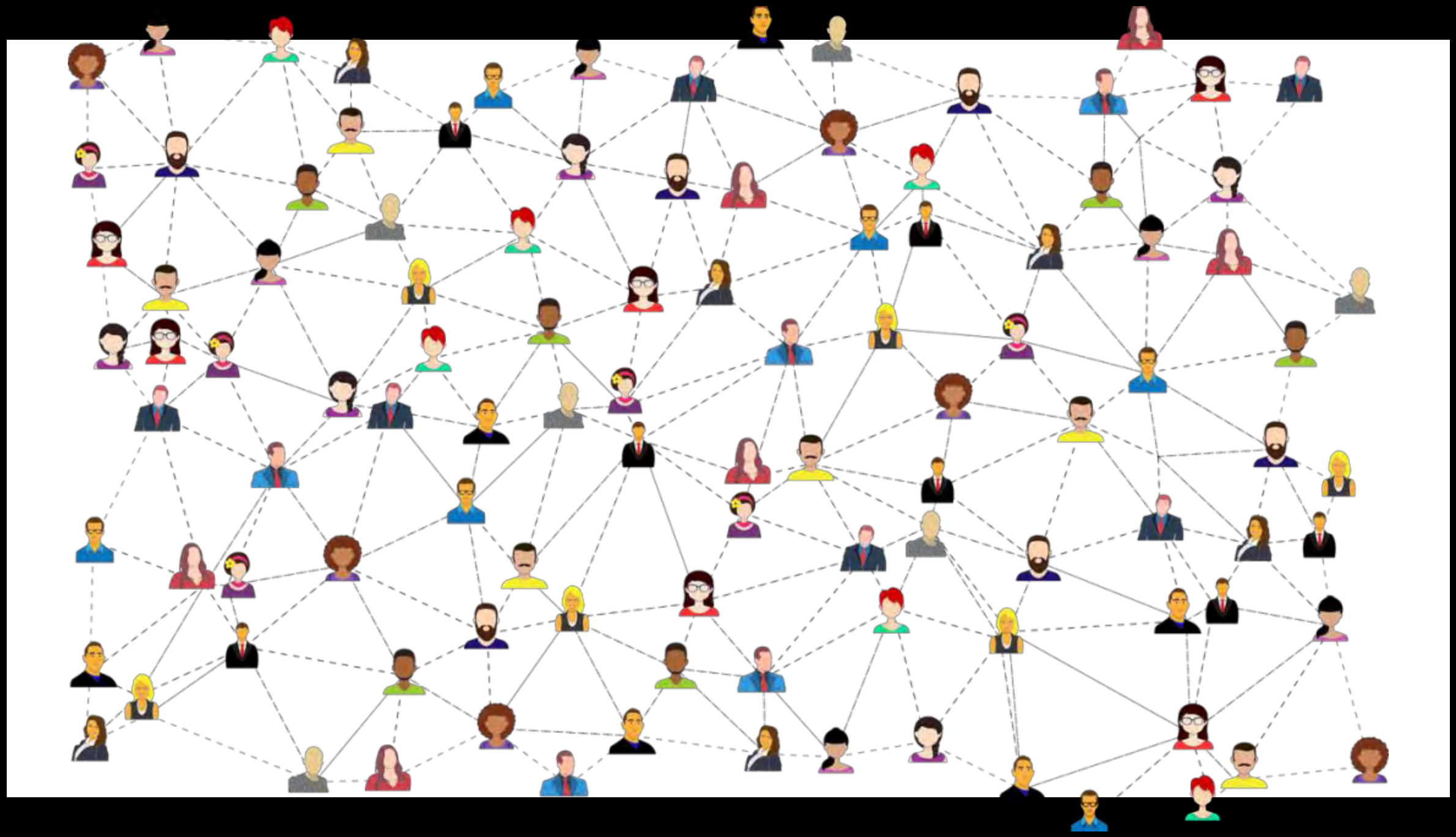
Connections, Development & Teambuilding

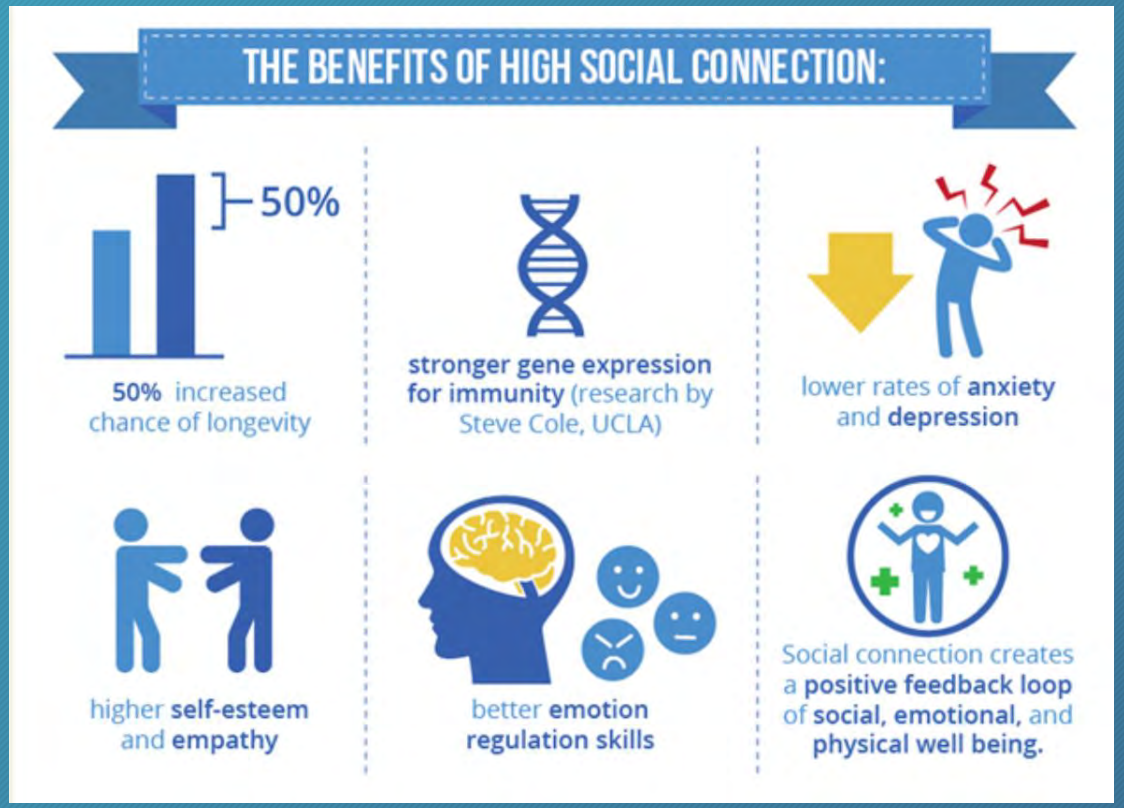
Learning Objectives

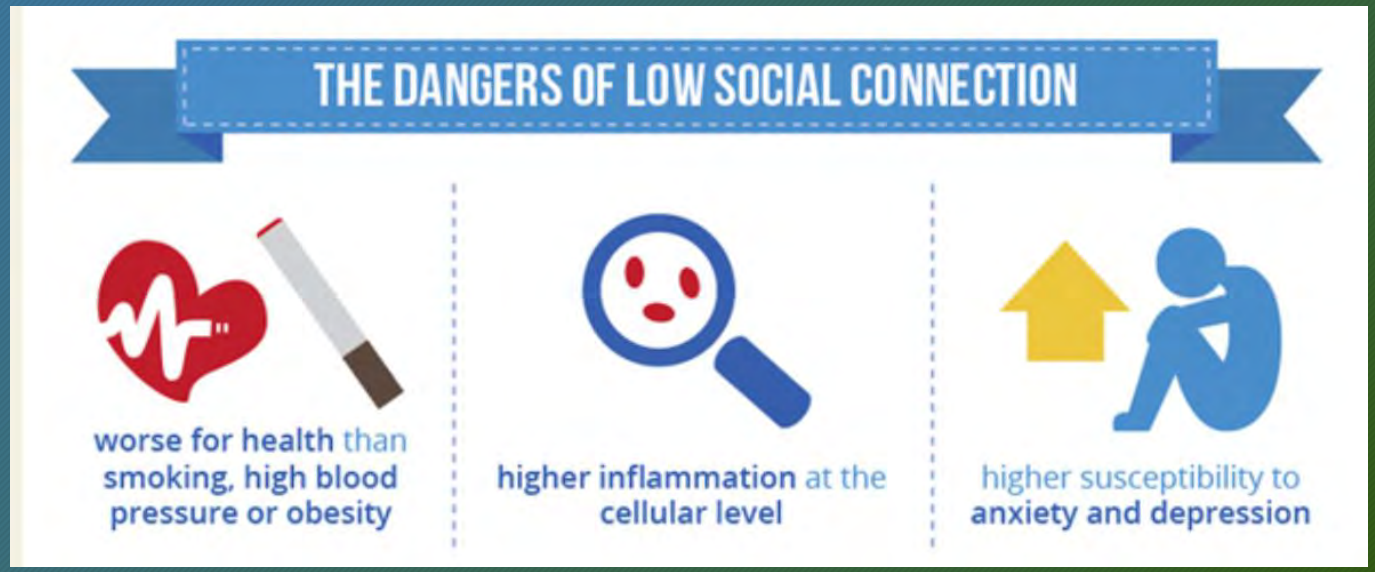
- Understand the importance of genuine connection in the workplace
- Discuss ways to adopt a culture of connection in your workplace
- Discuss importance of developing trust
- How to use Team Building & Assessments

It’s time to PLAY!!!

Why do we need connection?







Standford University - Dr Emma Seppala

30 Second Rule

Four Factors that Drive Higher Employee Retention and Overall Satisfaction

- Quality of Leadership
- Organizational Culture
- Interest in Work
- Potential for Future Growth

The Conference Board- November 2022


Imagine a World without Trust?

The Importance of Building Trust

It takes time and shared experiences.

What are some things you can do to actively build trust between you and your team?

Able

Believable

Connected

Dependable

ABCD's of Trust

Ken Blanchard, Trust Works!

Able

- Quality results
- Resolve problems
- Develop skills
- Good at what you do
- Use skills to assist others

- Listen well
- Praise others
- Show interest in others
- Share about yourself
- Show empathy for others
- Ask for input

Connected

Believable

- When someone tells you something in confidence, you'll keep it to yourself
- Being honest
- Keep your word
- Admit when your wrong
- Don't talk behind backs
- Be sincere
- Be nonjudgmental
- Show respect

- Respond on time
- Do what you say you will do
- You’re consistent
- Timely
- Responsive
- Organized
- Accountable, follow up

Dependable

Continuing the Alphabet

- Empower others
- Frequently communicates
- Go first
- Has consistent behavior

1:1 Time

50% of people surveyed said they wish they could meet with their boss on a weekly basis.

