FUTURE TRENDS IN STATE COURTS 2006

NCSC
National Center for State Courts

A nonprofit organization improving justice through leadership and service to courts

FUTURE TRENDS IN STATE COURTS 2006

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This publication is part of NCSC's "Report on Trends in State Courts" series. Opinions expressed herein are those of the authors, not necessarily of the National Center for State Courts.

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300 Newport Avenue
Williamsburg, VA 23185-4147
Web site: www.ncsconline.org
ISBN: 0-89656-260-3

Suggested Citation

C. Flango, C. Campbell, and N. Kauder. *Future Trends in State Courts 2006* (Williamsburg, VA: National Center for State Courts, 2006).

ACKNOWLEDGMENTS

The editors of *Future Trends in State Courts 2006* gratefully acknowledge the assistance of the many individuals who contributed to this report. The collaborative sharing of information makes this publication possible.

We would like to offer a special thanks to our many colleagues and consultants at NCSC for their reviews and contributions to sections of the report. Rob Baldwin, Linda Caviness, Fred Cheesman, Tom Clarke, Don Cullen, Denise Dancy, José Dimas, Chuck Ericksen, Kay Farley, Timm Fautsko, Gene Flango, Carola Green, Karen Gottlieb, Dan Hall, Roger Hanson, Don Hardenbergh, Bill Hewitt, Bonnie Hough, Dale Kasparek, Laura Klaversma, Jennifer LaMarche, Joe Lane, Ruth Low, Kathy Mays, Mary McQueen, John Meeks, Lorri Montgomery, Jim McMillan, Jim O'Neil, Carolyn Ortwein, Brian Ostrom, Tracy Peters, William Raftery, John Ramsey, Wanda Romberger, David Rottman, Mary Sammon, Richard Schauffler, Brenda Uekert, Doug Walker, Larry Webster, Jewel Williams, and Richard Zorza all greatly contributed to the quality of the report.

We would like to thank VisualResearch, Inc., especially Neal Kauder and Patrick K. Davis, for their contributions, as well as their work on gathering and creating the information graphics throughout this publication.

Many internal and external contributors wrote the articles for the second section of this report, and we are grateful for their efforts. Our gratitude also extends to members of the court community who shared information about projects on which they are working; such indirect contributions find their way into the content of this publication and illustrate the value of networking and collaboration within the state court community.

We would also like to recognize that online legal resources were provided by LexisNexis.

As always, a debt of gratitude is owed to the editorial and production assistance provided by NCSC's External Affairs and Communications office. Lastly, we are indebted to the National Center's senior managers for their continuing support of this project.

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PREFACE

Mary Campbell McQueen
President, National Center for State Courts

Strategic planning is most effective when courts are well informed about what challenges they may face in the future. Each year, the National Center for State Courts researches, writes, and publishes *Future Trends in State Courts* to help our nation's state courts effectively and efficiently plan ahead. This year's edition identifies the issues and trends that are starting to affect our courts—or have the potential to in the near future.

Future Trends reflects the work performed by NCSC as a whole to improve court operations and service to the public. For example, the first section in this edition is a series of short essays on broad issues facing courts, such as emergency preparedness, court budgets and budget challenges, America's aging population, and judicial independence. NCSC has taken the lead and worked with courts to confront these and other issues.

The second section is a compendium of articles growing out of the initial essays, which provides significant discussion in three areas: Courthouse Security (including the status of "anti-government" groups and how courts can prepare for when disaster strikes), Technology (including a model for court IT governance and how the use of DNA evidence on popular television crime shows influences what jurors expect in court), and Special Court Programs (including DWI courts and self-represented litigation). These articles will provide you and your court the necessary background to better understand these and other emerging issues—and what courts must do to address them.

Future Trends in State Courts 2006 provides an important look around, and ahead, at issues that are affecting the courts. I hope that you will find it an invaluable aid to improving your court's operations and public trust and confidence in the judiciary.

INTRODUCTION

Linda R. Caviness
Executive Director, Knowledge and Information Services and Association Services, National Center for State Courts

In its nineteenth year, NCSC's *Future Trends in State Courts* is introducing a new section that we hope will assist state courts in planning and making predictions about the future. This new feature, the "Ten Trends Impacting the Courts," is a result of information from a variety of sources and identifies the most important issues facing the courts—and the courts' need to make plans to face them.

The work in this volume helps to support the state courts in their efforts involving futures and strategic planning. It is our intention to stimulate thought and discussion about potentially important issues and their solutions, not to predict the future.

The entire collection of articles in this printed version of *Trends* is also found on the NCSC Web site at www.ncsconline.org, along with additional articles of interest this year and links to other sources on the topic you are searching. You may also order additional copies of the printed version by calling Knowledge and Information Services at (800) 616-6164.

This book is made possible by the contributions of many court experts, by court staff around the country, and by NCSC staff. A special note of thanks to the NCSC Board of Directors and Senior Management Team for having the foresight to make this book a priority and for providing the resources to accomplish it.

EXECUTIVE SUMMARY

Many courts over the past few decades have become more aware of the world around them. The more forward-thinking courts are learning how to position themselves to deal effectively with change. Successful planning not only readies courts for what the future holds, but also brings collateral benefits, such as increasing public trust and confidence, improving coordination between courts and other organizations, and making the work of the courts easier to evaluate and document.

But predicting the future is notoriously difficult. Surprise is inevitable, and no one can plan without predictions. NCSC produces its *Trends Report* annually to help those who work in the courts to better recognize the significant trends that will be affecting their day-to-day operations in the future.

To better enable courts to plan and help make predictions, *Future Trends in State Courts 2006* is organized into two parts. Part 1 features "Ten Trends Impacting the Courts." These topics were selected because they appeared time and time again from several different sources, including the NCSC's Environmental Scan,[1] an NCSC survey sent to court constituents to gauge what they considered the most significant topics for courts,[2] and a review of the major topics from requests for information and NCSC Web hits.

In Part 1, the ten trends identified for 2006 are:

1. Emergency Preparedness in the State Courts
2. The Impact of Technology
3. Cultural Diversity: The Use of Court Interpreters
4. The Impact of an Aging Population
5. Privacy and Public Access to Court Records
6. Judicial Independence and Selection
7. State Courts and Budget Challenges
8. Problem-Solving Courts
9. Access to Justice: The Self-Represented Litigant
10. Measuring Court Performance

These ten trends are, according to NCSC's current information and feedback, the areas that courts need to plan for most carefully. The history, the present, the future, and innovative practices are presented for most of the topic areas. Resource lists of current and former *Trends* articles and other sources for each topic complete Part 1.

Part 2 of this *Report* presents the articles that provide a closer look at the implications of the identified trends. The authors for these articles are the experts. This year's *Report* shows a heavy representation of court security and technology trends, as well as specialized court programs.

In the Courthouse Security section of the *Trends Report* there are six articles. First, Chuck Ericksen and Anne Skove explore "The Anti-Government Movement Today." Next, Carolyn Ortwein produces "A Road Map for the Design and Implementation of a State Court Emergency Management Program." "Protecting Court Staff: Recognizing Judicial Security Needs," which shows how judicial threats are increasing, is an article collaborated on by several National Center for State Courts staff. Privacy is also an important part of the court security arena, and two articles focus on it: Sue Jennen Larson's "Court Record Access Policies: Under Pressure from State Security Breach Laws?" and José Dimas's "Focus on Identity Theft, Social Security Numbers, and the Courts." In the last security piece, J. Douglas Walker examines how "Intelligent Video Technologies Enhance Court Operations and Security."

The second set of articles discuss court Technology: First, Larry Webster summarizes the "NCSC IT Governance Model" and J. Douglas Walker presents "Imaging Biometric Technologies Make Strides." James McMillan examines "Tablet Computers and the Courts 2006"; Judge Michael Marcus shares his information on "Smart Sentencing: Public Trust and Confidence Through Evidence-Based Dispositions"; Robin Gibson discusses "Information Sharing and Extensible Markup Language"; and Judge Donald E. Shelton takes an interesting look at "Technology, Popular Culture, and the Court System—Strange Bedfellows?"

The final set of articles discusses Special Courts and Programs. Davison Douglas writes a timely article on "Election Law: What State Courts Should Expect," and Brenda Uekert reviews "The Impact of an Aging Society on State Courts." Victor Flango and Carol Flango describe "What's Happening with DWI Courts"; Wanda Romberger and William Hewitt contribute "Wanted: Career Paths for Court Interpreters"; Virginia Suveiu examines "The Increasing Impact of Immigration on

State Courts"; and Richard Zorza and Chuck Ericksen present "Trends in Self-Represented Litigation Innovation" and "Trends in Judicial Education" (respectively). Finally, the *Report* turns to two articles on court performance: H. Ted Rubin describes how "Juvenile Justice Systems Are Issuing Accountability Report Cards to Their Communities," and Bill Hewitt, Brian Ostrom, and Richard Schauffler, senior staff from the NCSC's Research Division, summarize how "Performance Measurement Gains Momentum Through CourTools."

An index is included with this *Trends Report* to help readers find what they need quickly. *Future Trends in State Courts 2006* is also available on the NCSC Web site at http://www.ncsconline.org/D_KIS/Trends. Once on the site, the user can review former *Trends Reports* and the 2005 Environmental Scan.

We welcome comments, ideas, and possible articles for future publications. Comments on this *Trends Report* will help us to plan for future reports. Please send these to:

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Thank you for your interest in *Future Trends in State Courts 2006*. NCSC's Knowledge and Information Services staff enjoys helping you to prepare for your court's future.

RESOURCES

[1] The 2005 Environmental Scan is available online at http://www.ncsconline.org/WC/Publications/KIS_CTFutu_EnvScan05.pdf. NCSC does not produce a complete Scan annually.

[2] NCSC 2006 Survey, Significant Issues and Trends.

TEN TRENDS IMPACTING STATE COURTS

Emergency Preparedness in the State Courts

The Impact of Technology

Cultural Diversity: The Use of Court Interpreters

The Impact of an Aging Population

Privacy and Public Access to Court Records

Judicial Independence and Selection

State Courts and Budget Challenges

Problem-Solving Courts

Access to Justice: The Self-Represented Litigant

Court Performance Measurement

EMERGENCY PREPAREDNESS IN THE STATE COURTS

Historical Basis

Since September 11, 2001, federal and state governments have taken steps to ensure the continuity of government, at all levels, in the event of a disaster. While the judicial branch is not generally required to comply with executive-branch policies, many of the policies, programs, and approaches to emergency management and preparedness can be very helpful to courts. The enduring effects of Hurricane Katrina underscored the necessity of every court to have a plan to ensure that its essential functions can continue when faced with a broad array of disruptions.

In 2005 breaches of security at court facilities, and attacks on court staff, judicial officers, and even their families, compelled courts to revisit and enhance critical incident response and security procedures to protect court assets: people, facilities, and records.

New Orleans Criminal District Court, searching through evidence and court records after Hurricane Katrina.

Present Conditions

Disruption of court operations can result from natural events, such as hurricanes, floods, earthquakes, and fires, as well as man-made events, such as terrorism caused by conventional, biological, and chemical weapons. Courts should concentrate resources on planning for the possibility that at any time the courts can be adversely impacted or destroyed. Planning for the unthinkable can ensure resiliency, continue essential functions with minimal delay, and save lives, property, and vital records. Few courts actually have comprehensive continuity of operations plans, or COOPs.

Floodwater line, Orleans Parish Prison facility, adjacent to Criminal District Court building.

A COOP is a document prepared to ensure that a viable capability exists to continue essential court functions when faced with a broad array of disruptions. The plan should address:

- continuous performance of essential functions and operations
- protection of court facilities, equipment, records, and other assets
- reduction or mitigation of disruptions to operations
- identification and designation of principals and support staff to be relocated to alternate facilities, or assigned to the primary facility to perform essential functions
- facilitation of decision-making processes
- recovery and resumption of normal operations

A COOP provides a strategic framework for judicial officers and court managers to use during conditions that require the relocation of leadership and essential staff to alternate work sites geographically removed from the courthouse or affected court facilities. It establishes a reliable response capability with effective processes and procedures to quickly deploy predesignated personnel, equipment, vital records, and supporting hardware and software to an alternate site to sustain the court's essential operations for up to and perhaps more than 30 days.

The COOP establishes an emergency response team usually composed of a chief justice/judge, key court leaders from each court office, and technology and subject-matter experts who will perform the essential functions and establish technological capabilities to access essential records and databases.

Probable Future

The future may see court systems embrace emergency management as a routine function of court operations, similar to case filings, trials, and judicial proceedings, and weave it into the fabric of the court culture. Enhanced technologies will continue to play a significant role in the protection and accessibility of court vital records, information systems, and databases—and electronic case filings and case management systems may become the standard protocol. First-responder volunteer teams composed of subject-matter experts, such as IT, finance and budget, human resources, and case management, might be deployed to court systems impacted by a disaster.

11 Key Components of a COOP

1. Alert and Notification Procedures
2. Essential Functions
3. Order of Succession
4. Delegations of Authority
5. Alternate Facilities
6. Communications
7. Interoperable Communications
8. Vital Records, Databases, and Information Systems
9. Human Capital
10. Devolution
11. Recovery/Reconstitution

Innovative Practices

- The Administrative Office of the U.S. Courts deployed a Special Assessment Team to the Gulf States in the wake of Hurricane Katrina. The College of William & Mary's Courtroom 21 Project is developing a concept of operations for a national state court corps of first responders.

- Electronic filing in courts will help ensure smooth operation in the event of future emergencies. Back-up files can be sent to alternate sites for protection.

- Remote access to a court's intranet data communication network (DCN) via private broadband Internet and dial-up services is critical for all essential functions. The more laptops the court has available in emergencies, the better.

- The Communications Center for Displaced Attorneys facilitated direct e-communications for relocated lawyers with Internet access during Hurricanes Rita and Katrina. Representatives from the local Federal and Louisiana Bar associations provided lawyers with information regarding where to contact court officials, what special orders were in place, how to seek extensions or continuances, and other tasks.

- Communications for judges, court executives, and essential staff have been enhanced through the use of an enterprise Blackberry network and cellular phones or wireless personal-digital-assistant devices.

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American University and State Justice Institute Court Security and Disaster Preparedness Project. *Planning for Emergencies: Immediate Events and Their Aftermath—A Guide for Local Courts.*
http://spa.american.edu/justice/csdp.php

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George B. Huff, Jr. "Planning for Disasters: Emergency Preparedness, Continuity Planning, and the Federal Judiciary." *Judges' Journal* (Winter 2006): 6-17.

THE IMPACT OF TECHNOLOGY

Historical Basis

Advances in technology have always found a ready market in the private sector, where the need to be efficient and competitive are major driving forces. On the other hand, courts—saddled with the necessary burden of precedence, due process, and deliberation—have not been early adopters of technology. Over time, nevertheless, they have come to embrace its benefits wholeheartedly and today are as technology dependent as the rest of society.

Perhaps word-processing systems can be credited with initially moving courts from the traditional paper, pen, and (later) typewriter, introducing the concept of electronic documents, and paving the way for computerized case management systems (CMS). The resulting evolution of effective CMSs dominated the court technology scene for more than two decades. During this period, courts also began slowly incorporating video technology, beginning with closed-circuit television for security and limited court appearances; electronic document transmission, beginning with fax machines; and the Internet, beginning with e-mail and rudimentary court Web sites. Adapting their operations to use each new tool or technique required revising rules, procedures, and sometimes statutes, as well as changing attitudes within the legal culture.

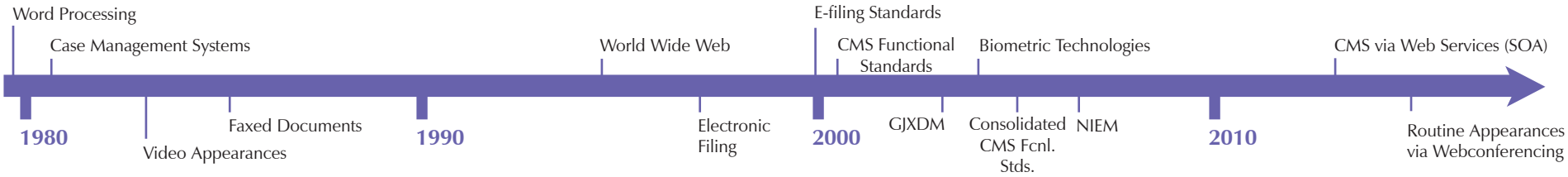
Present Condition

Courts now routinely employ multiple technology products and solutions to conduct their operations. Electronic files are considered the official court record in most courts of any size, although paper copies usually coexist for utility and backup. Many courts have at least one courtroom equipped for video arraignment and other appearances, and a growing number of courts around the country boast impressive high-tech exhibit-presentation capabilities for today's multimedia-conditioned jurors. Biometric technologies—especially fingerprint, iris, and face recognition systems—are materializing in a few courthouses to improve positive identification of defendants and control of access to facilities and information systems.

Although less flashy than the products and systems themselves, one of the most encouraging milestones is that, for the first time in the history of justice, usable national court technology standards are emerging. Draft versions of standards now exist for consolidated CMS functions, electronic filing of court documents, and the electronic exchange of common forms and documents between courts, law enforcement, and other justice partners. Providing the basis for practical information exchanges nationwide is the groundbreaking development of the Global Justice XML Data Model (GJXDM). The GJXDM enables organizations using disparate computer systems and databases to share information via uniform data semantics and structure. The Department of Justice and Department of Homeland Security are jointly sponsoring development of the National Information Exchange Model (NIEM), an outgrowth of the GJXDM that includes non-justice agencies and will help courts exchange information with all of their partners.

Arguably, the Internet has had the most profound overall impact on how courts currently operate and interact with the public. In addition to directly benefiting judges and court staff through enhanced availability of information and electronic communication, the Web has opened courts to the public as never before, making court information more accessible and improving public service. Nearly every court now has a Web presence, and many offer an astonishing range of interactive services along with video webcasts of trials and hearings. While reducing the burden on

Three Decades of Court Technology Advances



Available National Court Technology Standards

(may be unapproved draft versions)

- Consolidated CMS Functional Standards (V0.20)
- Electronic Court Filing Standards (V3.0)
- Information Exchange Package Documentations (IEPDs)
- Global Justice XML Data Model (V3.0.X)
- National Information Exchange Model (V1.0 beta)

court staff and facilities, Internet technology also has elevated public expectations and spotlighted significant issues of privacy vs. public access, as well as data security concerns.

Probable Future

Continued development and application of national standards will enable a quantum leap in the effectiveness of many technology solutions, especially when combined with the Internet's potential to leverage and synergize a wide range of technology applications. CMS vendors not only will produce more cost-effective and flexible systems, but will be capable of delivering standardized components via Web services (see "Understanding Web Services"), allowing courts to obtain the functionality they need with neither a data center nor dependency on a single vendor.

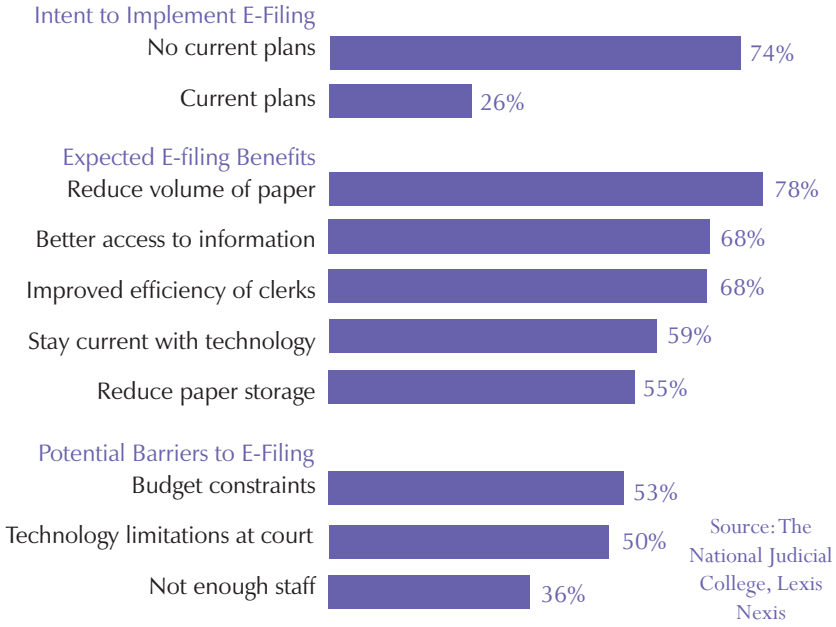
"Courts are more than criminal justice partners. The NIEM will also help courts exchange information effectively with agencies in areas like health and transportation."

--Thomas Clarke, PhD., Vice President of Research and Technology, NCSC
Chair, Global Infrastructure/Standards Working Group

Moreover, these "mix-and-match" systems inherently will be able to exchange data with other justice and non-justice partners through compliance with the NIEM.

Electronic filing will become more widespread as vendors adopt improved e-filing standards while advances in screen resolutions and portability will increase the utility of electronic documents and records. Meanwhile, in addition to transportation costs, the inconvenience of travel and courthouse access due to security concerns will increase demand for conducting court business—including conferences and hearings—via the Internet, pushing the "virtual courthouse" a step closer to reality.

Judicial Survey of 1,506 Judges
Electronic Filing in U.S. State Trial Courts, 2005



Source: The National Judicial College, Lexis Nexis

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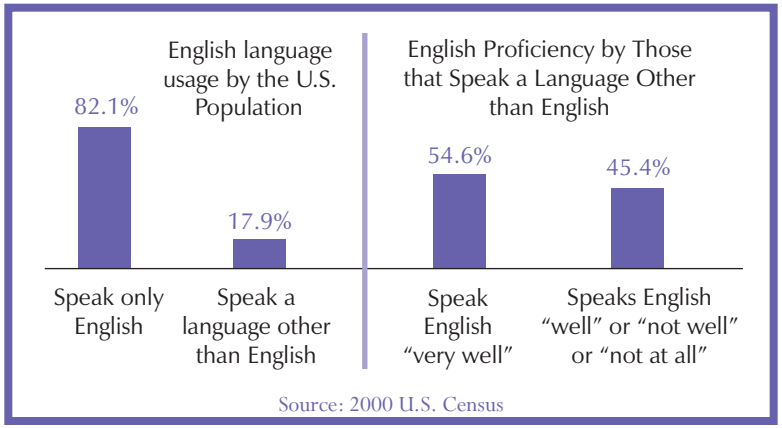
CULTURAL DIVERSITY: THE USE OF COURT INTERPRETERS

Historical Basis

In the late 1980s, the Conference of State Court Administrators (COSCA) and the Conference of Chief Justices (CCJ) recognized the need for every state to establish a task force to address bias and discrimination in the state courts. COSCA adopted a resolution in 2006 to support a national campaign to ensure fairness in America's state courts and eliminate bias and discrimination. In 2000, President Clinton signed Executive Order 13166, which seeks to improve access to services for persons with limited English proficiency. In 2002, the Department of Justice published official guidelines for the implementation of that Executive Order. Over the past two decades, many states have made progress in the elimination of bias and discrimination in their court systems, but the steadily increasing population of non-English-speaking individuals in the United States strains resources and presents ever-changing challenges. The threat of discrimination and bias is real in every office in the courthouse. If the party or defendant in a case cannot understand what is being said in the courtroom, equal access to justice is an unfulfilled promise.

Present Conditions

There is a substantial and steady increase in the percentage of the population in the United States who speak languages other than English at home and who do not speak English "very well." The U.S. Census reveals a 60 percent increase in those that do not speak English "very well" from 1990 to 2000. The increase in limited-English-proficient individuals, coupled with the increase in the number of different languages being spoken, presents difficult challenges for the nation's courts. The judiciary cannot concern itself with arguments about language rights and "English-only" rules, regulations, and ordinances. Instead, it is challenged to uphold the constitutional pledge of equal justice, without regard to race, color, or national origin.



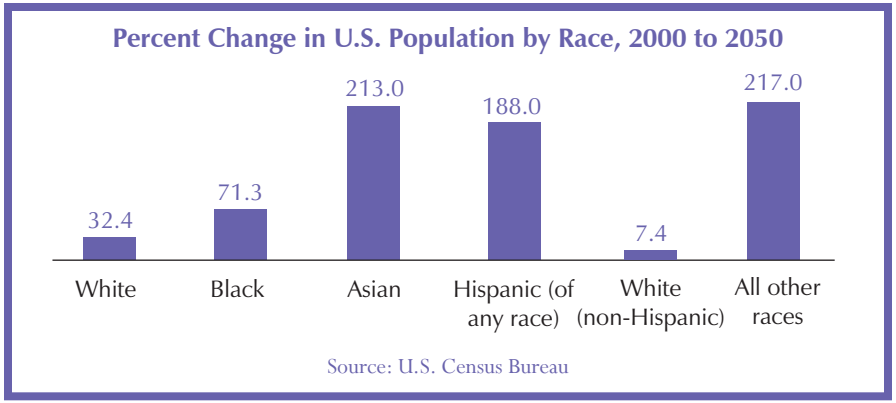
Source: 2000 U.S. Census

For the courts, the most effective method for making a non-English speaker "present" during court proceedings is to provide a qualified court interpreter, allowing the limited-English-proficient individual to hear and understand what is transpiring and providing the opportunity to speak and communicate with the court and the bar. Five major programs offer oral performance examinations to identify individuals who possess the minimally required knowledge, skills, and abilities to interpret in the courts. The Federal Court Interpreter Certification Examination program was established in 1980 and continues today to test and certify Spanish interpreters for the federal courts. The Consortium for State Court Interpreter Certification, founded in 1995, and currently consisting of 36 member states, develops and shares test instruments in twelve languages to certify state court interpreters. The National Association of Judiciary Interpreters and Translators (NAJIT) developed a Spanish performance examination in 2001.

Despite the growth in interpreter-testing opportunities, state courts continue to lack qualified interpreters, especially in languages other than Spanish. Some states have implemented training programs to increase the skills of borderline candidates, others have stepped up the recruitment process, and all are interested in increasing the number of qualified interpreters available to interpret in the courts.

"This extremely important and fundamental issue [court interpretation] has been allowed to become a 'stepchild' of the justice system: understudied, underfunded, and in terms of its ultimate impact, little understood."

Minnesota Supreme Court Task Force on Racial and Ethnic Bias in the Judicial System



Probable Future

The courts will continue to experience a dearth in the number of qualified interpreters (especially in languages other than Spanish) and will continue their efforts to recruit potential individuals and offer training to those who show promise. The judiciary will build institutional capacity by hiring staff with bilingual skills for services provided outside the courtroom and manage its calendars for better utilization of qualified interpreters inside the courtroom. Together, the courts and other agencies and organizations can coordinate available resources for meeting the needs of the diverse communities they serve. The higher demand for interpreters in recent years is expected to continue and contribute to growth in the number of jobs for interpreters.

Innovative Practices

- As a result of Executive Order 13166, the judiciary is facing the challenge of translating public-service documents, signs, and court forms into languages other than English when the population of foreign-language speakers reaches a prescribed level within the jurisdiction. In Massachusetts, the Reinventing Justice Project has helped to develop brochures that have been translated into the languages of the communities that the courts serve.
- In Washington, the Standing Committee on Public Trust and Confidence helps to ensure that the courts demographically reflect the communities they serve.
- In Oregon, the Access to Justice Committee helps facilitate the Justice Department's commitment to address various issues of diversity throughout the system.
- In New York, the Eighth Judicial District Committee has developed a program to educate minority communities about the importance of jury-service participation, with the goal of making juries more representative of the general population.

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U.S. Census Bureau. Table 4, "Language Spoken at Home and Ability to Speak English for the Population 5 Years and Over by State: 2000."
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THE IMPACT OF AN AGING POPULATION

Historical Basis

Two facts are shaping America's future. First, baby boomers (those born between 1946 and 1964) began turning 60 this year and are rapidly approaching retirement age. By 2030, the number of people older than 65 in the United States will exceed 71 million—double the number in the year 2000. Second, our concept of aging is changing. In the not-so-distant past, "old age" and retirement were considered a time when persons withdrew from society. Today's older Americans are healthier, more educated, more financially secure, and more active than previous generations.

Yet governments have not adequately addressed this demographic shift. A survey of more than 1,790 towns, counties, and other municipalities (carried out by the National Association of Area Agencies on Aging) found that fewer than half of all communities are looking at strategies to deal with an aging population. Nationally, a crisis of increased spending on Social Security, Medicare, and Medicaid is on the horizon. Cutbacks in traditional pension plans and rising health-care costs are reasons why financial security and health care continue to top the list of seniors' concerns.

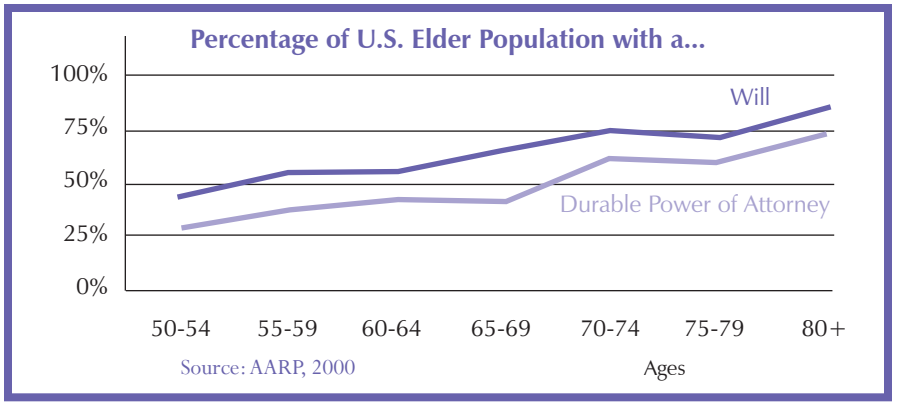
Present Conditions

Americans are living longer and having fewer children. At the turn of the century, the life expectancy was 46 years; today it is approximately 76 years. In the 1990s alone, the number of centenarians in the United States nearly doubled (from 37,000 to 70,000). Analysts at the Census Bureau suggest that this per-decade doubling trend may continue, with the centenarian population possibly reaching 834,000 by the middle of the next century.

The gentrification of society varies by gender. In 2000 there were 20.6 million women aged 65 and over compared with only 14.4 million men. In fact, a woman retiring at 65 today has a one-in-three shot of living to 90, and the odds for future retirees will be even better.

Probable Future

The aging of American society will impact every sector of the nation, including the courts. State legislatures and courts are already beginning to reform laws and practices on guardianships and conservatorships. Cases involving elder abuse, domestic violence, and family violence affecting older persons are increasingly finding their way into the nation's courts. Probate courts are especially likely to be strained in the near future. Courthouse renovations and new facilities will have to be built with a focus on accommodating the needs of disabled and older persons. The courts will be increasingly challenged to deliver efficient justice if the demographic shift is not taken into account in strategic planning for the future.

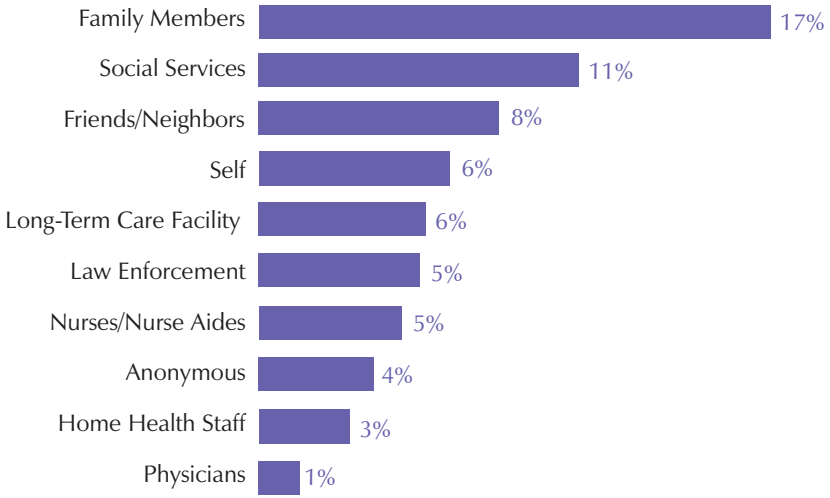


The United States Bureau of the Census paints the following picture of the future of American society:

- The number of people older than 65 will more than double between 2000 and 2050, and the population over age 85 will quadruple.
- Approximately 114,000 Americans will be centenarians in 2010, a number expected to swell to 241,000 by 2020.
- By 2050, 40 percent of the population will be older than 50. This means that for the first time in history, seniors will outnumber children and youth.
- There are currently nearly five people of working age for each older person. In the near future, this ratio will drop to fewer than three workers for each older person.

The aging of America will exert great pressure on health-care costs, forcing difficult choices. Caretaking options will remain challenging, especially for middle-aged adults who become the primary caretaker for both children and parents. On the economic front, elderly workers may play a larger role in the economy to minimize the impact of workforce shortages. Finally, communities will become more aware of the needs of their older citizens, ideally developing programs and facilities that improve the quality of life of an aging population.

2004 Survey of State Adult Protective Services: Top 10 Sources for Reports of Elder Abuse of Adults 60+ Years



Source: Elder Abuse Center

Innovative Practices

In April 2006 the National Center for State Courts, with support from the Archstone Foundation, held the first meeting of the Elder Abuse and the Courts Working Group, which brought together national experts to discuss effective strategies courts can use to improve their response to elder abuse and neglect, including outlining a training program for judges and court staff and identifying components of effective court responses. Members of a "special courts session" of the working group drafted a benchcard on elder abuse to provide a reference point for judges.

The Working Group also discussed promising court programs, including:

- an overview of a model courtroom designed to accommodate the needs of older persons;
- the Elder Abuse Protection Court in Alameda County Superior Court, California, which is the only court in the country that coordinates civil and criminal elder abuse cases in a single department; and
- the Elder Justice Center in Florida's 13th Judicial Circuit Court in Tampa.

Key Components of an Effective Court Response to Elder Abuse and Neglect

1. **Training judges, judicial officers, and court staff**
2. **Judicial leadership**
3. **Data collection and evaluation**
4. **Coordinated community responses**
5. **Improving access to the courts**
6. **Regular monitoring and docket management**
7. **Use of an advocacy model**
8. **Increased awareness of the problem**
9. **Developing a customer service orientation**
10. **Providing community outreach**

Source: Brenda Uekert, Denise Dancy, Tracy Peters, and Madelynn Herman. "Policy Paper: A Report from the First National Meeting of the Elder Abuse and the Courts Working Group Meeting." National Center for State Courts, June 12, 2006.

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PRIVACY AND PUBLIC ACCESS TO COURT RECORDS

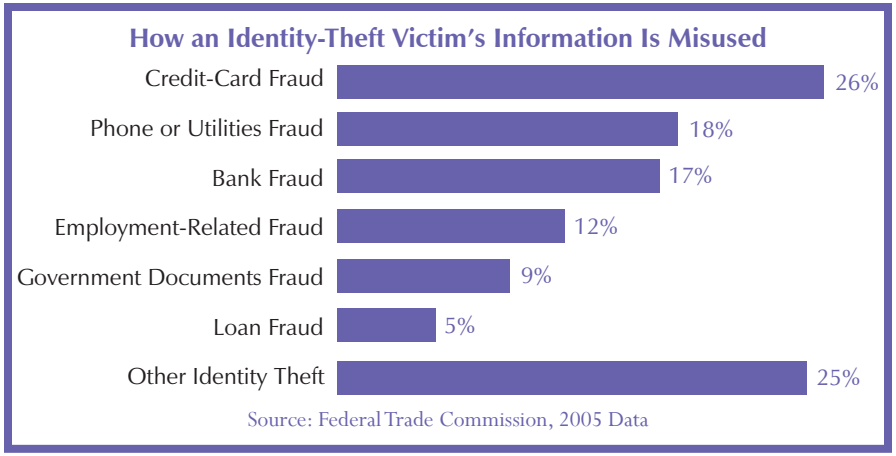
Historical Basis

Since pre-constitutional times, the concepts of open trials and open court records have been the cornerstone of judicial integrity. While the right of access to court records is not "absolute" and such acts as the Freedom of Information Act and the Privacy Act do not apply to court records, there is a recognized common-law right to inspect and copy judicial records, as well as a common-law right to privacy. Courts have long been challenged to use their own discretion in the delicate balance between the harm that may be rendered by the disclosure of certain sensitive information contained in the court record and a "fully open" court record. Examples of court discretion are illustrated by adoption records, medical records, and juvenile proceedings. The responsibility of the courts dramatically changes as the court record slowly migrates from paper form to electronic form where it may be disseminated in bulk, accessed over the Internet, or both.

Driven by overcrowded courthouses and understaffing, courts welcomed the idea of placing their court records online. It is now commonplace to find court Web sites offering access to their records. Whereas open access to manual court records was naturally limited (practical obscurity) by such elements as the location of the courthouse, staff availability, document-retrieval time, and reproduction costs, electronic court documents can be easily obtained with the click of a computer mouse.

Present Conditions

In light of the increased exposure of the court record and the intensifying identity-theft epidemic, the court community is giving serious consideration to the types of information that have been included as part of the court record. Of immediate concern are personal identifiers (Social Security number, city and date of birth, mother's maiden name, children's names, street address); third-party identifications (victims, witnesses, informants, jurors); and unique identifying numbers (operator's license, financial accounts, state identification). To assist state courts in developing new policies, the Conference of Chief Justices and the Conference of State court Administrators have published *Public Access to Court Records: CCJ/COSCA Guidelines for Policy Development by State Courts*.



States vary in their approach to setting policies and procedures for public access to court records. Most state guidelines fall somewhere between the Ohio county that placed entire divorce records on the Internet and the state of Florida that temporarily removed all their records from the Internet while developing new policies. Some states are making identifiers less personal by, among other precautions, using only the last four digits of the Social Security number; referring to only the year of birth; recognizing minors by initials; and identifying only city, state, and zip code in addresses. Some states are creating two records—a public record and private record for sensitive information. Still others are redacting this information. Efforts to mask harmful information from the online record so far have turned into a criminal's delight. Identity theft is one of the fastest growing crimes in the United States. The Internet is a rich source of information for thieves looking for unique personal identifiers (Social Security numbers, etc.) to enable them to assume someone else's identity. The accountability for the information contained in the court record is shifting to the parties involved. Parties, especially in family-court cases, need to be educated to exercise care in what is revealed in the public court record.

Probable Future

In the past decade the court community has made significant progress toward the paperless or paper-on-demand court. Paper files are on their way to obscurity. Just as technology has created many of the privacy dilemmas facing the courts today, technology remedies will emerge to solve them. For instance, in the future parties will be required to identify sensitive information during the electronic and manual filing processes. This information will be screened out of the public court record. Vendors are already successfully testing more reliable redaction software. Authentication processes (see McMillan, 2005) are being developed that will ensure that electronic documents are legitimately filed and tamper-proof. Electronically filed documents will be held to a much higher privacy standard than manual files. In the meantime, court leaders continue to work diligently to keep judicial integrity intact.

Innovative Practices

The Supreme Court of Florida issued a report, *Privacy, Access, and the Court Record*, in August 2005. This report addresses policies to regulate electronic court records by identifying sensitive information that is unnecessary and making this information exempt from the right of access (see http://www.flcourts.org/gen_public/stratplan/privacy.shtml).

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JUDICIAL INDEPENDENCE AND SELECTION

Historical Basis

The U.S. Constitution established three separate and independent branches of government to check and balance one another and to ensure that no single branch dominates over the others. Judicial review of the constitutionality of the actions of other branches—established in *Marbury vs. Madison* in 1803—is central to those purposes. Fair and impartial justice hinges on the judicial branch's ability—as individual judges and as an institution—to render decisions independent of political interference, public intimidation, or intrusion by the other branches into the authority given the courts.

The vast majority of states still elect judges. For years, judicial codes of conduct ensured that judicial candidates campaigned differently from other elected officials to preserve fair and impartial justice and public trust in the judiciary. The U.S. Supreme Court's *White* decision in 2002 struck down prohibitions on judicial candidates announcing their views on disputed political and legal issues. Subsequent federal court decisions removed even more of the traditional barriers that kept courts fair and impartial. The 2000 presidential election controversy, the *Schiavo* decision, and the struggle against terrorism, however, may have contributed to a new level of dissatisfaction and more concerted efforts to constrain the courts.

"I think I ought to be very clear about what judicial independence is not. It is not immunity from criticism. . . . They're [the courts' decisions] there for all to see, and informed criticism is certainly welcome. . . . But it should not degenerate into attack on individual judges for the decision as a means of intimidation, and it should not take the form of institutional retribution, action against the judiciary as a whole that might inhibit the judges from performing their vital function."

Chief Justice John G. Roberts, Jr., U.S. Supreme Court

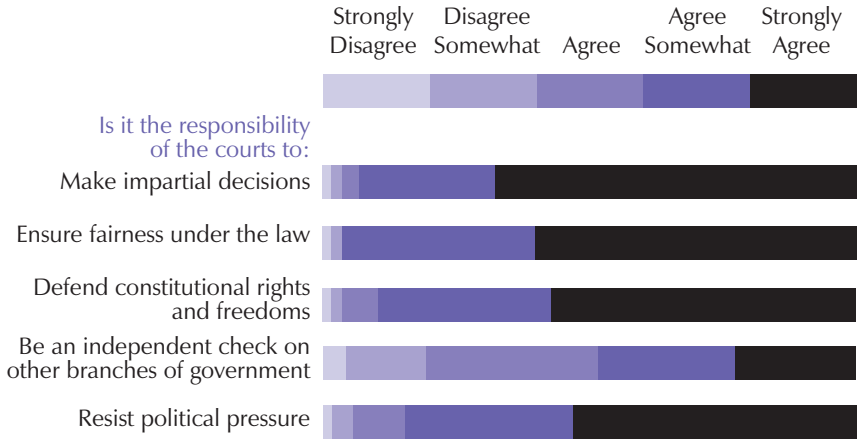
Present Conditions

Third-party and special-interest group involvement, campaign spending, negative advertising, and slanted judicial candidate questionnaires are becoming commonplace nationwide. Lawsuits challenging codes of judicial conduct and campaign activities have been successful in more than a half dozen states. In the wake, judicial candidates struggle with ethical questions on what and what not to say, and at what cost. Judicial campaign oversight committees ask candidates to agree to adhere to voluntary standards for campaigning.

In addition to attempts to further politicize judicial selection, efforts to limit or "strip" courts of jurisdiction over certain types of cases are increasing. Recent federal legislation and executive actions have aimed to limit or deny judicial review of cases related to the Pledge of Allegiance, military tribunals, Guantanamo prison detainees, and individuals (illegal immigrants) facing deportation.

State ballot initiatives and legislation aimed at limiting the independence of the judiciary are other approaches. Seven states have such initiatives on the 2006 ballot. A Colorado initiative would impose term limits for all appellate judges, removing the majority of current judges over the next two years. "JAIL4Judges" in South Dakota would eradicate judicial immunity and empower a special grand jury to fine judges, indict them, or remove them from the bench. A less virulent but similar Montana initiative broadens the basis for recall of judges. Other state initiatives would limit judicial authority on property rights and eminent domain, as well as in family-law cases. A recent Pennsylvania Supreme Court decision on judicial salary

Views of Court Officials, Missouri Municipal Courts, 2004



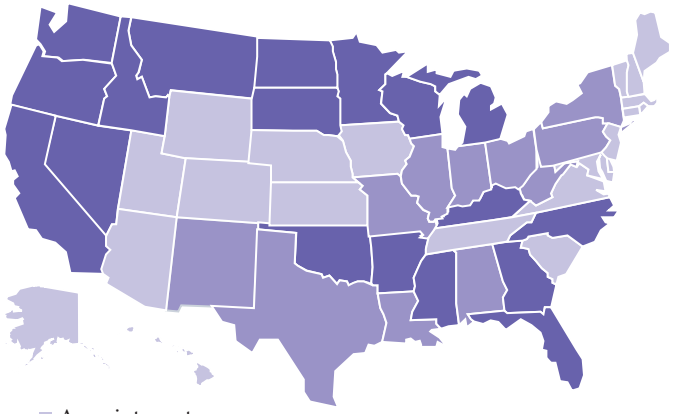
Source: *Court Review*, Summer 2004

increases (as well as other public officials' salary increases) provoked new proposed legislation reducing judicial terms and rescinding the salary increase.

Probable Future

Judicial elections across the country are likely to become even more politicized. Merit selection states may also see increased special-interest-group activity in their retention elections. Continued demands for public accountability may prompt more attempts to change current forms of judicial selection. Recent news from two states highlighting the failure of judges to recuse themselves due to campaign contributions may increase calls for public financing of judicial campaigns, more stringent recusal procedures, and sanctions for failure to do so. Candidate questionnaires and challenges to state codes of conduct may grow in sophistication and frequency. Judicial campaign oversight committees, voluntary codes of conduct, and campaign conduct agreements will increase. Judicial performance evaluations, already used in a number of states with retention elections, may increase in use.

Method of Selection for Trial Court Judges (Initial Term)



Source: NCSC National Court Statistics Project

The current tug-of-war over constitutional powers and attempts to constrain the courts will likely continue. New or revised versions of state ballot initiatives are also likely. More state legislation to strip courts of jurisdiction, cut their budgets, limit judicial pay or terms, and politicize judicial selection processes seems likely.

Innovative Practices

- The new *Kansas Commission on Judicial Performance* will conduct nonpartisan, qualification-based judicial performance evaluations based on court-user survey information to support a more informed electorate about judicial candidates.
- The *Iowa Judicial Compensation Commission* and the *Missouri Citizen's Commission on Compensation for Elected Officials* are independent commissions with constitutional or statutory authority to make binding recommendations regarding judicial salaries.
- Campaign oversight committees, such as the *Maryland Judicial Campaign Conduct Committee*, exist in 15 states, and are committed to enhancing the quality of judicial campaigns and candidate behavior.
- The U.S. Administrative Office of the Courts' *Courts to Classes* is one of many court-based, public-education outreach efforts to increase public understanding and confidence in the courts.
- Broad-based organizations are being created, such as Arizona's *Justice for All* and the *Missouri Legal Institute*, to provide support to state courts when under attack and to educate voters about the role of the judicial branch.

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www.judicialcampaignconduct.org.

STATE COURTS AND BUDGET CHALLENGES

Historical Basis

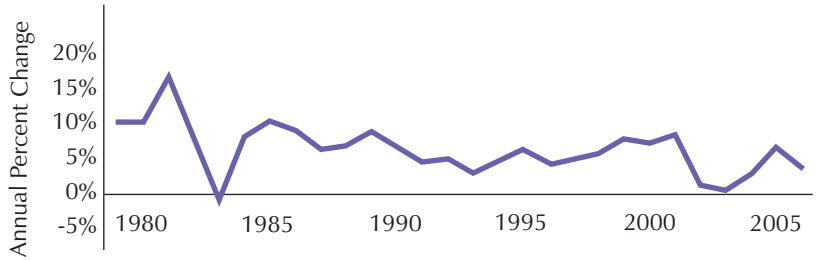
Any reductions that are made to court budgets have a disproportionately negative impact on services because court budgets are overwhelmingly composed of personnel expenses—levels range between 70-90 percent of expenditures. Consequently, reductions in court budgets translate to reductions in staff and, therefore, into reductions in service. State courts have addressed prior funding crisis by cutting spending, increasing court revenue, and increasing efficiency.

Spending reductions include cutbacks in out-of-state travel, hiring, pay raises, and court hours. Long-term budget cuts hit areas such as the education/training budgets, performance management, maintenance, and IT investment. On the revenue side, a measure used during fiscal shortfalls is an increase in fines and fees. Experts have challenged the value of this approach by suggesting that high fine and fee increases restrict access to justice and that the increases are temporary unless collection rates and methods improve simultaneously. Increasing efficiency often requires increasing investment in long-term programs such as PC/software upgrades, which can streamline operations, save man power, and increase fine and fee collection rates.

Present Conditions

Most states have seen widespread gains in the level of overall revenues during 2005-06 as a result of strong tax collections at the state level. The budgetary outlooks for most states as a whole are better than they have been since before the 2001 recession. However, the general improvement in revenues does not necessarily carry into judicial budgets. The tendency in many states is that once a court program is cut during a budget crisis, it is rarely restored to full funding. Additionally, state budgets are under increasing pressure to help provide funding for the soaring expenditures on Medicare and Medicaid. A majority of states have begun raising judicial salaries again after a multiyear lull (37 out of the 50 have raised salaries in 2006), which is generally a sign of increasing optimism in the legislatures.

State Annual Budgets, Percent Change, 1979 to 2006



Source: National Association of State Budget Officers

Probable Future

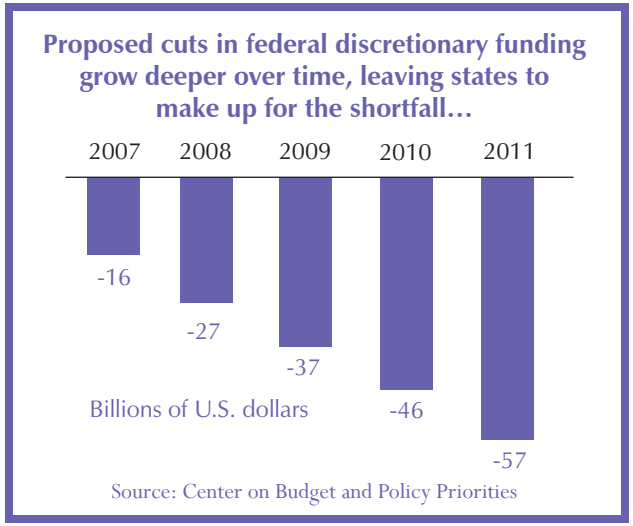
State budgets are difficult to predict in the long run, but there are two very foreboding fiscal trends for state courts. One, as mentioned above, the government's increasing liabilities for Medicare, Medicaid, and Social Security are making up larger components of both federal and state budgets. Since health-care costs are rising at a rate higher than inflation, as they have for several years, it would be prudent to say that this trend in increasing liabilities is going to continue indefinitely.

Two, the persistently high federal budget deficit is forcing the states to fund a greater proportion of traditionally federal government services. Without continual increases in tax revenues, sooner or later the federal government will have to reduce spending to balance the budget. The federal government has already begun shifting fiscal burdens to the states: Beginning in 2005, states noticed decreased federal grants and support to justice programs, transportation, and education. The many states with balanced-budget amendments will feel this pressure even more acutely. This trend, if it continues, will certainly put a great deal of strain on state coffers; by FY 2008, at least 19 states expect structural deficits.

Innovative Practices

While the trends discussed above do not seem very hopeful, the picture is not entirely bleak; there are a few measures that the courts and legislatures can take together to help protect judicial budgets from these fiscal problems.

A Change in Tactics. One of the principal problems faced by the judicial system is the relationship with the state legislature. Several states are trying to improve the flow of information between the two branches to ensure that a strong case for



the judicial budget is made and the need to be seen as an independent branch of government is reinforced. Several states have judicial councils composed of legislators, judges, and administrators, which make recommendations to the legislatures. A number of states also feature programs designed to familiarize new legislators with the courts and individual judges; these can range from having legislators "ride-along" (sit in during court proceedings) to holding "meet-and-greet" affairs where legislators and judges can discuss the issues of government and become more aware of each other's work.

Moving Toward General Funds. Another idea to ensure that priority areas get funding is for the courts to work with legislators and state executives to get more control over their own budgets. Rather than asking for increasing appropriations, some courts have compromised to increase their discretionary power over their budgets, asking for disbursement into general funds rather than programmatic allotments. This has the advantage of allowing the courts, who are in the best position to prioritize, to control the flow of money.

Alternative Funding Sources. Finally, there are opportunities for the courts to seek funds beyond the traditional legislative and executive sources. For example, some states seek support for problem-solving courts via the Substance Abuse and Mental Health Services Administration (SAMHSA). There is also some grant support through the State Justice Institute (SJI) and nonprofit entities such as the Mary Byron Foundation and the Wachovia Foundation.

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PROBLEM-SOLVING COURTS

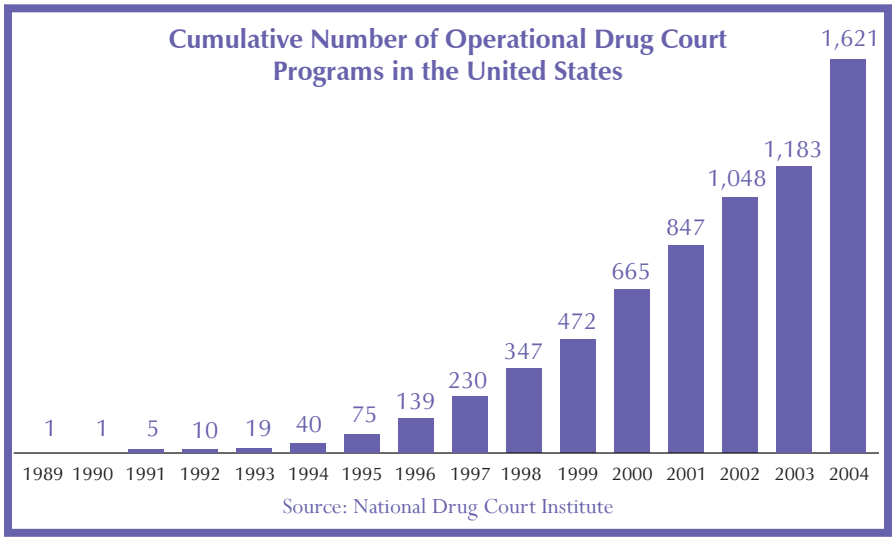
Historical Basis

Problem-solving courts are designed to hold criminal defendants accountable while addressing the underlying issues that resulted in the criminal activity with which the defendants are charged.

One of the best-known types of problem-solving courts is the drug court. Drug courts began not as the therapeutic courts we know today, but as an efficiency measure in which courts would hear all drug cases, sometimes bundling all the defendant's cases together, on a single day of the week.

The more attention courts paid to these cases, the more it became clear that defendants required more than quick case processing. Treatment, sometimes difficult to obtain, and even more difficult to follow through with, was also in order. Courts used the drug dockets to solve a variety of related community problems. Thus, therapeutic drug courts provide an early example of a problem-solving court.

The therapeutic jurisprudence movement views courts as conduits by which defendants, and indeed society, can better themselves. Problem-solving courts spread to other areas—DUI, quality-of-life crimes, and mental health, among others.



Key elements of problem-solving courts have been identified:

- focus on outcomes
- system change
- judicial involvement
- collaboration
- nontraditional roles
- screening and assessment
- early identification of potential candidates

Present Conditions

Long-term success and continued existence are two issues faced by problem-solving courts today.

Funding is an issue for many problem-solving courts. Early drug courts began with seed money from the federal government. After these funds lapsed, states and localities were forced to pick up the slack. The long-term survival of these courts depends on a creative and multifaceted approach to funding.

Measuring success is another hurdle faced by problem-solving courts. Problem-solving courts cannot be compared to traditional courts. The investment of judicial time, collaboration with entities such as probation and treatment providers, and holistic view of the issues prohibit problem-solving courts from being measured in the same way as other courts. The ability of problem-solving courts to get to the root of the matter means that recidivism and the long-term health of the defendant will be factors demonstrating success or failure. Short-term failures, such as "falling off the wagon," are part of the process. This challenge will likely continue as courts struggle for funding.

Probable Future

Problem-solving courts may well spread to other subjects. However, not all "specialty courts" are of a problem-solving nature.

One goal identified by those in the field is to integrate the principles of therapeutic jurisprudence into the court system as a whole. Thus, traditional courts would use the lessons learned from problem-solving courts.

The funding and performance measurement challenges discussed above will continue to present challenges to problem-solving courts. Best practices with regard to both issues should emerge in the future.

Some Problem-Solving Courts

DWI Court
Family Dependency Treatment Court
Gambling Court
Gun Court
Homeless Court
Mental Health Court
Teen Court
Tribal Healing to Wellness Court
Truancy Court

Drug Court
Adult Drug Court
Campus Drug Court
Juvenile Drug Court
Reentry Drug Court

Source: C. West Huddleston III et al. *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*. Vol. 1, no. 2 (May 2005).

"Courts are community problem-solvers. . . . Any group you can name has a stake in the strength and the integrity of the judiciary. The most difficult problems of our society are laid at the steps of the courthouse."

Paul J. De Muniz, Chief Justice of Oregon

Innovative Practices

The National Center for State Courts has created a database (www.ncsconline.org/D_Research/ProbSC/) by which one may search state-by-state for the following types of problem-solving courts:

- community
- domestic violence
- drug
- family
- mental health
- reentry
- other

Early in 2006, the first National Problem-Solving Courts Summit was held in Washington, D.C. The summit was hosted by the Problem-Solving Courts Committee of the Conference of Chief Justices and the Conference of State Court Administrators. The group identified areas for future study and development, including:

- institutionalization
- training and education
- advocacy
- research and evaluation

Another innovation in this area can be seen in law schools. Although they have traditionally aimed to produce adversarial lawyers, law schools are teaching and fostering therapeutic jurisprudence. Students at the Marshall-Wythe Law School at the College of William & Mary (Virginia) formed the Therapeutic Jurisprudence (TJ) Society, which "seeks to further [therapeutic jurisprudence] goals and views through the promotion of academic study, scholarship, research, community involvement, and collaboration with other organizations." The infusion of therapeutic jurisprudence into law-school education will create a new generation of lawyers who think and work differently.

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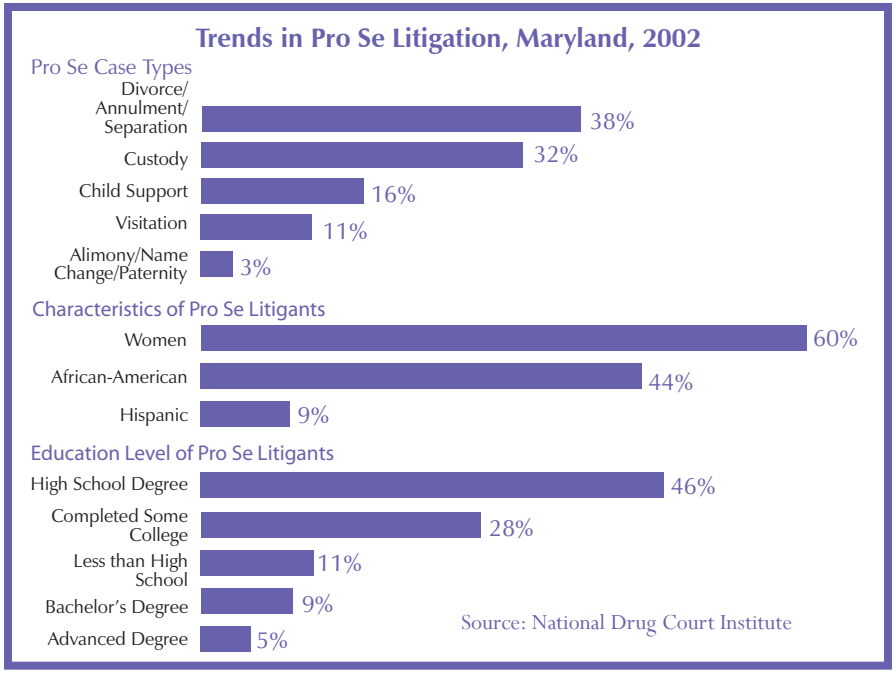
ACCESS TO JUSTICE: THE SELF-REPRESENTED LITIGANT

Historical Basis

In the last few years, a growing number of court professionals have come to realize that self-represented litigants are not just a minor, peripheral source of irritation for court administrators and judges. Rather, they see that self-represented litigants provide a large and important percentage of the courts' customer base, and innovations in access for the self-represented will significantly improve the functioning and reputation of courts. Attention to self-represented litigation issues serves the interests of all court users and staff, not just the self-represented litigants. Expanding assistance to self-represented litigants is an integral part of providing all Americans with equal access to justice.



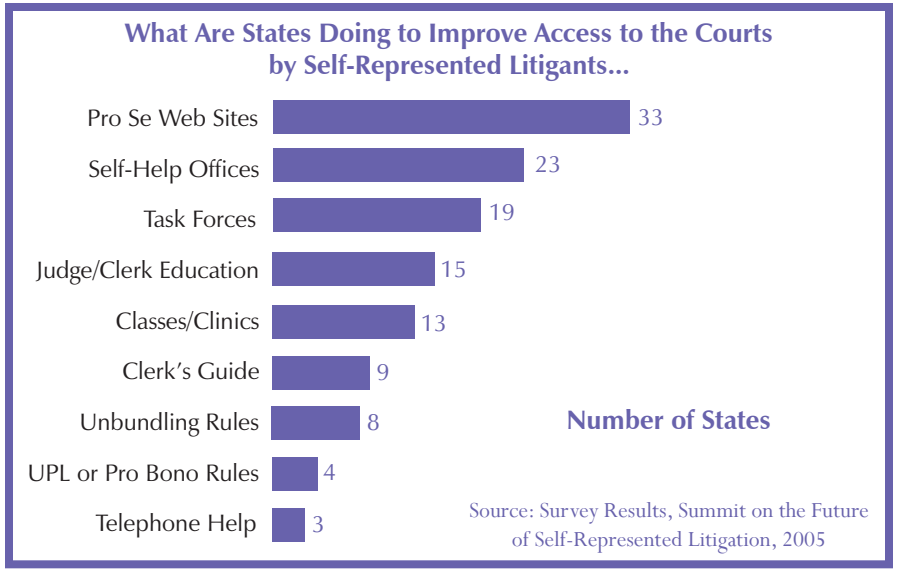
Courts agree that the numbers of self-represented litigants have been increasing over the last ten years. This increase has placed a burden on judges, court staff, and court processes and is expected to continue. Self-represented litigants are most likely to appear without counsel in domestic-relations matters such as divorce, custody and child support, small claims, landlord/tenant, probate, protective orders, and other civil matters. Studies from several states have shown that while significant majorities of the self-represented come to court without lawyers because they cannot afford to obtain one, they are not limited to the poor. The self-represented include a broad range of income and educational levels. In many courts and parts of the system they may represent 50 to 80 percent of the caseload.

Present Conditions

A survey by the American Judicature Society in 2005 found, "eleven states have established reasonably comprehensive programs in support of self-represented litigant access, nineteen states have partially integrated programs, fourteen states were described as 'emerging.'" The courts, the bar and legal aid have cooperated to establish many of these programs.

Many states have set up task forces, commissions, or committees to study the number of self-represented litigants in their states, and ways to address their needs. Current assistance for self-represented litigants include: self-help centers, one-on-one assistance, court-sponsored legal information assistance, Internet technologies, and various collaborative approaches (workshops, clinics, videos, telephone assistance, mobile service centers, lawyer-for-a-day programs). In addition to the courts, legal-service providers and libraries play a role in providing assistance to self-represented litigants.

Many courts have developed Web sites geared toward self-represented litigants that provide information such as online forms, instructions, and guides. Some courts have case coordinators to assist self-represented parties. In Washington State, facilitators refer parties to legal, social-service, and ADR resources; assist in the selection, completion, and distribution of forms; explain legal terms; provide information on basic court procedures; and preview pro se pleadings to ensure procedural requirements have been met. Several courts are adopting protocols for judges to use during hearings involving self-represented litigants, as well as changing court rules to allow court staff to provide assistance to self-represented litigants.



Probable Future

Every indication is that courts will become more user-friendly to those choosing self-representation. Technology will continue to play an increasing role. Web-based document-preparation tools, interactive forms, and electronic filing will become more commonplace. Courts will use videoconferencing workshops and clinics to assist self-represented litigants. Courts will consider systematic change to make access more user-friendly for this growing population. Innovations will include enhanced education for judges, dedicated calendars for self-represented litigants, formalized services, judicial support such as bench books, compliance support programs, and collaborations. This will be a major cultural change for many courts. Once courts realize that programs to assist self-represented litigants can save the court time, they will embrace these changes.

Innovative Practices

- Maryland provides statewide assistance to self-represented litigants with Family Law Self-Help Center programs in nearly all circuit court jurisdictions.
- A statewide project between the Supreme Court of Idaho, Idaho Legal Aid Services, and the Idaho Pro Se Project is underway to convert 300 court forms to an online format that has a document-assembly component.
- A live chat component of the Montana LawHelp Web site allows users to obtain information related to self-representation.
- Rural counties in California participate in SHARP (Self-Help Assistance and Referral Program) videoconferencing workshops.
- Minnesota, Florida, California, Idaho, and Wisconsin have adopted court rules that clarify when and how court staff can assist self-represented litigants and protocols to be used by judges during pro se hearings.
- At least eight states (California, Colorado, Florida, Maine, Nevada, Minnesota, Washington, and Wyoming) have amended their rules of ethics and/or civil procedures to permit attorneys to unbundle legal services.
- The Legal Document Preparer Program of the Arizona Supreme Court certifies non-attorney legal-document preparation providers.
- Several court Web sites, including California, Arizona, and Minnesota, provide court forms and guides in different languages.

RESOURCES

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http://www.ncsconline.org/wcds/Pubs/pubs1.asp?search_value=53

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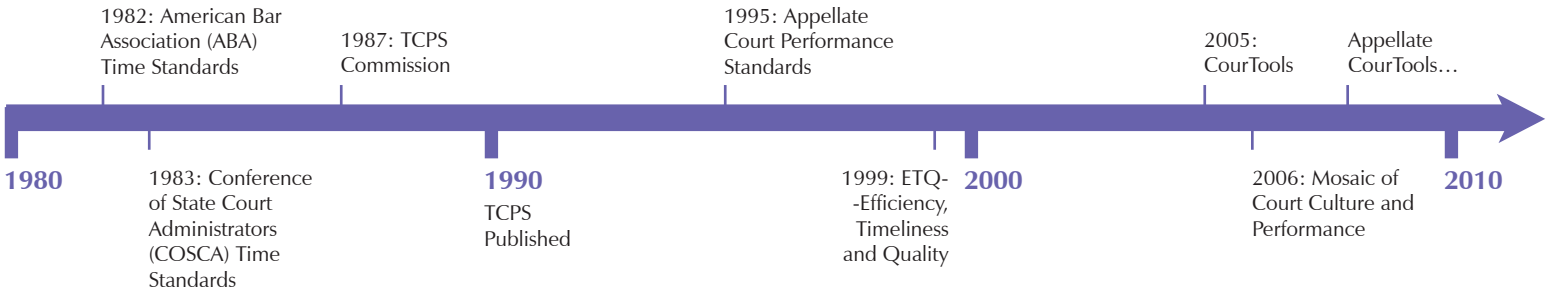
MEASURING COURT PERFORMANCE

Historical Basis

In the private sector, the principal measure of successful performance is profitability. A number of performance measure strategies, including six-sigma quality, TQM, and Quality Circles, emerged over the past several decades to help guide and manage the world's largest private-sector enterprises. Public agencies, on the other hand, have no such universal and widely accepted performance measure of success. For state courts, success can be more abstract; concepts such as equality, fairness, and liberty are difficult to measure.

All high-performing organizations, whether public or private, must be interested in developing and deploying effective performance measurement and management systems. Success is often viewed from the distinct perspectives of various court constituents such as legislators, regulators, vendors and suppliers, the general public, and other governmental bodies. Therefore, it is important that court performance measures be created, implemented, and monitored by all of these stakeholders.

Three Decades of Court Performance Measurement



Present Conditions

Courts are increasingly under pressure to improve their operations and deliver products and services more efficiently, and at the lowest cost to taxpayers. Performance measurement is a useful tool in this regard, since it formalizes the process of tracking progress toward established goals and provides objective justifications for organizational and management decisions. State courts currently use a variety of individual non-standardized performance measures, not typically integrated under a comprehensive and easily comparable system.

The NCSC is currently initiating the CourTools project, which blends successful public- and private-sector performance ideals. This balanced set of court performance measures provides the judiciary with the tools to demonstrate effective stewardship of public resources. Being responsive and accountable is critical to maintaining the independence courts need to deliver fair and equal justice to the public.

". . . chart a course for every endeavor that we take the people's money for, see how well we are progressing, tell the public how we are doing, stop the things that don't work, and never stop improving the things that we think are worth investing in."

President William J. Clinton, on signing the Government Performance and Results Act of 1993

Probable Future

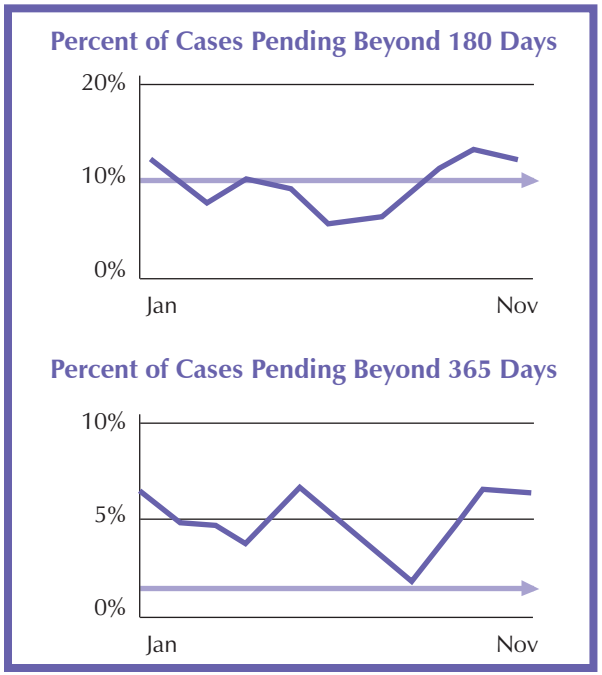
The future of court performance measurement is assessing how effectively courts can adopt and tailor CourTools to their individual organizations. With CourTools performance indicators in place, judges and court managers will gauge how well courts are achieving basic goals, such as access and fairness, timeliness, and managerial effectiveness.

Not everyone will see and accept the purported benefits of court performance measurement. Skeptical reactions will range from "performance measurement won't tell us anything we don't already know" to "we're happy with the way things get done now" to "we just don't have the time and money to even try this." These types of reactions show the need for a discussion of why the bench and court managers should devote energy to the systematic and ongoing task of performance measurement.