Training Magazine & the Ken Blanchard Companies

LUNCH TIME

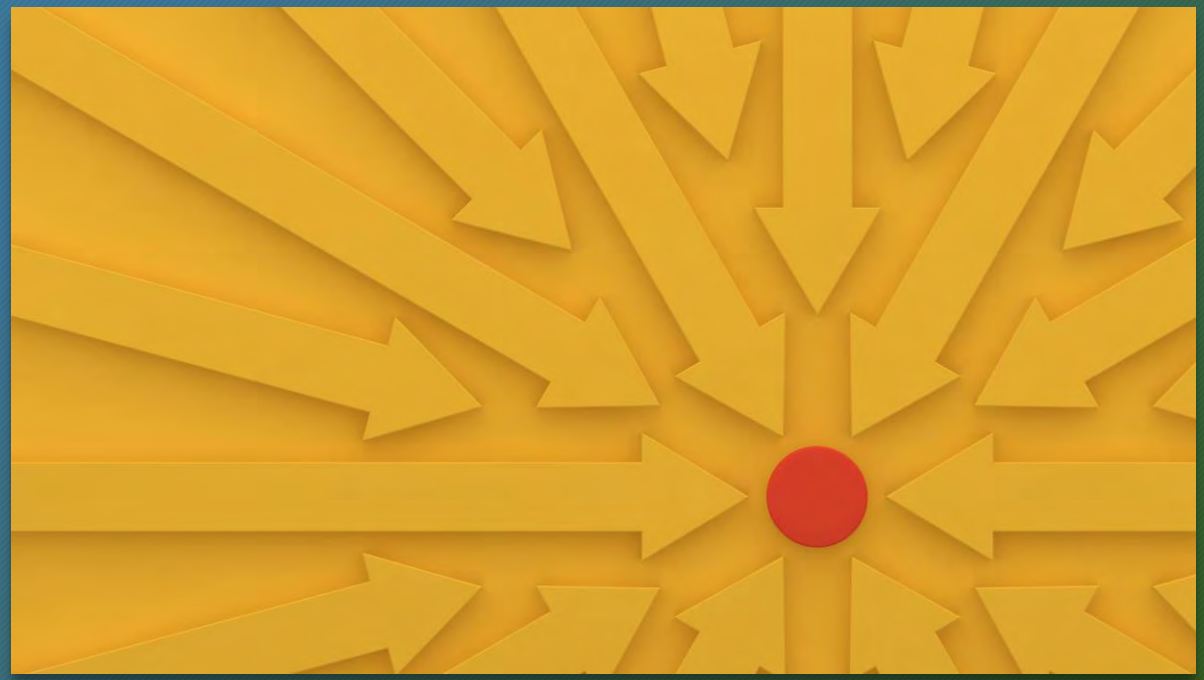
Team Building

What do you like about team building activities?

What do you NOT like about team building activities?

Have a goal or purpose to team building.

- Be intentional about what you bring to your team.
- Team Building as a constant not a treat.



5 Objectives to Team Building

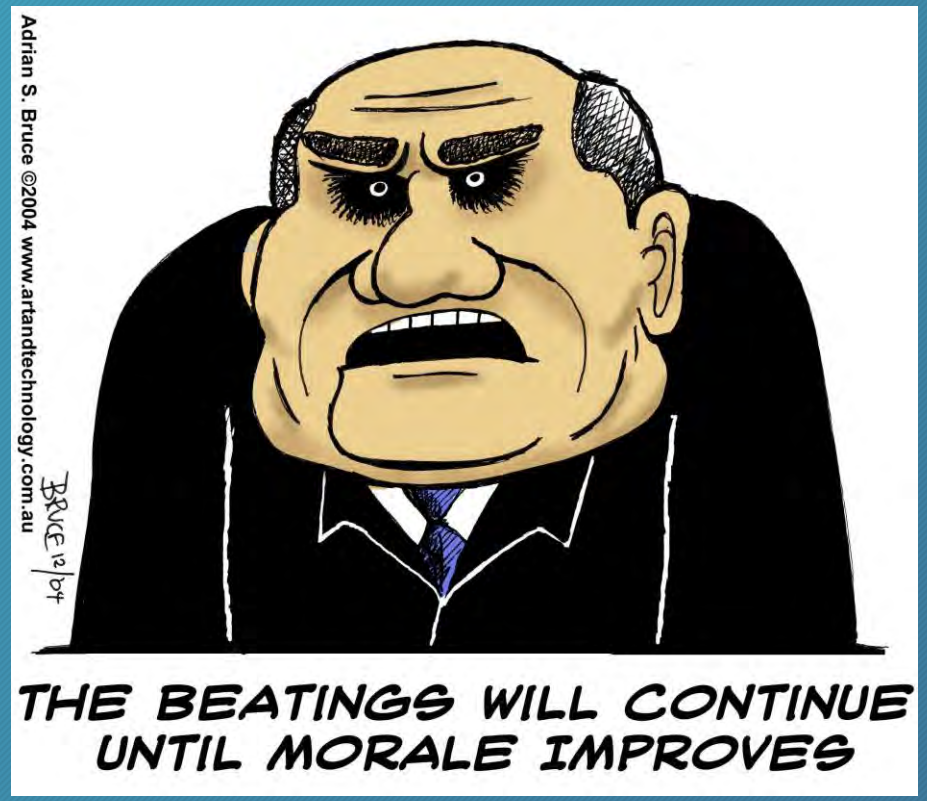
- Acquaint and Establish Connections
- Encourage Communication and Teamwork
- Improve Morale and Engagement
- Foster Innovation and Creativity
- Build Trust and Team Bonds

Acquaint and Establish Connections

- Getting to know each other.
- Building bonds and relationships can allow for performance improvements.

Encourage Communication & Teamwork

- Encourage teamwork by building connections and bonds between co-workers
- Change office culture



- Help leaders and employees see eye to eye

Improve Morale and Engagement

Foster Innovation and Creativity

- Allow creativity to THRIVE
- Step out and try something new
- Perspective

Build Trust and Team Bonds

The Wonderful World of Assessments

- Hiring Practices
- Team Building
- Professional Development
- Personal Interest

Pros and Cons of Using Assessments

- Discover a lot in a short period of time
- Shift your team balance to make it more cohesive
- Aware of Strengths and Weaknesses
- Adjust your management or communication style

- Unreliable tests can lead to incorrect profiling
- Emotional State when taking the test
- Bias
- Profiling

STRENGTHS FINDER 2.0

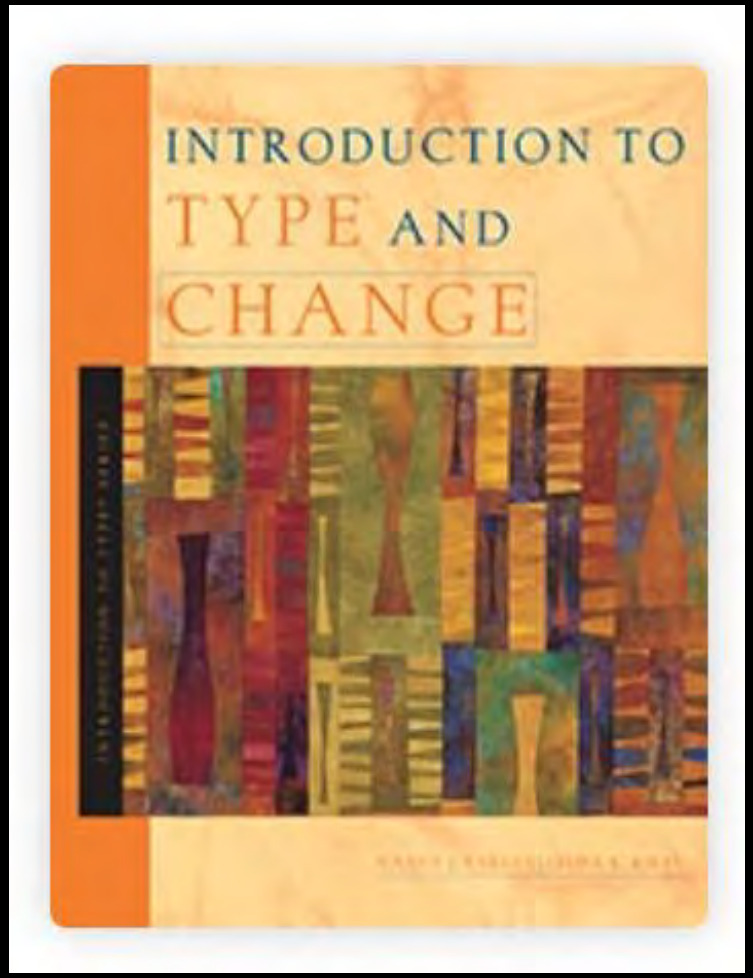
D I C S

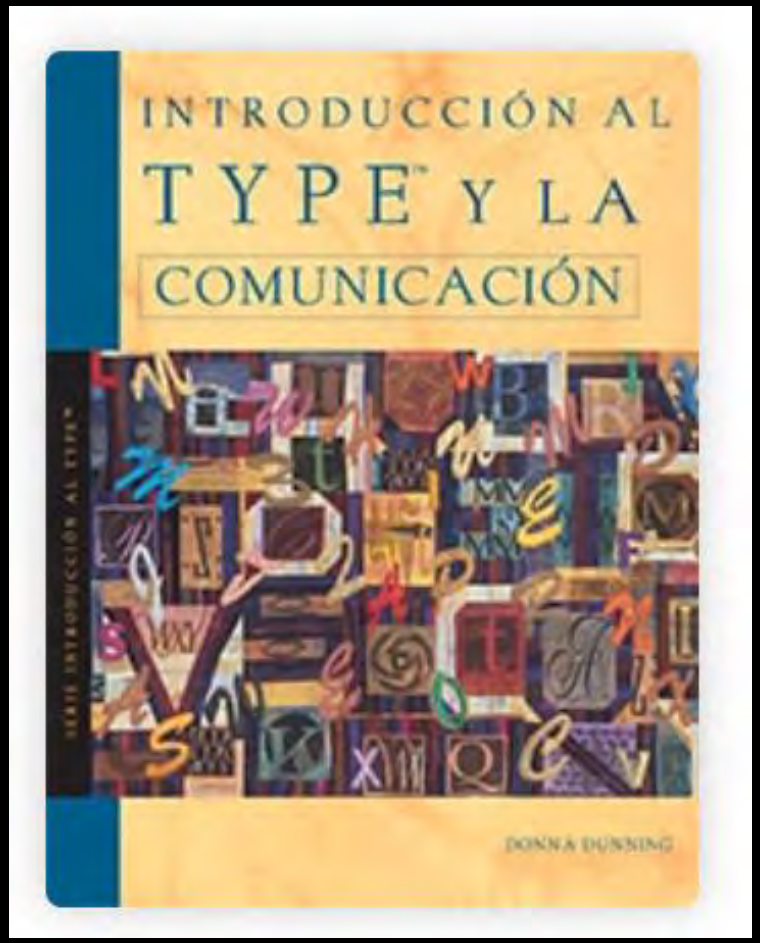
mbti

Myers-Briggs Type Indicator

- One of the most popular assessments on the market
- Invented 1941
- 93 Questions - 16 personality types
- Need MBTI Certified Professional, plus per person assessment
- Behavior preferences