Courts are just now beginning to examine the concepts of more formal performance measurement.

"With CourTools, state courts now have a balanced and focused set of performance measures. The key, of course, is actually using performance information to improve the work of the courts. Over the next decade, the biggest challenges will be sustaining these efforts and creating effective ways for courts to show they are delivering quality and value to the public."

Brian J. Ostrom, Ph.D., CourTools Project Director



List of CourTools Measures

1. Access and Fairness
2. Clearance Rates
3. Time to Disposition
4. Age of Active Pending Caseload
5. Trial Date Certainty
6. Reliability and Integrity of Case Files
7. Collection of Monetary Penalties
8. Effective Use of Jurors
9. Court Employee Satisfaction
10. Cost per Case

RESOURCES

National Center for State Courts. *CourTools.* http://www.courtools.org

National Partnership for Reinventing Government. *Serving the American People: Best Practices in Performance Measurement*, United States Government. http://govinfo.library.unt.edu/npr/library/papers/benchmrk/nprbook.html#executive

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The Impact of an Aging Population
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Map courtesy of *Caseload Highlights* series, National Court Statistics Project

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KIS thanks all reviewers for their comments on the trends.

A CLOSER LOOK AT...

COURTHOUSE SECURITY

THE ANTI-GOVERNMENT MOVEMENT TODAY

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Thought by many to be in decline, mitigated perhaps by tough prosecution, organizational incompetence, infighting, and the nonappearance of the New World Order, the anti-government movement groups have been "quietly retooling" since their peak in the 1990s. [1]

The assaults on the World Trade Center and the Pentagon on September 11, 2001, as well as recent attention on natural disasters and pandemics, may well have diverted our attention from internal extremist activities to focus on other potential, high-profile emergencies. Any attempt to discount these groups and the threat they pose to courts and judicial officers is shortsighted, especially in this era of increased attentiveness to court security issues. According to Dr. Mark Pitcavage, "These new militants seemed angrier and more volatile than the fringe figures of the past, bent on attacking America in order to save it—no matter how great the 'collateral damage.'" [2]

Moreover, while current discussions of extremism focus on Islamic terrorism, the heightened attention to public threats increases the scrutiny of domestic terror. In a new way, court leaders must be equally diligent to identify and measure the scope of extremist activity and its potential threat to court security and procedures.

This article attempts to identify the trends in the anti-government movement and serves as a reminder of potential resources on extremism. Special thanks go to the Anti-Defamation League (ADL) and their law-enforcement Web site (www.adl.com/LEARN). The site provides numerous entries about the prominent players and trends in the extremist world, including a comprehensive list of groups and an index of the most prominent symbols used by hate groups.

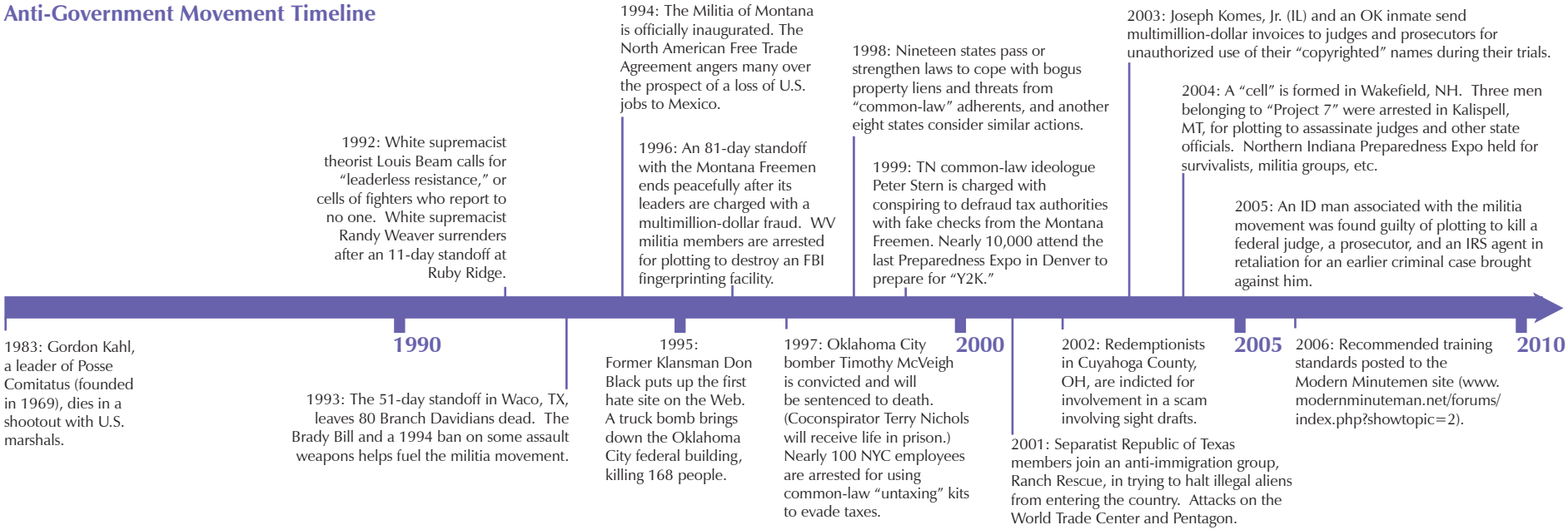
According to the ADL, the landscape of American extremism constantly changes. Recent years witnessed:

- increasing emphasis on "lone-wolf" activism (acting in small cells or alone to avoid arrest);
- the ascendancy of the Internet as an instrument for organizing extremists and disseminating information;
- the use of "white-power" music as a recruiting mechanism by professional bigots like National Alliance head William Pierce;
- the emergence of Holocaust denial as an extremist *lingua franca*, both domestically and worldwide, as well as budding alliances between Western deniers and their Middle Eastern counterparts—even as David Irving lost a widely publicized libel lawsuit and other deniers were repeatedly defeated in their courtroom battles;
- the increasing role of women (who are held in low esteem by the traditional militia groups) in far-right movements;
- the apparent demise of the neo-Nazi stronghold Aryan Nations after the group and its aging leader, Richard Butler, lost a multimillion-dollar civil decision (stemming from an assault by its security guards);
- opportunistic support of the anti-globalization effort and of the Palestinian cause by some on the far right;
- the convergence between the radical right and some elements of the radical left—conspiratorial anti-globalists and hard-core anarchists in particular;
- the emergence of a new and active anti-government extremist group that calls itself the "Little Shell Pembina Band of North America";[3] and, most recently,
- increased support of foreign anti-American terrorists.

The Militia Movement Today

The militia movement is the youngest of the major right-wing anti-government endeavors in the United States (the sovereign-citizen movement and the tax-protest movement are the two others), yet this movement has seared itself into the American consciousness as virtually no other fringe movement has. The publicity extended to militia groups in the wake of the Oklahoma City bombing in 1995, although the militia movement was erroneously linked to that tragedy, made

Anti-Government Movement Timeline



them into a household name. Indeed, reporters, pundits, and politicians alike use the term so frequently that it is often bandied about carelessly as a synonym for virtually any right-wing extremist group.

Even though militia groups were not, in fact, involved with the Oklahoma City bombing, they have nevertheless embroiled themselves since 1994 in a variety of other bombing plots, machinations, and serious violations of law. Their extreme anti-government ideology, along with their elaborate conspiracy theories and fascination with weaponry and paramilitary organization, lead many members of militia groups to behave in a manner that justifies the concerns expressed about them by public officials, law enforcement, and the general public.[4]

Experts say that by the mid-1990s, all 50 states harbored an organized anti-government group. By 1996, the number of militia and patriot organizations had grown to 858 identifiable groups, including 380 armed ones according to the Southern Poverty Law Center's Klanwatch. These figures don't even include secessionist campaigns, which deny that Texas, Hawaii, and Alaska are legally part of the United States; property-rights and land-use advocates, who deny the legality of environmental and other federal laws; and tax protesters, who refuse to pay taxes on the grounds that the IRS is an illegal entity. Nor do the center's figures include radical environmentalist, ultra-fundamentalist, hate, or survivalist groups. Moreover, the emergence of a more sophisticated economic infrastructure and information network has given a sense of permanence to what experts are now calling a "movement."

Redemption Scams

Would you like to obtain the hundreds of thousands of dollars that the government holds in your name? Would you like to discharge your debts, including car payments, taxes, and child support? What if getting a traffic ticket meant that the government would pay you for an amount you specify?

These promises by the "redemptionists" are like most things that sound too good to be true. The "redemption scam" is an unusual and quite destructive tactic, which has come to light in recent years. The scam literally capitalizes on forces already in place—jailed militia members, the bogus legal history devised by anti-government groups, and basic human greed and need.

Source: Anti-Defamation League

The idea behind the scam amounts to convoluted and bogus revisionist legal history. With handbooks circulating in prisons, audiotapes and books available for purchase,[5] seminars offered across the country, and information on the Internet, the procedures are tried by a range of people, many of whom may not have ties to anti-government groups.[6]

Particularly troubling and difficult to stem is the tide of state corporation commission (SCC) filings. The challenge with these filings is that, unlike liens and other documents, they are not filed in court. (However, Pitcavage notes that one benefit to this system is that filings exist in a centralized place, unlike court filings, which are county-by-county, so that a pattern is easier to discern.[7]) Such scams are prolific in jails, where "Moorish Nationals" have latched onto the procedure.

Due to the combination of new technology—electronic filing—and the ministerial nature of SCCs, there is very little procedure by which an SCC can screen or even view bogus filings.[8] But these and other frivolous filings do have distinctive markings. Red flags to watch for include:[9]

- A © symbol after the person's name
- Names in all capital letters
- Putting punctuation before the surname
- Using terms or initials after the person's name ("sui juris" or "SPC," for example)
- Debtor and secured party have the same name (although one may be in all capital letters, or surname first)
- No zip code, or putting brackets around a zip code
- The phrase "debtor is transmitting utility"
- Use of the term "Employer ID Number" rather than "Social Security Number"
- Reference HJR-192
- Gratuitous references to the Uniform Commercial Code (UCC)
- References to scripture[10]

How can such filings be stopped? The solutions involve various groups working together—prosecutors, courts, state corporation commissions, prison personnel, and other entities. Offenders who are already serving life without parole for other crimes pose particular challenges. In Virginia, one such inmate filed UCC financing statements with the state SCC in which he named himself as a secured party for total debts of $108,000,000 owed by federal judges, prison employees, and a clerk of federal court.[11] He was evidently not part of any organized group, but learned the tactics from a manual circulating the prison system. After a lengthy paper battle, the courts, prosecutors, and prison staff finally collaborated and used what appeared to be the only remedy at their disposal: holding him in criminal contempt, with fines taken from his canteen account, and viewing the situation as a violation of prison rules meriting segregation.

Prisons—The New Front

Not surprisingly, with the tougher prosecution of extremists in the latter part of the 1990s, prisons have begun to see a notable increase in activity. Convicted anti-government leaders have come to see prison as a great opportunity for recruiting. Mark Pitcavage, the fact-finding director for the Anti-Defamation League, recently

spearheaded a study of the contemporary prison-gang scene called "Dangerous Convictions: An Introduction to Extremist Activities in Prisons." The *Intelligence Report* interviewed Pitcavage, a historian and expert about the radical right, about the findings of the ADL's 52-page report:

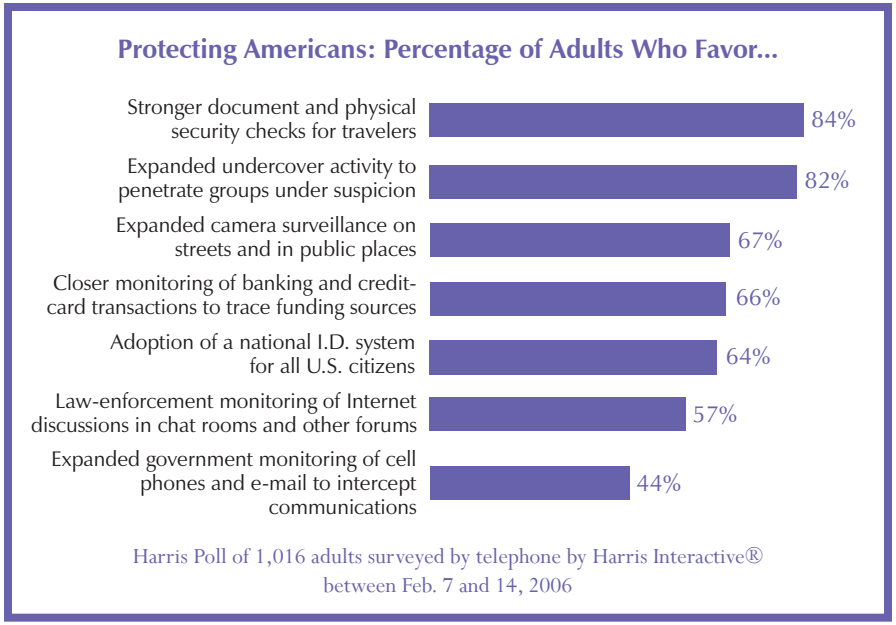
> Take Leroy Schweitzer, the Montana Freeman [a form of "sovereign citizen"] leader who's in federal prison in South Carolina serving a 22-year sentence for various financial scams. He's teaching prisoners how to engage in "paper terrorism," how to file bogus liens against public officials, attorneys and others. He even showed one jewel dealer serving a 40-year sentence on money laundering charges how to file a [bogus] $1.5 billion lien against the judge in his case. Other imprisoned ideologues try to influence followers outside of prison. Craig "Critter" Marshall, an environmental extremist serving a five-year sentence for conspiracy to commit arson, told Earth First! readers last year that the only form of solidarity he wants is more arsons. He wrote something like, "When someone picks up a bomb, instead of a pen, is when my spirits really soar."

Conclusion

Though in decline since the deadly Oklahoma City terrorist bombing in April 1995, militias have been enjoying a quiet upsurge since 9/11. While new trends like the redemption scams and the Little Pembina Shell Band will almost certainly emerge from time to time, many old-line militias have tried in recent years to reposition themselves as a force on local political and environmental issues.

Some of the bigger, old-line militias have even shifted their focus since the attacks on the World Trade Center and the Pentagon to battling terrorism by providing security training and selling survival gear. In Michigan, once the hotbed of the militia movement, militia groups went one step further: they've offered the government their expertise in training domestic anti-terrorist forces.

That's a dramatic departure from the militias of just a decade ago. Only time will tell whether the shift may be genuine, or at least partly so. Nevertheless, courts, prosecutors, state agencies, and prison staff must work together to identify and stem frivolous filings. Attorneys general can work to root out the fraudulent scams perpetuated by con artists. And those responsible for court security must keep such groups and tactics on their radar screens, and be aware of these issues when planning security measures.



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ENDNOTES

1 Mark Pitcavage. "The Quiet Retooling of the Militia Movement." Anti-Defamation League, 2004.

2 Ibid.

3 Members of the group claim that they belong to a sovereign Native American tribe and, therefore, are not subject to laws and regulations. Although it started as a tribe, the "Little Shell Pembina Band" is part of the anti-government "sovereign-citizen" movement. Unlike true Native American tribes, one need not be genealogically linked to the tribe to become a member. Its members' activities range from driving with bogus license plates to perpetrating insurance fraud to committing tax evasion.

4 Pitcavage, "Quiet Retooling," 2004.

5 "Discover how your governmentally-created, ALL-CAPITAL LETTERS-WRITTEN NAME, which is a corrupted, non-standard English version of your true name *and compromises you with an entirely separate legal entity that*-is used by banks, government agencies, and corporations to attack and exploit you legally and financially." *Redemption in Law*, 2nd ed., July 2000.

6 Jean Keating Work Shop (December 25, 2004), posted on the Austin Freedom School site: www.freedom-school.com/keating_seminar_transcription.pdf.

7 Mark Pitcavage, "Old Wine, New Bottles: Paper Terrorism, Paper Scams and Paper 'Redemption,'" *Militia Watchdog Bulletin* (November 8, 1999) (www.adl.org/mwd/redemption.asp). "The fact that they file with the Secretary of State is a fortuitous happenstance, because it means that there is a centralized repository for much of these filings, whereas in many previous such schemes, filings were only done at the county level, meaning that a state that wanted to track the scheme had to contact every single county."

8 "With the advent of electronic filing of UCC statements with the Clerk's Office, which is expected to be available later this year, there will be little, if any, human involvement or intervention with UCC documents that are electronically filed." *State Corporation Commission v. Martin & Falice*, Response to Petition, (c)(d), at 5.

9 *Intelligence Report*, "Behind the Walls." An expert discusses the role of race-based gangs and other extremists in America's prisons. Southern Poverty Law Center, Winter 2002. http://www.splcenter.org/intel/intelreport/article.jsp?sid=55.

10 One such filing quoted Proverbs 17:18: "A man void of understanding striketh hands, and becometh surety in the presence of his friend."

11 *Falice v. Mullen, et al*. 2004 U.S. App. LEXIS 11275 (June 7, 2004). See also *Williams, et al., v. Martin & Falice*. No. CLK-2004-00011, Final Order, State Corporation Commission, December 20, 2004.

A ROAD MAP FOR THE DESIGN AND IMPLEMENTATION OF A STATE COURT EMERGENCY MANAGEMENT PROGRAM

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State courts have expressed an urgent need to develop and enhance their emergency-preparedness programs. This article provides a model for the development of an emergency-preparedness program.

Since the tragic events of September 11, 2001, and the 2005 courthouse violence in Fulton County, Georgia, the murders of a federal judge's family, and the effects of Hurricanes Katrina, Rita, and Wilma, state judiciaries have contemplated ways to improve courthouse and perimeter safety and security and ensure continuity of operations when faced with a disaster. While some courts have sophisticated, detailed programs, others have struggled to identify requirements, capabilities, and the expertise necessary to design and implement programs. This article is intended to provide judicial officers and court executives a road map to create a robust, multidisciplined emergency management program regardless of the size of the court.

The purpose of any emergency management program is to protect people and property; ensure the ability to continue essential judiciary functions when confronted with a broad array of disruptions; respond effectively to the disruption; and return to normal operations as soon as practicable after the crisis.

The figure below displays the six components of a typical emergency management program.

First, the success of any program depends on the endorsement and commitment of chief justices, chief judges, and other court administrators. Court leadership must endorse the development and implementation of a program, provide continued commitment to its life-cycle maintenance, and lead that commitment to court employees and external stakeholders. Without this imprimatur, court personnel may have little incentive to make the time commitment necessary to develop and implement the program.

The chief justice or chief judge should designate one person and an alternate, such as a state court administrator or clerk of court, to lead the program development effort. A multidisciplinary working group composed of court managers and those that provide court security should be convened to design, develop, and implement

A Strategic Model for a Comprehensive Emergency Management Program
Program Elements

Program Management
- Leadership Commitment
- Guidance/Laws
- Internal Coordination
  - All Staff
  - Advisory Council
  - Coordinators
- External Coordination
  - State and local Agencies
  - Sheriff's Office
- Multiyear Strategy

Prevention
- Risk Assessments
- Facility, Perimeter, and Physical Security
- Personal Security and Safety Procedures
- Business Impact Analysis

Preparedness
- COOP Plan (includes pandemic)
- IT Disaster Recovery Plan
- Evacuation Plan (includes shelter-in-place)
- Critical Incident Procedures

Response
- Plan Activation
- Emergency Response Teams
- Crisis Communication
- Go Kits
- Checklists

Recovery
- Activities to Return Operations and Administration to Normal Operations
  - IT Systems
  - Voice and Data Communications
  - Business Operations
  - Personnel

Training
- Testing
- Exercises

the program. The court could consider using an existing group, such as a court security committee, to serve as the working group.

Program Management begins with understanding federal guidance, which provides the framework for any emergency management program whether it involves the three branches of federal or state government, non-government agencies, or the commercial sector. For example, Federal Preparedness Circulars (FPC) 65, 66, and 67 set standards and guidelines for Continuity of Operations (COOP), and Homeland Security Presidential Directives (HSPD) 1, 2, 3, 5, and 8 established requirements for the prevention, preparation, and response systems of the Department of Homeland Security. HSPD 5 established the National Incident Management System (NIMS), which is required of all states, tribes, and territories. By extension, some state emergency management agencies require courts and other government and non-government agencies to comply with this standard to obtain Homeland Security funding. State courts should also know what Homeland Security guidance exists that is unique to their jurisdiction, be it state, territory, or tribe, and consider all these when developing the program components.

Prevention activities are plans designed to protect occupants and visitors (including prisoners) in court facilities, as well as the court facility and perimeter. Activities to achieve these goals are facility and perimeter security-vulnerability assessments and gap analysis, risk analysis, and risk management plans. Once the vulnerabilities and gaps are identified, steps should be taken to correct the problems. For those gaps that cannot be corrected or mitigated, the court should develop a risk mitigation and management plan. This will help the court understand which things are and are not in their control and to prioritize the impact of the risk on essential court functions. Court security entities, e.g., sheriff's office, whether internal or external, must be involved in this analysis, as well as in plan development and mitigation efforts.

Preparedness activities involve creating plans to respond to a broad array of disruptions (see Figure 2).

Preparedness plans typically include, at a minimum, *Continuity of Operations Plans (COOP plan)* that may contain a pandemic annex; *Disaster Recovery Plans* that specifically address the continuity of information technology systems; and *Evacuation Plans* that also include shelter-in-place procedures. COOP plans are designed

Figure 2
Potential Security Disruptions

Natural Hazards	Human-Induced Hazards	Terrorism
• Floods • Storms • Hurricanes • Virus or epidemic • Earthquakes • Fires	• Vandalism • Transportation or incidents • Arson/Fire • Hostage taking • Attacks by aggrieved litigants • Prisoner escapes	• Conventional weapons • Incendiary devices • Biological agents • Chemical agents • Nuclear agents • Cyber-terrorism • Weapons of mass destruction (utilizing one or more of the above)

to ensure the performance of essential court business for 30 or more days, are usually performed at an alternate site because the primary facility is unavailable or inaccessible, and typically contain the following 11 components:

- Alert and Notification Procedures
- Essential Functions
- Alternate Facilities
- Order of Succession
- Delegations of Authority
- Vital Records, Databases, and Information Systems
- Interoperable Communications
- Communications
- Human Capital
- Devolution
- Reconstitution

It is important for state courts to understand and use these industry terms to ensure commonality when working with external stakeholders and partners, particularly if the court intends to seek state or federal funding assistance. The standard definitions of the COOP plan components can be found at http://www.fema.gov/doc/government/coop/coop_plan_template_instructions.doc .

A *Multiyear Strategy* to help court leadership project and plan for the costs of a security program's life cycle, enhancement, and maintenance costs can be developed and sustained during the preparedness phase. The strategy also should contain a plan for maintenance and a test and training schedule.

Response is the activation of the preparedness plans, including relocation of essential functions and the emergency response team to alternate sites.

From *Emergency Preparedness in Dependency Courts* (NCSC 2006)

Recovery plans are those that contain steps to return court personnel, operations, administrative functions, and infrastructure to pre-event status.

Finally, **Test, Training, and Exercise** plans should be developed and executed annually. Prevention and preparation plans are of no use if employees and emergency response teams are unaware of how they should respond in a crisis. By testing plans, e.g., table-top exercises, leadership can identify gaps and strengthen capabilities, and simulated exercises help the emergency response and essential function team rehearse the prevention and preparedness plans.

Effective emergency management programs integrate each of the six elements; demonstrate commitment from judicial officers and court leaders; involve collaboration between key internal and external personnel for the development, implementation, and maintenance of the program; and deliver a robust training and testing program. Following this road map will ensure that courts can sustain their essential functions, protect their most valuable assets, respond to a broad array of emergencies, and efficiently recover from a crisis or disaster.

PROTECTING COURT STAFF: RECOGNIZING JUDICIAL SECURITY NEEDS*

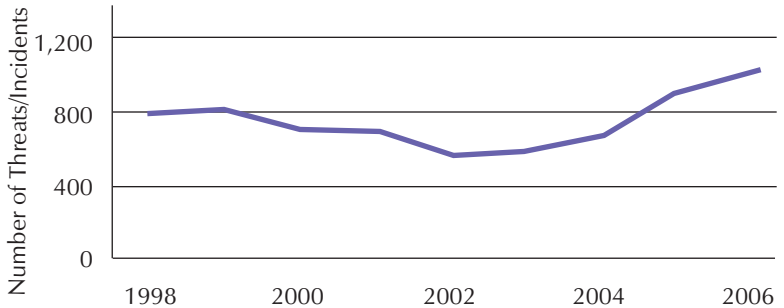
National Center for State Courts Staff
with George Perkins, KIS Research Assistant

The number of incidents against the federal judiciary has been increasing, and it is expected that the incidents against state judiciaries have as well, but an incident-reporting system for states is not yet available to track the trends. A more comprehensive knowledge of potential risks, such as developing threat-assessment databases and collecting statistical data on judicial incidents, will make state courts safer for employees. Even with a better understanding of security threats, judges and court staff should remain vigilant against potential risks.

Background

The history of violence against the judiciary provides horrific examples of assaults, shootings, and murder. In the last several years, there have been several highly publicized incidents of disgruntled court clients injuring or even killing judges and other court staff. One Georgia state judge and two courtroom officials were fatally shot in an Atlanta courthouse in 2005.[1] A year later, Judge Chuck Weller was injured by a sniper at a Reno, Nevada courthouse; the attacker was in a divorce case presided over by Weller.[2] In 2003 a Georgia state judge was shot in the back, not in the courthouse but while at her house.[3]

Threats/Incidents Against the Federal Judiciary



Source: U.S. Department of Justice; U.S. Marshals Service

Future Trend of Violence in the Courts

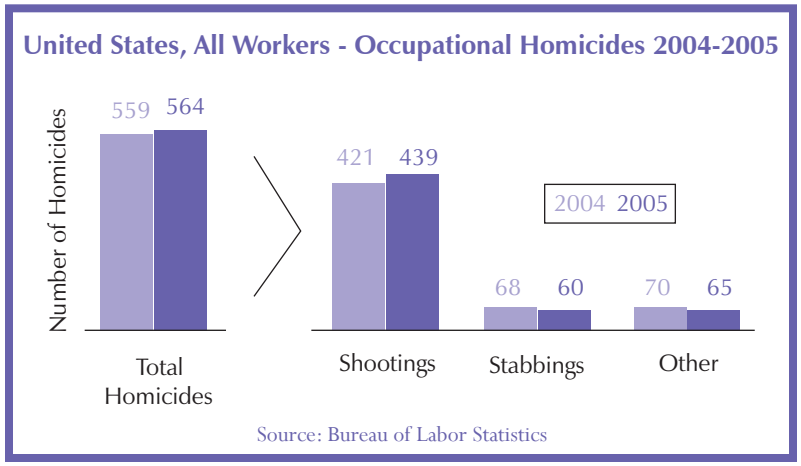
A 2004 study by the U.S. Department of Justice shows the number of threats to the federal judiciary decreasing between the years 1998-2003, but increasing dramatically since then.[4] In 2002 the United States Marshals Service (USMS) reported 565 incidents, but by 2004 this had increased by almost 20 percent to 674 incidents.[5] More than 900 incidents against the federal judiciary were recorded in 2005.[6] By July 2006, the USMS has already documented 822 incidents of threats and inappropriate communication, with more than 1,000 incidents estimated by the end of the fiscal year.[7] If this trend continues, it is likely that the number of reported incidents against the federal judiciary will be more than 1,200 by 2008. Note that this marked increase of incidents at the federal level is likely to be the result of increasing violence toward federal judicial officials, but may also be a result of better reporting mechanisms and public awareness.

There are no comparable figures of threats against state and local judges and court staff because most states do not collect statistics on threats in an incident-based reporting system. Consequently, no aggregate number of incidents can be compiled at the national level. Because state and local courts have significantly larger case volumes and many more judges than the federal judiciary, it is likely that more incidents occur in state courts than in federal courts. One recent study of risks to court employees, conducted by the Bureau of Justice Assistance (BJA) in June 2006, shows that 16 judicial employees, including 8 judges, and 42 court clients have been killed in the last 35 years. During that same time frame, more than 40 judicial officials and 53 court clients have been assaulted.[8]

The threat of violence varies by case type. Though criminal cases provide potential for violent incidents, domestic relations and other civil cases also present opportunities for violence.[9] Because emotional levels are heightened and security preparations are usually less stringent than in criminal cases, domestic relations and other civil cases provide an atmosphere where violence can erupt.[10] Court security staff should make sure all court clients, including the courtroom spectators, are following adequate security measures to ensure courthouse safety.

Because case volume is much higher in local and state courts, the chances of a tragic event are far more likely than in the federal courts. Even diagnosing the extent of the problem is difficult without data on violent incidents in state and local

courts. The Secure Access to Justice and Court Protection Act of 2005 appropriates "grants . . . to the highest State courts in States participating in the program, for the purpose of enabling such courts to establish and maintain a threat assessment database."[11] A comprehensive threat-assessment database will allow state and local court-security staff to implement appropriate security measures and prevent potentially dangerous situations. If this legislation becomes federal law, the database funds would be available between the fiscal years 2006-09.



Concern for the safety for judges, court staff, and people who use the courts extends beyond the courthouse. Following the reported increase in threats against federal judicial officials and the publicized 2005 murder of U.S. District Judge Lefkow's family in Chicago, Congress appropriated $12 million for the USMS to enhance federal judicial security.[12] A portion of the funds was used for installing anti-home-intrusion systems in the residences of federal judges in February 2006.[13] No comparable home-security-installation programs have been created to protect state and local judges.

The judicial security concerns of the states and municipalities fail to receive the attention they deserve. The problem of ensuring security for courthouses and its personnel is an issue left to state and local governments to solve. Since the risk is always present, it is imperative that state and local courts implement proper preventive security precautions.

The judicial security model demonstrated by the USMS is the most comprehensive security example for state and local courts. Unfortunately, state courts have different caseloads and court clients than federal courts, and these differences translate into different security needs. However, if local and state law-enforcement officials follow USMS strategies, adapt the strategies to their own judicial environments, and emphasize the necessity of ensuring judicial security, then perhaps these preventable tragedies will not happen in the future.

Preparing for the Future

In *Protecting Judicial Officials: Implementing an Effective Threat Management Process*, the Bureau of Justice Assistance (BJA) created a ten-point list of effective ways to promote judicial security. Suggestions include:

- Recognize the need for a plan to manage threats, assaults, and other incidents against judicial officials, court staff, and clients;
- Promote security education for the court staff and other officials;
- Maintain consistency with threat management processes; and
- Monitor internal security incidents in a database.

Frederick S. Calhoun and Stephen W. Weston, "Protecting Judicial Officials: Implementing an Effective Threat Management Process," *BJA Bulletin* (June 2006), p. 1, http://www.ncjrs.gov/pdffiles1/bja/213930.pdf.

Courthouse Design and Internal Procedures Are Important

It is also important to address the courthouse's architectural design and its internal personnel procedures to promote safe judicial environments.

- Implement a policy of not permitting weapons in the building. All court clients and judicial staff (judges, attorneys, administrators, etc.), with the exception of court security personnel, should be screened for weapons.
- Never permit weapons within any secure area of the building. Officers escorting prisoners should never be armed.
- Maintain a visual presence of court security officers in the courthouse.
- Security personnel should be present in all courtrooms while court is in session.
- Officers providing security in the courtrooms should not escort prisoners.

- A minimum of two officers should be present whenever prisoners are escorted.
- Courthouses should have separate three-way public, judicial/staff, and prisoner circulation systems.
- Create sufficient public-waiting space to permit the separation of opposing parties in court cases.
- Provide secured parking facilities for judges with separate and secured entrances to the building.
- Allow judges to reach their offices and courtrooms without having to pass through public areas of the building or to come into contact with in-custody defendants.

Don Hardenbergh, president of CourtWorks, a consulting firm in Williamsburg, Virginia.

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7 Mark Sherman, "An Angry Trend: Threats Against Federal Judges Set Record Pace," *Boston.com* (July 28, 2006).

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11 HR 1751, 109th Cong., 1st sess. (November 10, 2005). This legislation was passed by the U.S. House of Representatives and has been referred to the Senate Judiciary Committee.

12 John Files, "Year After Shootings, Calls to Increase Judges' Security," *New York Times* (March 19, 2006).

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COURT RECORD ACCESS POLICIES: UNDER PRESSURE FROM STATE SECURITY BREACH LAWS?

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Courts are affected by national trends in privacy legislation. Over the past ten years, many courts have reevaluated and modified public access record policies to increase protections on personal information in court records, especially as court records are made available via the Internet. As private-sector data is more heavily regulated, and as state legislatures enact state security breach laws to protect consumer privacy and ward off identity theft, court record access policies may be under continued pressure to conform.

Court Record Access Policy Changes

The past decade has brought significant changes to state court record access policy in the area of privacy protections for personal information in court records. Many state courts have reevaluated and modified public access policies to limit the availability of personal information in paper and remotely accessible electronic records. Primarily because the Internet has emerged as a proven vehicle for providing public access to court records, public and special-interest groups have expressed privacy concerns about "too-easy" access to personal information in court records via the Internet, and identity theft has emerged as a growing crime based on fraudulent use of personal identifying information.

A base-line resource for understanding the issues and complexities of the topic of public access to court records is *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts*, together with its follow-up report, *Public Access to Court Records: Implementing the CCJ/COSCA Guidelines Final Project Report*.[1] In addition, several law-review articles have been published on this topic in the past five years, discussing various policy implications and trends.[2]

The National Center for State Courts offers a Web site titled *Privacy and Public Access to Court Records*, which contains links to various state court Web sites and access policy materials.[3]

Emergence of State Security Breach Laws

A parallel wave of state legislative activity, over the past two years, has created a new breed of state laws that protect consumers against the disclosure of certain personal information. Since 2005, many states have enacted laws that seek to protect against the release of certain personal data elements from the hands of business and government by requiring consumer notifications and establishing criminal and civil penalties for unauthorized disclosures (see table for full citations of state acts).

State Security Breach Laws

Arkansas	Personal Information Protection Act, S.B. 1167, Ark. (2005).
California	S.B. 1386, Cal. (2002).
Connecticut	Public Act No. 05-148, S.B. 650, Conn. (2005).
Delaware	Computer Security Breaches, H.B. 116, Del. (2005).
Georgia	S.B. 230, Ga. (2005).
Illinois	Personal Information Protection Act, Public Act 094-0036, H.B. 1633, Il.
Indiana	S.B. 503, In. (2005).
Louisiana	S.B. 205, La. (2005).
Maine	Notice of Risk to Personal Data Act, H.P. 1180, Ma. (2005).
Minnesota	H.F. 2121, Minn. (2005).
Montana	H.B. 732, Mont. (2005).
North Carolina	Identity Theft Protection Act of 2005, Sess. L. 2005-414, S.B. 1048 (2005).
North Dakota	S.B. 2251, N.D. (2005).
New Jersey	Identity Theft Protection Act, A. 4001, N.J. (2005).
Nevada	S.B. 347, Nev. (2005).
New York	S.B. 3492, N.Y. (2005).
Ohio	H.B. 0104, Oh. (2005).
Pennsylvania	S.B. 712, Penn. (2005).
Rhode Island	Identity Theft Protection of 2005, H.B. 6191, R.I. (2005).
Texas	S.B. 122, Texas (2005).