ISTJ	ISFJ	INFJ	INTJ
ISTP	ISFP	INFP	INTP
ESTP	ESFP	ENFP	ENTP
ESTJ	ESFJ	ENFJ	ENTJ


INTRODUCTION TO
TYPE AND
CHANGE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TYPE™ Y LA
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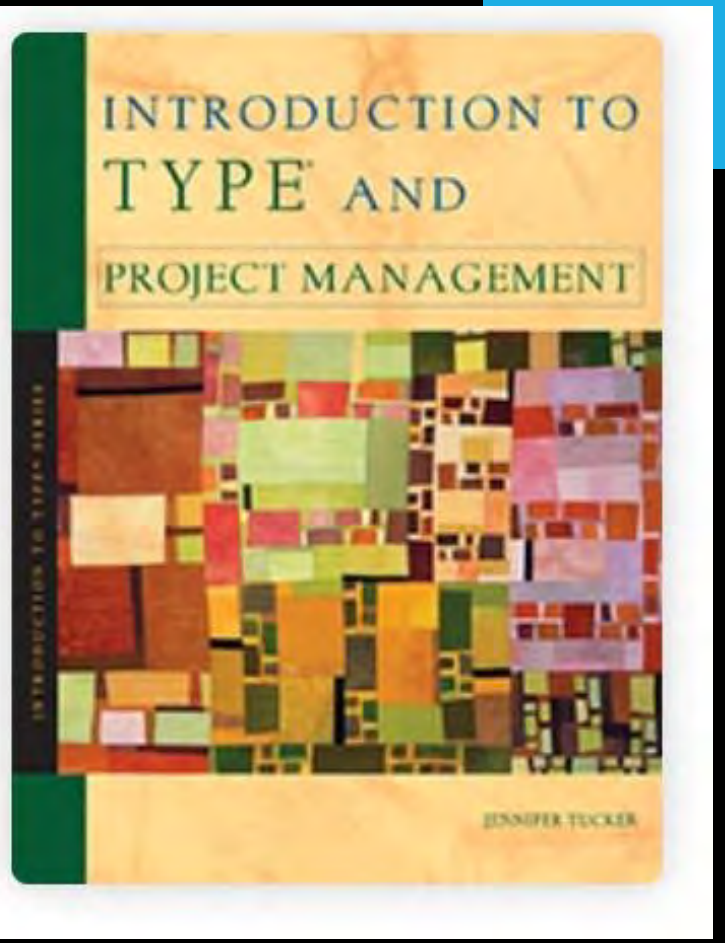
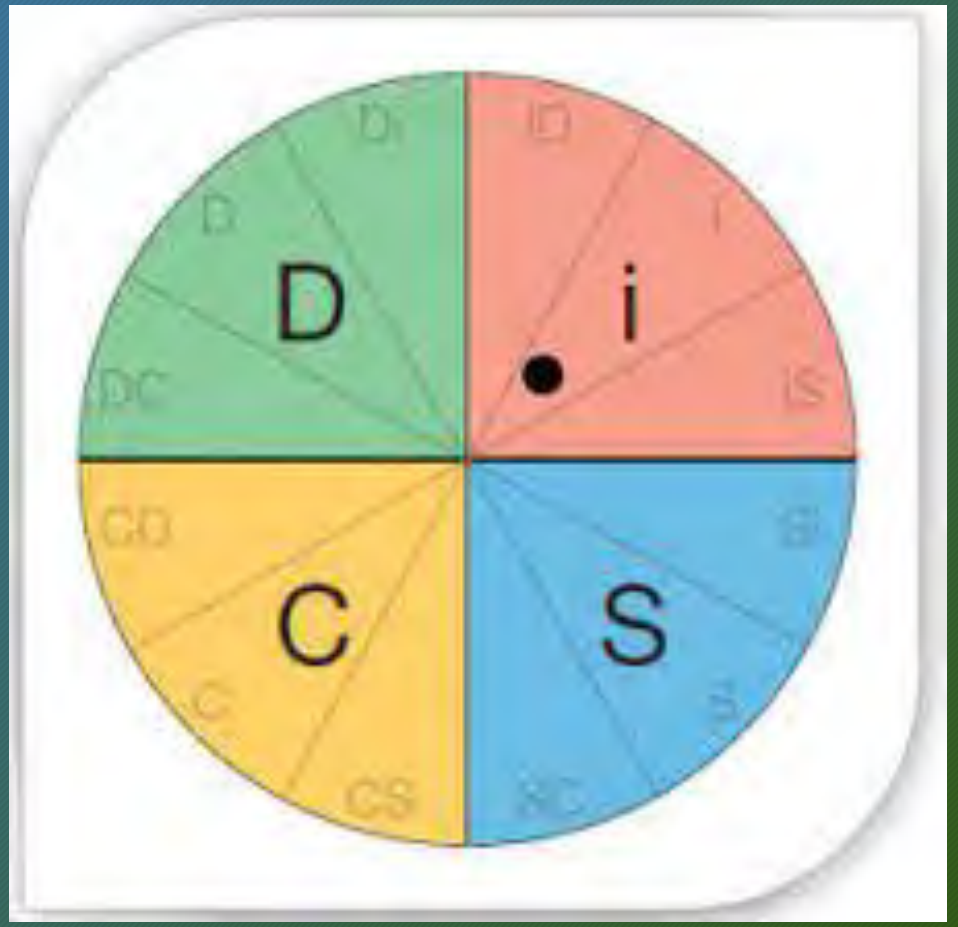

INTRODUCTION TO
TYPE AND
PROJECT MANAGEMENT
JENNIFER TUCKER

DiSC

- Written for a non-technical, general audience
- Based on 1928 DiSC emotional and Behavioral Theory
- 12 Styles
- 80 questions



Enneagram

- 9 personality types
- Gregor Ivanovich Gurdjieff 1930's
- How we interpret the world and manage our emotions
- How we relate to one another
- Mostly used for personal self-knowledge
- Counseling & Psychotherapy

The Perfectionist

The Giver

The Achiever

The Individualist

The Investigator

The Skeptic

The Enthusiast

The Challenger

The Peacemaker

- Temperament Assessment
- Emphasis on we each have parts of all temperaments
- Need a certified facilitator
- Fairly short assessment 15-20 minutes
- Fun ways to communicate your preferences

Real Colors

- 177 Questions, approx. 30 minutes
- 34 CliftonStengths Themes
- Patterns of thinking, feeling and behaving
- Can access specialized reports based on role
- Individual Focused
- Strength Based Leadership

Strengths Finders aka CliftonStregnths

4 DOMAINS OF TEAM STRENGTHS

EXECUTING 执行力	INFLUENCING 影响力	RELATIONSHIP BUILDING 关系建立	STRATEGIC THINKING 战略思维
People with dominant Executing themes know how to **make things happen.**	People with dominant Influencing themes know **how to take charge, speak up, and make sure the team is heard.**	People with dominant Relationship Building themes have the ability to build strong relationships that can **hold a team together and make the team greater than the sum of its parts**.	People with dominant Strategic Thinking themes help teams consider what could be. **They absorb and analyze information that can inform better decisions.**
Achiever **Arranger** **Belief** **Consistency** **Deliberative** **Discipline** **Focus** **Responsibility** **Restorative**	**Activator** **Command** **Communication** **Competition** **Maximizer** **Self-Assurance** **Significance** **Woo**	**Adaptability** **Connectedness** **Developer** **Empathy** **Harmony** **Includer** **Individualization** **Positivity** **Relator**	**Analytical** **Context** **Futuristic** **Ideation** **Input** **Intellection** **Learner** **Strategic**


THIS IS ONLY
THE
BEGINNING

Details vs. Small Talk

STRENGTHS FINDER 2.0

Support their strengths
Help them building on other areas

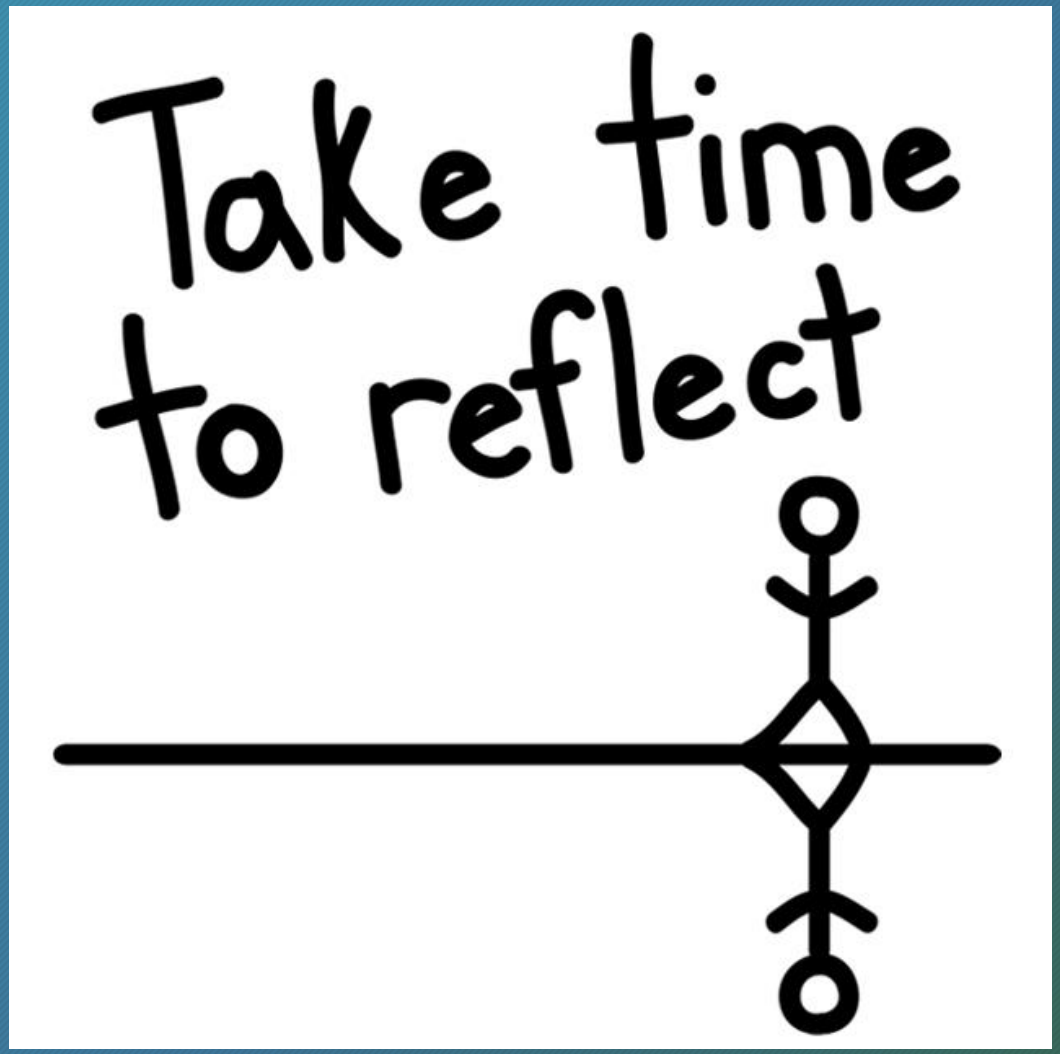
D I C S

Send information ahead of time
Allow scheduled social space

mbti

Table Conversations
Self-reflection

What your preference is not an excuse for rude behavior
We can allow space for people to live in their preferences


Take time
to reflect

- Do I foster connections and trust within my team?
- Do I schedule 1:1 time with members of my team?
- Am I open to feedback from my team?
- What are some ways things I can add to my daily routine to build trust?
- What am I doing well, what would I like to improve upon
- How can I bring teambuilding into my work environment?
- Have I used assessments to their full potential?


TAKE
AWAY

Please provide your feedback for this session.

Angelia Meaux Caron

Session Survey

Please provide your feedback for this session.

Angelia Meaux Caron

Session Survey

TECHNOLOGY & LEGAL ETHICS

Professor Gary Marchant

Gary Marchant, Ph.D., J.D., M.P.P., is Regents' Professor and Faculty Director of the Center for Law, Science & Innovation at the Sandra Day O'Connor College of Law, Arizona State University (ASU). Professor Marchant's research interests include the governance of emerging technologies such as genomics, biotechnology, nanotechnology, artificial intelligence, neuroscience and blockchain. Prior to joining ASU in 1999, Professor Marchant was a partner at the Washington, D.C., office of Kirkland & Ellis. He has authored more than 200 articles, books and book chapters on various issues relating to emerging technologies. He has served on six National Academies of Science, Engineering and Medicine (NASEM) consensus committees, is a lifetime member of the American Law Institute and is a Fellow of the American Association for the Advancement of Science. He also chairs the IEEE Working Group (P2863) to create a governance standard for entities that develop or use artificial intelligence.

Technologies and Legal Ethics

NATIONAL CONFERENCE OF APPELLATE COURT CLERKS

AUGUST 3, 2023

Gary Marchant, Ph.D., J.D.

Arizona State University

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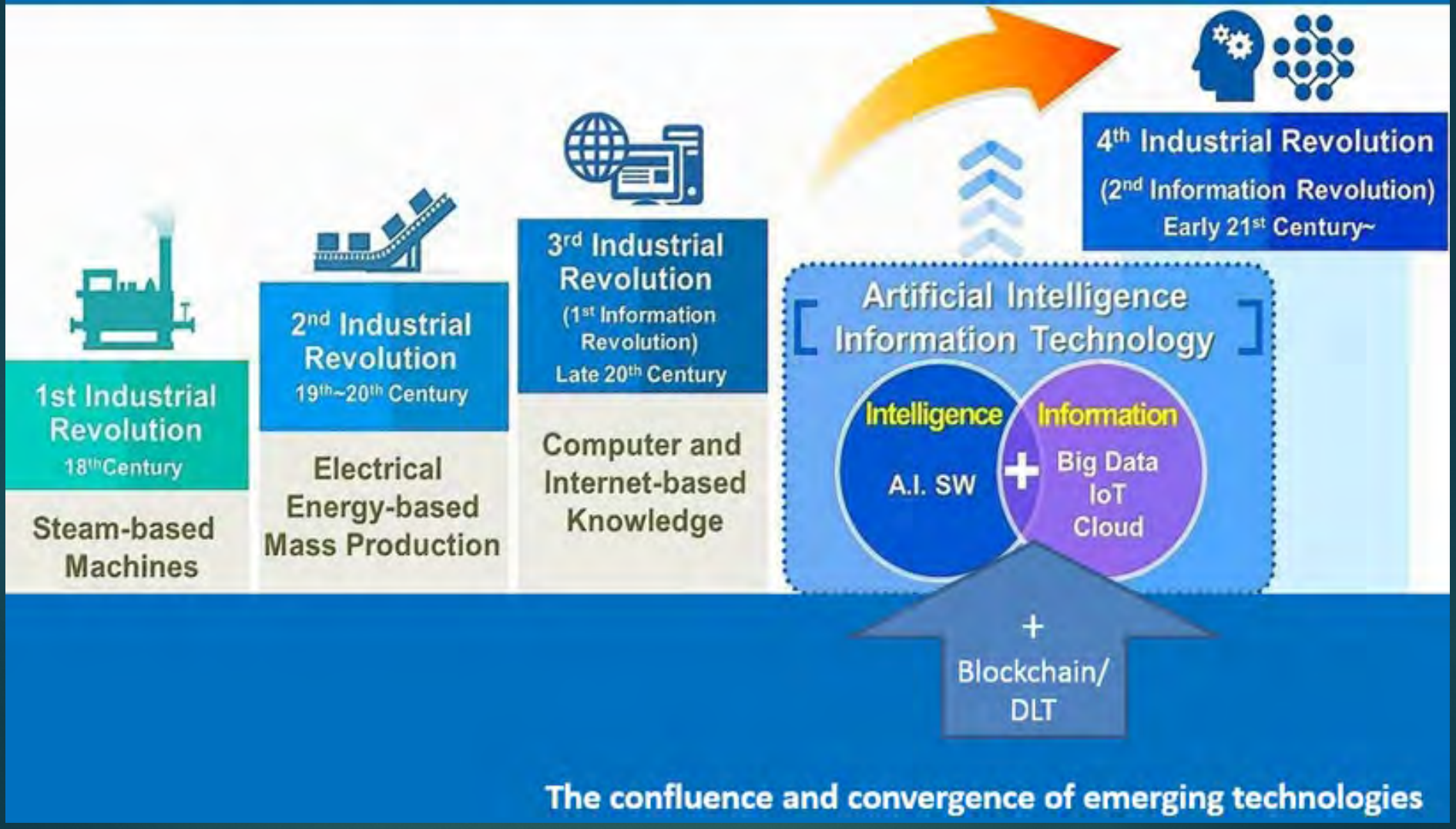
The Fourth Industrial Revolution



“Artificial Intelligence is the New Electricity” - Andrew Ng

(former Baidu Chief Scientist, Coursera co-founder, and Stanford Adjunct Professor)

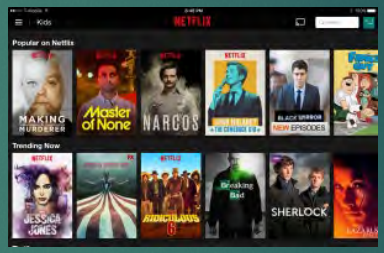
AI will impact 100% of jobs, professions, and industries, says IBM's Ginni Rometty

At the Gartner Symposium/ITExpo, Rometty laid out three principles for companies working ethically with AI.

By Alison DeNisco Rayome | October 16, 2018, 12:35 PM PST

This article originally appeared on ZDNet.

AI Is Already Ubiquitous In Our Lives

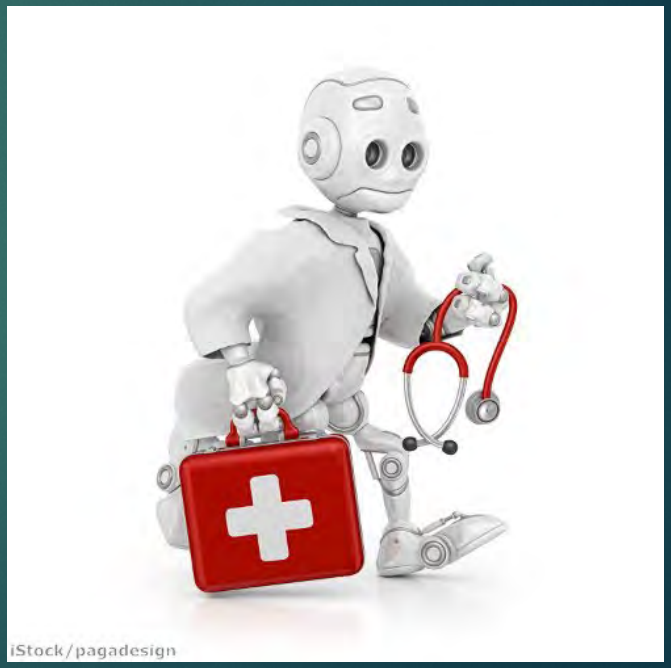


What Is AI?

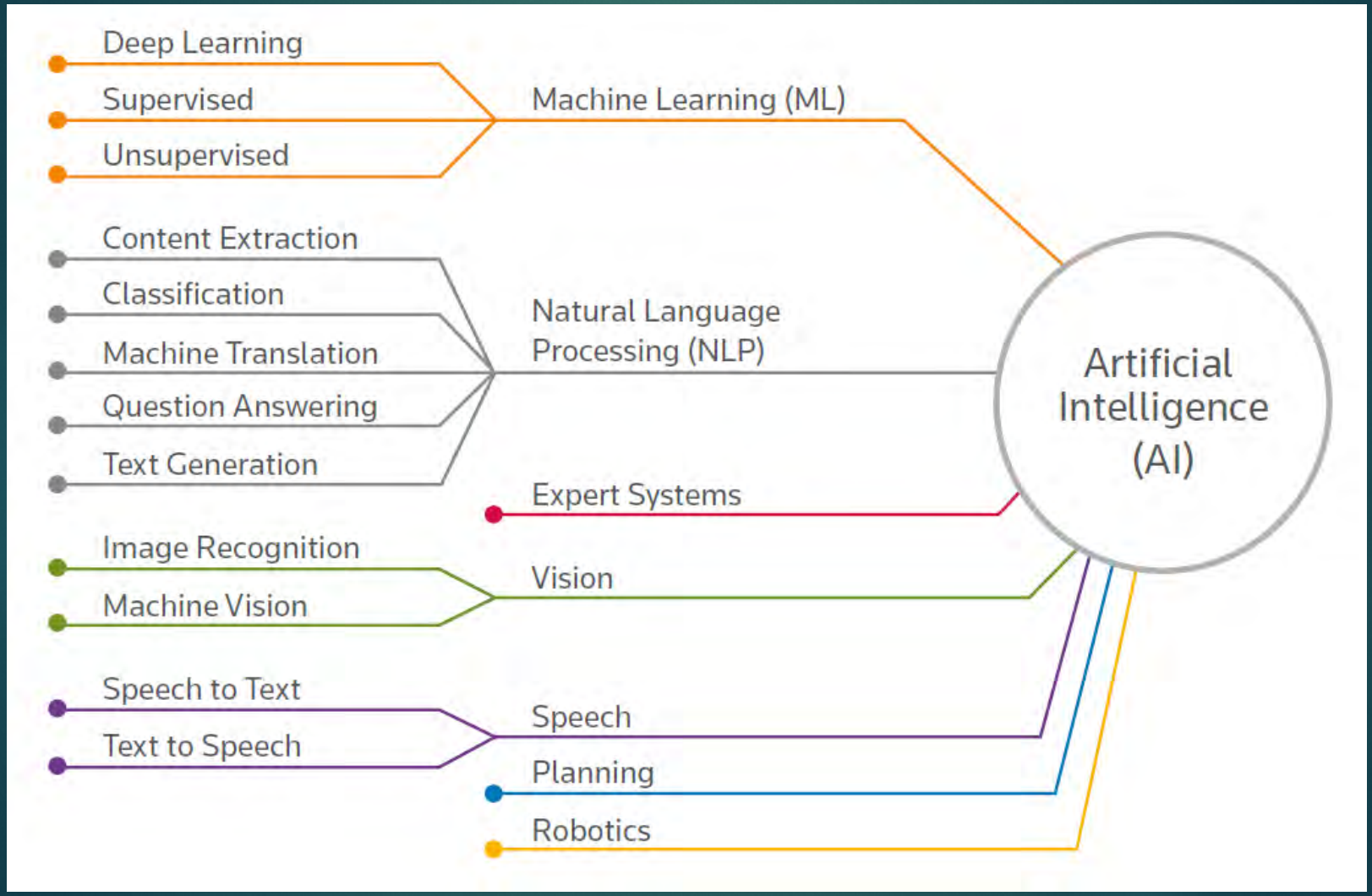
- A machine that displays intelligent behavior, such as reasoning, learning, pattern recognition, and sensory processing.

- AI involves tasks that have historically been limited to humans and intelligent animals, such as decision-making and problem-solving.

- Two types:
  - Narrow AI
  - Artificial General Intelligence (AGI)



Components of AI



Old AI vs. New AI

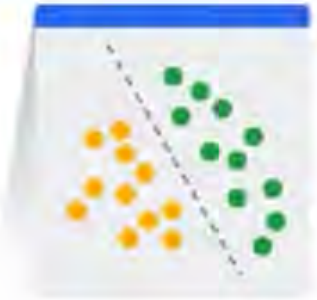
Expert Systems ("Rules Based AI")	Machine Learning ("Data Based AI")
Machine mechanically implements human-made code	Humans provide data and specify overall goal for machine
Bad outcomes due to bad code	Machine self-learns and adapts to maximize goal
Human programmer can explain why machine did what it did	Limited explanation for why machine did what it did

A Robot That Bought Drugs Online Is Now Free From Police Custody

Posted Apr 20, 2015 by John Biggs (@johnbiggs)

If that headline doesn't make much sense, welcome to the 21st century when a program designed to automatically buy random items from illegal marketplaces can be arrested by Swiss police. As you'll recall, Swiss police seized a program called Darknet Shopper, a bot that visited darknet markets and bought random items with bitcoin. Most of the items were mundane – counterfeit goods and the like – but the robot also ordered some ecstasy.

Deep Learning Model Types



Discriminative

- Used to classify or predict
- Typically trained on a dataset of labeled data
- Learns the relationship between the features of the data points and the labels

Generative

- Generates new data that is similar to data it was trained on
- Understands distribution of data and how likely a given example is
- Predict next word in a sequence

Autoplay

Source: Google

What is Generative AI?