For more information, references, and links to various state security breach laws, see http://www.pirg.org/consumer/credit/statelaws.htm.

Although individual state laws within this new breed have been given various titles, such as the Personal Information Protection Act (Arkansas), Computer Security Breaches (Delaware), Database Security Breach Notification Law (Louisiana), Notice of Risk to Personal Data (Maine), Identify Theft Protection Act (Rhode Island), and Information Security Breach and Notification Act (New York), the overall category is commonly referred to as "state security breach laws." For ease of reference, this term will be used throughout this article.

State security breach laws contain six common elements: purpose, applicability to data collectors, protected data elements, security breaches, exceptions for encrypted data, and exceptions for public records. Many of the similarities can be traced back to a common origin in the *Clean Credit and Identify Theft Protection Act: Model State Laws*, a project of the state Public Interest Research Groups and Consumers Union of U.S., Inc.[4]

1) Protective Purpose

The common purpose behind the individual security breach laws is stated in various ways by the individual state legislatures: for example, "to ensure that sensitive personal information about [state] residents is protected . . . [and] to provide reasonable security for the information" (Arkansas), "to implement individual privacy and to prevent identity theft" (Montana), "to ensure that the Social Security numbers of citizens . . . are less accessible in order to detect and prevent identity theft" (New Jersey), "prevention and punishment of identify theft" (Texas), to "guarantee state residents the right to know what information was exposed during breach, so they can take the necessary steps to both prevent and repair any damage they may incur" (New York), and "providing for the notification of residents whose personal information data was or may have been disclosed due to a security system breach" (Pennsylvania).

2) Defined Data Collectors

All state security breach law contains a provision to define the types of data collectors subject to the law. This is an area of significant variation from state to state. For example, some apply strictly to information brokers (Maine), some apply to only consumer-reporting agencies (Montana), some apply to individuals and businesses that conduct business in the state (Minnesota), and some apply even more broadly to government, business, and individuals (Nevada, New York, and Pennsylvania). Of those laws that apply to government entities, some specifically include language to exempt the judicial branch (New York). Of course, if a judicial-branch exemption is not stated in a state security breach law, a separation-of-powers analysis is required to fully resolve the issue of applicability to the respective state judicial branch, but such analysis is outside the scope of this article.

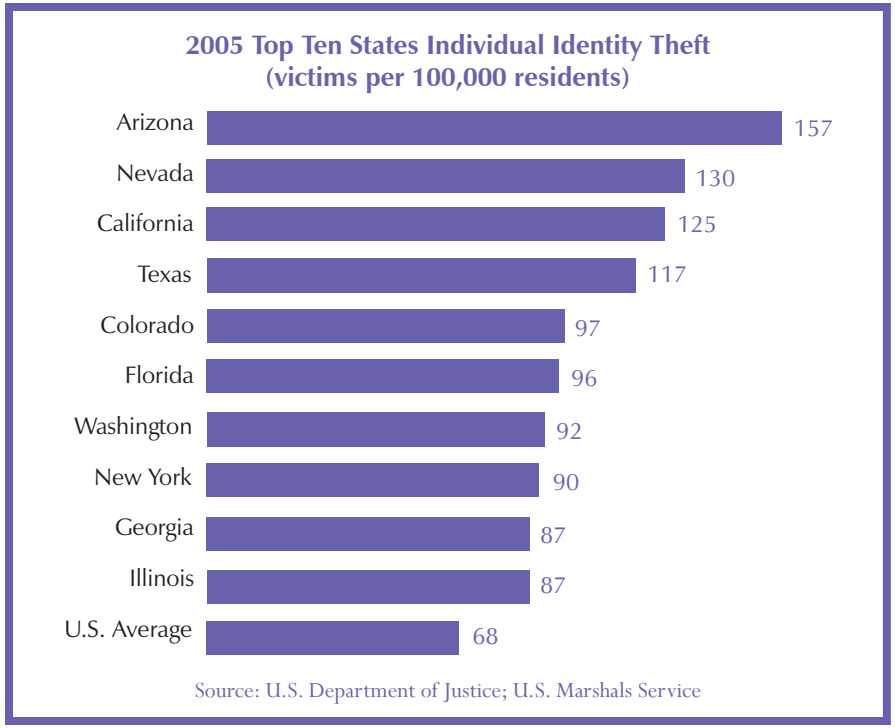
3) Protected Data Elements

The state security breach laws protect a class of data elements that are personal and identifying in nature and typically labeled "personal information" (Connecticut, Georgia, and others). However, other terms are also used. For ease of reference, the term "personal information" will be used throughout this article to describe all such protected data in the state security breach laws.

Regardless of variations in terminology, most state security breach laws set forth a fairly similar definition of protected data, and most protect only a small set of data elements. The Illinois provisions illustrate the most common set of protected data: "personal information" means "an individual's first name or first initial and last name in combination with any one or more of the following data elements: social security number, driver's license number or state identification card number, account number or credit or debit card number, or account number in combination with any required security code, access code, or password that would permit access to an individual's financial account." States with similar definitions may include some variation on the individual data elements included, the combination of data elements required, or both.

North Dakota defines personal information somewhat more broadly, to mean an "individual's first name or first initial and last name in combination with any of the following data elements, . . . social security number, operator's license number, nondriver color photo identification card number, financial institution account number or credit or debit card number with required security or access code, birth date, mother's maiden name, employment identification number, or digitized or other electronic signature."

Rhode Island has one of the broadest definitions, defining "personal information" as "any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification



card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information."

4) Defined Security Breach

Under state security breach laws, a security breach involving the protected data triggers notification requirements and other penalties. "Security breach" is commonly defined as an unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information. However, good-faith acquisition by an employee or agent of the data collector is not a security breach, provided that the information is not used for or subject to unauthorized disclosure (e.g., Arkansas, Delaware, Georgia, Illinois, Indiana, and Louisiana). Variations on this language exist from state to state.

5) Encryption Exception

An exception included in state security breach laws is for encrypted data. When personal information is compromised in a manner that would constitute a security breach if not encrypted, the security breach provisions and corresponding penalties do not apply.[5] This is accomplished in the state security breach laws in a couple of ways: either 1) encrypted data does not fall under the definition of personal information;[6] or 2) the security breach provisions do not apply when encrypted personal information is compromised (New Jersey and North Dakota).

6) Public Records Exception

Many of the state security breach laws include exceptions for information that is lawfully made available to the general public from federal, state, or local government records (Illinois and New York). For example, North Carolina excludes from the definition of *personal information* any information "made lawfully available to the general public from federal, state, or local government records." Other states take a similar approach, with the same or slightly different language (Ohio, North Dakota, Pennsylvania, and Rhode Island).

Will State Security Breach Laws Influence Court Record Access Policy in the Future?

Will state courts modify court record access policy to align with state security breach laws in the future? If not, how will inconsistencies between the two affect state residents? Will courts come under public scrutiny for releasing through public records the very information protected by state security breach laws?

Almost all the recent state court efforts to review and modify court record access policies were undertaken before the enactment of corresponding state security breach laws. New York is a good example where a commission on court record access policy released its findings and recommendations one year before the enactment of New York's security breach law and, therefore, did not address all the data elements protected under the data breach law.[7] Driver's license numbers were not discussed in the commission's recommendations, although these numbers were protected under the state data breach law one year later. A comparison of other state court record access policies would likely reveal similar inconsistencies.

In August 2005, the New York Information Security Breach and Notification Act was signed into law (hereinafter "NY Act"). The legislative intent of the NY Act is stated within:

> The legislature finds that identity theft and security breaches have affected thousands statewide and millions of people nationwide. The legislature also finds that affected persons are hindered by a lack of information regarding breaches, and that the impact of exposing information that should be held private can be far-reaching. In addition, the Legislature finds that state residents deserve a right to know when they have been exposed to identity theft. The legislature further finds that affected state residents deserve an advocate who can speak and take action on their behalf because recovering from identity theft can, and sometimes does, take many years. Therefore, the legislature enacts the information security breach and notification act which will guarantee state residents the right to know what information was exposed during a breach, so that they can take the necessary steps to both prevent and repair any damage they may incur because of a public or private sector entity's failure to make proper notification. (See table for full citation.)

Ease of Finding Personal Information Online

For $39.95 (an additional $20 for 1-hour e-mail delivery) you can obtain the following information about a person, knowing just their first and last names, by using an Internet people-search site…

- **Current and previous addresses**
- **Possible aliases**
- **Phone numbers**
- **Liens/Tax Liens against them**
- **Small-Claims/Civil Judgments for or against them**
- **Property ownership**
- **Bankruptcies**
- **List of neighbors**
- **Possible names of relatives**
- **National death index data revealing whether they are alive**
- **Drug enforcement agency actions against them**
- **Marriage status**
- **Divorce status**

Source: US Search

Among other things, the NY Act requires state entities to notify people of an unauthorized acquisition of their private information resulting from a breach of information security. The NY Act covers private business and state entities such as state boards, divisions, commissions, councils, public authorities, and other governmental entities performing a governmental or proprietary function for the State of New York. However, the judiciary is specifically excluded. Cities, counties, municipalities, villages, towns, and other local agencies also are excluded; however, these are required to develop a policy or pass a local law consistent with the notification requirements of the act no more than 120 days after enactment. Consequently, the New York Judiciary is singled out as the only government entity that does not have to conform.

Under the NY Act, protected "private information" includes "personal information" (defined as name, number, symbol, mark, or other identifier) in combination with any of the following unencrypted data elements: 1) Social Security number; 2) driver's license or nondriver identification-card numbers; or 3) account, credit-, or debit-card numbers, in combination with any required security code, access code, or password, which would permit access to an individual's financial account. However, private information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

Approximately one year before the enactment of the NY Act, in February 2004, the New York Commission on Public Access to Court Records (hereinafter "the Commission") published its findings and recommendations in *The Report to the Chief Judge of the State of New York*. The Commission concluded that "the rules and conditions of public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet" (at 1). However, it also made recommendations to restrict certain information in both types of records (at 5).

More specifically, with respect to personal identifiers, the Commission made the following recommendation:

> Without leave of court, no public court case records, whether in paper or electronic form, should include the following information in full: (1) Social Security numbers, (2) financial account numbers, (3) names of minor children, and (4) full birth dates of any individual. To the extent that these

> identifiers are referenced in court filings, they should be shortened as follows: (1) Social Security numbers should be shortened to their last four digits, (2) financial account numbers should be shortened to their last four digits, (3) the names of minor children should be shortened to their initials and (4) birth dates should be shortened to include only the year of birth (at 7).

The Commission heard testimony from interested parties regarding this recommendation, including the chief of the New York Attorney General's Internet Bureau, Mr. Kenneth Dreifach, who testified on the rise of identity theft every year. "Mr. Dreifach described Social Security numbers and financial account numbers as 'high value' personal identifiers that can be combined with birth dates and other more accessible information by identity thieves" (at 9).

Although this recommendation and Mr. Dreifach's testimony aligns with the NY Act with regard to Social Security and financial account numbers, neither make reference to driver's license numbers, which are a specifically protected data element under the NY Act. The Commission makes no reference to driver's license numbers anywhere in the report.

Where does this leave the State of New York in terms of a consistent and comprehensive approach to identity-theft protection and notification of state residents of data security breaches? Assuming adoption and implementation of the Commission recommendation, inconsistencies exist in these areas:

- The judiciary is not subject to the notification requirements required of state entities, local government, and business entities;
- The judiciary may classify certain personal identifiers, such as driver's license numbers, as public data, when such is classified as private information under the NY Act; and
- Business entities are subject to civil and criminal penalties for the release of data that may be publicly available through the judiciary and other government entities in New York.

These inconsistencies tend to circumvent the overarching goals of the NY Act and may be cause for public scrutiny.

Conclusion

A similar analysis applies to other states with security breach laws, especially those with security breach laws that protect a broader class of data elements than identified in the NY Act, such as Rhode Island. Over time, as public awareness increases regarding security breach laws and inconsistencies in the protection of data elements across the public and private sector, state judiciaries may feel more pressure to conform their record access policies with the provisions of state security breach laws.

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4 Updated November 2005 and January 2006, at http://www.consumersunion.org/pub/core_financial_services/001732.html.

5 The Ohio law defines encryption to mean "the use of an algorithmic process to transform data into a form in which there is a low probability of assigning meaning without use of a confidential process or key."

6 Ohio, New York (adding the limitation that the encryption key not be compromised), North Carolina (adding the limitation that the encryption key not be compromised), and Pennsylvania.

7 *Report to the Chief Judge of the State of New York*, Commission on Public Access to Court Records (February 2004), at http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf.

A FOCUS ON IDENTITY THEFT, SOCIAL SECURITY NUMBERS, AND THE COURTS*

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This article examines the interest by federal policymakers to tackle the problem of identity theft by restricting the display of Social Security numbers in public documents. Social Security numbers are replete in court records such as probate files, land records, divorce documents, and other family-related court documents. This article will discuss the problem as well as the state court perspective on this issue and offer examples of what some state court systems are experimenting with to reduce the incidences of identity theft.

Recent incidents in which Americans' confidential information has been compromised are making Congress take another serious look at legislation to prevent identity theft.

- In 2006 a staff person at the Department of Veteran Affairs staff reported that his laptop, which held confidential data for about 26 million veterans, had been stolen.[1]
- In 2005 ChoicePoint, a Georgia-based information broker, revealed that personal information of more than 100,000 customers in all 50 states had been compromised.[2]
- Again in 2005, Bank of America said that it had lost tapes containing the records of 1.2 million federal employees.[3]

Why are Social Security numbers required for so many everyday transactions?

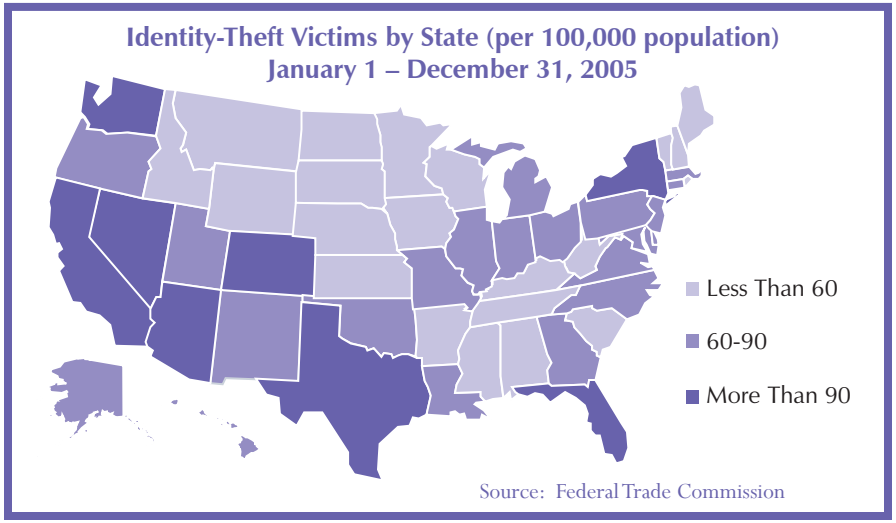
Congress will likely use the above incidents to push longstanding legislation to restrict the display of Social Security numbers (SSNs) on public records, including those found in court documents. A surge of identity-theft cases has added fuel to the growing fear of misuse of personal information. According to a Javelin Strategy and Research survey, in 2005 there were nearly nine million identity theft victims with estimated losses totaling almost $57 billion.[4]

What impact will this potential legislation have on the state courts, which have numerous uses for SSNs, such as determining assets and income, identifying parties, and collecting fees, fines, and restitution? The Conference of Chief Justices and Conference of State Court Administrators (CCJ/COSCA) have expressed concern about meeting the costs of SSN redaction requirements and are urging the Congress to work with the state courts to craft a workable solution.[5]

CCJ/COSCA's Court Management Committee surveyed state court systems in 2005 to determine what innovative approaches courts were taking to use and protect SSNs in official documents and records. According to NCSC president Mary Campbell McQueen, in testimony to a House Ways and Means Subcommittee, CCJ/COSCA identified three best practices for protecting SSNs, while still maintaining the traditional openness of courts:

1) creation of two sets of records, public and private;
2) requirements that parties in cases be responsible for removing SSNs; and
3) requirements that individuals use only the last four digits of SSNs.[6]

The survey also showed that many states are already taking the lead in protecting litigants' SSNs, particularly in cases involving families, through court rules promulgated by individual court systems.



For example:

- Washington State is developing a procedure for sealing family-court records containing SSNs and financial information.
- Vermont requires parties to expunge or redact SSNs from court papers.
- Minnesota requires divorce-case parties to fill out a confidential information sheet (containing SSNs), which is kept separate from the official court record.
- South Dakota adopted a rule that protects SSNs and financial account numbers by requiring that these numbers be redacted from documents and submitted to the court on confidential information forms.

CCJ/COSCA also established the *Public Access to Court Records: CCJ/COSCA Guidelines for Policy Development by State Courts* project, which gives state court systems and local trial courts assistance in establishing policies and procedures that balance the concerns of personal privacy, public access, and public safety. The CCJ/COSCA Court Management Committee examined the use of SSNs in current court practices, the inclusion of SSNs in bulk distribution of court records, and information in other documents besides SSNs in court records, such as addresses, phone numbers, photographs, medical records, family-law proceedings, and financial account numbers. Finding solutions to protect an individual's privacy is difficult. The state court leadership is working together through this subcommittee to research the issues and identify the best practices for all courts to consider. Then, the subcommittee will be prepared to share innovations with Congress and the Bush administration.

Federal Trade Commission – Excerpts from Identity Theft Warning

Type of Scam:
Telephone. The caller eventually attempts to get the victim to provide their Social Security number and other personal information.

Origin:
This scam is believed to have originated in the U.S around September of 2005.

How It Works:
An individual receives a telephone call from someone pretending to be a **jury coordinator**. The caller advises the individual that they have missed jury duty and a warrant has been issued for their arrest. The victim never really received a notice for jury duty, but is upset and wants to quickly resolve the matter. Under the pretense of assisting the victim in resolving the issue, the caller asks the victim for their Social Security number, date of birth and other personal information for verification.

What to Know:
A jury coordinator or representative will almost never contact you via telephone. They typically communicate via postal mail.

If it is a rare occasion that the jury coordinator or representative does communicate with you via telephone, they will NEVER ask you for your Social Security number, date of birth, credit card number or similar personal information.

Source: Federal Trade Commission, condensed by VisualResearch, Inc.

ENDNOTES

* Research Assistance provided by George Perkins, Knowledge and Information Services.

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INTELLIGENT VIDEO TECHNOLOGIES ENHANCE COURT OPERATIONS AND SECURITY

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The latest advances in intelligent video surveillance, video streaming, and Web-based conferencing can help courts secure their facilities, increase operational efficiency, and improve the administration of justice. Combining technologies increases the scope and utility of applications, while coordinating with other government technology initiatives enables courts to realize even better cost/benefit ratios.

Fueled by large-scale Homeland Security initiatives, accelerating adaptation by state and local law-enforcement agencies, and increased demand in the corporate marketplace, the technology industry is making rapid advancements in the capabilities and cost-effectiveness of video-based technologies. Meanwhile, improved standards and widespread deployment of high-speed Internet service and wireless networks are helping to provide a reliable framework for expanding the scope and flexibility of these new products and solutions. Together, these advances offer very promising applicability to courts under pressure to increase the security of their facilities and records, provide better public service, and simultaneously improve the efficiency of their operations.

Intelligent Video Surveillance Systems

Intelligent video surveillance (IVS) systems can combine human monitoring of scenes in and around the courthouse with software monitoring and analysis of what each camera is capturing. Such systems can detect situations that may require attention and alert security personnel, thereby enhancing security and reducing the number of staff required to monitor video feeds. Among other situations, IVS software can detect persons entering unauthorized areas, a briefcase or package left unattended, an individual loitering in a particular area or a vehicle sitting in a no-parking zone, and removal of a normally present object. IVS systems can also monitor a secured entrance to detect, for example, when someone on the inside holds open a door to permit another person to enter from outside. When triggered by any of these events, the software can interface with the camera to pan and zoom as needed to provide more detailed monitoring.[1]

With some IVS software products, the end user can easily set up the rules and parameters through a wizard interface to define a potential threat and the alerting action to be taken by the system. Suppose, for example, that a courthouse camera is trained on a corridor leading from a public to a restricted area. The security administrator can "draw a line" on the camera image and define a rule to alert security personnel whenever a person crosses that line. Thus, even if the secure area itself is protected by a touchpad door lock or other device, the IVS can draw security personnel's attention to the appropriate monitor to view the individual. A second rule can send an alert if a package or other object is left in that corridor.


License Plate Recognition IVS

Another type of system combines IVS software with automatic number-plate-recognition capabilities to monitor entrances to parking garages or lots. These systems not only capture an image of the entering vehicle, driver, or both, but also read the license plate and compare it with a database of plate numbers. Although they can serve routine purposes such as automatically admitting court staff to restricted parking areas, their real power lies in the ability to check plates against a watch list and take appropriate action if a match occurs. The list might include vehicles registered to or associated with individuals for whom an outstanding warrant exists. However, the possibilities do not end there: imagine detecting the arrival of an ex-spouse with a history of violence on the same morning his former wife is scheduled for a traffic hearing, or noting several vehicles belonging to members of rival gangs. Even though such scenarios would require sophisticated programming and database coordination, the potential to avoid a serious security incident and perhaps apprehend certain wanted persons has undeniable value.

Combining Video Technologies with the Internet and Wireless Communications

Combining technologies has become an established strategy to leverage and expand the utility of applications. Key video-based technologies, such as IVS,

image recognition (e.g., face, iris, and number-plate recognition systems), and videoconferencing, can deliver far more extensive benefits when they are designed to tap into the powerful and adaptable communications capabilities of Internet Protocol (IP) networks. IP video networks not only are highly configurable, but also permit a court to extend its capabilities worldwide as needed. With an IVS system connected to an IP network, alerts from a security event can be transmitted via e-mail to second-level parties, such as court managers and law-enforcement investigators, who can then connect remotely to the video stream transmitted from the monitored location. Similarly, a videoconference can be expanded beyond the boundaries of a typical closed-circuit system.

Videoconferencing

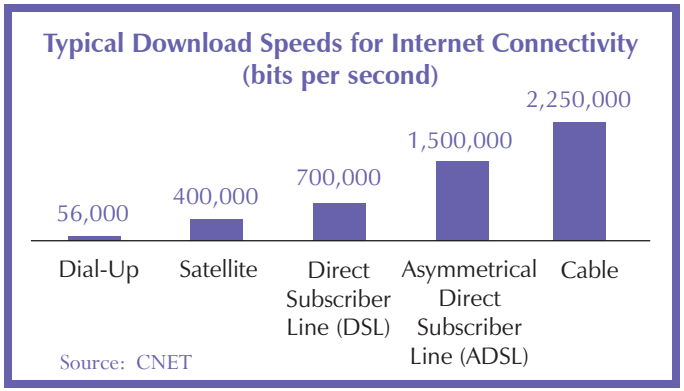
Oakland County, Michigan, decided to implement judicial videoconferencing over an IP network rather than use a more traditional point-to-point, closed-circuit approach. The resulting system enables a judge, with a simple mouse click, to initiate a videoconference from any courtroom to any law-enforcement officer, prosecutor, or holding cell in the county. The county uses a robust fiber-optic backbone to support reliable high-speed communications among the 180 facilities in the county, and the system can easily tie into the Internet for webcasting of events or to enable remote testimony by an expert witness. The system has been so successful that the county has now licensed its judicial arraignment software to a commercial integrator for development and marketing to others.[2]

Thanks to the ubiquity of high-speed Internet service, webcasting and web conferencing have become much more commonplace in many settings during the past few years, and courthouses are no exception. Many courts, both at the trial and appellate level, routinely webcast their hearings. Some law firms now are regularly using video-streaming capabilities to enable attorneys to watch court proceedings from the convenience of their own offices or from other remote locations while traveling. Courts must be ready to face a growing demand for such capabilities, whether they provide the technology themselves or decide to outsource it. For example, Courtroom Connect, which provides Internet, videoconferencing, and video-streaming services to law firms, also says it maintains permanent Internet connections in over 40 courthouses and has over 250 public videoconferencing rooms in court-reporting firms around the country. On-demand Internet connectivity between these entities can help lower litigation costs, reduce delays, and relieve pressure on court facilities and security requirements.

Web-savvy courts are branching out in their use of the Internet's ability to connect people and share video, audio, and data. Training for judges and court staff through online Webinars is available from several organizations (including NCSC's Institute for Court Management). Services such as WebEx and GoToMeeting enable full two-way participation in real-time seminars. In addition, however, these services are highly effective for online collaboration. For example, an appellate judge working from home or a hotel room can connect with his or her law clerk to draft an opinion or review and annotate a motion. Perhaps as a harbinger of a trend, at least one attorney[3] offers uncontested divorce services via GoToMeeting. Both client and spouse can participate, watch as documents and divorce terms are developed in real time, and discuss via conference call as the editing takes place. Usually within 20 minutes following completion of the online meeting, final documents in PDF format are e-mailed to both parties!

Adding Wireless IP Video Connectivity

Once an IP video network is in place, subsequently expanding its reach, where appropriate, with wireless data transmission greatly increases its operational flexibility while reducing deployment time and cost. Need to deploy an expanded video surveillance system in a hurry, perhaps to monitor public areas around the courthouse in preparation for a notorious trial? One proven solution



is to combine IP video-surveillance technology and Wi-Fi (wireless networking) technology, as did San Mateo County for the Scott Peterson trial in 2004. Because Wi-Fi-enabled cameras require no video cabling, the county was able to set up an entire system—including the wireless network, digital-video-recording software, and five digital IP cameras mounted on rooftops around the area—in less than three days. In addition to being monitored in the sheriff's office and courthouse, video images could be transmitted wirelessly to authorized laptops and PDAs, enabling officers to view them en route to a location.[4] Today's technology is even more cost-effective and, especially when combined with intelligent video threat analysis, more capable of enhancing security.

What to do when a security incident materializes in or moves toward an area not covered by a camera? Toss in "The Eye Ball" (Eye Ball R1 Compact Wireless 360 Degree Mobile Display System). Slightly larger than a baseball and enclosed by rubber for silence, the device can be thrown, dropped, or rolled into an area to transmit audio and video after automatically righting itself.[5]

Courts stand to benefit tremendously from these and other continuing advances in video-based technologies. It is obvious that the demand for security solutions at the federal and local government levels as well as in the corporate world directly spurs the development of security-oriented video technologies such as IVS. Ironically, it is also security concerns that have made traveling to a physical location so much more inconvenient, time-consuming, and (together with increased fuel prices) costly. Consequently, security concerns have indirectly increased demand for productivity-oriented tools such as webcasting, web conferencing, and online collaboration. Courts should seek opportunities to identify and apply both categories of products and systems, combining compatible hardware, software, and communication components to build comprehensive solutions.

ENDNOTES

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TECHNOLOGY

THE NCSC COURT IT GOVERNANCE MODEL*

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Almost all courts are relying more and more on technology to help them do their work. Court leaders of the future, to establish vision and strategic direction for technology, will be adopting an IT governance strategy for their courts. IT governance is a formal structure and process for managing business operations and supporting technology tools.

This article was prepared to substantiate trends and to document best practices in information technology (IT) governance in the court environment. Almost all courts rely on technology to help them do their work. Some technologies can be installed out of the box and require little or no configuration, adjustments to work processes, documentation, or training of users. Tools that are more complex may require a great deal of specialized expertise to implement and operate. The magnitude of budget and staff commitments to case and document management systems, as well as their effects on business operations in the courts and related organizations, makes IT a significant management issue for the judicial branch. For more than 30 years, court leaders have struggled to apply technology tools to the work of the courts, often with great success, but seldom without high levels of tension, frustration, and exasperation.

Court leaders are responsible for the success of technology initiatives, but few have the training or experience to guide these efforts. Court leaders who succeed have found ways to assemble teams of individuals at all levels of the organization who possess the appropriate knowledge, skills, and abilities to get the job done. How those teams are organized and operate is an important key to success.

Court Context

This article is intended to provide principles of IT governance that are applicable in all kinds of court environments. Some courts rely on an executive-branch IT department or similar organizations for automation support; other courts operate and maintain their own systems; others rely on the private sector for some or all of their technology services; others participate in centralized or federated systems administered at the state level; and some are part of integrated justice environments where they are but one of many stakeholders. These principles have proven to be effective in all of these situations.

IT governance seldom is completely internal to the court; often, it crosses organizational boundaries and includes non-court stakeholders that provide or receive court information. In most environments, IT governance must balance the competing interests of many organizations.

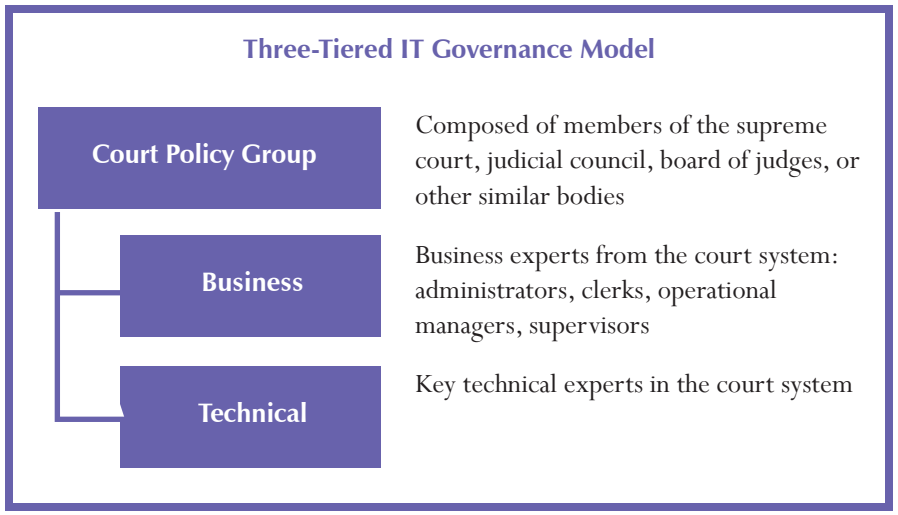
Many court leaders are well grounded in IT management principles, where few were in that position just a decade ago. More and more, courts are relying on technology solutions developed in the private sector (which creates new and different governance issues), though many still develop and maintain their own systems. Many court leaders still do not focus well on IT issues and struggle to manage technology projects.

IT Governance

IT governance is a formal structure and process for managing business operations and supporting technology tools. It is a method of making decisions, allocating resources, and resolving problems within and across organizational boundaries, arriving at solutions that are optimal for the system as a whole, rather than for its discrete parts. From multiple interests, it produces a single, consolidated agenda to guide the efforts of individuals and organizations.

The Three-tiered Governance Model

The National Center for State Courts recommends a three-tiered approach for the governance of business operations and technology. At the top level is the court policy group that is responsible for the administration of the judicial branch. This role typically is played by the supreme court, judicial council, board of judges, or other similar body. This group is responsible for setting priorities and for limiting the number of worthy projects that are pursued to match available resources. It also is responsible for overall budgets, financial management, strategic planning, and project oversight.



The second tier is the business layer, composed of experts in business operations from throughout the court system, including selected administrators, clerks, operational managers, and supervisors. The business group defines and analyzes business problems, adjusts business practices, implements policy directives, and manages projects. It labors closely with the technologists to design changes to case management and other applications, managing priorities within the structure defined by the policy group. It is responsible for signing off on all technology products as they are delivered. It develops plans, budgets, issue papers, and other materials to assist the policy leaders in making important decisions. It ensures that technology efforts are focused on solving business problems.

The third tier of the governance model is the technical level, consisting of key technical experts in the court system. Even if all of the technical expertise resides in a single organizational unit of a court, a formal group still should be established and should be the vehicle for providing assignments and managing progress. Often, there are multiple IT organizations supporting technology at various levels of the court system, and this arrangement provides an opportunity for them to work together and coordinate their efforts. The technical group develops architecture; manages the infrastructure; creates, procures, and implements technology solutions; and resolves day-to-day operational problems.

The court CIO[1] is the key contact between the court and technology worlds. This individual should be conversant in both languages to communicate effectively. The CIO is responsible for educating court leaders on IT and for helping technical staff understand the business environment in which they work. The CIO, who should report directly to the court administrator, manages technology staff and related resources, system development and acquisition, technical operations and production activities, and user support, including problem management. The CIO assesses staff capabilities and obtains outside expertise, when needed.

Very large or complex court or justice systems may have additional tiers in their governance structures; these three are the minimum required to manage IT effectively.

Most court IT issues have policy, business, and technical implications. Managing the overlapping aspects of business and technology issues requires that a member of the policy group participate with the business group, that a member of the business group participate with the policy and technical groups, and that a member of the technical group be a part of the business group. This will help ensure adequate communication and advocacy for important issues. It is assumed that the CIO participates in meetings of the policy group whenever technology issues are discussed.

The Charter

An essential element of effective governance is a charter. A charter is a document that defines the structure, mission, role, responsibility, and rules of operation of the various individuals and groups with governance responsibility. It reflects agreements between policy leaders about how decisions will be made, how resources will be allocated, and how problems will be solved. All participating organizational units must share sacrifice, work, and benefits fairly. The charter defines how this will be done. A written charter represents a strong commitment by the participating organizations, groups, and individuals to work together to manage technology jointly.

Who participates in policy-setting meetings, and how are votes allocated? Will a decision require consensus, or will a majority vote be sufficient? When business and technical experts cannot agree on an optimal approach, how will a decision be made? These are the kinds of questions that should be answered in advance in the charter; rules of operation cannot be invented during a crisis.

Principles of Court IT Governance

Certain principles facilitate effective court IT governance, in addition to the principles of structure and process outlined above. Some of these key principles are:

Court Leaders Must Provide Vision and Strategic Direction

Working with court staff and other stakeholders, court leaders must establish vision and strategic direction for technology in the courts. Three questions outline technology vision: where are we, where do we want to be, and how do we get there? The answers to these questions must be practical, concrete, and realistic. Creating, articulating, and communicating vision throughout the organization is a responsibility of court leadership.

Distorted vision in technology leadership (unrealistic expectations, erroneous beliefs about the capabilities and limitations of technology, inadequate comprehension of the complexity of judicial and justice-system business processes, quixotic budgeting and time scheduling) is a sure prescription for failure, despite the caliber of staff and the quality of technology tools.

Building vision and strategic direction is not an event, but an ongoing process. Just keeping up with changing technology is sufficient to demand continuous reeducation of court leaders. Shifting political, economic, and organizational winds also force periodic reassessment of the court's vision. In such a dynamic environment, flexibility is essential to success.