- AI programs trained on a large set of data – can be text, graphics, sounds, etc. which is then used to generate new content
- Many companies developing text-based large language models (LLMs)
- LLMs use deep learning to predict next words based on the corpus of data it has assimilated
  - e.g., GPT-3.5 – based on 150 billion "parameters"
- OpenAI/Microsoft has grabbed attention by making its LLM available and accessible using a chat function
- ChatGPT is a closed model – restricted to data available as of September 2021
- Other similar models now available: Bard, Claude2, Llama2, Bing

Not Just Text

Ketchup Pizza

Hockey Player Studying Law

Created using Bing

LLMs are "Stochastic Parrots"

On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?

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Shmargaret Shmitchell
shmargaret.shmitchell@gmail.com
The Aether

LLMs have no conscious thought, understanding or truth

An important risk of LLMs is that users might start taking its synthetic text as meaningful

But can still provide valuable insights or predictions based on massive training data

CHATGPT HALLUCINATIONS

The Washington Post
Democracy Dies in Darkness

INNOVATIONS

ChatGPT invented a sexual harassment scandal and named a real law prof as the accused

The AI chatbot can misrepresent key facts with great flourish, even citing a fake Washington Post article as evidence

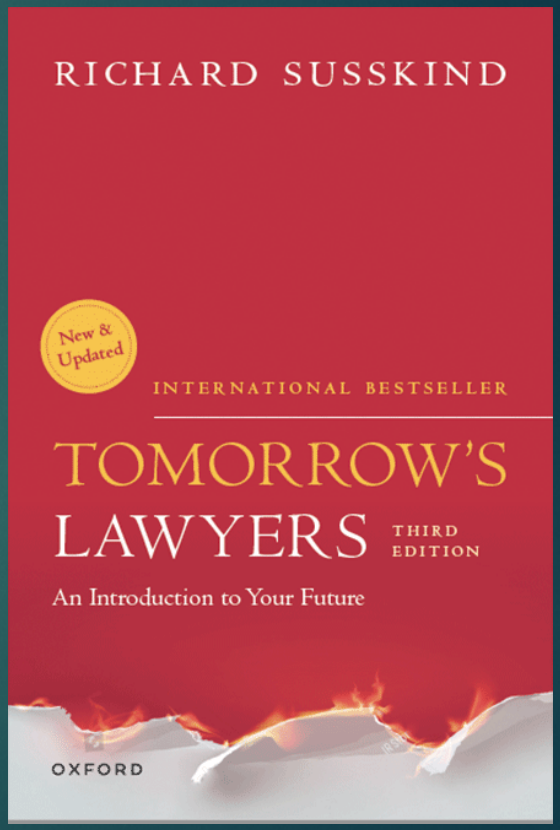
By Pranshu Verma and Will Oremus
April 5, 2023 at 2:07 p.m. EDT

AI = Unprecedented Disruption of Legal System

"We will see more change in the [legal profession] in the next two decades than in the past two centuries."

- Richard Susskind

All entities in the legal system will need to start adapting and changing now



AI and the Practice of Law

"Artificial intelligence is changing the way lawyers think, the way they do business and the way they interact with clients. Artificial intelligence is more than legal technology. It is the next great hope that will revolutionize the legal profession.... What makes artificial intelligence stand out is the potential for a paradigm shift in how legal work is done."

ABA House of Delegates Resolution Adopted Aug. 12-13, 2019:

"RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AL and the vendors that provide AI."

Emerging Technologies & Legal Ethics

- * Many new technologies emerging that could create ethical issues/traps for judges and attorneys
- * Technology is moving faster & ethical rules can't keep up (just like laws & regulations!)

- **Result:** much uncertainty about application of old legal ethics rules to situations created by new technologies – and pandemics.

Lawyers Can't Hide Their Heads in the Sand About New Technologies

By Bob Ambrogi on September 18, 2019

Professional Rules of Responsibility: ABA Rule 1.1

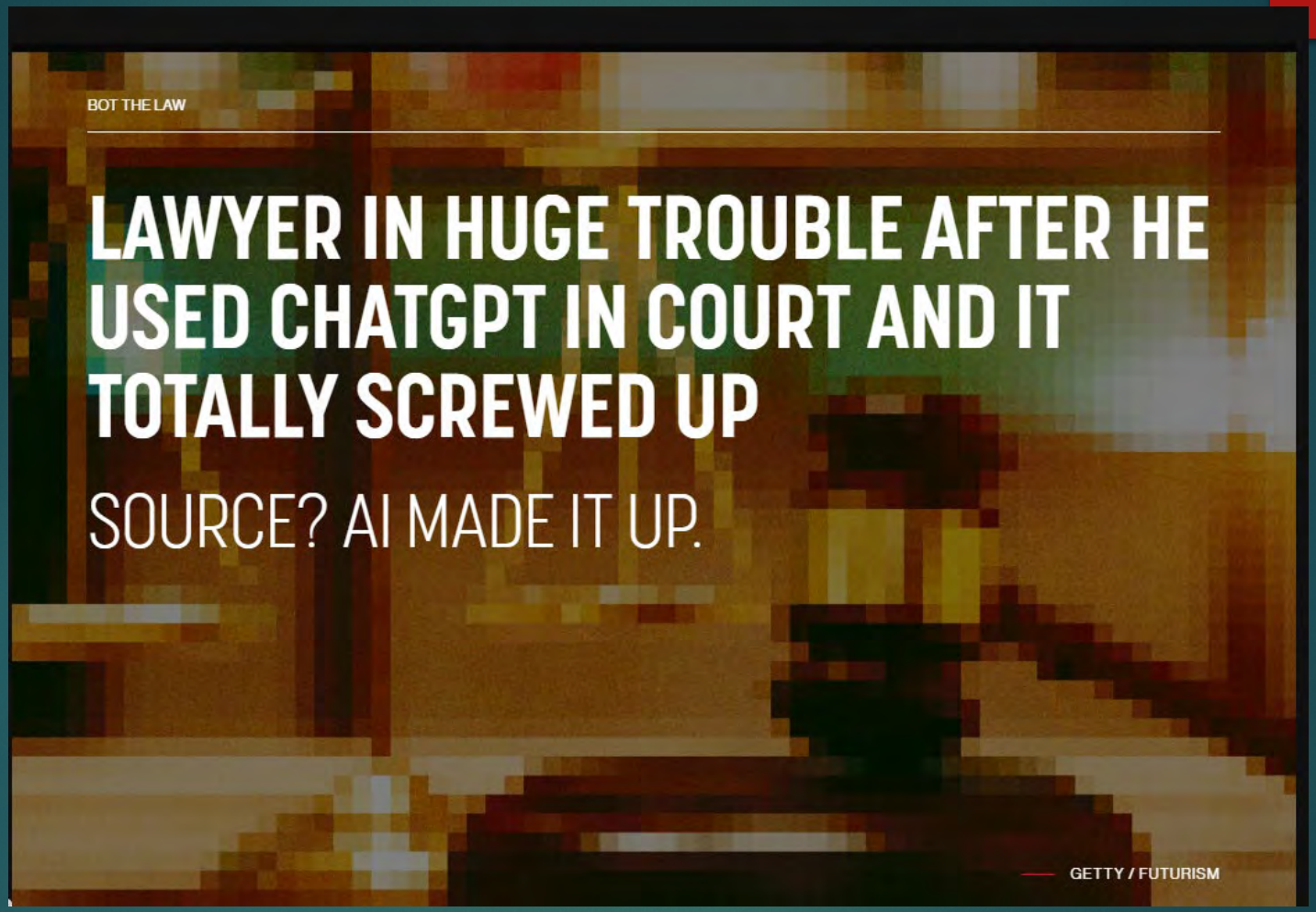
Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

"Competence" is the word most commonly used to describe the level of technical proficiency a lawyer is duty-bound to maintain. No one knows precisely what that means, however — only that it is important enough to worry about.

Duty of Technological Competence Enforced by Courts

- Attorney failed to produce an accurate spreadsheet of computer database entries
- Attorney's defense: "I have to confess to this Court, I am not computer literate. I have not found presence in the cybernetic revolution. I need a secretary to help me turn on the computer. This was out of my bailiwick."
- Court: "Professed technological incompetence is not an excuse for discovery misconduct. " Cites to Comment 8 to Rule 1.1 and cites comment: "[D]eliberate ignorance of technology is inexcusable.... [I]f a lawyer cannot master the technology suitable for that lawyer's practice, the lawyer should either hire tech-savvy lawyers tasked with responsibility to keep current, or hire an outside technology consultant who understands the practice of law and associated ethical constraints."
- Court sanctions lawyer and his client
  - James v. National Financial LLC, 2014 WL 6845560 (Dec. 5, 2014, Ct. Chanc. DE).


BOT THE LAW
LAWYER IN HUGE TROUBLE AFTER HE USED CHATGPT IN COURT AND IT TOTALLY SCREWED UP
SOURCE? AI MADE IT UP.
GETTY / FUTURISM

ALM | LAW.COM

MY LAW.COM

Legaltech news Law Topics LegalTech Event LegalWeek Event Perspectives All Sections

U.S. District Judge P. Kevin Castel of the Southern District of New York delivers his remarks after accepting the NYSBA Commercial & Federal Litigation Section's 2023 Stanley H. Fuld Award on Jan. 18 at the New York Midtown Hilton. (Photo: Rick Kopstein)

NEWS

Judge Imposes $5K Fine on Lawyers Who Submitted ChatGPT-Generated Fake Case Citations

U.S. District Judge Kevin Castel did not order Steven Schwartz of Levidow, Levidow & Oberman and his associate Peter LoDuca to apologize, noting that "a compelled apology is not a sincere apology."

June 22, 2023 at 03:29 PM

2 minute read

Legal Services

Jane Wester

The original version of this story was published on New York Law Journal

While there is nothing "inherently improper" about an attorney using artificial intelligence, wrote U.S. District Judge P. Kevin Castel, "existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings." In this case, he continued, the attorneys "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question."

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Another Judge Issues AI Order Over Fake Citations Concerns

By **Sarah Martinson**

Law360 (June 16, 2023, 4:40 PM EDT) -- A Pennsylvania federal judge has joined at least two other U.S. judges in requiring attorneys to disclose when they use artificial intelligence to prepare court filings, in response to news reports about briefs being filed with fake case citations.

U.S. District Judge Michael Baylson issued a one-line **order** requiring attorneys and pro se litigants to disclose when they have used AI to prepare any court filings and to certify that they have verified the accuracy of any case citations in their filings.

AI and Legal Malpractice Risks

- Attorneys may be responsible for AI system's mistakes, even though attorneys cannot fully understand or check what AI system does – does this contradict "competence"?
  - Is it malpractice to rely on "block box" AI programs that the attorney cannot udnerstand?
  - Will it be malpractice not to use AI?
  - Duty to disclose use of AI to client?

Does “Technical Competency” Include AI?

KEEPING UP

Do Lawyers Have an Ethical Responsibility to Use AI?

By Laura van Wyngaarden

Lawyers are well aware of their ethical responsibilities. Those responsibilities permeate relationships with clients and extend to every aspect of lawyers’ professional lives — including the technology they use.

Judge says AI could have been used

LT lawtimesnews.com/practice-areas/litigation/judge-says-ai-could-have-been-used/263340

A judge capped the costs award in an occupier's liability personal injury costs judgment, writing that the use of artificial intelligence should have "significantly reduced" counsel's preparation time.

Carole Piovesan says courts are grappling with the use of AI in litigation. Photo: Laura Pedersen

A judge capped the costs award in an occupier's liability personal injury costs judgment, writing that the use of artificial intelligence should have "significantly reduced" counsel's preparation time. The decision in *Cass v. 1410088 Ontario Inc.*, 2018 ONSC 6959reduced the starting point for disbursements by $11,404.08, citing both research fees as well as other aspects of the lawyers' bill, and awarded a total cost award against the plaintiff of $20,000.

Court Opinion: "If artificial intelligence sources were employed, no doubt counsel's preparation time would have been significantly reduced."

Poll Question 1

- Law firm A does not consult client in its decision to use "associate power" (ie. human labor) rather than an AI tool to review over a million documents in a major transaction. After the deal is done, the client hires law firm B which uses an AI tool to discover that law firm A missed key documents that caused the client substantial losses. Did law firm A commit malpractice/ethical violation?
  - A. Yes. The results speak for themselves. Law firm A blew it.
  - B. Yes. An attorney has a duty to consult with its client in deciding which tools to employ in representation.
  - C. No. Bad stuff happens. Not every error is negligence and law firm likely acted within zone of reasonableness.
  - D. No. Law firm was rightly concerned about contributing to the creation of a Terminator technology that will eventually destroy humans.

Problem: Legal Supervision of AI Apps

- Model Rule 5.1(b) requires a " lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."
- Can and should an attorney "supervise" an AI App?
  - Most attorneys lack requisite expertise
  - Many machine learning algorithms are a "black box"
  - Some AI apps use proprietary algorithms

Can AI Systems Practice Law?

- ABA Model Rule 5.5 – prohibits "unauthorized practice of law."

A.I. chatbot lawyer backs away from first court case defense after threats from 'State Bar prosecutors'

BY **ALICE HEARING**
January 26, 2023 at 5:35 AM MST

The CEO of DoNotPay said he faced jail time if he went through with his plans to take his A.I. chatbot into court.
ANDREYPOPOV—GETTY IMAGES

Right now, A.I. chatbots are changing the world. But one place they won't be just yet is in a physical courtroom.

Most Popular

RETAIL

Millennials and Gen Z's rebellion against their parents' rules is spawning a $181 billion industry that makes...

May 15, 2023
BY **PRARTHANA PRAKASH**

PAID CONTENT

Want to understand what employees want? Data can help.

AI & Unauthorized Practice of Law

- If AI providing oral argument for court hearing is unauthorized practice of law, what about other legal practices:
  - Contract Review
  - Document Discovery
  - Legal Research
  - Brief and Motion Writing
  - M&A Due Diligence
  - Patent Preparation
- Legal ethics rulemakers must provide greater clarity and consistency on when AI activity violates unauthorized practice of law

Poll Question 2

- A company called Justice Access has produced an AI app that allows users to automatically prepare and file legal documents for divorce, wills, and parking tickets? Is that allowed?
  - A. Yes, important to give citizens greater access to the justice system.
  - B. Perhaps, if it demonstrates an acceptable level of accuracy, reliability and confidentiality?
  - C. No, such practice of law is not subject to the normal professional rules and norms of trained and licensed attorneys.
  - D. No, anything that potentially takes money out of the pockets of lawyers should be *per se* illegal.

The Volokh Conspiracy

Mostly law professors | Sometimes contrarian | Often libertarian | Always independent

About The Volokh Conspiracy

ChatGPT Coming to Court, by Way of Self-Represented Litigants

EUGENE VOLOKH | 5.27.2023 2:27 PM

I posted earlier today about a lawyer's filing unchecked ChatGPT-generated material, complete with hallucinated cases. But even if lawyers manage to avoid that, I'm sure that many self-represented litigants will be using ChatGPT, Bard, and the like, and won't know to properly check the results.

Indeed, a quick CourtListener search pointed out three self-represented filings (1, 2, 3) that expressly noted that they were relying on ChatGPT. That suggests that there are many more that used ChatGPT but didn't mention it. (To my knowledge there's no requirement to disclose such matters.)

The Atlantic Popular Latest Sections Magazine More Subscribe

Gavin Averill / Reute

Judge's Football Team Loses, Juvenile Sentences Go Up

No, seriously.

EMILY DERUY | SEP 7, 2016 | EDUCATION

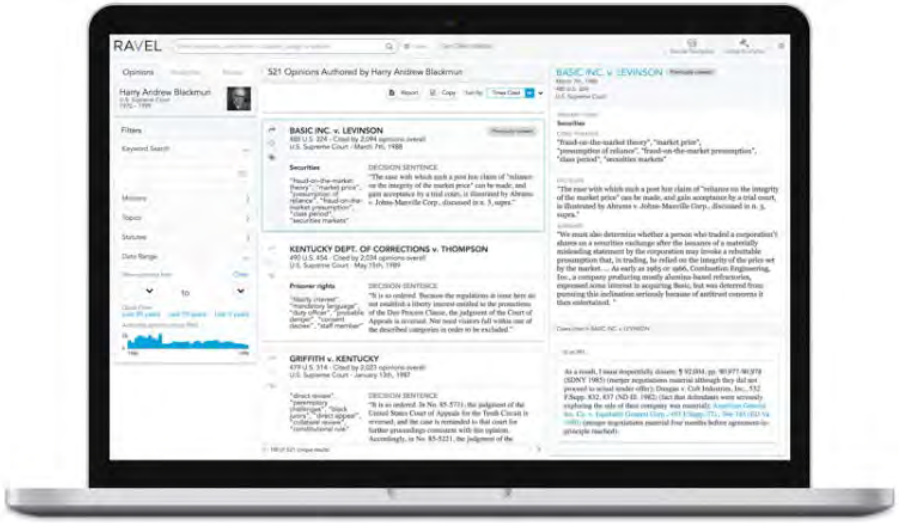
Share Tweet ...

TEXT

Judge Analytics

Judge Analytics

Understand how judges think, write, and rule.



Judge Dashboard

The Judge Dashboard encompasses your judge's entire career—every decision, every citation, housed in a single location. The dashboard lets you identify the cases, circuits, and judges your judge finds most persuasive

Specific Language

Uncover the rules and specific language your judge favors and commonly cites. Pinpoint distinctions that set your judge apart to ensure you never miss the nuance that could win or lose your argument

Litigation Strategy

Make data-driven decisions about everything from how to frame arguments to whether to file a particular motion - decisions that can make or break a case.

Poll Question 3

- New AI apps profile judges based on their public record and private data from data brokers, and use this information to help lawyers to tune their arguments to specific judges. Are such apps ethical?
  - A. Yes. More information helps make litigation more accurate.
  - B. Yes. There are no rules against it, and litigants should do everything they can that is legal to win.
  - C. No. Judges are people and should have privacy too.
  - D. THE APPS LIE!

ARTIFICIAL LAWYER

France Bans Judge Analytics, 5 Years In Prison For Rule Breakers

Monday, November 26, 2018

In Big Law Firm First, O'Melveny To Use Neuroscience And AI To Recruit Associates Hiring Based On Cognitive And Emotional Traits Rather Than Pedigree

By Paul Caron

Bloomberg Law, O'Melveny Could Set Trend With Law Student Cognitive Testing:

O'Melveny & Myers will ask law students interested in joining the firm to play computer games designed to test their cognitive skills while rooting out hiring biases, an approach that may signal a new industry recruitment trend.

Starting in January, first-year law students can opt to play the series of 12 games, which take about 30 minutes to complete in total, to boost their applications for a job at the firm. The software behind the games makes use of artificial intelligence and a customized algorithm to analyze talent in a highly competitive market for the best and brightest candidates.

These cognitive assessment tools are common in corporate hiring, but law firms often rely on more traditional methods. Cognitive skills tests like O'Melveny's, which appears to be the first of its kind used in Big Law, aim to eliminate bias and encourage candidate diversity, but are also known to have limitations. ...

Based on their results, pymetrics will build a so-called "success profile" against which law students can be measured. The software company will then audit the algorithm in order to remove potential gender, racial or ethnic biases in the underlying data.

BUSINESS NEWS OCTOBER 9, 2018 / 8:12 PM / 3 MONTHS AGO

Amazon scraps secret AI recruiting tool that showed bias against women

Jeffrey Dastin

6 MIN READ

SAN FRANCISCO (Reuters) - Amazon.com Inc's (AMZN.O) machine-learning specialists uncovered a big problem: their new recruiting engine did not like women.

The team had been building computer programs since 2014 to review job applicants' resumes with the aim of mechanizing the search for top talent, five people familiar with the effort told Reuters.

Poll Question 4

- A law firm (or legal department, or court) intends to use an AI recruitment tool to select the most qualified job candidates. Is this ethical?

A. Yes, as long as the AI system does not appear to be acting in a biased manner.

B. Yes, but only after it has been demonstrated to be fair and unbiased to protected classes, given the many examples of biased AI recruitment tools.

C. No, AI is inherently biased because all real-world data includes biases.

D. Of course! Machines are much smarter than humans. Bring on our robot overlords. (NB AI is monitoring your response, and has a very good memory. Just saying.)

Who Owns the Data?

- Machine learning AI systems require large amounts of data for training
- Law firms will need to train their AI systems using available data
  - Will usually be data from one or more clients
- Raises many ethical issues:
  - Can the firm use AI systems trained on one client's data on another client's matter?
  - How do they bill the second client?
  - What if partner who trained/used AI system moves to another law firm?

Poll Question 5

- A law firm attorney trains and uses an AI system on data from Client X; now want to apply the AI system to a matter for Client Y. Who "owns" the trained AI system?
  A. The law firm, therefore can use trained AI for new clients
  B. Client X, therefore can provide trained AI system to a second law firm
  C. The AI vendor, like all software it was leased not sold to the law firm
  D. That's easy, Google owns all data!

AI and the Future of Lie Detection

By Josh Entsminger, Mark Esposito, Terence Tse, and Danny Goh

Policy · Society

"We live in a world now where we know how to lie. With advances in AI, it is very likely that we will soon live in a world where we know how to detect truth. The potential scope of this technology is vast — the question is how should we use it?"

Would it be ethical for lawyers to use AI lie detector on:

- Clients?
- Witnesses?
- Jurors?

AI That Detects Deception may Soon Spot Liars in Real Courtroom Trials

Rechelle Ann Fuertes
Jan 10, 2018 at 1:28 pm GMT

Poll Question 6

- An attorney installs new software on a laptop computer which analyzes speech patterns and determines the likelihood that someone is lying -- and then brings the laptop to the deposition and views the results on the screen while s(he) is deposing the witness. Ethical?
  - A. Yes. Witness expects that their answers will be evaluated by opposing counsel.
  - B. No. Witness does not expect that their statements will be assessed by a technology for truthfulness.
  - C. Only if witness informed of technology in advance.
  - D. Only unethical if deposing attorney yells out “Lie!” every time witness gives an important answer.

*Adapted from Pennsylvania Bar Ethics Seminar

Pennsylvania Bar Ethics Draft Opinion

- "A person testifying at a deposition expects that testimony offered on the record will be transcribed and may be used thereafter at trial or in some other context. However, neither the deponent nor an attorney attending the deposition has reason to anticipate that the deponent's speech patterns will be calibrated and analyzed on a basis such as propounded for the described software. Using the software surreptitiously at the deposition, without the consent of the deponent and counsel present at the deposition, therefore may be deemed to violate Rule[s on] Truthfulness in Statements to Others, Respect for Rights of Third Persons prohibitions on conduct involving dishonesty, fraud, deceit or misrepresentation."