Court Leaders Must Understand Technology Issues at the Conceptual Level

Court leaders must understand technology issues; they cannot manage what they do not understand. The National Association for Court Management has published the Information Technology Management Core Competency Curriculum Guidelines, which outline the essential knowledge, skills, and abilities (KSAs) needed to lead court IT initiatives.[2] The Institute for Court Management provides a program to assist court leaders in acquiring the KSAs outlined in the core competencies.[3]

Court Leaders Must Lead Technology Initiatives

Court leaders must lead technology initiatives, not technologists. While they may not grasp all of the detail, they are responsible for the outcome. Technologists, like business experts, play a supporting role. Technology leadership must be institutionalized and integrated into established court leadership structures and processes; it is not a separate activity conducted by a separate organization.

Policy Decisions Must Be Made by Policy Leaders

Policy decisions must be made by policy leaders. Business experts and technologists must define the issues and alternatives and must help educate the policy leaders.

Business Experts Must Drive Technological Innovation

Business experts play a key role in improving court operations. Technology solutions must be created to address the business problems of the court. Business experts drive this process.

Court Leaders Must Rely on Their Technology Experts

Technologists are best equipped to understand the rapidly changing world of technology. Court leaders must insist on thorough explanation of technology issues and options that relate to policy decisions. Responsibility for technology operations should be delegated to the CIO.

Why Things Go Wrong

Technical jargon often goes mainstream.

Most governance problems occur when issues are addressed at the wrong level of the structure. For example, when policy leaders become ensnared in discussions of printer problems and other trivial operational issues, they may disengage and cease to participate in meetings. When no one is at the table to make policy decisions, business experts cannot set a direction, and while there still may be a lot activity and talk, there will be much less accomplishment. When technologists cannot get answers to business questions, they must guess about how to develop technology solutions, and they often make

the wrong choices. If policy leaders make technology decisions without the input of technologists, solutions may be incompatible with existing architecture. Effective governance requires policy leaders to address policy questions, business experts to address operational issues, and technologists to take the lead on technology decisions.

Benefits of Effective Governance

The implementation of a sound system of governance will help court organizations work together to achieve common goals, instead of working as discrete, competing units. It will produce a single set of priorities that will allow resources to be focused more effectively on solving the highest priority problems as quickly as possible. It will provide a forum for resolving related policy, business, and technical issues in a thorough, systematic way. Better expectation management will result in a lower level of frustration. Conflicts will be resolved before they damage working relationships. Technology staff will receive clear, unambiguous direction. Solutions will be business driven, rather than technology driven.

ENDNOTES

* Review and assistance with this article was provided by Thomas Clarke, Terrie Bousquin, James E. McMillan, John T. Matthias, Scott Fairholm, Jim M. Harris, and Thomas C. Carlson.

1 Chief information officer, the head technologist in the organization.

2 National Association for Court Management, *Information Technology Management Core Competency Curriculum Guideline*, available at http://www.nacmnet.org/CCCG/cccg_4_corecompetency_ITmgmt.html.

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IMAGE RECOGNITION BIOMETRIC TECHNOLOGIES MAKE STRIDES

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Current National Institute of Standards and Technology projects on image-based biometrics reveal impressive gains over the past four years. The justice community, led by law enforcement and corrections but increasingly including the courts, is finding face and iris recognition systems effective for appropriate applications. Courts should prepare to piggyback onto these systems to improve security and administration of justice.

Although fingerprint technology remains by far the leading biometric technique employed in the criminal justice arena, image-based biometrics is gaining ground. Face and iris recognition technologies, despite their relatively short development histories and lack of extensive databases, offer some distinct advantages over fingerprints in both criminal and non-criminal applications. Recent substantial improvements in accuracy, reliability, and availability of products are accelerating their pace of implementation. As law-enforcement, corrections, and motor-vehicle agencies deploy these systems and establish reliable image databases, courts have an opportunity to share in the benefits with only an incremental cost burden.

Fingerprint technology remains the leading biometric measure.

Face Recognition

Face recognition, arguably the least invasive biometric technology, has made rapid strides during the last four years. The National Institute of Standards and Technology (NIST) is wrapping up its Face Recognition Grand Challenge (FRGC) 2006 project, which began in May 2004 with the objective of encouraging commercial and academic organizations to develop vastly improved still- and 3D-image-processing algorithms for facial recognition systems. These algorithms constitute the heart and soul of the computations that enable computer-matching of facial images.

The baseline for measuring improvement was established by the Face Recognition Vendor Test (FRVT) 2002, which analyzed the effectiveness of the latest available systems at that time. Substantially raising the bar, the FRGC 2006 performance goal is an order of magnitude higher than that of the FRVT 2002:

- FRVT 2002: 20 percent error rate or 80 percent verification rate
- FRGC 2006: 2 percent error rate or 98 percent verification rate

(Both goals include a false acceptance rate of 0.1 percent.)

Preliminary results from testing the new algorithms on attempting to match sets of images (see example below) are very encouraging: 3D verification rates of 98 percent; high-resolution still verification rates of 99 percent; and verification of multiple high-resolution still images approaching 99.99 percent.

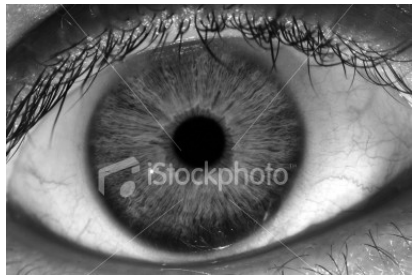
Software algorithms are catching up to humans in comparing sets of images.

One intuitive criterion by which to determine the practical applicability of a face recognition system is whether it can meet, or possibly exceed, human performance. Therefore, the FRGC 2006 evaluations included human control subjects as well as seven different algorithms submitted by commercial organizations and academic institutions. The surprising results? Three out of seven algorithms were **better than humans** at matching "difficult" pairs of facial images, and six out of seven were **better than humans** at matching "easy" pairs.[1]

How do these lab-oriented results translate into face recognition solutions that can benefit the courts? While FRGC 2006 was designed to spur development of algorithms, FRVT 2006 is evaluating the overall efficacy of the latest commercially available systems incorporating improved algorithms. FRVT 2006 began in January,

and NIST anticipates releasing a final report in the fall. The findings should reveal to what extent real-world systems can deliver the potential accuracy levels of the algorithms on which they are based. The dramatic improvements already indicated by the NIST programs imply that significantly more effective products and systems are emerging for practical consideration in justice applications, which, in turn, will speed up the rate at which face recognition is being adopted, stimulating yet further product development.[2]

Iris Recognition



Progress in image-based biometrics is not limited to face recognition systems, of course. Iris recognition technology—one of the youngest of all biometric technologies—is moving forward at a fast pace also, in part due to NIST incentive programs similar to its face recognition programs. Iris Challenge Evaluation (ICE) 2005 presented iris recognition challenge problems to encourage and focus technology development. ICE 2006, by contrast, is the independent government technology evaluation of iris recognition, with formal evaluations beginning in June and the final report expected in December 2006.

Iris recognition systems analyze the random pattern of a person's iris, and iris images can be computer matched much more accurately than facial images. Indeed, iris recognition is generally acknowledged to be potentially more accurate than any other current biometric technique, although enrollment failure rates (i.e., failing to capture the initial iris image adequately for subsequent comparisons) may be somewhat higher than for fingerprint systems. Because of their accuracy, iris recognition systems have been deployed in recent years for access control in high-security areas such as prisons, government buildings, research laboratories, airports[3], corporate offices, and selected other locations.

While iris recognition is more accurate, it is a far more intrusive and inflexible biometric technique than face recognition, requiring one to stand directly before a camera and, for a typical system, no further than 10 inches away from the lens. This intrusive nature makes it less desirable for many court applications, including controlling staff access to restricted areas. However, some of the latest advances promise systems capable of scanning an approaching subject's iris at a greater distance from the camera, which should reduce the most common objections to its implementation. Even so, iris recognition remains best suited to applications where screening subjects either are very willing and cooperative or can be carefully controlled, such as in a prison.

Applying Image Recognition Biometrics to the Justice Community

Law-enforcement, corrections, and motor-vehicle agencies generally are the early adopters of face recognition and other biometric technologies, and court leaders should be planning to capitalize upon their efforts. Often initiated under grant funding, these efforts not only identify good solutions but also establish image databases, protocols, and procedures that can be tapped by the courts. For instance, an arrest-and-booking application that uses facial recognition to identify and track arrestees would have even greater utility if both corrections and courts participated, sharing access to databases. The facial image database used by a local law-enforcement agency for an arrest-and-booking system may already have been made accessible to mobile units in patrol cars and other remote locations to identify suspects. With proper planning, jail management systems could tie into the same database to help control and record prisoner movement and confirm identities for release or transport. Similarly, courts could employ compatible technology and access the database to confirm that the defendant appearing in court is the same individual who was arrested and charged by law enforcement.

Prudent court leaders will stay alert for opportunities to piggyback on such developments in their own justice communities. The exchange of biometric information among entities is facilitated by some of the latest systems on the market that conform to the Global Justice XML Data Model (GJXDM). As courts begin to leverage the GJXDM to participate more fully in the exchange of other types of data, image recognition systems can provide another key mechanism by which to improve the effectiveness of not only the court but also the entire justice system. The following examples of existing justice applications illustrate this point.

Examples of Current Justice Applications of Image Recognition

- The Massachusetts Registry of Motor Vehicles (RMV) this year joined a growing list of state motor-vehicle agencies in implementing facial recognition technology to combat fraud, identity theft, and other crimes. With all 36 RMV locations linked, any new photo taken for a license is compared with the millions of other photos in the state RMV system. Possible matches are displayed, and RMV staff can then make a visual comparison to detect situations such as an existing license for the same person under a different name. The RMV also is piloting a coupling of the facial recognition system with a document validation system that checks for the security features in visas, passports, and other documents used to obtain a driver's license. This increasingly reliable image database represents a rich resource to be tapped by the courts with a relatively modest expenditure for equipment, software, and training.[4]

- Jefferson County, Missouri, has been using facial recognition technology successfully at the county jails in Birmingham and Bessemer for over a year and hopes to implement it in the courthouses as well. The system matches 30,000 incoming inmates annually against a 500,000-image database of individuals who have previously been in jail, and it also helps prevent mistaken releases. In addition to inmates, the system screens all visitors to the jail and compares them to a database of 5,000 criminals with outstanding warrants, resulting in five arrests already.[5]

- Pinellas County, Florida, already has implemented facial recognition in the courthouse, following its success with the technology in other applications. With a U.S. Dept. of Justice grant to the sheriff's office, the original system was developed for booking-and-release processing at the county jail. The technology was next extended to a mobile identification system in patrol cars, then for use by investigators throughout the county. To expand and share its image database, the sheriff's office partnered with other state and local agencies in Florida. In 2002 the technology was installed to screen passengers at the airport. Based on these earlier successes, the sheriff implemented a similar system at the Jail Visitation Center and, finally, the courthouse, where on the first day it correctly identified an individual on the watch list.[6]

- The Children's Identification and Location Database (CHILD) Project represents one of the more interesting applications of iris recognition technology. Growing rapidly, it involves a national registry and Web interface managed by the Nation's Missing Children Organization and National Center for Missing Adults. Through this project, sheriff's offices and social-service agencies can enroll, locate, and identify missing children using iris recognition. More than 1,600 sheriff's offices in 33 states are already participating or will be by the end of 2006.[7]

ENDNOTES

1 It should be noted that all images were of individuals previously unknown to the human subjects. Human recognition abilities for familiar faces are much better than for unfamiliar ones. "Difficult" and "easy" categories were determined by a standard control algorithm.

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4 Scott J. Croteau, "RMV Tackling ID Fraud," *Worcester Telegram and Gazette* (April 18, 2006).

5 Carol Robinson, "ID System Never Forgets a Face," *Birmingham News* (April 20, 2006).

6 "Facial Recognition in Action," *Government Security Magazine* (August 1, 2004).

7 See http://www.thechildproject.org.

TABLET COMPUTERS AND THE COURTS 2006

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New portable Tablet computers with pen, speech, or keyboard input can change the way that judges and court staff work.

Tablet Personal Computers were introduced with great fanfare in January 2003. Since that time there have been refinements to the basic computer hardware and software, as well as new applications that take advantage of the system's capabilities.

But what is a Tablet PC? It is basically a fully functional portable computer that provides for user interaction via keyboard, speech recognition, and a pen-stylus interface. The pen allows for data to be entered either as non-computer-readable "ink" or with handwriting recognition. Most Tablet PCs are light enough so that one can cradle it in one arm while writing with the opposite hand.

Tablet PCs currently come in three forms. The slate format (see Image 1) looks like a slightly thicker 9" to 12" laptop screen. Most people who purchase the slate format also purchase a docking station that allows one to plug the slate into a keyboard, mouse, and network connection in one click. The convertible format (see Image 2) opens and closes like a normal laptop computer. However, an ingenious hinge allows the screen to be flipped around and flattened over the keyboard to turn the machine into a slate. As a result, one has the best of both worlds in one machine. Very recently an ultra-portable Tablet PC, known by its project code name as an Origami (see Image 3), has been released. This is essentially a smaller slate Tablet with a 7" or smaller display screen. Origami-style computers also can be manipulated with one's finger as an additional input method.

So much was made of the "failure" of handwriting recognition in the original Apple Newton personal digital assistant in 1993 that it was even lampooned in the comic strip *Doonesbury*.[1] In the decade since the Newton was released, the power of both digital assistants and PCs themselves has grown in accordance to Moore's law, which states that computer-processing speed doubles every 18 months. As a result, there is currently enough computer power for the Tablet PC pen-input software.

Image 1. Slate Format Tablet PC

Image 2 Convertible Format Tablet PC

Image 3 Origami Style Tablet PC

As noted above, the first type of pen input stores the stylus strokes as images. This method is called "ink," and it allows for capture and storage of drawings and diagrams in their native format.

The second is the handwriting-recognition engine called the Tablet Input Program, or TIP. TIP provides three different recognition interfaces. The first is freestyle in which one can use cursive handwriting. The second is a delimited input for block

lettering. The third is a screen keyboard to use when one wishes to be very precise in data input. In addition, some programs can convert handwriting to text, and forms-input programs can be programmed with additional "hints" about the field, such as "this field is only for names or addresses."

The remaining input format is speech recognition. Tablet PCs include a "trainable" speech-recognition engine that allows the computer's user to teach it how the person pronounces words so that it can convert the speech to text. Speech recognition greatly benefits from a quiet environment and specific types of microphones.

But How Is a Court Affected by This New Technology?

Currently, more than 300 Colorado judges are equipped with Tablet PCs. The Honorable O. John Kuenhold[2] shared the following comments regarding their use of the Tablet PC:

> All the district judges in Colorado now have Tablet convertible PCs running on XP with Office 2003 and OneNote. At first I was greatly enamored with the handwriting ability (you can really "sign" orders in Word to send to E-filing) but have found that I use the Tablet PC convertible more as a conventional laptop. I have had some carpal tunnel problems from overuse of the mouse.
>
> With the Tablet PC one can review e-mails and delete messages with the pen. It actually saves time and is also kind to the wrist. In Colorado, our Tablet PCs come with a program called Microsoft OneNote, which can be used on any XP-based computer. One Note takes good advantage of the handwriting and drawing features of the Tablet PC ability, but the program has other more impressive features.
>
> One Note allows a tab-based organization of complex related materials. For example, I create an electronic One Note folder for each trial with subfolders for each side's witnesses and a folder for pleadings and another for research. I create a "page" for each witness. These tabs sit to the right side of the screen so you can jump back and forth. One can also import other documents as a picture on the OneNote page with links back to the original document. So if I have found a case on Westlaw that I wish to refer back to, I import the case and it becomes a tabbed page. Similarly, I was the official secretary at our last chief judge's meeting. During the meeting there were references to all kinds of documents that had been e-mailed to us before the meeting. I had imported all the documents as pages into OneNote so they were tabbed in the folder. When I finished my minutes, I sent them out to the other chiefs, administrators and the Chief Justice as a One Note file. They could then read the minutes and, with one click go to the document that the minutes refer to. No more trying to find that e-mail from three weeks ago!

Mr. Tom Bishop identified similar benefits for lawyers in a series of articles posted on the Tablet PC Buzz Web site.[3]

But What About the Future of Tablet PCs in the Courts?

Many believe that information systems professionals will begin to work with judges to start to use the enormous amount of disk storage space on the Tablet PC. For example, it is possible, as Judge Kuenhold notes, to carry the entire case file in the computer. The new systems do allow a judge to carry their entire case contents for all of their current and past cases with them. Using larger Tablets, the display size is the same as a standard sheet of paper. This means that judges can continue working with their cases without connection to the court's computer network and even when the electrical power has failed for as long as their battery power holds. There is even good technology news on that front because the new "dual core" Tablet PCs are reporting a 20 percent increase in battery life.

The other new technology that courts will take advantage of is wireless networking. This will allow clerks and judges to maintain connection to the computer network while moving about the courthouse. Thus, a clerk could work in the courtroom or evidence room with the pen and a single device. If the case files were electronic, it would mean that the tedious process of pulling and replacing manual file folders would not be necessary. Again, court forms could be completed by pen, thus speeding input.

Technology often changes the way that people work. This time the technology has changed so that it works with people, and courts will recognize and take advantage of that change.

ENDNOTES

[1] http://pcd.stanford.edu/hcils/examples/newton.html

[2] O. John Kuenhold is the chief judge in the 12th District of Colorado. He was appointed as a district court judge in 1981. Judge Kuenhold received his law degree from the University of Michigan in 1969, the same year he was admitted to the Colorado Bar. From offices in Alamosa County, Kuenhold sits in all six counties that make up the 12th Judicial District, hearing appeals from county court and cases arising under criminal, civil, juvenile, domestic relations, and mental-health law.

[3] Law and Tablets: The Series by Tom Bishop - Contributing Editor, Tablet PC Buzz
http://www.tabletpcbuzz.com/features/article.asp?ID=34
http://www.tabletpcbuzz.com/features/article.asp?ID=36
http://www.tabletpcbuzz.com/features/article.asp?ID=45

SMART SENTENCING: PUBLIC SAFETY, PUBLIC TRUST AND CONFIDENCE THROUGH EVIDENCE-BASED DISPOSITIONS

Hon. Michael H. Marcus
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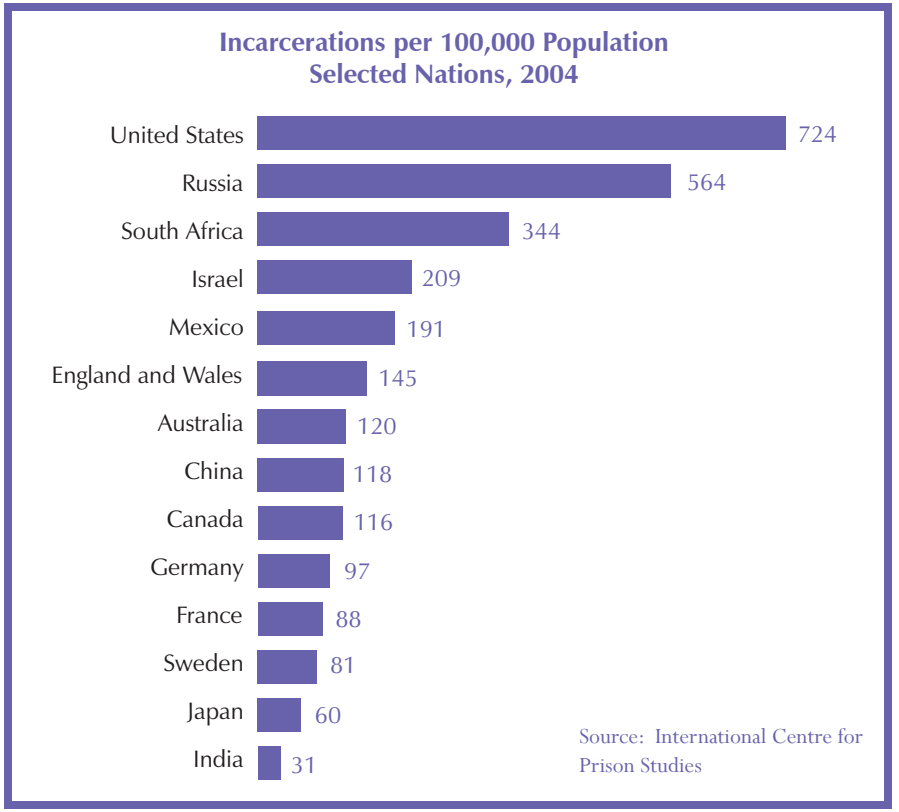
A long-simmering, but often tacit debate questions whether sentencing discretion should reflect best efforts to reduce recidivism. Smart-sentencing trends embrace that responsibility and enlist a wide range of strategies in pursuit of evidence-based decisions that earn public trust and confidence through accountability for public safety.

Sentencing Policy at a Crossroad

When the mid-twentieth-century enthusiasm for the medical model of crime control crumbled under empirical scrutiny, it was replaced with increased reliance on jails and prisons.[1] Although incarceration surely halts criminal behavior during the period of incapacitation, it proved an insufficient strategy for the many offenders whose numbers and crime seriousness ruled out permanent imprisonment as a matter of social economics or proportionality—or both. Because jail and prison performed no better (and often even worse) than programs or treatment in preventing an offender's next crime, at least for some offenders, the demand for incarceration grew and left most cities and states with strained correctional resources.[2]

The United States now persistently vies for first place in the world for the percentage of its population in custody.[3] The sentencing-guideline movement appealed both to policymakers seeking a way to control prison growth for fiscal integrity and to those opposed on principle to heavy reliance on incarceration. Some of the latter, having largely abandoned reliance on programs and treatment, now treasure guidelines as promoting consistency and as restraining what they perceive as "punitivism." Although many crime-control advocates initially condemned guidelines as codified leniency, having adjusted them with minimum and mandatory sentencing schemes, they now regard guidelines as bulwarks against judicial leniency. This diverse mix would support the current project for revising the Model Penal Code provisions on sentencing.[4]



The competing strain of sentencing policy also finds a wide spectrum of support. The demise of the medical model was not complete. Some criminologists and theorists responded to empirical disappointment by using research to identify program and treatment variables that yield success. A strong body of experience and literature now demonstrates that some approaches work very well—and significantly better than jail or prison—on some offenders. And many concerned with crime control doubt that the enormous recidivism rates we generate represent the best public safety we can produce. After all, when measured by post-incarceration recidivism, jail and prison work even worse than treatment and programs—and often far worse—on some offenders than programs and treatment designed and allocated based on sound evidence.[5] Policymakers concerned with the public-safety impact of corrections, victims' groups committed to preventing

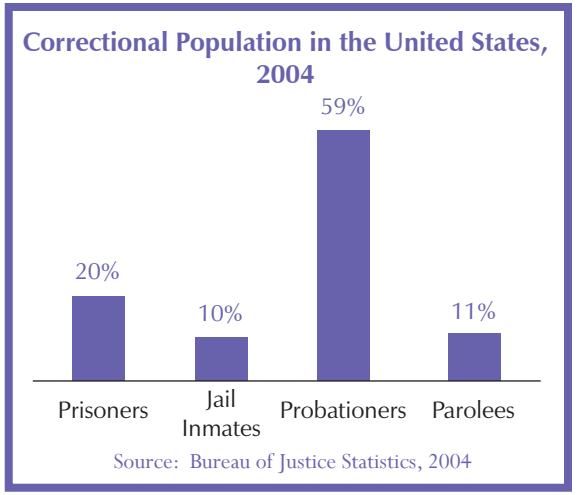
avoidable victimizations, and proponents of "therapeutic jurisprudence" find common ground in evidence-based sentencing initiatives.

The resulting critical issue in sentencing policy thus runs along a very different axis than the traditional divide between punitivists and advocates of reformation. Evidence-based "smart sentencing" posits that by rigorously scrutinizing data on what works or not on which offenders, we can allocate our correctional resources far more efficiently—measured by public safety—than if we continue to settle for "just deserts" with no accountability for outcomes. Smart sentencing demands that the primary mission of sentencing discretion be the responsible pursuit of crime reduction. Within limits imposed by law, proportionality, and resources prioritized by risk levels, dispositions should be based on what is most likely to reduce criminal behavior for a given offender. Programs and alternative sanctions should be used on those offenders whose criminal behavior is most likely to be reduced by those dispositions; jail and prison beds should be reserved primarily for those offenders for whom incapacitation is the disposition most productive of public safety. Smart sentencing holds that we are likely to do a better job of crime reduction if we make a concerted effort to promote public safety with sentencing discretion than if we insist that we are only responsible for just deserts.[6]

Aligned against smart sentencing are a mix of those who reject utilitarian sentencing on principle, those who fear evidence-based sentencing will lead to accelerated severity, and those who fear that allowing judges to consider "what works" will only produce inappropriate leniency.[7]

Strategies in Pursuit of Smart Sentencing

Proponents of smart sentencing have pursued a variety of strategies to nudge sentencing toward evidence-based practices. After Oregon voters emphatically amended the state constitution to proclaim "safety of society" as a primary purpose of sentencing,[8] the 1997 legislature directed that reduction of criminal behavior be a dominant performance measure, and required that criminal-justice agencies collect, maintain, and share data to facilitate display of correlations between dispositions and future criminal conduct.[9] Subsequent sessions have employed "budget notes" to encourage agencies to convert case-based criminal-justice data to "offender-based" systems to facilitate tracking and analysis of most effective practices.



A contemporaneous initiative in Multnomah County constructed sentencing-support tools that show judges and advocates outcomes in terms of recidivism for any given cohort of offenders sentenced for any given crime. Once the user selects the crime for which an offender is being sentenced, the tools build a default display based upon what the database "knows" about that offender and similar offenders sentenced for similar crimes. Users can access and modify the variables to improve results. The results show outcomes measured by recidivism correlated with various dispositions previously used for such offenders and crimes. They do not purport to display causation; their primary purpose is to encourage advocates in sentencing hearings to address what works to reduce crime.[10]

The Oregon Judicial Conference also adopted in 1997 a resolution urging

> that in the course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct.[11]

In 2001 the Oregon Criminal Justice Commission (Oregon's sentencing commission) completed hearings and a study, then published its mandated "Public Safety Plan." The plan's first recommendation was:

> Oregon should develop availability of offender-based data in order to track an offender through the criminal justice system and to facilitate data-driven pre-trial release, sentencing and correctional supervision decisions.[12]

In 2002 judges in Multnomah County modified the form by which to order presentence investigations to request "analysis of what is most likely to reduce this offender's future criminal behavior and why, including the availability of any relevant programs in or out of custody."[13]

Presentence reports in Multnomah County now routinely include analysis based on needs assessment, state-of-change analysis, and sentencing-support-tools queries as part of a recommended disposition. Through continued collaboration with the Multnomah County Department of Community Justice, judges and probation-department managers have implemented a program to train probation officers to use the same approach in probation reports and probation-violation hearings. The goal is to transform probation officers into the court's experts in what works, to the end that they bring their training in the literature of corrections and criminology, and experience with available resources and persistent offenders, to the service of best efforts at crime reduction in responding to probation violations.[14]

The 2003 legislature required that correctional agencies demonstrate that an increasing proportion of "program" spending is "evidence-based"—meaning that programs must be cost-effective and employ "significant and relevant practices based on scientifically based research."[15]

Building on its "Justice 2020: A Vision for Oregon's Courts,"[16] the Oregon Judicial Department adopted "performance measures" in pursuit of "public trust and confidence" and "accountability." Although, in common with the national performance-measure movement,[17] these measures otherwise avoid general accountability for the public-safety impact of sentencing decisions, Oregon has at least made a cautious beginning in this direction by adopting one performance measure that evaluates juvenile-drug-court performance by graduates' avoidance of recidivism. The 2005-2007 revisions to the performance measures are scheduled to consider additional performance measures based on the effectiveness of sentencing decisions in reducing future criminal conduct. The challenge is to express performance measures so as accurately to reflect the wide range of risk levels among offenders and to highlight the role of shortages of effective corrections and program resources. But public trust and confidence cannot be achieved by performance measures that ignore our impact on public safety.

Between biennial legislative sessions, Oregon governor Ted Kulongoski convened a "Public Safety Review Steering Committee" to explore how criminal justice might better serve public safety.[18] Two measures recommended by the "Sentence Imposition Task Force" of that committee were among those adopted by the 2005 legislature. One measure adopted the Multnomah County approach to presentence investigations by directing that the Oregon Department of Corrections

> require that a presentence report provide an analysis of what disposition is most likely to reduce the offender's criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity.[19]

Even more promising, the other measure directs the Oregon Criminal Justice Commission to

> conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines and, if it is possible, the means of doing so.[20]

The required advisory committee is chaired by Oregon's immediate past chief justice, the Honorable Wallace P. Carson, Jr. Its work plan includes examination of Virginia's innovative incorporation of validated risk-assessment into that state's sentencing guidelines.[21]

Late in 2005, the Oregon Judicial Department Court Programs and Services Division completed a massive update of a Criminal Law Bench Book, available online to attorneys, judges, and the public. Some 30 pages are devoted to practical considerations in pursuit of best efforts to exercise sentencing discretion effectively to reduce future criminal conduct.[22]

Conclusion

Having confronted the choice between avoiding and accepting responsibility for the public-safety outcomes of sentencing decisions, Oregon has provided examples of many strategies for reducing crime through sentencing decisions. The proponents of this approach believe that it is essential to public trust and confidence. It is also more likely to control unwarranted reliance on expanded incarceration than approaches that seek to avoid accountability for public safety.

ENDNOTES

[1] Kevin R. Reitz, Reporter, "Model Penal Code: Sentencing Report" (American Law Institute, April 11, 2003): 28-29, and authorities cited; Michael H. Marcus, "*Blakely, Booker*, and the Future of Sentencing," *Federal Sentencing Reporter* 17 (2005): 243.

[2] Michael H. Marcus, "Justitia's Bandage: Blind Sentencing," *International Journal of Punishment and Sentencing* 1 (2005): 17-21, and authorities cited, available at http://www.sandstonepress.net/ijps/IJPS_sample.pdf (accessed on January 21, 2006).

[3] See, e.g., The Sentencing Project. "New Incarceration Figures: Growth in Population Continues," available at: http://www.sentencingproject.org/pdfs/1044.pdf (accessed on January 21, 2006).

[4] Marcus, "*Blakely, Booker*, and the Future of Sentencing," *supra* note 1.

[5] Michael H. Marcus, "Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1," *American Journal of Criminal Law* 30 (2003): 135, available on WestLaw at 30 AMJCRL 135.

[6] Marcus, "Comments on the Model Penal Code," supra note 5; Michael H. Marcus, "Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It," *Federal Sentencing Reporter* 16 (2003): 76, available on WestLaw at 2003 WL 23269275.

[7] Marcus, "*Blakely, Booker*, and the Future of Sentencing," *supra* note 1.

[8] Oregon Constitution, Article I, Section 15, as amended by a 1996 ballot measure, now provides: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."

[9] 1997 Oregon Laws, chapter 433 (1997 Or HB 2229), accessible at http://www.leg.state.or.us/97reg/measures/hb2200.dir/hb2229.en.html (accessed January 21, 2006), or in the form of the printed and enrolled bill at http://ourworld.compuserve.com/homepages/SMMarcus/ch433.htm (accessed January 21, 2006).

[10] See, e.g., Michael H. Marcus, "Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link," *Ohio State Journal of Criminal Law* 1 (2004): 671 (available on Lexis at 1 Ohio St. J. Crim. L. 671). See generally http://www.smartsentencing.com. Although the tools themselves require a direct connection, the user manual is available on the Multnomah County Circuit Court Web site at http://www.ojd.state.or.us/mul/marcus_defattymanual.pdf (accessed January 21, 2006).

[11] Available at http://ourworld.compuserve.com/homepages/SMMarcus/JCRESNO1.htm (accessed January 21, 2006).

[12] Http://www.ocjc.state.or.us/PSP.htm (accessed January 21, 2006).

[13] Http://ourworld.compuserve.com/homepages/SMMarcus/WhatsNew.htm (see entry for January 2, 2002) (accessed January 21, 2006).

[14] Michael H. Marcus, "Sentencing Support Tools and Probation in Multnomah County," *Executive Exchange* (Spring 2004) (journal of the National Association of Probation Executives).

[15] 2003 Oregon Laws, chapter 669 (2003 Or SB 267), accessible at http://www.leg.state.or.us/03orlaws/0669.pdf (accessed January 21, 2006).

[16] Http://www.ojd.state.or.us/osca/cpsd/programplanning/futures/documents/justice2020vision.pdf (accessed January 21, 2006). The "Partnerships" vision includes "We use preventive measures and effective sentencing to reduce criminal behavior;" the strategies include "Employ Technology to Improve Sentencing Practices and Data-Sharing Systems."

[17] See, e.g., National Center for State Courts, "*CourTools—Trial Court Performance Measures*," accessible at http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm.

[18] Http://www.ocjc.state.or.us/PSReview/index.php (accessed January 21, 2006).

[19] 2005 Oregon Laws, chapter 473 (2005 Or SB 914), accessible at http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0914.en.pdf (accessed January 21, 2006).

[20] 2005 Oregon Laws, chapter 474 (2005 Or SB 919), accessible at http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0919.en.pdf (accessed January 21, 2006).

[21] Virginia Criminal Sentencing Commission, *Assessing Risk Among Sex Offenders in Virginia* (Richmond: Virginia State Sentencing Commission, 2001), accessible at http://www.vcsc.state.va.us/sex_off_report.pdf; Brian J. Ostrom, Matthew Kleiman, Fred Cheesman II, Randall M. Hansen, and Neal B. Kauder, *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (Williamsburg, VA: National Center for State Courts, 2002), accessible at http://www.vcsc.state.va.us/risk_off_rpt.pdf (accessed January 21, 2006); Virginia Criminal Sentencing Commission, *2004 Annual Report* (Richmond: Virginia State Sentencing Commission, 2004), accessible at http://www.vcsc.state.va.us/2004FULLAnnualReport.pdf (accessed January 21, 2006).

[22] The bench book is available on the Oregon Supreme Court Library Page at http://www.ojd.state.or.us/reference/criminalbenchbook.htm (accessed January 21, 2006).

INFORMATION SHARING AND EXTENSIBLE MARKUP LANGUAGE (XML)

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Today's social and political environment places ever increasing demands on courts to share information with other courts and various law-enforcement agencies. One of the most promising technologies that facilitate information sharing is Extensible Markup Language, commonly referred to as XML. XML has been around for a number of years, but it has taken the development of standards and supporting applications to bring this technology to the courts.

Depending on the local drivers and funding, each court usually begins by solving a specific issue, and then XML use expands beyond that for greater benefit. In Missouri, XML was initially used to improve data conversion for courts being brought into the statewide court case management system. It has been expanded in just a few months to include a prosecuting attorney interface and will be used for electronic case filing when it is implemented. In other states, such as Georgia, it began as a way to enable multiple courts to begin electronic case filing with multiple vendors and case management systems and to gain interoperability.


Sample XML code

The Need

As we move into the 21st century, budgets have become leaner, terrorism has become more threatening, and the need to exchange information has become vital. If people can move around faster than the information about them, then we can never hope to exchange the information we need in a timely fashion. In addition, federal requirements for reporting grow every day. It has been necessary to find a more efficient way of accomplishing these exchanges.