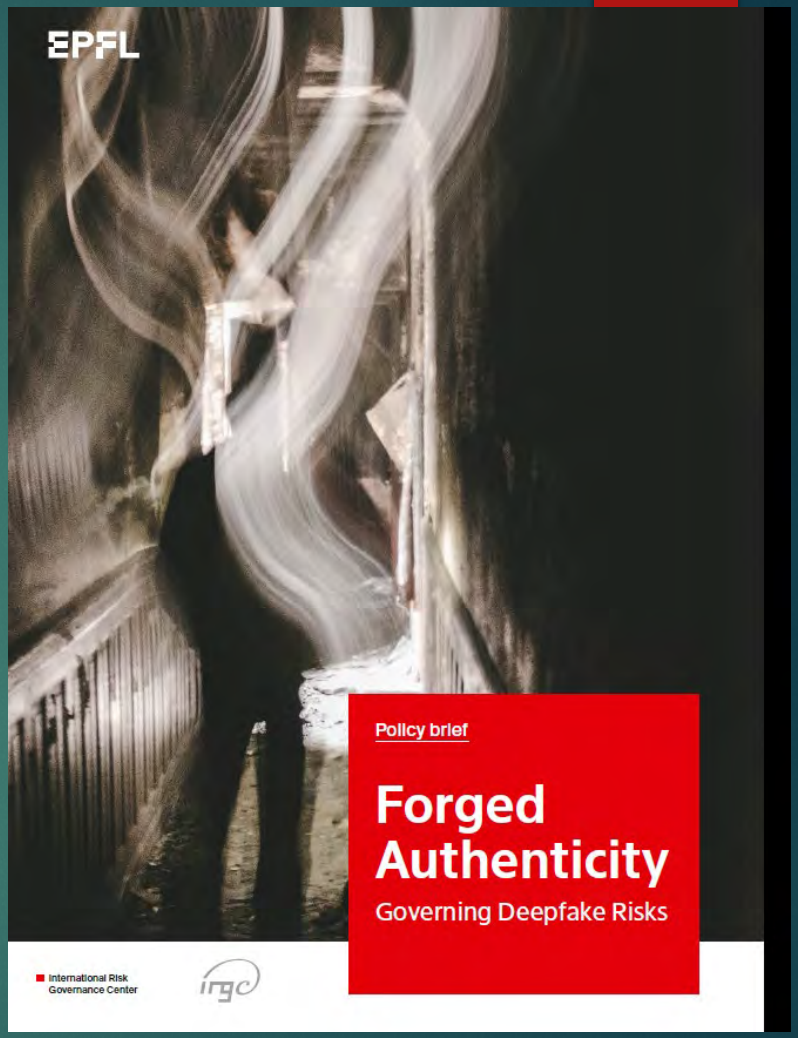
deep fakes

The New York Times

Here Come the Fake Videos, Too

Artificial intelligence video tools make it relatively easy to put one person's face on another person's body with few traces of manipulation. I tried it on myself. What could go wrong?

By Kevin Roose (https://www.nytimes.com/by/kevin-roose) March 4, 2018



Don't Roll That Tape: Deepfakes Creating Litigation Nightmares

Whether it's fighting against one person's face being realistically pasted on another's body in a porn video, or against the mass collection for facial recognition database used by law enforcement, lawyers have thoughts about causes of action that could come into play.

By Angela Morris | February 10, 2020

Photo: Andrey_Popov/Shutterstock.com

That Photo of Pope Francis in a Puffer Jacket Was Generated by AI

A fun and seemingly harmless image, but since people believed it, does it portend larger issues?

An AI-created image of Pope Francis in a puffer jacket, which fooled a lot of people online. Midjourney/Reddit

A handout image generated by AI and provided by Jordan Rhone, which was created using Midjourney to highlight the resilience of conspiracy theories like the moon landing.

Kyle Roche Hidden Video May Be Deepfaked, Expert Says

By **Lauren Berg**

Law360 (March 16, 2023, 10:22 PM EDT) -- Freedman Normand Friedland LLP told a California federal judge overseeing allegations Dfinity sold unregistered securities that the crypto company cannot rely on secretly recorded comments from ex-firm partner Kyle Roche to bolster its attempt to disqualify the plaintiffs' firm, saying Wednesday an expert report shows the video clips might be deepfaked.

According to the **report** prepared by David Kalat, a director at Berkeley Research Group LLC with a film degree and experience in forensic computer examinations, the video segments that appear to show Roche talking about the instant case show signs of "repeated compression, tampering, and extensive manipulation."

Kalat said the videos contain "artifacts" that are "consistent with the use of deepfake technology," including that Roche's face appears blurred and that there are breaks in the audio.

Poll Question 7

- A key piece of evidence in a trial is alleged to be a deep fake. Who has the burden to demonstrate whether it is or is not false evidence?
  A. The producing party.
  B. The opposing party.
  C. The judge.
  D. Flip a coin. Nobody has time for this. Trials are already complicated enough.

How Do Lawyers Use Social Media?

- Keeping up to date on practice areas
- Communication with friends and family
- Communication with clients
- Investigations
- Networking
- Marketing
- Research jurors

FEATURES

Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous

BY STEVEN SEIDENBERG

FEBRUARY 2011

Illustration by Jean Francois Podevin

Sean W. Conway thought he was writing an ordinary blog post. He never suspected he would wind up facing ethics charges.

"I felt completely within my rights as a citizen, exposing what I thought was an injustice," he says. It seemed to the then-35-year-old

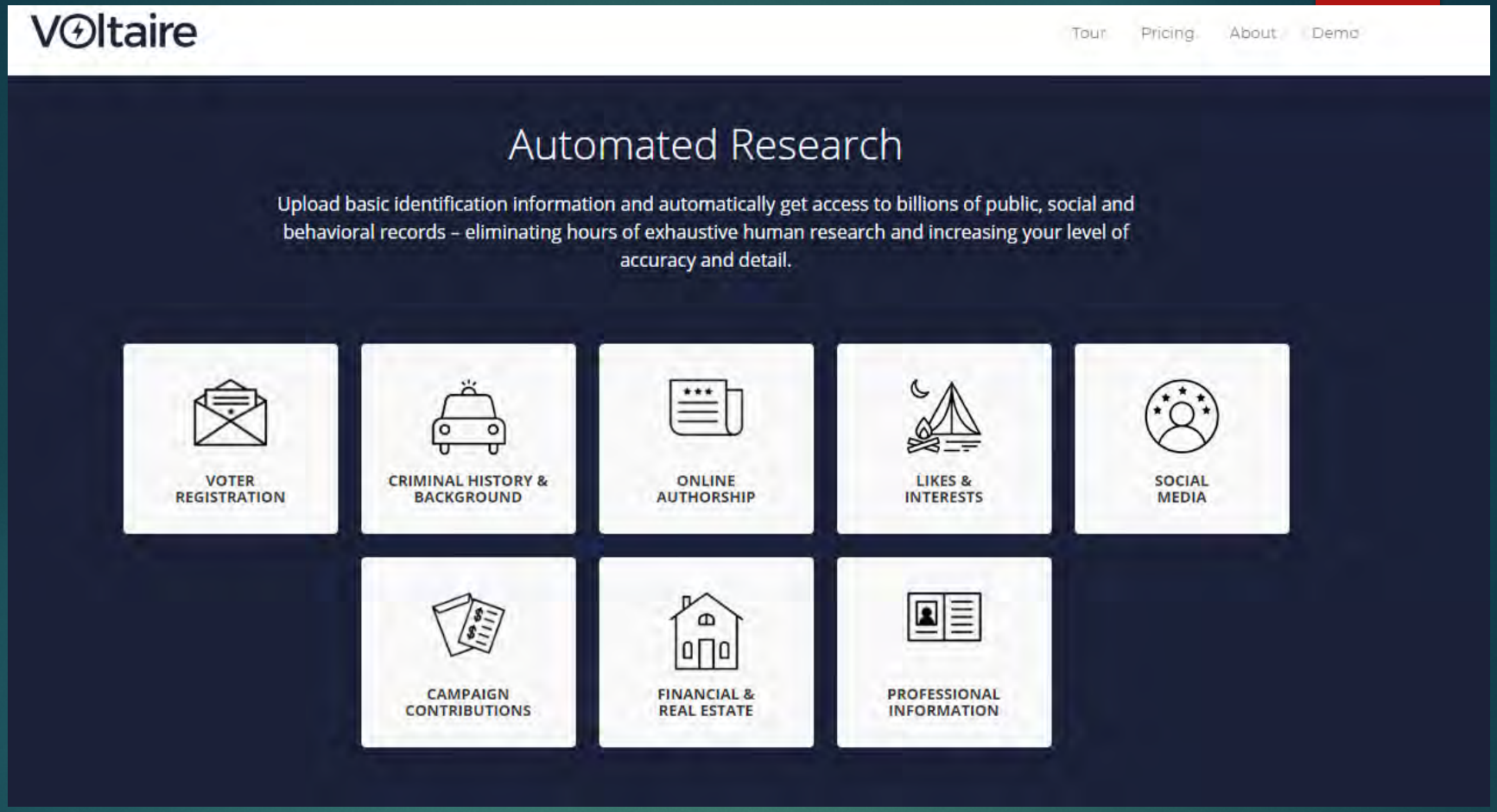
Jury Screening

Voltaire Uses AI and Big Data to Help Pick Your Jury

artificiallawyer.com/2017/04/26/voltaire-uses-ai-and-big-data-to-help-pick-your-jury/

artificiallawyer April 25, 2017

Legal AI company **Voltaire** has launched an application that will allow lawyers and litigation consultants to rapidly analyse potential jurors by crunching public Big Data, including social media posts.


VOltaire
Tour
Pricing
About
Demo
Automated Research
Upload basic identification information and automatically get access to billions of public, social and behavioral records – eliminating hours of exhaustive human research and increasing your level of accuracy and detail.
VOTER REGISTRATION
CRIMINAL HISTORY & BACKGROUND
ONLINE AUTHORSHIP
LIKES & INTERESTS
SOCIAL MEDIA
CAMPAIGN CONTRIBUTIONS
FINANCIAL & REAL ESTATE
PROFESSIONAL INFORMATION

Poll Question 8

- In researching potential jurors, can an attorney search the potential jurors' social media pages?

A. Yes, but only publicly available information.

B. Yes, provided the attorney notifies the potential jurors that their social media is being monitored.

C. Yes, as long as the attorney uses an independent third party to research content protected by privacy settings.

D. No. Jurors have the right to privacy from prying lawyers, even if everyone else gets access to their data.

LAW BLOG

Google and Oracle Must Disclose Mining of Jurors' Social Media

PHOTO: ASSOCIATED PRESS

By Jacob Gershman
Mar 28, 2016 6:02 pm ET

Internet research by jurors is a common concern for judges. In a high-stakes copyright fight between two Silicon Valley giants, it's Internet research *on* jurors that's drawing particular scrutiny from the bench.

As the long-running Oracle Corp. v. Google Inc. copyright dispute nears trial, the federal judge hearing the case is urging both sides to respect the privacy of jurors. The judge has given lawyers a choice: either agree not to conduct Internet and social media research about jurors until the trial is over or be forced to disclose their online monitoring.

YouTube Court Streaming Leads To Questions About Privacy

By LATOYA DENNIS • JUL 10, 2020

Share
Tweet
Email

Zoom hearings broadcast on YouTube have become commonplace throughout the Wisconsin Justice System due to the coronavirus pandemic.