Historically, courts, corrections, and law enforcement, the most common exchange partners in this environment, have developed their computer systems and applications independently of one another. This isolation has been a result of both funding and political-turf issues. The resultant environment is one where information is kept in isolated, often idiosyncratic databases, not connected in any usable way (for information interchange) to electronic data networks.

Like many of the courts in the United States, Missouri's judiciary had deadlines, limited funds, and a need to work smarter to meet the requirements for information handling. Missouri's investigation into XML began in 1999 when the judiciary became a participant in LegalXML, an organization established to develop "XML Standards for Electronic Court Case Filing," later adopted by the Joint Technology Committee of COSCA and NACM.[1] Missouri also became a member of the U.S. Department of Justice's Global Infrastructure Standards/Working Group and an active participant in that organization's XML Structure Task Force in 2002.[2] In 2005 XML, specifically the Global Justice XML Data Model, was chosen as the information exchange technology for Missouri's courts.

How It Works

XML is not a programming language such as Fortran or C++, but a structured mechanism for sharing information. XML uses a prescribed information-tagging methodology combined with a normalized data dictionary to establish the criteria for information exchanges. The largest hurdle in preparing to use XML is the development of a data dictionary that exchange partners can mutually adopt. Once a data dictionary and schema have been developed using XML, then the various members of an information exchange have a common understanding of the information pieces being shared and their meaning and context. This understanding is key to the success of information exchanges, and the establishment of a schema is essential to allow various exchange partners to use and expand exchanges.

XML is one in an evolutionary chain of markup languages that have existed since 1949. It is an offspring of the Standard Generalized Markup Language (SGML) used for publishing and the HyperText Markup Language (HTML) used for browser-based Internet communications.

Many diagrams show how XML interacts with various information users and sources. What they all have in common is the heart of how XML works, and why it is so powerful—the data dictionary. This data dictionary, unlike exchange documents in the past, is not limited to a single exchange, or purpose, but is composed of a nearly holistic set of data elements describing an environment. As an example, the GJXDM not only describes the information to be exchanged for a driver's license reporting process, but also encompasses a broad realm of associated and interrelated information components. These include additional

information details about the driver to whom the license is issued; information about the issuing agency; any associated criminal history; vehicle information if the license information is being used as part of an automobile-accident-incident report; and information about personal property, employer, the court hearing the case represented by a criminal traffic ticket, and even the case disposition and correctional facility.

The sending and receiving systems can continue to handle their data in the applications and structure they choose. There is no need to change them to accomplish the information exchange, and this is one of the reasons XML is so powerful. The complex "translation" takes place when the schema is applied and an XML Information Exchange Package[3] is created based on an organized set of documentation.[4]

Definition of XML

XML's primary purpose is to facilitate the sharing of data across different systems, particularly systems connected via the Internet. XML is a cross-platform, software and hardware independent tool for transmitting information. XML provides a text-based means to describe and apply a tree-based structure to information. It allows designers to create their own customized tags, enabling the definition, transmission, validation, and interpretation of data between applications and between organizations.

Source: Wikipedia

Benefits of XML

Reusability. Once the data dictionary and schema have been produced, they can be reused for many different exchanges. For example, Missouri developed a dictionary and schema package (known as an IEPD—Information Exchange Package Documentation) for case conversion into the statewide Justice Information System (JIS) case management application. Since this encompassed all of the data elements in JIS, it has enabled the intake of information from the prosecuting attorneys' Dialog application. This development involved selecting the appropriate elements from the schema and providing them, with their contextual definitions, to the prosecutors. This is an endeavor that had been considered impractical before the use of XML. When Missouri prepares for electronic case filing, a similar process will take place with the selected electronic filing vendor.

Standardization. A good set of standards exists today to enable courts to use XML. These include the OASIS LegalXML Electronic Court Filing Standard,[5] the Global Justice XML Data Model,[6] and the World Wide Web Consortium's various standards.[7] In addition to the Department of Justice, national support is growing with the Department of Homeland Security as they develop a broader standard that embraces the GJXDM—the National Information Exchange Model (NIEM).[8] Using standards reduces the work courts have to do on dictionary development and makes requirements for conformance more defensible. Using the competitive bid process, one of the requirements for providing data services to the court can be that data must be submitted in the format of the approved XML schema.

Decreased development costs. The establishment of a data dictionary to accommodate user needs greatly reduces the expense of developing the translations to accept data. Once the court publishes its schema, prospective exchange partners can build to communicate with it without modifying their existing databases and applications.

Missouri's IEPD comprises over 500 data fields. The conversion of Missouri's 49 unique case management systems using a non-XML method would have required processing over 25,000 data fields. The development of a universal translation point—the data dictionary—eliminates the need for converting over 24,500 data fields since they basically carry similar knowledge, only named differently in each of the 49 instances. This type of savings will apply to all future XML developments in Missouri.

Decreased development/implementation time. After the completion of the data dictionary and schema, rapid development potential immediately presents itself. The development of the JIS IEPD and data-conversion schema took less than six months. Compare this with Missouri's historical development time of 18 to 24 months for data conversion. In addition, the labor savings is estimated at about $1.6 million. There are additional functions the court can implement that would have been much more complex and costly before XML. These include electronic filing and the prosecutor's interface mentioned earlier.

Operational savings. In addition to the significantly reduced development costs for additional exchanges, operational savings are now seen as well. Automating the exchanges of traffic tickets resulted in a nearly 90 percent reduction in data-entry labor time. Similar savings are expected to be realized from the prosecuting attorney's transfer once it has been operational long enough to gather metrics.

XML Requirements

The requirements to implement XML are within reason for most modern courts. Information technology staff will need to learn the protocols for developing XML schemas if the staff is inexperienced. In addition, using Web Services to support exchange of information over the Internet is recommended.[9] Several new "helper tools" were used by Missouri's IT staff to develop XML, most of which are available as open-source free applications.

The most important requirement is the court's commitment to a core data dictionary based on standards and resulting in a local, standards-based schema and IEPD. This will be developed by both technologists and subject-matter experts from the court and exchange partners.

Summary

XML is a technology that has matured over the last few years. The development of national and justice XML standards has established a platform that any court can use to produce their own IEPD and enable information exchanges with improved cost-effectiveness.

Once information behemoths such as the FBI implement XML, then the accomplishment of mandatory reporting will show even greater improvements and implementing them will be much easier and cheaper. Missouri has already identified a handful of exchanges that could be implemented in short order if the receiving agency could accept XML.

ENDNOTES

[1] The Joint Technology Committee of COSCA (Conference of State Court Administrators) and NACM (National Association for Court Management) recommended the electronic filing standard in 2002.

[2] The XSTF has produced several versions of a justice XML standard, the most current being the Global Justice XML Data Model (GJXDM) version 3.0.3. It is available at: http://www.it.ojp.gov/

[3] The Information Exchange Package (IEP) is the "payload" of the information exchange, and the Information Exchange Package Documentation (IEPD) describes the schema, data dictionary, and the exchange being accomplished.

[4] Further discussion and examples of IEPDs can be found at http://www.ncsconline.org/d_tech/gjxdm/ and http://www.it.ojp.gov/iepd/

[5] http://www.ncsconline.org/D_Tech/standards/.

[6] *Supra* note 2.

[7] World Wide Web Consortium standards can be accessed at http://www.w3.org/.

[8] At the time of this writing, the NIEM 1.0 beta version has just been released and is available at http://niem.gov/.

[9] Web Services are a suite of XML applications mapped to programs and databases. They define the format of the message and how the information is mapped to and from programs.

TECHNOLOGY, POPULAR CULTURE, AND THE COURT SYSTEM—STRANGE BEDFELLOWS?

Hon. Donald E. Shelton
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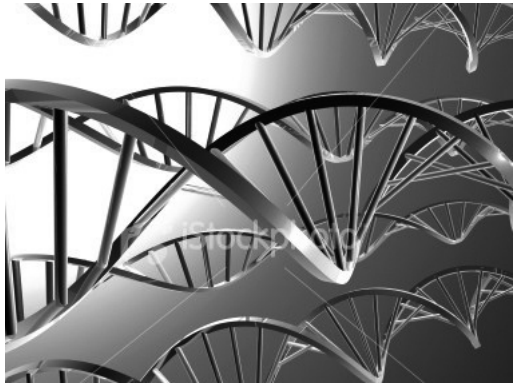
The technological revolution is now part of our popular culture and that popular culture is directly reflected in our juries, as it should be in a system that puts its faith in the people. The court system needs to find ways to keep pace.

This is an amazing technological age in which we live. In the last 30 years we have seen such scientific discoveries and developments that some justifiably call it a technology revolution.[1] The development and miniaturization of computers and the application of that technology to almost every human endeavor has been a primary force in new scientific discoveries. The ability to begin to understand the complex DNA that is at the source of human "being" and then to map the human genome is one prime example.[2]

At the same time, new technology has been used to create another revolution in information availability and transmission. The Internet is certainly an obvious example and is in many ways the catalyst for this as yet unfinished information revolution.[3] The World Wide Web really is worldwide and now extends, at least in our society, into virtually every household in some way.[4] Developments in voice and video technology have coupled themselves to the Internet and other sources of information so that worldwide communication is literally in the palm of our hands, or maybe even just in the crook of our ear.

These developments in science and information are contemporaneous, and they feed off each other. Advancements in science are fostered by the ability to exchange and transfer information among scientists. At the same time, scientific developments almost immediately become available not only to scientists but also to the entire world. The information technology system uses its media to grab scientific discoveries and almost immediately make them part of our popular culture. The dissemination is fast and vast through the media online, on television (in fiction and nonfiction), on film (now video transmission, of course), and, yes, even on traditional news sources. "DNA," for example, has gone from an abstract concept


DNA helix structure

known only to the small biochemical community to a term that even children recognize and use.[5] Ordinary people know, or at least think they know, more about science and technology from what they have learned in the media than they ever learned in school.

What, say the judges, does all this have to do with us? Everything! As an institution, the judicial system has traditionally been loath to embrace new ideas. The validity of the concept of stare decisis rests on a steadfast belief in the value of the status quo.

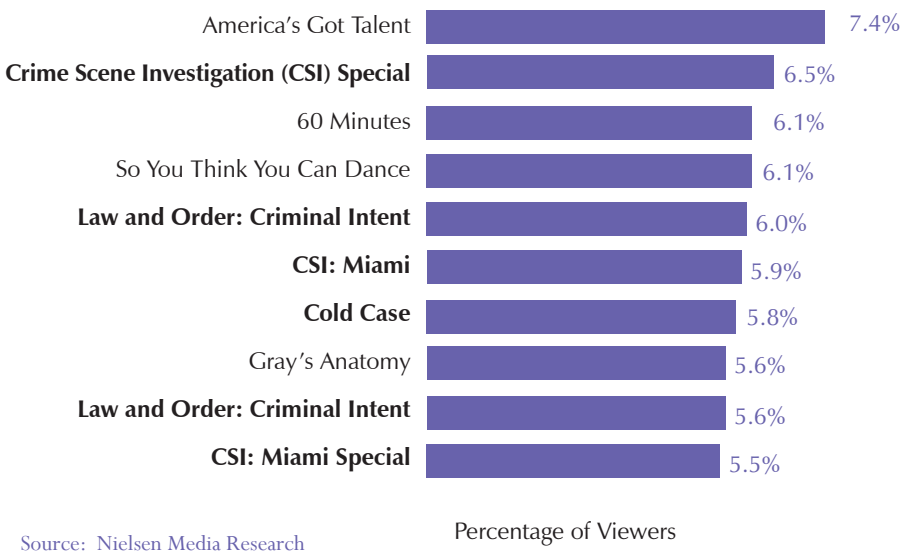
Even within the workings of the court system itself, many judges are not only reluctant but even hostile to the use of computer technology that is commonplace throughout the rest of our society.[6] Sometimes lawyers even claim, or pretend, to be ignorant neo-Luddites as an appeal to a perceived camaraderie with a judge. As Slack and Wise (2005) said, "[N]eo-Luddism has become something of a contemporary rallying cry for a number of individuals and groups engaged in analyzing and/or resisting technology in some form or another. There is even a certain cachet attached to the claim of being a Luddite" (p. 72).[7]

While judges may resist the use of technological advances within the court itself, we cannot avoid the impact of these scientific and information revolutions on the substance of what we do. The rush of new scientific developments has been so swift that the court system is struggling to deal with the expert testimony they produce. The Supreme Court has even ironically decided that the same technology-avoidant judges should be the "gatekeepers" to decide what science is good enough

to be heard in the courtroom.[8] Commercial disputes traditionally decided by judges on arcane principles of contract law now often involve technology and "cyberspace" issues that are truly foreign to many judges. One result has been that many technology-driven commercial enterprises have created their own dispute resolution forums outside the courthouse, and even in cyberspace.[9]

But perhaps the most poignant confrontation of our courts and modern technology and information arises in the jury system. Every week, this new scientific and information age comes marching through the courtroom door in the psyche of almost every juror that claims a seat in the box. The impact of popular culture on the judicial system, and in particular the criminal justice system, has been recognized by scholars for some time.[10] Jurors come into court today filled with now years of information and preconceptions not only about science but also about the court process itself. Film and television have long found fodder in courtroom dramas.[11] But in recent years the media's use of the courtroom as a vehicle has not only proliferated, but also changed in focus. Many of the more recent courtroom portrayals on the media are based on actual cases in a seeming fascination with our criminal justice process.

Ten Most Watched Programs-Nielsen Ratings, Week of July 3, 2006



Source: Nielsen Media Research

The popularity of such viewing has reached the point where Court TV now makes live "gavel-to-gavel" Internet coverage of ordinary trials available on a subscription basis. The blurring of reality with fiction, however, begins with the so-called crime-magazine television shows, such as *48 Hours Mystery* or *American Justice*, or even *Dateline* on occasion. In those shows the actual case is portrayed but only after it has been edited and narrated for dramatic effect. The next level of reality distortion about the criminal justice system is with the abundance of extremely popular crime-fiction television programs. The ubiquitous *Law and Order* promotes its plots as "ripped from the headlines," and, indeed, it and other shows seemingly immediately replicate some issue in an actual case that was widely disseminated in the rest of the media just a short time before.

While such "reality-based" portrayals of the criminal justice system have flourished, it is the marriage of those portrayals with the news about scientific and technological advancements that seems most troubling to the court system. The most popular courtroom portrayals, whether actual or edited or purely fictional, have been about the use of new science and technology to solve crimes. *CSI* is so popular that it has spawned other versions of itself, and they dominate the traditional television ratings. Its success has also produced similar forensic dramas, like *Cold Case*, *Bones*, *Numb3rs*, and many others.

The focus of much of the recent concern about the impact of mass media on the criminal justice system has been on these programs. Prosecutors, and judges, complain that the "*CSI* effect" has led jurors to demand too much from the prosecution in the way of scientific evidence and to "wrongfully" acquit defendants when no such evidence is forthcoming. The popular media has been quick to repeat the complaints.[12] Fitting to their subject, these anecdotal reports have generated more light than heat, and there is still no credible empirical study to determine if juror expectations have changed specifically as the result of the forensic-drama trend in the media. Some commentators have questioned whether such a pattern of acquittals where there is no scientific evidence exists or, even if it does, whether it is the result of other, more legitimate influences.[13]

The flaw in the complaints about the "*CSI* effect" is in our narrow stating of the issue. It may well be that jurors are not influenced particularly by *CSI* or any particular shows of that genre. But it is clear that jurors do now have significant expectations that prosecutors will use the advantages of modern science and

technology as tools to meet their burden of proving guilt beyond a reasonable doubt. The origins of those expectations probably lie in the broader permeation of the changes in our popular culture brought about by the confluence of rapid advances in science and information technology and the increased use of crime stories as a vehicle to dramatize those advances.

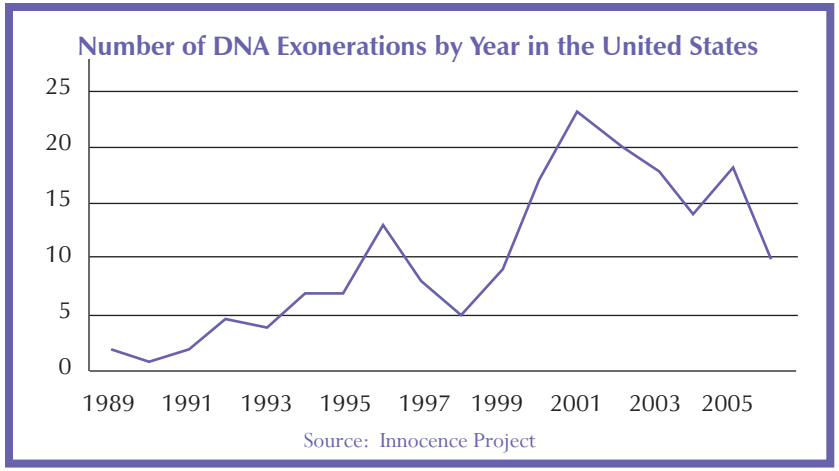
The response of the judicial system so far has been predictable. There has been small and increasing, but for the most part begrudging, acceptance of the use of technology in the mechanisms of the courts. Substantive resistance to changes in the status quo is much stronger. While law-enforcement officials have seemingly embraced the use of DNA in murder and rape cases, they have not adopted it to the extent that the public expects them to do so in many other types of cases. Police and prosecutors have not been given the resources to perform the other scientific tests in cases where they could do so. Juries will force them to do so.

Fiber optic cable strands

In fact, perhaps the jurors are right in expecting much more from the prosecution in this age. Our legal system demands proof beyond a reasonable doubt before the government is allowed to punish alleged criminals. Where there is a scientific test available that would produce evidence of guilt or innocence, and the prosecution chooses not to perform that test and present its results to the jury, it may not be unreasonable for the jury to have a doubt about the strength of the government's case. What is a "reasonable" doubt depends, as the common jury instruction says, on the facts and circumstances of each case. What is "reasonable" evidence to expect from the prosecution today is very different from what it was 20 or even 10 years ago.

In cases where such scientific evidence is unavailable or irrelevant, prosecutors have not found an effective way to convey that fact to jurors. They have not consistently tried to show jurors that in a particular case it is not "reasonable" to demand scientific evidence.

Instead, the system has concentrated its efforts at complaining about juror expectations and trying to find ways to convince jurors that they should ignore



everything they have "learned" about the courts and modern science from our culture. They will not and cannot do so. If it is to be effective, indeed if it is to continue to be relevant, the justice system must at least try to keep pace with the dramatic changes in our society. The technological and information revolutions are thoroughly integrated in our popular culture.[14] That popular culture is directly reflected in the courts, as it should be in a system that puts its faith in the people to make legal decisions.

ENDNOTES

[1] See, e.g., Richard Silberglitt, Philip S. Antón, David R. Howell, and Anny Wong, *The Global Technology Revolution 2020: Bio/Nano/Materials/Information Trends, Drivers, Barriers, and Social Implications* (Santa Monica, CA: Rand Corporation, 2006). Summary available online at http://www.rand.org/pubs/technical_reports/2006/RAND_TR303.sum.pdf.

[2] Donald E. Shelton, "DNA, the Human Genome, and the Criminal Justice System," *Judges' Journal* 39, no. 3 (Summer 2000). Available online at http://courts.ewashtenaw.org/DNA.htm.

[3] "Unlike the Industrial Revolution, which has run its course, the Information Revolution is still growing." Michael Dertouzos, *The Unfinished Revolution: Human-Centered Computers and What They Can Do for Us* (New York: Harper Collins, 2001), p. 15.

[4] Donald E. Shelton, "All Aboard?: Electronic Filing and the Digital Divide," *Judges' Journal* 40, no. 3 (Summer 2001). Available online at http://courts.ewashtenaw.org/DigDiv.html.

[5] Thomas G. Gutheil, "'What Does DNA Stand for, Daddy?' Or, What Does the Law Do When Science Changes?" *American Academy of Psychiatry and the Law Newsletter* 25, no. 3 (September 2000): 4-6. Available online at http://www.emory.edu/AAPL/newsletter/N253_DNA.htm.

[6] Donald E. Shelton, "Teaching Technology to Judges," *Judges' Journal* 40, no. 1 (Winter 2001). Available online at http://courts.ewashtenaw.org/teachtech.htm.

[7] Jennifer Slack and J. Macgregor Wise, *Culture + Technology: A Primer* (New York: Peter Lang, 2005).

[8] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); and see *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *United States v. Scheffer*, 523 U.S. 303 (1998). Supreme Court Justice Stephen Breyer is a proponent of this approach. See Breyer, "Science in the Courtroom," *Issues in Science and Technology Online* (Summer 2000). Available online at http://www.issues.org/16.4/breyer.htm.

[9] See Ethan Katsh, Janet Rifkin, and Alan Gaitenby, "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law,'" *Ohio State Journal on Dispute Resolution* 15, no. 3 (2000). Available online at http://www.umass.edu/cyber/katsh.pdf.

[10] See Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: University of Chicago Press, 2000); and Sherwin's latest work, *Popular Culture and Law* (London: International Library of Law and Society, 2006).

[11] See Michael Asimow and Shannon Mader, *Law and Popular Culture* (New York: Peter Lang Publishing, 2004).

[12] See Kit Roane, "The CSI Effect," *U.S. News and World Report* (April 25, 2005): 48; "'CSI Effect' Making Cases Hard to Prove: Lawyers," *ABC News Online* (September 24, 2005) at http://www.abc.net.au/news/newsitems/200509/s1467632.htm; Richard Willing, "'CSI Effect' Has Juries Wanting More Evidence," *USA Today* (August 5, 2004) at http://www.usatoday.com/news/nation/2004-08-05-csi-effect_x.htm; Stefan Lovgren, "'CSI Effect' Is Mixed Blessing for Real Crime Labs," *National Geographic News* (September 23, 2004) at http://news.nationalgeographic.com/news/2004/09/0923_040923_csi.html; K. Florin, "Crime TV: A Bad Influence on Juries?" *The Day*, New London, Connecticut (July 29, 2006).

[13] Tom R. Tyler, "Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction," *Yale Law Journal* 115 (2006):1050.

[14] See the even stronger view of the interrelationship between technology and popular culture advanced by Slack and Wise, *supra* note 7.

SPECIAL COURTS AND PROGRAMS

ELECTION LAW: WHAT STATE COURTS SHOULD EXPECT

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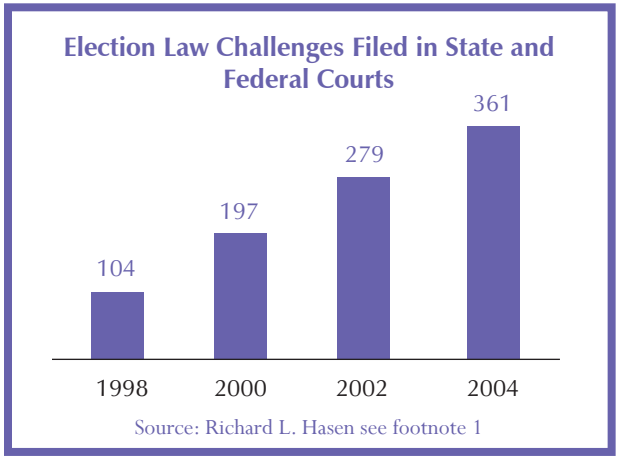
Election-related litigation in state courts has dramatically increased in recent years. This trend will continue through the November 2006 election and for the foreseeable future.

In recent years, we have seen a sharp increase in election-related litigation in both state and federal courts. The November 2006 election is expected to produce many new lawsuits raising a variety of election law claims.



Source: Richard L. Hasen see footnote 1

Increase in Election-Related Litigation

According to Loyola Law School professor and election law expert Richard Hasen, the number of election challenges filed in state or federal court more than tripled between 1998 and 2004. The graph above shows the breakdown of election-related litigation from 1998 through 2004 in both state and federal courts.[1]

This litigation has involved a wide range of issues. What follows is a discussion of just a few of the election-related legal issues that have arisen in recent years and that are likely to arise in the future.

Problems with Vote Tabulations

First, much election-related litigation involves disputes over voting tabulations. Some litigation, as in the celebrated challenge to the presidential vote totals in Florida in 2000, has involved challenges to the accuracy of vote-tabulation results. Moreover, following the United States Supreme Court's decision in *Bush v. Gore* (2000), some litigants have raised equal-protection challenges to the use of different voting technologies in different precincts.[2]

Punch card ballot, which can produce "hanging chads"

Since 2000, in the wake of the Florida fiasco with "hanging chads" and with the assistance of federal funds provided by the Help America Vote Act of 2002 (HAVA), many jurisdictions have obtained new electronic voting systems to provide more accurate vote tabulations. The transition to these new technologies, however, has been fraught with problems in many localities. Indeed, in recent weeks, many observers have forecast a sharp increase in election-related litigation in November 2006 because of problems arising from the use of these new electronic voting systems.[3]

One-third of all precincts in the United States are using electronic voting machines for the first time in 2006.[4] The use of these new electronic systems is expected to cause a variety of problems that will inevitably produce litigation. Many of these new technologies require extensive testing ahead of time to work out problems. Some precincts have not made adequate preparations to make sure that their new electronic voting machines work correctly and that their poll workers understand their operation.[5] The September 12, 2006 primaries in Maryland demonstrate the problem. On that day, several precincts experienced significant problems with both electronic vote-tabulation machines and electronic voter-registration systems that produced significant disruptions.[6] These problems included malfunctioning voting-machine access cards and electronic voter-registration lists that crashed; losing candidates have vowed to sue.[7] Maryland was not alone. This year, nine other states have also had problems with their new electronic voting machines during primary

voting.[8] Voter turnout will be considerably larger in the November 2006 general election than in the primaries; these increases will further complicate the effect of electronic voting-machine malfunctions.

Where electronic voting-machine problems arise, litigation is likely to result. For example, in November 2004, electronic voting machines in Carteret County, North Carolina, stopped counting votes late on election day, resulting in the loss of approximately 4,500 votes. Litigation followed and election administrators and courts struggled with whether to call a new election.[9] Less dramatically, voting-machine problems frequently cause long voting lines that can provoke election-day lawsuits to extend voting hours.

Problems with Voter ID Requirements

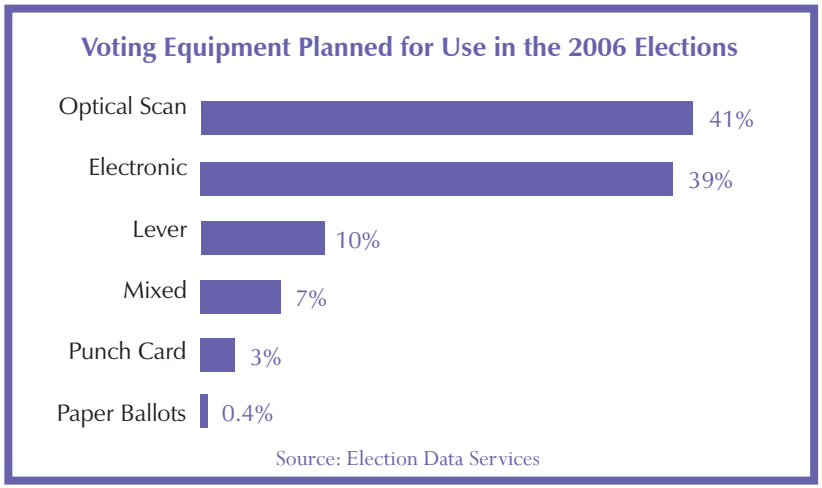
The federal Help America Vote Act mandates that all states require voters who registered to vote by mail to show identification before voting for the first time. Many states impose additional requirements. Twenty-four states require all voters at every election to show some type of identification. Of those 24 states, 7 require a photo identification to be shown before voting.

These photo-identification requirements have produced considerable litigation. In July 2006, a state court judge in Georgia enjoined the enforcement of his state's photo-identification requirement on the grounds that it constituted an undue infringement on the right to vote, proving receptive to the argument that the requirement imposed a burden on poor and elderly voters who might not have a driver's license—a particularly convenient form of photo identification.[10] In September 2006, a state court judge in Missouri enjoined enforcement of his state's law on similar grounds.[11] On the other hand, legal challenges to photo-identification requirements have failed in Arizona and Indiana, and other legal challenges are pending.[12] Litigation over photo-identification requirements is likely to continue, as additional state legislatures consider adopting such provisions.

Problems with Administration of Voting Procedures by Political Partisans

A third issue that has contributed to election-related litigation has been the administration of state voting procedures by political partisans. In 33 states, the chief election officer is chosen through a partisan election process.[13] Suspicion of partisan bias by election administrators, as in Ohio during the 2004 election cycle, has helped trigger considerable litigation challenging various administrative decisions. As Professor Richard Hasen has observed: "Since 2000, both Democrats and Republicans have focused their attention on controversial election law decisions of secretaries of state chosen in partisan elections, intimating that the secretaries' decisionmaking was in the interest of their party, rather than the interests of the public."[14] Many observers have called for a system whereby election officials are selected outside of the partisan political process. For example, in 2005, the prestigious Commission on Federal Election Reform, chaired by James Baker and Jimmy Carter, recommended the use of nonpartisans to administer elections.[15] Despite such calls, most states have chosen to retain their system of using political partisans to administer elections. This practice will likely contribute to charges of political bias and of a failure to follow proper election procedures—charges that will inevitably wind up in court.

The Impact of Close Elections on the Increase in Litigation



Finally, the likelihood of litigation arising out of an election sharply increases when the margin between the candidates in an election is very narrow.[16] When a relatively small change in the final vote tally can change the outcome of an election, political partisans have a powerful incentive to go to court. For example, provisional ballots are now widely used as a result of the Help America Vote Act. If, on election day, questions arise as to a voter's eligibility, the voter can be provided with a provisional ballot, which is held separately from the other ballots. The legality of these votes will be determined only if they matter. In a close election,

these ballots may very well matter and, hence, election officials and perhaps a court may be called upon to determine whether these provisional ballots should be counted as actual votes.

Dealing with Election-Related Litigation

Each election year, many state court judges will be called upon to resolve election-related disputes. Election litigation is inevitable. But there are certain actions that state courts can take to prepare for this litigation. The most difficult aspect of election-related litigation is deciding an electoral dispute after the election has been held and the votes have been counted. If, in fact, some impropriety has occurred, what remedy should the court order? The losing party will frequently call for a new election, but courts will understandably be reluctant to order such a drastic remedy.

One thing that state court judges can do is to try to resolve potential disputes before the election, at a time when relief can be granted that does not require a new election. The court cannot force litigants to file their complaints pre-election, but the court can certainly try if at all possible to resolve those cases that are filed before the election. The court can also decline to consider issues raised after the election that could have been raised during the pre-election period under the doctrine of laches. If, for example, a candidate complains after the election that the ballot was deficient in some way, the court can dismiss such a complaint if the litigant could have raised the issue before the election. The goal is to create an incentive for litigants to raise their concerns at a time when the remedial options are far more appealing.[17]

ENDNOTES

1 The source for this table of election-related litigation is Richard L. Hasen, "Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown," *Washington and Lee Law Review* 62 (2005): 937, 958. This graphic includes only litigation reported in the Lexis database and, hence, likely underreports the actual scope of election-related litigation.

2 See, e.g., *Stewart v. Blackwell*, 356 F. Supp. 2d. 791 (N.D. Ohio 2004); *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002). See generally, Richard L. Hasen, "*Bush v. Gore* and the Future of Equal Protection Law in Elections," *Florida State University Law Review* 29 (2001): 377.

3 See, e.g., Dan Balz and Zachary A. Goldfarb, "Major Problems at Polls Feared: Some Officials Say Voting Law Changes and New Technology Will Cause Trouble," *Washington Post* (September 17, 2006), at A01; Richard Wolf, "Election Glitches 'Could Get Ugly,'" *USA Today* (September 14, 2006).

4 Balz and Goldfarb, *supra* note 3, at A01.

5 *Id.*

6 Cameron W. Barr, "Md. Election Problems Fuel Push for Paper Record: After Primary Day Fiasco, Some Area Officials and Activists Say Electronic Voting Systems Need Backup," *Washington Post* (September 17, 2006), at A04.

7 Ovetta Wiggins, Eric Rich, and Hamil R. Harris, "2 Candidates Question Vote in Pr. George," *Washington Post* (September 16, 2006), at B01.

8 Balz and Goldfarb, *supra* note 3, at A01 ("The problems . . . have contributed to doubts among some experts about whether the new systems are reliable and whether election officials are adequately prepared to use them").

9 Hasen, "Beyond the Margin of Litigation," *supra* note 1, at 951; Heather Moore, "Committee Meets to Discuss State's Voting Process," *News 14 Carolina* (December 13, 2004).

10 Brenda Goodman, "Judge Blocks Requirement in Georgia for Voter ID," *New York Times* (July 8, 2006).

11 Kelly Wiese, "Judges Strikes Down Missouri Voter ID Law," *Jefferson City News Tribune* (September 15, 2006).

12 "Judge Refuses to Block Ariz. Voter ID Requirement," *AZCentral.com* (September 11, 2006) (refusal to grant preliminary injunction before primary in Arizona case; additional hearing scheduled for October 2006); Peter Wallsten, "Voter-ID Battle Is Playing Out in the Courts," *Seattle Times* (September 14, 2006).

13 Hasen, "Beyond the Margin of Litigation," *supra* note 1, at 974.

14 *Id.* at 959.

15 See *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* (2005).

16 See Hasen, "Beyond the Margin of Litigation," *supra* note 1, at 946. ("The closeness of election results is the single biggest factor that predicts the possibility of a post-election controversy spilling into court. . . . The smaller the margin, the more likely an error in election administration affected the results.")

17 *Id.* at 945 ("the key is to encourage courts to be more willing to entertain pre-election litigation and to be more chary of entertaining post-election litigation").

THE IMPACT OF AN AGING SOCIETY ON STATE COURTS

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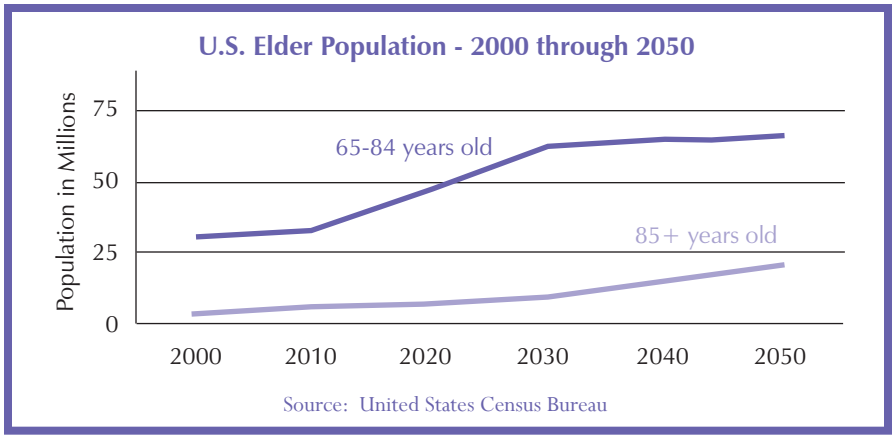
As the American population ages, the courts will be stressed to educate staff, develop innovative strategies to address elder abuse, and reform guardianship policies and practices.

According to the U.S. Census Bureau, the number of people older than 65 will more than double between 2000 and 2050, and the population over age 85 will quadruple. What does this trend mean for the courts?



Court Training on Issues Related to Aging Will Become Paramount

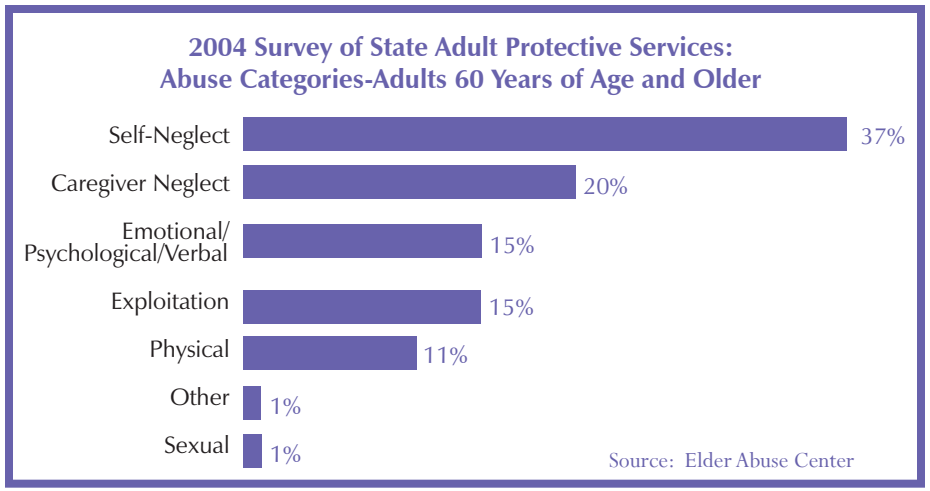
Rothman and Dunlop, writing in *Court Review*, noted that "there has been little effort to examine the implications of aging in America on judicial administration, access to the courts, and resolution of the underlying issues that often precipitate court involvement for older adults."[1] Given the dearth of research in this area, it remains unknown how negative stereotypes of older adults affect court proceedings and the effective administration of justice. As the demographics of America shift and greater awareness of ageism builds, training for judges, judicial officers, court administrators, and staff will become commonplace.

Current justice system training on elder issues tends to focus on elder abuse and neglect. For example, the University of Miami School of Medicine, Center on Aging and Disabilities, has a training project called *Take a Closer Look (A Training Curriculum on Abuse and Domestic Violence Against Elders and Vulnerable Adults for Professionals in the Justice System)*.[2] The curriculum includes modules on applicable laws and definitions, crime and people with disabilities, vulnerabilities that come with the aging process, abuse and neglect, domestic violence, exploitation of vulnerable adults, and professional responses. In addition, the Office on Violence Against Women is developing national curricula that will be used to train law enforcement, prosecution, and the judiciary on domestic violence against older individuals.

A foreseeable outcome of training programs is greater awareness of the physical limitations often caused by aging. Consequently, an area of future growth may be the renovation of courtroom facilities to accommodate an aging population. Examples of modifications that can be made to courtrooms to improve access include the use of amplification devices, nonglare lighting, and unobstructed pathways to the counsel table, witness box, and jury box.[3] In 2005 Stetson College of Law built the nation's first model courtroom for the elderly and disabled. The courtroom features touch screens, electronic gates that open automatically, hearing amplification devices, flat-panel monitors, and other features specifically designed for people with reduced vision, limited hearing, or other physical disabilities.[4]

Greater Awareness of Elder Abuse, Neglect, and Exploitation Will Encourage Innovative Strategies and Community Collaboration

An increasing number of states are passing laws that provide explicit criminal penalties for various forms of elder abuse.[5] Additionally, a number of legislatures have enacted enhanced penalties for certain crimes against older persons. Laws specific to fraud and financial exploitation of older persons have become widespread. For instance, in June 2006, Alaska governor Murkowski signed a bill to create a new Office of Elder Fraud and Abuse to investigate complaints relating to fraud involving older Alaskans who are not otherwise able to bring a complaint without assistance and to provide assistance to vulnerable older victims. In California, Governor Schwarzenegger signed a bill that will require banks to report suspected cases of financial elder abuse to authorities.



Collaboration and coordination among courts, law enforcement, prosecution, social-service agencies, the defense bar, aging services, and financial institutions are the wave of the future in addressing elder abuse, neglect, and exploitation. For instance, coordination was a key theme at the first national meeting of the Elder Abuse and the Courts Working Group, sponsored by the National Center for State Courts. The meeting, held in Williamsburg, Virginia, in April 2006, brought together some of the nation's leading experts from a variety of disciplines.[6] The Working Group ranked the development of coordinated community responses among the top-ten key components of an effective court response to elder abuse.

At the local level, several courts are leading the way toward addressing elder abuse, neglect, and exploitation.

- Florida's 13th Judicial Circuit Court in Hillsborough County features an Elder Justice Center (EJC). The mission of the EJC is "to remove barriers and enhance the linkages between seniors and the court system, as well as social and legal services."[7] The center, in addition to providing a designated facility for elders, offers public education, coordinates access to service agencies, advocates for victims, and manages guardianship cases.
- The Superior Court of California, Alameda County, under Judge Julie Conger, established an Elder Protection Court. The specialized calendar initially addressed civil remedies involving older or dependent adults and provided specialized case management that included vigorous court-community collaboration.[8] In January 2006, the specialized court also began hearing felony elder and dependent-adult abuse cases occurring in Alameda County, thus coordinating civil and criminal elder-abuse cases in a single department. The Elder Abuse Protection Court is the first of its kind in the country.

In sum, the nation's courts will need to promote coordination, outreach, victim-centered approaches, and problem-solving strategies to judiciously address the complex problem of elder abuse, neglect, and exploitation.

Increased Need for Adult Guardianships Will Lead to Reform of Current Laws and Practices

Americans are living longer than ever. As the demographics shift, more and more older persons will require some assistance in making personal and financial decisions. Guardianship is a relationship in which a court gives one person (the guardian) the duty and power to make personal or property decisions for another (the incapacitated person or ward).[9] States use a variety of terms to distinguish types of public and private guardianships. For instance, fiduciaries and conservators are the terms used in a number of states to refer to those who have financial control of a person's estate.

The national status of guardianships is plagued by poor data. In a 2005 survey of state court administrator offices, the American Bar Association Commission on Law and Aging found that there is no state-level guardianship data for the majority of reporting states, and there is almost no data on elder abuse as a distinct case type.[10] The poor collection of data and lack of performance standards result in a nationwide crisis that impacts the abilities of states to effectively monitor guardians, gauge the extent of abuse by guardians, and shape public policy.

In 1987 the Associated Press examined 2,200 randomly selected guardianship court files and found that half of the files were missing at least one annual accounting, and 13 percent of the files were empty, except for the opening of the guardianship. The report contended that "overworked and understaffed court systems frequently break down, abandoning those incapable of caring for themselves," and that courts "routinely take the word of guardians and attorneys without independent checking

or full hearings." In short, it claimed that, sometimes, the courts responsible for overseeing guardianship cases "ignore their wards."[11]

Nearly 20 years later, the *Los Angeles Times* ran a series of articles on professional conservators after reviewing more than 2,400 cases handled in southern California.[12] The *Times* found the system to be "deeply flawed," with little state regulation of conservators and court oversight that is "erratic and superficial." The series led to the creation of a Probate Conservatorship Task Force, public hearings, and a push for legal reform. A variety of bills under consideration on state ballots in September 2006 include:

- A bill that would double the frequency with which court investigators visit seniors or dependent adults under conservatorship (AB 1363)
- A bill that would make it more difficult for a conservator to sell a client's home (SB 1116)
- A bill that would require the Department of Consumer Affairs to license and regulate conservators (SB 155)
- A bill that would allow courts to investigate complaints about conservators without a formal request (SB 716)

The California experience is not unique. A tidal wave of guardianship reform can be expected in the coming years, as state courts and legislatures grapple with a system that has been overwhelmed and neglected for decades.

ENDNOTES

1 M. B. Rothman and B. D. Dunlop, "Judicial Responses to an Aging America, *Court Review* 42, no. 1 (2005): 9.

2 For more information, go to http://cad.med.miami.edu/. Click on "CAD Recent Projects."

3 See W. E. Adams, Jr., "Elders in the Courtroom," in *Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century*, M. B. Rothman, B. D. Dunlop, and P. Entzel, eds. (New York: Springer Publishing Company, Inc., 2000).

4 For more information, see www.law.stetson.edu/Eleazercourtroom/.

5 See "Information About Laws Related to Elder Abuse," American Bar Association Commission on Law and Aging, prepared for the National Center on Elder Abuse (2005) at www.elderabusecenter.org.

6 *Policy Paper: A Report from the First National Meeting of the Elder Abuse and the Courts Working Group Meeting* can be found at http://www.ncsconline.org/famviol/elderabuse/pdf/MeetingReportFINAL.pdf.

7 For more information, visit the 13th Judicial Circuit Web site at 222.fljud13.org/ejc.htm.

8 California AB 56 created a civil remedy to prevent the recurrence of elder abuse, giving senior adults aged 65-plus and dependent adults the ability to obtain restraining orders, stay-away orders, and residence exclusions against any person who is abusing them emotionally, physically, or financially.

9 See the National Center on Elder Abuse for additional information (www.elderabusecenter.org).

10 Erica F. Wood, *State-Level Adult Guardianship Data: An Exploratory Study* (Washington DC: American Bar Association Commission on Law and Aging, for the National Center on Elder Abuse, 2006).

11 Cited in S. B. Hurme and E. Wood, "Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role," *Stetson Law Review* 31 (2002): 868-69.

12 Robin Fields, Evelyn Larrubia, and Jack Leonard, "When a Family Matter Turns into a Business" (part one of a four-part series), *Los Angeles Times* (November 13, 2005).

WHAT'S HAPPENING WITH DWI COURTS?*

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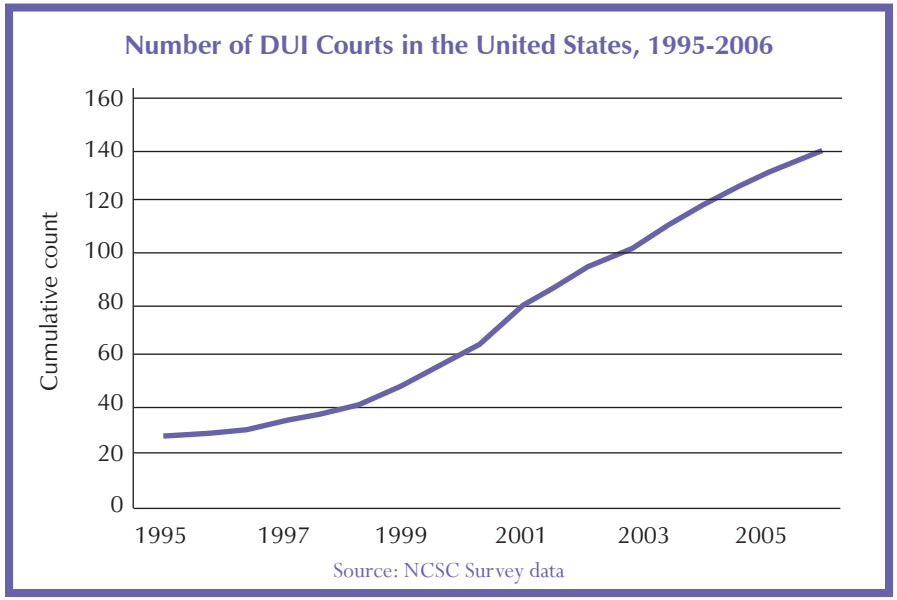
Nurtured by federal funding, DWI courts have sprung up at a rapid pace during the past five years. Although evolving as a branch of drug courts, specialized DWI courts have tended to take root and grow more rapidly in states not saturated with drug courts and states not suffering from the highest alcohol-related fatalities. The growth rate could be sustained with a more diversified funding base and the use of technology to reduce the cost of monitoring clients.

DWI courts were established to protect public safety and to reduce recidivism by attacking the root cause of impaired driving—alcohol and substance abuse. The mission of sobriety and DWI courts is "to make offenders accountable for their actions, bringing about a behavioral change that ends recidivism, stops the abuse of alcohol, and protects the public; to treat the victims of DWI offenders in a fair and just way; and to educate the public as to the benefits of DUI Courts for the communities they serve."[1]



Proponents contend that specialized DWI courts, which are in effect specialized dockets, are better equipped to handle DWI cases, permitting swifter resolutions, reducing backlog, and improving outcomes. Judges also believe that DWI courts should be expanded, allowing experienced judges to use treatment resources and to sentence, sanction, or reward offenders with greater consistency.[2]

Common characteristics of DWI courts include intense alcohol-addiction treatment and heavy court supervision, with jail sentences as a last resort. "Compliance with treatment and other court-mandated requirements is verified by frequent alcohol and drug testing, close community supervision, and interaction with the judge in non-adversarial court review hearings."[3]

The National Association of Drug Court Professionals (NADCP) reported 176 DWI courts in existence as of December 2004.[4] We report a total of 133 DWI courts as of 2005.[5] One obvious reason for the discrepancy is that this article considers only operational courts, not courts that are in the planning stages.

The primary reason for the difference, however, is a matter of definition. NADCP classified 90 of its 176 DWI courts as "designated DWI" courts and the other 86 as "hybrid DWI" courts. We classified 74 of the 133 courts as "hybrid" because they handle both substance-abuse and alcohol-abuse cases.[6] For us, however, the relative proportion of the docket that is composed of DWI cases determines the classification. On that basis, we would classify the 51 courts in New York as drug courts, although they do occasionally hear DWI cases as well. The same is true for 9 courts in Louisiana.

The missions of DWI courts, drug courts, and hybrids are similar in their emphasis on offender accountability and the goals of changing offender behavior, eliminating substance abuse, and reducing recidivism.[7] They differ in that drug courts work to make drug offenders productive members of society, whereas DWI offenders are often productive in spite of their alcohol abuse. Educating the public about alcohol abuse is more of a challenge. Although it is possible to consider some types of substance abuse as a victimless crime because it only hurts the offender, it is not possible to consider DWI offenses as victimless because public safety is

at risk. Monitoring DWI offenders is more difficult than monitoring drug-court participants because alcohol goes through the body quickly and is harder to detect than drugs. Alcohol is also legal and easier to obtain than drugs.

Trends

DWI Courts Will Need to Stabilize Funding for Continued Growth. The growth in DWI courts has been dramatic, with nearly as many new courts (22) being established in 2005 and after than were established in the years before 2000 (29). A Spanish-language court was added in Maricopa County in 2002 and won an achievement award for an innovative county program in 2005.[8]

As a result of drug courts and DWI courts being heavily dependent on federal funding (especially the Byrne Justice Assistance Grant [JAG] program, formerly called Byrne Formula Grants), their growth is influenced by federal funding. The very existence of many drug and DWI courts was threatened when the Byrne JAG program was eliminated in the president's 2007 budget proposal. However, the House of Representatives' FY 2007 Commerce-Justice-Science spending bill (HR 5672) allocated $634 million to the Byrne JAG program.[9]

Over the longer term, DWI courts may need to consider finding a firmer financial footing by supplementing, and perhaps replacing, federal support with state funding or increases in fines and fees. Michigan, for example, has created a Justice System Fund to preserve their large number of specialty courts. All fines and fees collected by Michigan courts are placed into the fund and redistributed to the courts according to need. The Drug Court Treatment Fund, which includes DWI courts as well, receives a 2.85 percent share of the Justice System Fund, and that supports between 40 and 75 percent of the costs of DWI courts.[10]

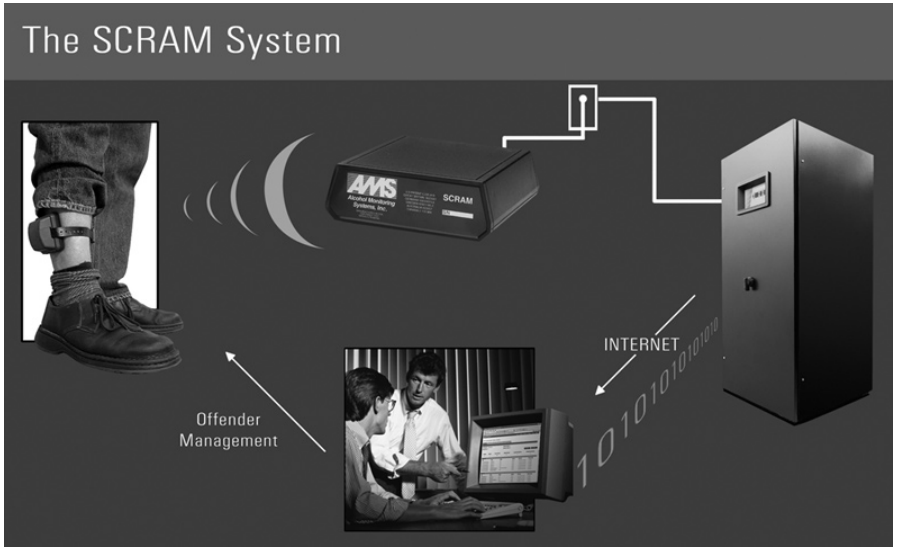
DWI Courts Tend to Evolve from Drug Courts, But Take Root in Different States. Michigan (25), Missouri (17), Georgia (10), and Idaho (10) are the states with the largest numbers of DWI courts. DWI courts are not most prevalent in states that have the highest number of alcohol-related fatalities (California, Florida, and Texas). And even though most DWI courts evolved from the drug courts, the states with the largest number of adult drug courts, e.g., California, New York, and Florida, do not have the largest number of DWI courts (the exception is Missouri, which has 17 hybrid courts). Although most drug courts handle the occasional DWI case, and more than half of the DWI courts are "hybrids" with a mixed docket, most dockets emphasize either drug cases or DWI cases.

DWI Courts Need a Stable Case Volume to Be Effective. The vast majority of DWI courts handle fewer than 100 cases (of the 77 DWI courts who reported case volume, only 20 had more than 100 cases per year, and only 7 had more than 200 per year). Most offenders have had two or more DWI convictions in the past.

DWI Courts Are Not for Violent Offenders. Although 44 percent of the DWI courts (51 of the 114 courts reporting data by case type) had jurisdiction over felonies, DWI courts, like drug courts, do not accept violent offenders, perhaps because there is a fear that they would pose a threat to treatment providers.[11] In addition, the most restrictive programs do not admit sex offenders, first-time offenders, or people with mental illnesses. However, some drug courts are considering admitting violent offenders. If this experiment works, it could very well spread to DWI courts.

DWI Courts Need to Report Recidivism Rates. Although reported recidivism rates from DWI courts that track them are impressive, only 30 courts were able to report recidivism rates—a primary indicator of effectiveness. Nearly a third (37) of the DWI courts were established after 2004—too recent to develop a track record. A court must be operating for at least a year to provide an opportunity for the first clients to graduate, and then have another year pass after graduation to calculate a recidivism rate. As time passes, it will be necessary to obtain rates of recidivism from DWI courts and to compare them with those of non-specialized courts. (At that time, the finer points of calculating recidivism will need to be addressed to ensure that comparisons are fair. For example, are people who drop out of the program still counted in the denominator? Are the rates of recidivism for dropouts lower than for people who did not enroll at all?) Recidivism rates can also help to guide policy; e.g., are DWI courts most successful with their targeted populations of "hard-core" offenders who are less likely to deny that they have a drinking problem?

DWI Courts Can Use Technology-Based Monitoring to Reduce Costs. Although data on recidivism and effectiveness of sanctions is limited, the National Highway Traffic Safety Administration finds the following sanctions to be most effective in general: licensing sanctions (including suspension or revocation of licenses),



Secure Continuous Remote Alcohol Monitoring (SCRAM) System

vehicle sanctions (including impoundment or forfeiture), and assessment and rehabilitation.[12] Some innovative sentencing practices used in some communities, but not yet fully evaluated, include home confinement with electronic monitoring, fines based upon cost of public services or offender's daily income, publishing of offenders' names in newspapers, and court-ordered visits to emergency departments and physical-rehabilitation facilities.[13]

DWI courts require close, frequent contact with the judges and frequent testing, which increase the cost of operating DWI courts. One way to reduce the cost of monitoring is to employ technology. For example, 36 states are using "SCRAM Bracelets" for 24-hour-a-day monitoring. A SCRAM (Secure Continuous Remote Alcohol Monitoring) Bracelet is tamper and water resistant and uses an electrochemical sensor that is attached to the offender to capture transdermal alcohol readings from continuous samples of perspiration collected from the air above the skin.[14] Costs include installation ($50.00-100.00) and daily monitoring fees ($10.00-12.00)—less than the cost of remote electronic alcohol monitoring and certainly less expensive than incarceration. Funding arrangements are generally offender-pay and often include some accommodation of indigent offenders.

ENDNOTES

*The authors would like to express their appreciation to Benjamin Wise and Whitney Myers, who helped with the research, compiled the survey results, and made follow-up telephone calls to the DWI courts.

1 J. Tauber and C. W. Huddleston, *DUI/Drug Courts: Defining a National Strategy* (Washington, DC: National Drug Court Institute, 1999), p. 5.

2 R. D. Robertson and H. M. Simpson, *DWI System Improvements for Dealing with Hard Core Drinking Drivers: Sanctioning* (Ottawa, Ontario: Traffic Injury Research Foundation, 2002).

3 William Brunson and Pat Knighten, eds., *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, DC: National Highway Traffic Safety Administration, 2004), p. 11.

4 C. West Huddleston III, Judge Karen Freeman-Wilson, Douglas B. Marlowe, and Aaron Rousell, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (Washington DC: National Drug Court Institute, 2005).

5 A list of DWI courts is being maintained at http://www.ncsconline.org/D_KIS/DWI/index.html. Readers are encouraged to review the table for accuracy and contact the authors with corrections and suggestions, so that the list can be kept current.

6 An earlier *Trends* article attempted to focus on designated DWI courts, but also included some "hybrid" courts that handled substance-abuse cases along with the alcohol-abuse cases. Victor E. Flango, "DWI Courts: The Newest Problem-Solving Courts," *Future Trends in State Courts 2004* (Williamsburg, VA: National Center for State Courts, 2004).

7 Tauber and Huddleston, 1999.

8 "Spanish-Language DUI Court Receives Award," *Arizona Business Gazette* (September 15, 2005) at www.azcentral.com/abnews/articles/0915lawrail15.html.

9 National Center for State Courts, *Washington Update* 13, no. 6 (August 2006). The Senate Appropriations Committee approved its version of HR 5672 at a funding level of $555.1, but the full Senate has not approved the bill at the time of this writing.

10 R. Mack, State Court Administrative Office, telephone interview, September 13, 2006.

11 The prohibition stems from a requirement under section 2201 of the Omnibus Crime Bill, which covers funding distributed under the Drug Court Discretionary Grant Office (and was distributed by the Drug Courts Program Office). This prohibition does not apply to all federal funding for drug courts. So, drug courts or DWI courts that are not using funds under that particular funding stream

are not required to exclude violent offenders. Many drug courts, which do not receive funding under this provision, still choose to exclude violent offenders due to local concerns, and some states may also have statutes that define broad eligibility requirements for drug courts. The authors are grateful to Carson Fox, a Fellow at the National Drug Court Institute, for this clarification.

12 National Highway Traffic Safety Administration, *A Guide to Sentencing DWI Offenders* (Washington, DC: National Highway Traffic Safety Administration, 2005), p. i.

13 *Ibid.*, 14.

14 R. Robertson, W. Vanlaar, and H. Simpson, *Continuous Transdermal Alcohol Monitoring: A Primer for Criminal Justice Professionals* (Ottawa, Canada: Traffic Injury Research Foundation, September 2006).

WANTED: CAREER PATHS FOR COURT INTERPRETERS

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Now that a number of states are testing and certifying court interpreters, the courts must begin to consider improved service-utilization techniques for existing interpreter resources and provide incentives to entice new interpreters into the field. More effective management and scheduling practices can increase the number of interpreter resources, make the job of interpreting a more attractive one, and provide growth and development opportunities within the interpreting field.

Background

The need for qualified court interpreters is well documented.[1] Over the past decade, court managers have, sometimes belatedly, recognized that the number of non-English speakers facing a judge in the courtroom is increasing at a rapid pace and that something must be done to meet that need. Many states (at least 25 at this writing) have developed court-interpreter-testing programs to identify those interpreters who possess the minimum skills necessary to interpret in the courts. As those programs have matured, court managers have recognized and bemoaned the low passing rates on certification tests, and have come to recognize that minimally qualified court interpreters are a scarce commodity whose services, when they are available, must be used effectively.

In an effort to increase the number of interpreters who pass a performance examination, statewide interpreter-testing-program managers have begun to examine ways to increase the number of interpreters in the *potentially qualified pool*, i.e., those individuals who have the highest likelihood of passing a performance examination. Some offer training programs, others require college or university study before participation in an oral examination is allowed, and still others have implemented screening devices (written exams, translation exercises, etc.) in order to administer oral examinations only to those individuals with the highest likelihood of passing with the hope that the pass rates will improve. Others have attempted to better coordinate the court's schedule in an effort to better use the court's time and the interpreter's time.

All of these efforts are admirable, but some fundamental realities have been overlooked: the court and other public institutions have failed to develop a desirable work environment for the individuals who have the highest likelihood of passing an examination. In other words, we have failed to create a desirable destination on the career path for professional interpreters.

The Problems

To better use the services of existing and potential interpreters, court leaders should consider at least three important concepts: the working conditions under which existing interpreters operate, the incentives that are provided to entice new interpreters into the field, and the service-utilization techniques that are employed once qualified interpreters are identified.

Poor Working Conditions. Are highly proficient, capable, bilingual individuals motivated to become qualified court interpreters? You decide. How interested would you be in a job that:

- Supervisors have little or no understanding of?
- Fails to recognize your unique and valuable skill sets?
- Is regularly challenged with uncomfortable ethical dilemmas?

Compensation for Salaried Court Intepreters, Select States, 2006

	Starting Salary	Maximum Salary
Arkansas	26,000	51,000
California	30,000	66,000
Colorado	34,980	60,036
Connecticut	38,036	49,565
Minnesota	30,326	54,808
New Jersey	50,000	71,000
New Mexico	38,168	59,634
Oregon	38,160	51,096
Pennyslvania	36,326	44,985

Note: Salaries are approximate. Some salaries based on hourly or monthly rates.
Source: National Center for State Courts

Considering the very hard work and specialized cognitive and motor skills that are required to become a qualified court interpreter, the job is too often not a tempting one. Although the job should be viewed, and treated, as an important one—certainly as important as the court reporter—it is often viewed or misunderstood in ways that fail to lure potential interpreters into the job market. Too often, interpreters enter a courtroom where the judge and the attorneys do not possess an understanding of the ethical and professional responsibilities of an interpreter. Court personnel often view the interpreter as working on behalf of a party to the case instead of as a court official, appointed to help the court accomplish its work (i.e., moving cases forward fairly and providing access to all who enter the courtroom).

If the court, attorneys, and court personnel fail to grasp the function of the court interpreter, the interpreter may be left floundering, with no background about the case at hand, and may be asked to perform activities that are inappropriate and unethical for an interpreter—an uncomfortable position for anyone, to be sure.

It is unlikely that qualified individuals will actively seek out a professional environment that undervalues or simply does not understand the role the interpreter should play in the courtroom. It is important for the judiciary, court leaders and managers, and court personnel to become educated about interpreters, what interpreters do, what their role should be in and out of the courtroom, and the unique skills that are required to be considered qualified. Once the job is understood and appreciated by others in the workplace, existing interpreters will be more satisfied with their working conditions, and potential interpreters will be more likely to do the hard work and invest the money that is required to become qualified.

Too Few Incentives. To repeat the earlier question, are highly proficient, capable, bilingual individuals motivated to become qualified court interpreters? Once again, you decide. How interested would you be in a job that:

- Is sporadically needed?
- Is low paying?
- Offers no benefits?

Even if the job of interpreting in the courts is a respected one, many courts simply do not have enough work to keep an interpreter busy for eight hours a day, especially in languages other than Spanish. This results in a conundrum for the courts—when an interpreter is needed, the need is an important and urgent one, but the need is not frequent enough to justify paying for a part- or full-time interpreter. Some jurisdictions have adopted unique scheduling calendars to group those case files that require an interpreter together on the court's schedule, but often even that does not provide enough work to justify entering into a formal contract whereby an interpreter agrees to be available during regular blocks of time for some reliable amount of money. Consequently, many qualified individuals hold other part- or full-time jobs where they can make a reasonable living, leaving the courts with even fewer scarce resources.

The market for interpreters is not a coordinated one. The courts alone may not have enough work to keep an interpreter busy; however, there may be other offices and agencies that experience a similarly occasional need for interpreters. If the courts and other offices and agencies operate in a vacuum, it creates a seller's market wherein the interpreter can or must charge a large amount of money to make the assignment worthwhile.

It is difficult to imagine that a highly qualified individual will strive to enter a job market that is sporadically needed and fails to provide a reliable living. Interpreters, like other professionals, must find jobs that pay enough and offer some incentive for growth and development in the field.

Service Utilization Techniques. In many jurisdictions, court leaders have avoided the issue of trying to determine how to use court interpreter services in more cost-effective and efficient ways. Just having a testing program may seem to be a big enough investment. The challenges surrounding the issue of providing interpreter services to non-English-speaking individuals in the courts can appear so overwhelming that court leaders may avoid an analysis of current practices. But poor scheduling practices can discourage potentially qualified persons from putting forth the effort and financial commitment required to become a court interpreter and cause frustration and confusion for existing court interpreters. If chaos reigns in the courtroom because of poor scheduling practices, it may be impossible for the court manager to determine whether an interpreter showed up; whether

that person provided interpreting services, for whom, for how long; and whether access to justice was actually provided.

Certainly, court leaders who manage court-interpreting services can implement some inter-jurisdictional procedures that better coordinate the needs of the court with the needs of the individual interpreters. Committing to a better organized, more coordinated approach to scheduling interpreters in the courts can lead to innovative approaches within the jurisdiction. The collection of relatively simple data can help in the coordination process; for example, knowing how many interpreted proceedings there were in the past year and in what languages is powerful information when managers are planning for the future.

In some jurisdictions, courts have blocks of time on a regular calendar to hear cases for which an interpreter is needed, eliminating or minimizing the occurrences of unexpected and emergency needs for an interpreter. Some communication and collaboration with the clerk's office can result in early identification of those case files that will require the services of an interpreter. Once identified, the cases can be better managed and scheduled, helping both the court and the interpreter, and reducing the number of times an interpreter appears for a case, only to find it was postponed, delayed, or dismissed and leaving the court with an invoice for some minimum appearance fee. If cases that require an interpreter can be "stacked," an interpreter can be scheduled for a block of time, during which more than one case will be heard.

These improvements in local practice can improve the outlook for the local court and for the local interpreters, but thinking outside the courtroom and beyond the jurisdictional boundaries may be necessary to meet the long-term and growing challenges facing some courts.

Public Service Interpreter Resource Centers

Currently, many agencies and offices have their own list or roster of interpreters they call upon, and there is no organized sense of how often interpreters are needed, in what languages, and at what geographic location, or of how much work there is over specific time periods. The rosters are often jealously guarded, with office managers fearing that other agencies or the courts will "steal" resources and make the interpreters unavailable to the office keeping the roster.

Therefore, while it is conceivable that there might be a *collective* demand for one or more full-time qualified interpreters among all of the various offices and agencies, the failure to collaborate with the other offices prohibits recognition of that fact and obscures the potential for positive results.

Courts must learn that once an interpreter is tested and found to be qualified, it is important to hang on to that interpreter, to consider ways to make the interpreter available when the courts need him or her, and to keep the interpreter busy enough to make a living interpreting. A *public service interpreter resource center* may be a solution.[2] The solution would share interpreter resources with other offices in the courthouse, with other jurisdictions, or with other public service agencies and governmental offices, creating enough work to keep the interpreter available and meeting the needs of multiple offices or agencies. Creating such a resource center, however, demands a highly organized and centralized scheduling process.

To share resources successfully, the *demand* for interpreters must be pooled into a single coherent system, organized in a single place. By centralizing the demand and organizing the scheduling process, the quality of the service provided can be improved and the availability of interpreters can be increased. In addition, by channeling the demand for interpreters into a common place, decisions can be made about the level of expertise needed for the job. At a resource center a coordinator can link local and regional service areas, channel the demand for work to the appropriate interpreters, and provide more efficient access to interpreter services.

Classifying Interpreters Appropriately

As awareness of Executive Order 13166 grows, the agencies and entities that are peripheral to the courts have begun to recognize their own need for interpreters, including police departments, prosecutor's offices, public defenders offices, clerk's offices, and others.[3] This expanded need for interpreters brings with it an additional issue for consideration.

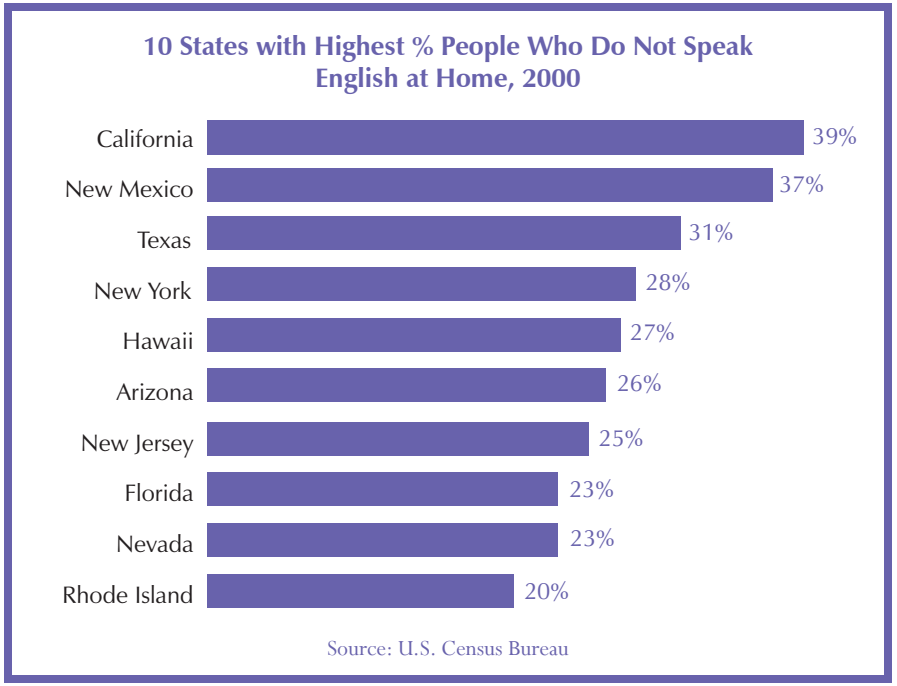
Do interpreters that provide services in the quasi-legal or non-legal environment have to meet the same level of expertise as the interpreter who works in the courtroom during a trial or other pivotal proceeding? A court interpreter must possess a very high level of expertise to function in the courtroom. The public defender's office, the police department, or the community-based organization may not require such a high level of skill, but only someone who is bilingual and highly educated in both languages.