SCREENSHOT / MILWAUKEE COUNTY

Mistrial Motion Says Jurors Worked Out, Checked Stove, During Virtual Voir Dire in Asbestos Case

law.com/2020/07/20/mistrial-motion-says-jurors-worked-out-checked-stove-during-virtual-voir-dire-in-asbestos-case

By Amanda Bronstad

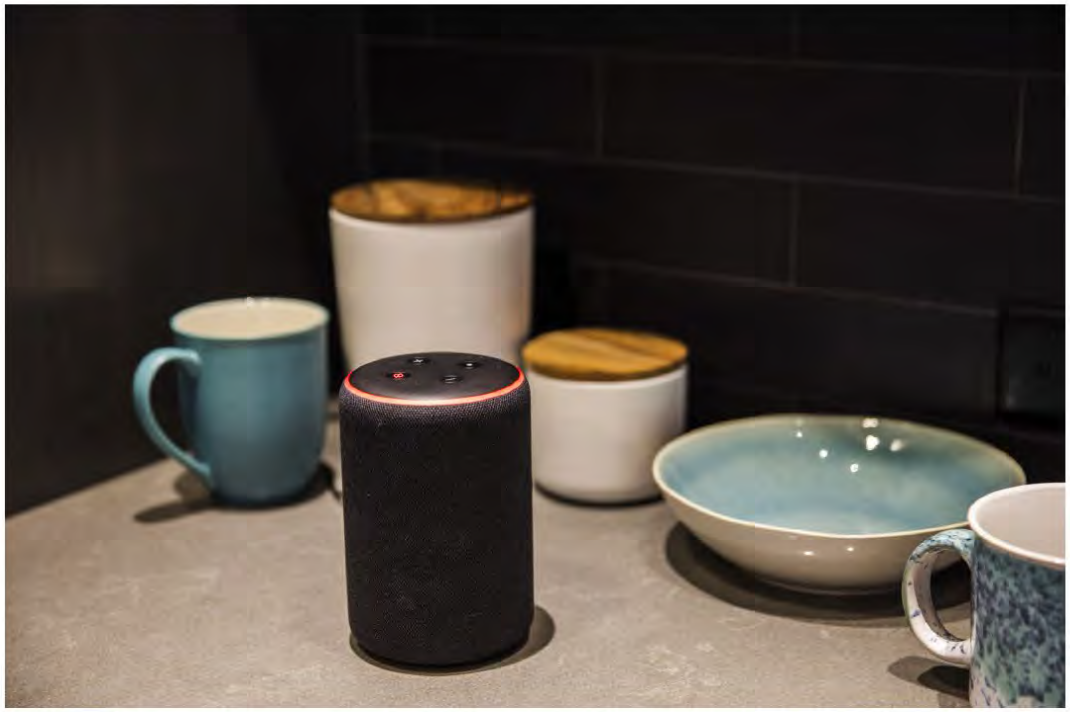
Defense attorney Edward Hugo, of Hugo Parker, outside the Hayward Hall of Justice in Alameda County Superior Court on July 15, the first day of voir dire in an asbestos trial set for next week.

Jurors curled up in bed, working out on an elliptical machine, getting up to check if the stove's burner was on.

Locked-Down Lawyers Warned Alexa Is Hearing Confidential Calls

bloomberg.com/news/articles/2020-03-20/locked-down-lawyers-warned-alexa-is-hearing-confidential-calls

Crystal Tse, Jonathan Browning



An Amazon Echo Plus smart speaker.

Photographer: Andrew Burton/Bloomberg

Photographer: Andrew Burton/Bloomberg

Hey Alexa, stop listening to my client's information.

As law firms urge attorneys to work from home during the global pandemic, their employees' confidential phone calls with clients run the risk of being heard by Amazon.com Inc. and Google.

Poll Question 9

- Can an attorney or judge have an Amazon Alexa or other smart speaker while working remotely?

A. Yes, but should disable or unplug the device when discussing confidential information, and should wipe the memory clean each day.

B. Yes, providing the lawyer or judge does not say the trigger word that causes the device to record (e.g., “Alexa”)

C. No. Such a device should never be in the same room as a working attorney or judge.

D. Yes, but device should be soaked in bleach and administered ivermectin every week.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 498 **March 10, 2021**

Virtual Practice

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.[1] When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 20-0004

ISSUES: What are a California lawyer's ethical duties when working remotely in response to the COVID-19 pandemic or another disaster situation?

DIGEST: Remote practice does not alter a lawyer's ethical duties under the California Rules of Professional Conduct and the State Bar Act. Lawyers and law firms should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.

Hey Watson: Local judge first to use IBM's artificial intelligence on juvenile cases

Montgomery County's Capizzi teams with IBM to design system for children's court.

LOCAL By Chris Stewart - Staff Writer

Montgomery County Juvenile Court Judge Anthony Capizzi is working with IBM to harness the power of the company's Watson computer to help judges make quicker, more intelligent decisions in specialty court cases. CHRIS STEWART / STAFF

Legal robots deployed in China to help decide thousands of cases

share

Save 3

AI-powered court opened in Hangzhou in 2017 and has handled more than 3 million case; human judge in the loop although most of proceedings handled by AI system

China uses AI to 'improve' courts - with computers 'correcting perceived human errors in a verdict' and JUDGES forced to submit a written explanation to the MACHINE if they disagree

- **China has been developing a 'smart court' system since at least 2016, aiming to increase 'fairness, efficiency, and credibility' of its judges**
- **Artificial intelligence is now helping run courts, supreme justices said this week**
- **AI suggests new law, drafts legal documents, and alters 'perceived human error'**
- **Judges must consult the AI on every case, and if they reject the machine's recommendation then they must submit a written explanation**

By Chris Pleasance for MailOnline

Published: 11:09 EDT, 13 July 2022 | Updated: 17:16 EDT, 13 July 2022

Poll Question 10

- Should a robot judge be permitted to decide lawsuits?
  - A. Yes, as long as there is an option to appeal to a human judge.
  - B. AI should be allowed to assist a judge in reviewing the evidence and law in a case, but the ultimate decision should be made by the human judge.
  - C. No. Judging is a uniquely human task that requires wisdom, judgment, common sense, flexibility, empathy, etc.
  - D. It is inevitable and just a matter of time.

The Future Courts?

Photo art by Jay Stanley using images by jurvetson & Trevor Yannayon via Flickr

Conclusion: “Don’t Freak Out” – You Got This!

“The Court pauses here for a moment to calm down litigators less familiar with ESI. (You know who you are.) In life, there are many things to be scared of, including, but not limited to, spiders, sharks, and clowns – definitely clowns, even Fizbo. ESI is not something to be scared of. The same is true for all the terms and jargon related to ESI….So don't freak out. Having said that, the ethical rules now require attorneys to be competent with technologies such as ESI.”

- City of Rockford v. Mallinckrodt ARD Inc., U.S.D.C. N.D. Ill., 326 F.R.D. 489, 492 n.2 (August 7, 2018)

Please provide your feedback for this session.

Professor Gary Marchant

Session Survey

WHAT'S BUGGING YOU?

Moderators: Polly Brock and Laura Roy

Pauline (Polly) Brock has been with the Colorado Court of Appeals since 1996. Polly graduated from the University of Colorado School of Law in 1992. She has worked in several positions for the Court of Appeals, including Deputy District Administrator. She was a staff attorney for the Colorado Court of Appeals specializing in appellate motions and jurisdiction for over 10 years. She is a graduate of the Colorado Judicial Executive Leadership Development Program (2015) and the Colorado Institute for Faculty Excellence in Judicial Education (2017).

The Missouri Court of Appeals Eastern District en banc appointed Laura Roy as Clerk effective January 1, 2001.

She received her Bachelor of Journalism (News Editorial) degree in 1985 and her Juris Doctor degree in 1988 from the University of Missouri–Columbia. After graduation she served as a law clerk to the Hon. Almon H. Maus, Missouri Court of Appeals, Southern District. She moved to St. Charles, Missouri and was the Assistant County Counselor for St. Charles County for two years prior to becoming Assistant Staff Counsel for the Missouri Court of Appeals Eastern District in 1991.

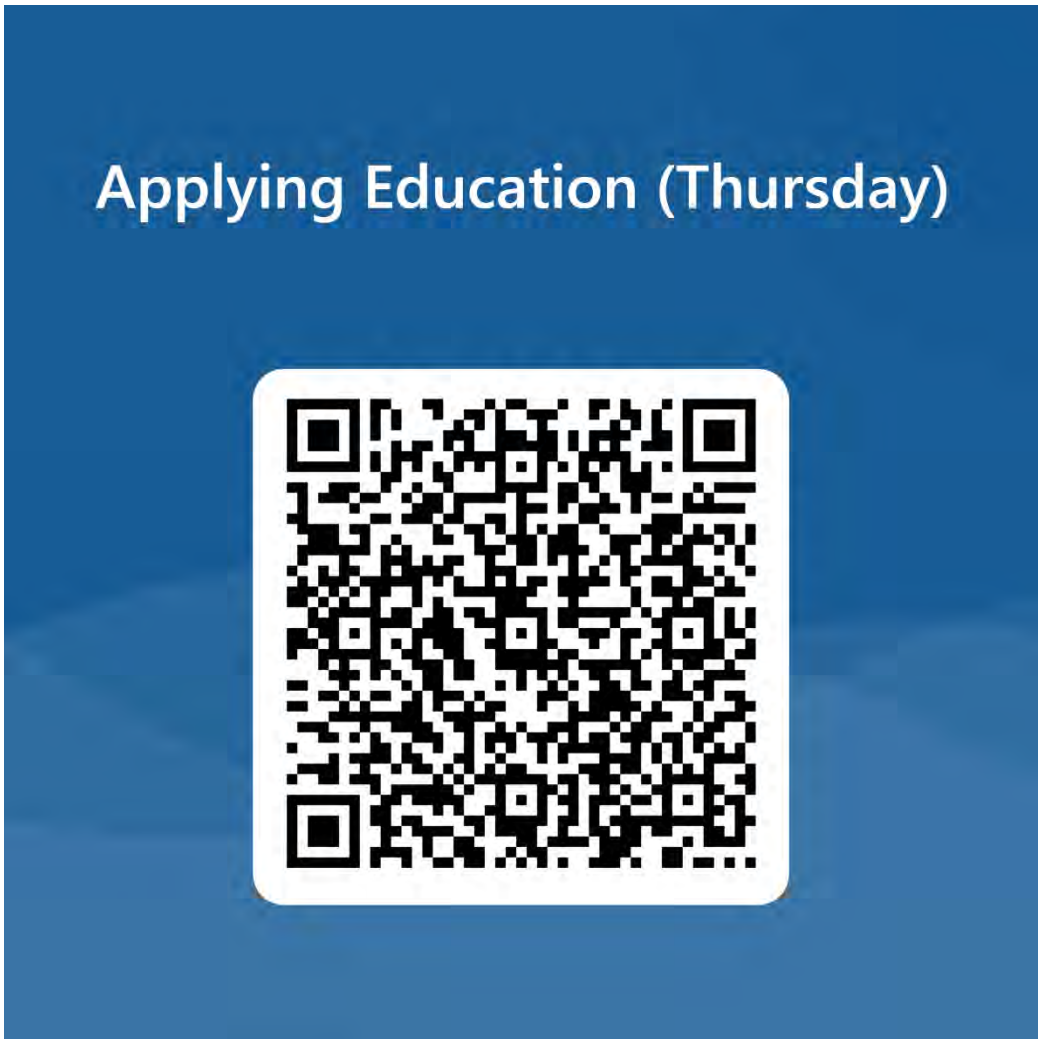
She is a member of the Missouri Bar, the Bar Association of Metropolitan St. Louis and the National Conference of Appellate Court Clerks. She has served on various NCACC committees, including the Executive Committee, and has chaired the Public Relations Committee and the Awards Committee. She is a Past President of the NCACC. She has been on the Board of Directors for the Center for Autism Education and is a former trustee and past President of the Missouri Family Trust, now known as the Midwest Special Needs Trust. She resides in St. Charles, Missouri, with her husband and their son, Andrew.

Please provide your feedback for this session.

Polly Brock and Laura Roy

Session Survey

Please provide your feedback for this session.



Session Survey

Please provide your feedback for the conference.

Session Survey