A public service interpreter resource center can maintain rosters of interpreters who have varying degrees of ability and experience, scheduling appropriately trained interpreters for the various kinds of proceedings and events.

Possible Categories of Interpreters

It is possible to categorize interpreters into three general groups. The first group might be called *community interpreters*.[4] These interpreters possess a level of skill that allows them to be useful in a non-legal or community setting. For example, these interpreters could be helpful at the information booth in the local courthouse or at the community-based organization, school, or agency when a non-English speaker needs assistance.

The second group of interpreters might be called *general interpreters*. These interpreters would possess a higher level of skill than the community interpreters, allowing them to be useful in a quasi-legal setting where the subject matter being interpreted is important and the language may be technical, but the interpreter has the freedom and opportunity to clarify words and phrases and ask questions of the non-English speaker and of the English speakers.[5] These interpreters would be useful to attorneys (attorney/client interviews), probation officers, police departments, jails, and at all points where the interpreter has the opportunity to interrupt and clarify without unduly disrupting the meeting or conversation.



The third group of interpreters would consist of the *court interpreters*. These are the interpreters who must possess the highest level of language and interpreting skills and who help the courts keep the promise of equal access to justice for all individuals. These individuals can help identify potential individuals for the other two groups and assist in training and coordination of the resources with a goal of moving interpreters through the groups and increasing the number of highly qualified *court interpreters*.

Identifying levels of skill and using interpreters in this cost-effective and efficient way can solve a myriad of problems for the courts and other agencies, while improving the career outlook for potentially qualified people and providing the opportunity for professional development and growth for existing interpreters.

Conclusion

There is no evidence that the need for more interpreters in more languages at more locations is going to subside. In fact, the demographic trends in the United States

suggest that the state court system and other public service and governmental agencies will continue to face mounting difficulties in meeting the challenges of growing ethnic and linguistic diversity.

Collaboration between the courts and other offices and agencies that share the same challenges can lead to innovative solutions. Coordinating the need for interpreters, the available resources, and the scheduling processes, whether within a local jurisdiction or by creating a public service interpreter resource center, can yield positive results. Within a resource center the pool of interpreter resources can increase in size, and the qualification level of interpreters can be matched with job opportunities. The coordinator at the resource center can network outward until a threshold for substantial employment opportunities can be achieved for the various categories of interpreters, and the interpreters can further their career in the field.

Court leaders should begin to focus on effective management and scheduling practices that increase the number of interpreter resources, make the job of interpreting a more attractive one, and provide growth and development opportunities within the field. Collaboration and resource sharing with other agencies and offices, whether in the local courthouse or via a public service interpreter resource center, can be effective tools, helping the state courts to achieve the goal of guaranteeing access to justice in a meaningful way and illustrating the leadership role that the court can play in its community.

ENDNOTES

[1] For these purposes, "qualified" means an interpreter who has passed a reputable and recognized oral performance examination—for example, the examinations offered by members of the Consortium for State Court Interpreter Certification, the Federal Court Interpreter Certification Examination program, the NAJIT examination, or the Judicial Council of California's examination.

[2] The concept of public service interpreting resources centers belongs to William E. Hewitt, author of *Court Interpretation: Model Guides for Policy and Practice in the State Courts* (Williamsburg, VA: National Center for State Courts, 1995). Mr. Hewitt has written a draft concept paper, "Interpreting Resource Centers for the Justice System and Other Public Agencies" (April 2004, revised October 2005).

[3] Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency was signed by then-President Clinton on August 11, 2000. See www.lep.gov for more information about the order and its enforcement.

[4] This is a term used in a number of countries with varying definitions. For purposes of this article, we refer to the definition provided by M. Eta Trabing in her presentation at the Carolina Association of Translators and Interpreters seminar, "Ethical Aspects of Community Interpreting" on November 1, 2003. Available online at: http://lrc.wfu.edu/community_interpreting/extras/EthicsCommInt..pdf.

[5] Better language and interpreting skills—for example, having a broader vocabulary, including legal terminology, a higher level of education in both languages, or a higher score on an oral examination.

THE INCREASING IMPACT OF IMMIGRATION ON STATE COURTS

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Current national debate highlights a lack of understanding of immigration issues. Increased awareness of a state's immigrant population will allow state courts to handle increasingly complex cases involving immigrants more effectively.

All states will have more immigrants in their courtrooms as victims or defendants, as litigants, and as witnesses in civil, criminal, and traffic cases. While it is important to note that not all immigration growth in the United States comes from undocumented immigrants, illegal immigration will have an increasingly heavier impact on state courts.

The current estimate of undocumented immigrants in the United States ranges between 11 and 12 million.[1] In particular, states that are not traditionally associated with undocumented immigrants will see large increases (mainly in the South and Midwest). To understand more fully the scope of the challenge awaiting state courts, compare the numbers of undocumented immigrants in the United Kingdom and North Carolina: the UK estimates it has 570,000 undocumented immigrants, while North Carolina, ranked eighth nationally for the number of undocumented immigrants in the state, has about 300,000.[2] State courts need to be aware of the potential impacts of immigration growth on their operations. Discussed here are three trends for state courts to watch.

More Fraud and Confusion Will Increase the Need for Court Actions

Immigrants tend to congregate in ethnic communities, which can be closed to the mainstream population, forming networks for more immigrants to come.[3] "Immigration consultants" or "notarios" (as they are called in some Latino communities) prey on recent arrivals.[4] Immigrants are usually under the mistaken belief that they are on the path to citizenship when they pay large sums of money to these consultants, only later to find that the consultants do little work on their cases and that they too may be in danger of being deported.

Immigrants could be particularly vulnerable in the future because Congress is currently debating amendments to immigration law.[5] Whenever there are proposed changes, these consultants and unscrupulous lawyers take advantage of a complicated situation to confuse clients, telling them that under the law they can gain the coveted green card, when in fact no such law exists.

States with the Most Illegal Immigrants

	Illegal Population, 2005	% Change Since 2000
California	2,770,000	10%
Texas	1,360,000	25%
Florida	850,000	6%
New York	560,000	4%
Illinois	520,000	18%
Arizona	480,000	45%
Georgia	470,000	114%
New Jersey	380,000	9%
North Carolina	360,000	38%
Nevada	240,000	41%
All States	**10,500,000**	24%

Source: U.S. Department of Homeland Security

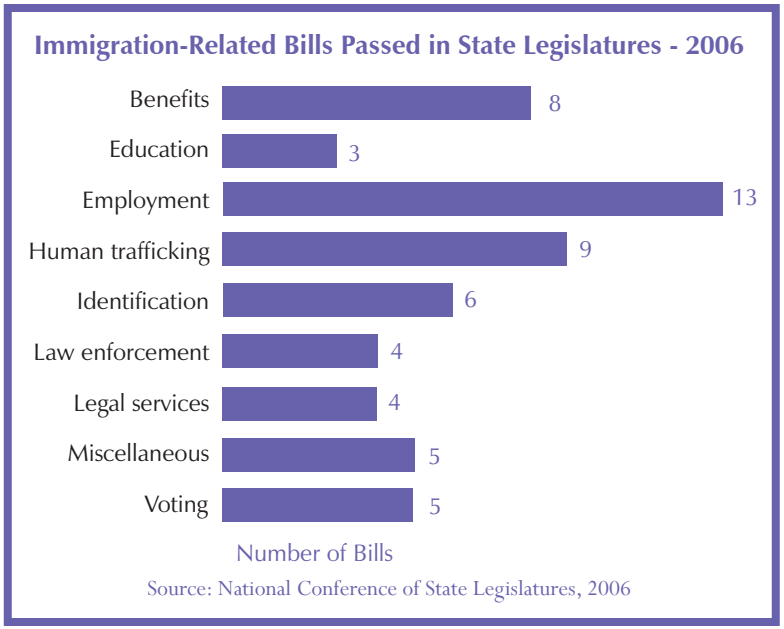
California and Texas have passed legislation targeting corrupt consultants and lawyers, but the major difficulty facing local prosecutors is that they have too few resources to charge, indict, prosecute, or convict perpetrators. To combat this problem, California's Office of the Attorney General instituted the Office of Immigrant Assistance to sue fraudulent immigration consultants and attorneys. Yet this problem will only grow, because such operations multiply in growing immigrant communities and in an unclear legislative environment.

Given the fraud and uncertainty, state courts can prepare for an increase in attorney-malpractice claims. Immigration law has been described by the courts

as "a maze of hypertechnical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."[6] The federal courts face the complexity of immigration laws daily, and federal attempts to find solutions can be helpful to state courts. For example, in May 2006, the Ninth Circuit met with immigration experts to discuss ways to better manage the immigration caseload.[7] Recommendations were a) to screen cases to identify common legal issues; b) to take greater advantage of the pro bono legal services available and to further educate the public on those services; c) to provide more training for court personnel in language and cultural issues; and d) to apply closer scrutiny to negligent and incompetent attorneys.

An Immigrant's Legal Status Will Matter Less

Senate Bill S.2611 contains provisions allowing a path toward citizenship to certain undocumented immigrants. Because the Senate and House bills differ substantially on how to deal with immigration, and with practically no hope of passing a new law by the end of 2006, there is currently little federal direction for states to follow. It is up to the states to decide how to handle immigration issues. In 2006 alone, about 500 pieces of legislation concerning immigration were introduced in state legislatures, and 57 bills have been enacted, far exceeding the passage rate of 2005.[8]

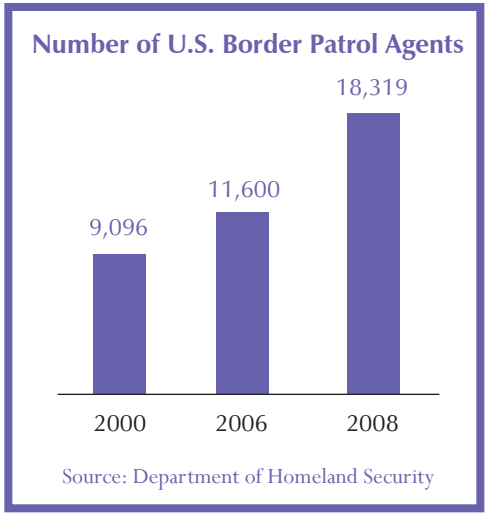


The tide is turning toward not taking legal status into consideration in several situations. Recently, President Bush said, "We cannot kick out people who have been here for a while," citing various reasons, including America's need for skilled and unskilled labor.[9] For instance, states are currently debating whether to adopt the REAL ID Act of 2005. The act, passed by Congress in 2005, prohibits federal agencies from accepting state-issued driver's licenses or identification cards unless the Department of Homeland Security determines the documents meet minimum security requirements.[10] While in New York the court recently decided that the DMV can demand proof of legal status, some states, such as New Hampshire and Washington, have bills in committee that would ask the president and Congress to repeal the act because it is seen as unconstitutional and they would rather not attach legal-status requirements to such documents in their states.[11]

Status already matters less in some federal laws. For example, President Bush signed into law the reauthorization of the Violence Against Women Act in January 2006, which provides services to victims of domestic violence, sexual assault, and human trafficking, regardless of immigration status.[12] States, too, have passed laws allowing certain benefits regardless of status: Under Florida's S.B. 498, children can obtain state welfare benefits, and Georgia's B. 529 has no requirements of legal status for certain health and emergency services. Philadelphia police commissioner Sylvester Johnson testified in a congressional hearing that he is against having police check immigration status in criminal cases because it would deter people from acting as witnesses or reporting crimes, which is the similar fear in many domestic-violence and human-trafficking cases.[13]

More Deportations Could Result from State Court Decisions

Federal courts are no longer the only courts exclusively affecting the lives of immigrants. During the 1990s, laws were passed vastly expanding the crime-related grounds for deportation/removal, and more recently, the Department of Homeland Security added enforcement priorities for state and local authorities. State courts will see a significant increase in the number of immigrant defendants in their courtrooms. Even if arrested or charged with a misdemeanor, an immigrant could be deported. With such power and responsibility, state courts need to



understand their growing immigrant populations. Washington state's Outreach Subcommittee of the Minority and Justice Commission is educating its state court judges on how the Department of Homeland Security's United States Citizenship and Immigration Services works, as well as on the needs of its immigrant communities. The commission states it is "imperative that state court judges acknowledge reality" to ensure that immigrant defendants have a meaningful defense, which includes the use of certified interpreters and competent counsel.

Tangent to the removal issue, the House bill, if it passes, could lead to the removal of millions of undocumented immigrants, and state courts should brace for a slew of various convictions of immigration activists. The May 1, 2006 marches, which brought out hundreds of thousands of protesters throughout the United States, would only increase. Thousands of activists are prepared to be convicted and sentenced to jail time.[14]

As America's diversity continues to grow through immigration, almost all aspects of the law will be affected. The need for labor, growing immigrant populations, and national security concerns all make immigration a crucial issue that will affect the state courts for many more years to come.

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14 *Id.*

TRENDS IN SELF-REPRESENTED LITIGATION INNOVATION*

Richard Zorza
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Courts are responding to the increasing demands placed on them by self-represented litigants with an ever-widening variety of services and innovations. These services are now more grounded in a detailed understanding of the demographics and needs of the self-represented. It is becoming clear that these changes benefit judges, court staff, attorneys, and both represented and self-represented litigants and improve public trust and confidence in the courts.

What Is the Emerging Perception of the Significance of the Issue of Self-Represented Litigation?

Court leaders from throughout the country are coming to recognize that self-represented litigants are a large and important part of the customer base for the courts. Further, they have come to see that innovations in practices, procedures, and programs can demonstrably improve both the functioning and reputations of their courts, and that attention to self-represented litigation issues serves the interests of all court users, judges, and staff.

What Services for the Self-Represented Are Becoming Standard?

The recently published *Directory of Court-Based Self Help Programs* found over 130 programs throughout the country.[1] There is a huge variety of services. Many centers and states routinely provide broad ranges of information resources, and many now provide training for judges in how best to facilitate access for the self-represented. Some courts, such as Utah and Idaho, provide or are planning to provide electronic document-assembly services, while others provide clinics and individual informational services. The broad spread of these services has been greatly facilitated by guidelines, protocols, and codes of ethics governing the appropriate role of court staff in providing informational assistance.[2] The central point of these often-detailed documents is to maintain neutrality and the appearance of neutrality. All the customer surveys of the users of these services show overwhelming levels of satisfaction. Surveys of court personnel support the theory that these services also improve court efficiency and operations.[3]

Is the Judicial View of the Self-Represented Changing?

In parallel with court-based innovations that help people prepare for their appearances have been equally dramatic changes in the way judges think about the way they handle such cases. Led by reports from the American Judicature Society, the Conference of Chief Justices/Conference of State Court Administrators Joint Resolution of 2002,[4] and, more recently, activity in the American Bar Association's Joint Commission on Evaluation of the Model Code of Judicial Conduct, and reflected in significant academic writing and a growing number of state and national training programs, a very significant change in judicial attitudes is taking place.[5]

For decades, judges have felt inhibited from conducting their courtrooms in ways that increased access for those without lawyers for fear that any modification of the traditional aloof and disengaged style of judging would be viewed as non-neutral. Now, however, many judges are finding that there are non-prejudicial techniques for eliciting evidence that increase access to justice and facilitate just results, while maintaining both neutrality and the appearance of neutrality. While the detail of these techniques is beyond the scope of this article, it should be noted that they rely heavily on transparency (explaining what the judge is doing and why), on early engagement (explaining what will be done early in a hearing, rather than at the moment at which an action might appear to be result oriented), and on repeated public explanations regarding the goal of access.[6] It is anticipated that as the judicial conversation and judicial experimentation on these issues increases, that the pace of improvement will increase. As of this writing, the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct has proposed the addition of specific language to the comment to the rule governing judicial neutrality.[7] If this change is approved by the House of Delegates, it is expected to have a significant impact upon practice.

What Is the Impact on Court Operations Overall and on the Management View of Courts?

It is increasingly understood that the way a court manages its self-represented litigation cases has a broad and major impact on every aspect of its operations. Frustrated litigants place heavy time and emotional demands on clerks and others who deal with the public. Judges and attorneys are similarly frustrated when calendars become clogged by unprepared litigants without appropriately completed paperwork.

More and more courts are therefore adapting the now well-established and broadly accepted principles of case management to self-represented litigant cases. They recognize that ultimately it is the court, rather than counsel of the parties, who must take leadership in moving the caseload, they develop criteria and timelines for intervention, they focus attention on those cases most in need of resources, and they provide services in support of overcoming litigant blocks. Some states such as California now include attention to such self-represented litigation issues in their overall case management training. Some courts, such as Hennepin County, Minnesota, now place the director of self-help programs on the court's management team, recognizing that almost any significant decision is impacted by, and will have an impact on, the self-represented.

Is There an Emerging National Response?

To assist courts in meeting this challenge, the National Center and a wide variety of partners have jointly established the National Self-Represented Litigation Network to promote and share best practices and innovation. The idea for the Network arose from the SJI-funded 2005 National Summit on Self-Represented Litigation, which brought together key stakeholders to identify such best practices and develop a broad agenda for future innovation.[8]

Launched in spring of 2006, the Self-Represented Litigation Network is hosted at the National Center for State Courts and operates under a Memorandum of Understanding that provides both flexibility and continuity. The Network currently receives support from the state court administrative offices of California and Maryland, the National Center, and the State Justice Institute. Additional members range from the Conference of State Court Administrators to the National Association for Court Management, and from the National Association of IOLTA Programs to the Harvard Law School Project on Access to Civil Justice.[9]

The Network currently operates through ten working groups:

- Information and Outreach
- Research and Evaluation
- Funding
- Overall System Change
- Problem Assessment
- Best Practices in Self-Help Services
- Best Practices in Courtroom Services
- Best Practices in Judicial Education
- Best Practices in Discrete Task Representation (Unbundling)
- Best Practices in Forms, Document Assembly, and Electronic Filing

Each group is developing resources that will be shared through regional conferences on self-represented litigants, as well as the Web site. Almost 100 individuals are involved in one or more of these groups. Participation is welcomed. Those interested in joining the process should contact the coordinator, Richard Zorza, at richard@zorza.net.

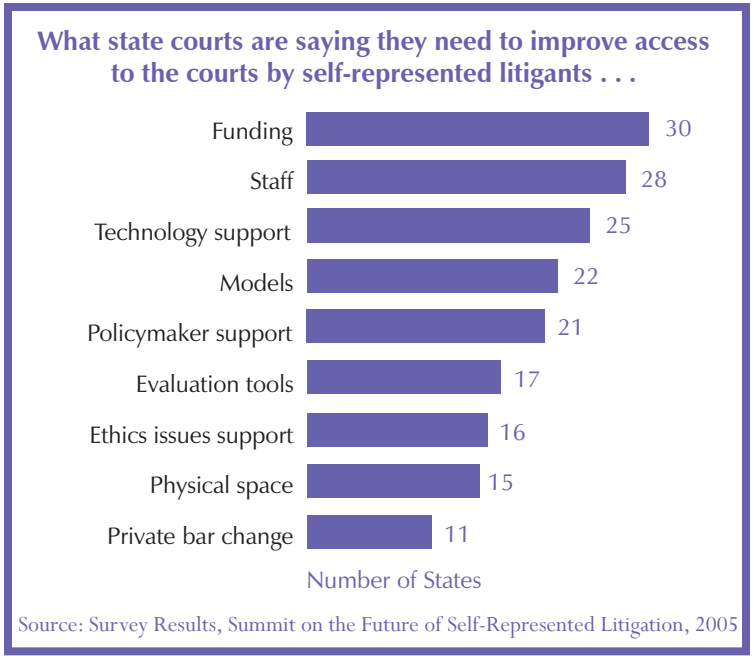
What Is the Key Information-Sharing Resource?

The National Center for State Courts, working with Pro Bono Net and a broad informal network of groups now operating with SRLN, launched www.selfhelpsupport.org, which now has over 1,700 members and includes over 1,200 individual online resources. This Web site, which also receives funding from the State Justice Institute, includes online webcasts of workshops, sample materials from self-help programs, training materials, sample job descriptions, guidelines for clerks, electronic document-assembly programs for self-represented litigants, research and evaluation reports, and other materials that allow courts to quickly establish or enhance services.

What Are the Early Products of the Network?

The Network has recently published a *Directory of Court-Based Self Help Programs* with over 130 programs throughout the country. The directory documents a huge variety of services and methods of creating and funding programs. Contact information is available to allow for referrals and to facilitate the sharing of ideas. The Network also operates a mentoring project open to those involved in starting or improving services to the self-represented.

The Network has also published a manual on how to start a self-help center that uses volunteers and technology to help provide services. Focusing on technology-supported centers, it provides practical, step-by step ways for courts to work with legal services, libraries, and other community partners to expand resources for the self-represented.



What Are the Important Judicial Education Tools Being Developed?

The working group on Judicial Education is working with the California AOC on developing a bench guide for judicial officers on effectively handling cases with self-represented litigants.

This planned bench guide builds on the experience of judges who have found that there are non-prejudicial techniques for eliciting evidence from all that increase access to justice, and facilitate just results, while maintaining both neutrality and the appearance of neutrality. Techniques include providing a general explanation of how the case will be heard and taking an active role in asking questions of the litigants.

Planning is underway for a national conference on judicial education and self-represented litigation. The goal is to produce a model curriculum for use in educational programs for new judges.

What Are the Important Research Developments and Planned Tools?

The Network is focusing on, and the State Justice Institute is supporting, two major research/toolkit projects in 2006-07. The first will build a comprehensive set of self-evaluation tools for courts to assess their services and access-to-justice capacity for the self-represented. These tools will include surveys, focus-group tools, and a self-assessment instrument. The second will review videos of hearings to begin the process of developing a better understanding of how judges can improve courtroom communication. The match for both these projects is being provided by California and Maryland through their participation in the Self-Represented Litigation Network.

What Are the Emerging Additional Areas of Significant Interest?

While there are many very valuable models for assisting the self-represented with court appearances and for helping judges to assist the self-represented with obtaining access in the courtroom, there are still relatively few models for how to support litigants in obtaining compliance with the orders that they do obtain. Nor do we know how best to structure proceedings to maximize the chance of the losing party being willing to comply.[10]

We are similarly in need of models and much better understanding of how self-help services can best identify the underlying needs of those who seek court services, and how they can then more effectively refer those litigants who need more intensive assistance or representation to those who can provide it. This problem is exacerbated by the lack of such resources in the community. Current thinking focuses on what is called a "continuum of services" that includes everything from limited informational help, to a Web site, to document-assembly assistance, to discrete task assistance from an attorney, to comprehensive representation when needed. Various courts are working on problem-assessment and intake systems to match cases to the most appropriate resources.

What Are the Implications of These Changes for Court and Judicial Leadership?

Court and judicial leaders are faced every day with the consequences of the flood of self-represented litigants. What is being learned is that with focused attention from good managers committed to an access vision of the courts, the solutions are relatively simple, and less financially and managerially burdensome than might at first appear.

These solutions include the establishment of information-assistance programs to prepare litigants to present their cases, support for discrete task-representation programs to assist those for whom attorney assistance is critical, the use of aggressive case management techniques to identify and support those cases in need of assistance, training in judicial techniques that support access for litigants without lawyers, continued evaluation of the needs of litigants and the success of court programs in meeting those needs, services that support compliance with court orders, and close collaboration with other access-to-justice stakeholders.

Court and judicial leaders who embrace these solutions are finding higher public trust and confidence, more smoothly operating courts, and better relations with stakeholders and the public.

ENDNOTES

*Thanks to Bonnie Rose Hough, Esq., of the Center for Children, Families and the Courts of the California Administrative Office of the Courts, and Kathy Mays Coleman, of the Of Counsel Program at the National Center for State Courts, for their suggestions.

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TRENDS IN JUDICIAL EDUCATION

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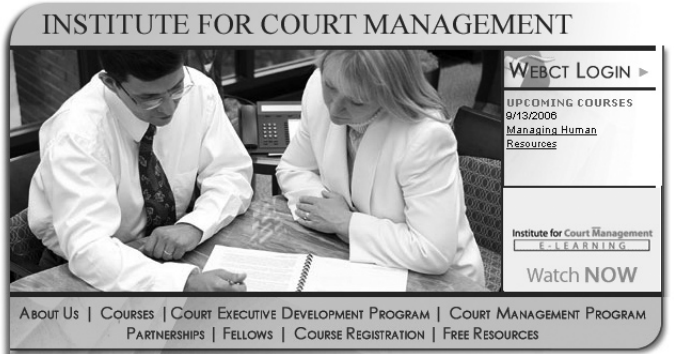
The emergence of continuing judicial education has been both recent and rapid, and has brought with it changes and challenges to judicial policymakers and educators alike. The United States alone has over 65 state and national organizations actively engaged in educating the nation's judges and court professionals, and almost none of them existed 40 years ago. Judicial education has undergone significant changes, and as the field nears its 50th anniversary, revisiting the fundamental role of judicial education is as important today as ever. It is equally important to examine the emerging trends and ask what judicial education will look like at the end of the next fifty years.

> *"The relentless onslaught of technological innovation is enabling courts and lawyers to use office procedures that change so fast that we are constantly adapting to new variations. The search for alternatives to traditional dispute processing is changing court procedures. . . . Science is forcing us to reexamine some of our basic concepts of life and death."*
>
> *Justice Sandra Day O'Connor, Second National Conference on Court Management in Phoenix*

The issue, she went on to say, is not simply one of learning how to cope with change but rather, "how to prepare ourselves and our courts—for the future."[1]

In 1990 the State Justice Institute and the American Judicature Society cosponsored a remarkable conference on "The Future and the Courts," at which judges, lawyers, judicial administrators and educators, social scientists, technologists, and futurists gathered to "look over the rim" 30 years into the future of the American legal system.[2] One of their tasks was to identify trends likely to affect our world, our country, and our courts over the next 30 years. Trends related specifically to the courts included:



Institute for Court Management Web Site

- new legal issues generated by societal trends; i.e., a scarcity of resources and a rise in conservation practices, globalization, ethnic and cultural diversity, and the aging of America;
- court management issues resulting from new technology, funding limitations, and increased numbers of women and minorities working in the system;
- increased public scrutiny of the courts;
- changes in the roles of judges resulting from increased complexity for some cases, a shift to alternative dispute resolution for others, and possible losses of prestige and income; and
- changes in the structure of our legal and judicial institutions, including courts and law firms.

The conference generated a list of strategies for achieving positive change in the courts under various categories, such as increasing fairness and legitimacy, improving operations and efficiency, allowing better access, encouraging multi-door options and/or ADR, globalizing justice through international conferences and exchanges, achieving judicial independence and credibility, creating a flexible and future-oriented judiciary, and, particularly noteworthy to judicial educators, "*re-educating judges regularly to lessen their resistance to change and new ideas*."

The Emergence of Judicial Education

During the last half of the 20th century, the state and federal courts of the United States underwent significant change, not least of which was the emergence

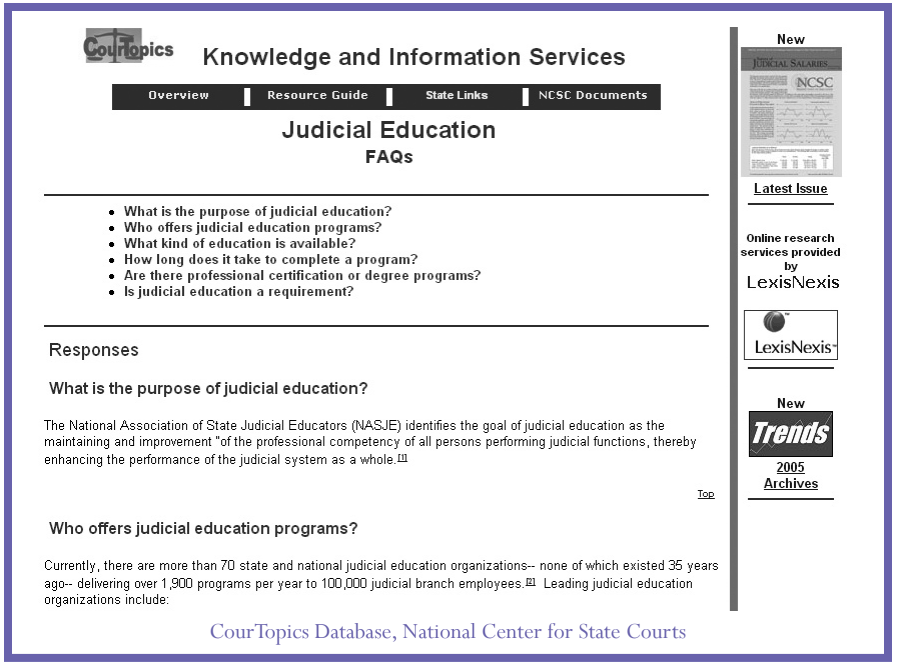
of judicial education as an important component in helping judges and court professionals prepare themselves not only for the future but also for their day-to-day responsibilities. For judges and judicial staffs in the United States and around the world, the opportunities for continuing judicial education have increased dramatically over the last 40 years, aided by the formation of numerous state, national, and international organizations. There is great breadth of programming by these organizations, and the best source for data regarding subject matter and trends can be found through JERITT, the national clearinghouse for information on continuing judicial education for judges, other judicial officers, and court personnel.[3]

In 1975 judicial educators founded an organization, the National Association of State Judicial Educators (NASJE), which played a major role in building the profession by providing support for networking and opportunities for continuing education training and development of judicial educators. NASJE is a leader in defining the practice of judicial branch education and in gathering and sharing resources among educators both nationally and internationally. As the following decades saw the rapid growth of both state-based and national judicial education organizations,[4] other organizations were formed to support judicial educators through technical assistance (JEAEP), leadership development in judicial education (LIJE), and data collection, publications, and monographs on best practices in the profession (JERITT).

As the field of judicial education nears its 50th anniversary, revisiting the fundamental role of judicial education is as important today as ever. *Why educate judges? What makes a good judge? Is continuing education needed, and who for? How should judicial education be provided?* It is equally important to examine the emerging trends and ask what judicial education will look like at the end of the next 50 years.

"The increase in judicial education might well be described without exaggeration as an explosion of activity in the field in the last decade."

P.A. Sallmann in "Comparative Judicial Education in a Nutshell," Journal of Judicial Administration (1993): 252



CourTopics Database, National Center for State Courts

The Globalization of Judicial Education

In recent years, judicial education has expanded in exciting new ways to the international arena. Numerous judicial training centers have been created throughout Central and Eastern Europe, Central Asia, Africa, and Latin America, which remain active in conducting workshops on a host of topics, such as novel substantive legal issues, new procedural codes, judicial ethics, and judicial skills, and in producing resources such as benchbooks. International Rule of Law projects have also provided technical assistance to these new judicial training centers on designing judicial orientation programs, curriculum and faculty development, and training on adult education methodology.

On March 17-21, 2002, following several planning meetings in South America and Israel, the International Organization for Judicial Training (IOJT) was established in Jerusalem. Over 100 educators and judges from 25 countries and the Council of Europe assembled to create the organization: Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Estonia, France, Georgia, Ireland, Israel,

Kenya, Latvia, Lithuania, Madagascar, Mexico, Moldova, Norway, Philippines, Poland, Romania, Sweden, Togo, and the United States of America.

Dr. Shlomo Levin, then deputy president of the Supreme Court of Israel, who conceived the organization, proposed that it have the following objectives:

1. Sharing successful methods of addressing issues of common interest regarding judicial training, and
2. Establishing an international mechanism to enable training institutes from one country to learn from another.

In 2004 the International Association for Court Administration was formed in Ljubljana, Slovenia, with a group of founding members from 24 countries representing most of the world's geographic regions. Their mission is:

1. To promote professional court administration and management in emerging democracies and other countries pursuing the rule of law;
2. To sponsor international conferences, forums, and education and training programs on court administration and management; and
3. To serve as a resource for judges, court administrators and managers, and other government officials in search of ways in which to evaluate and improve court and justice systems.

Much has been written about the differences in judicial education programs between common-law and civil-law jurisdictions. Despite these differences, the distinctions are decreasing as countries adopt effective principles of judicial education regardless of their underlying legal system. The emergence of international associations such as the IOJT and IACA, in addition to the many organizations involved in International Rule of Law Projects, provides a great opportunity for the cross-fertilization of ideas, sharing of best practices, and promotion of judicial education in developing nations.

Broadening Who Gets Education

Although a majority of judges throughout the country have continuing education opportunities available each year, the same cannot be stated when considering key support personnel (e.g., court administrators and managers, clerks, probation officers, and others). According to JERITT, only about 25 percent of court support personnel have access to a given continuing education program in a given year.[5]

Despite the lagging efforts at addressing the educational needs of court support personnel, some promising trends have emerged in the field of court administration education, training, and development. One of the more significant efforts to address educational needs of court professionals was spearheaded in the 1990s by the National Association for Court Management (NACM) to identify "Core Competencies," a framework outlining core areas of court management skills and responsibilities that all court managers should possess to be effective.[6] The NACM Curriculum Guidelines developed around ten interrelated and interdependent Core Competencies: purposes of courts and court systems; leadership; resource allocation, acquisition, budget and finance; vision and strategic planning; caseflow management; information technology management; public information and media relations; employee training and development; ancillary services and programs; and human resource management.

Court managers can use the Guidelines as a self-assessment tool to determine the professional capabilities and training requirements within their court systems. National education providers and universities also can use the guidelines to plan and develop workshops, seminars, and certificate and graduate programs. Acceptance and use of the Guidelines is already widespread by universities and national providers, as well as by international educators, who have used the Guidelines to plan and deliver workshops, seminars, and graduate programs.

Conclusion

Finally, after nearly half a century of judicial education, it behooves us at least to ask, what comes next? What are the emerging questions facing judicial educators as they look to the future?

What new leadership competencies will be identified and needed to better prepare judicial leaders in the next three decades? Do they relate to large changes apparent now, such as the increasing diversity in ethnicity in the American population, the increasing reliance on digital information and the Internet, and the globalization of commerce and other human exchanges? Or do they relate to large changes only dimly perceived now, harder to catalog, but destined to overtake us? Are judicial educators providing education that will produce the leadership competencies that will be required in this new era? How may we ensure space in our curriculum for new and innovative programs? How can we ensure educational opportunities are an

integral part of ongoing court operations for all court employees and are seen as a tool for organizational development and change?

The future for judicial branch education is both bright and challenging, one in which future judicial educators can draw upon a rich history as they work toward building effective education programs that are needed to develop outstanding judges and court personnel.

ENDNOTES

1 "Managing Courts in Changing Times," *New York State Bar Journal* (February 1991): 8-15.

2 J. A. Dator and S. J. Rodgers, "The Future and the Courts Conference: Executive Summary," American Judicature Society (November 1990).

3 JERITT's *Issues and Trends* is a thorough overview of judicial branch education programs and organizations in the United States. Offering a comprehensive examination of the structure and direction of judicial branch education, *Issues and Trends* is a valuable resource for those interested in the field. Among its features are profiles of nearly 70 organizations and lists and analyses of administrative information, such as staffing, budgets, and salaries. For more information, contact the JERITT Project, Michigan State University, Suite 330 Nisbet, 1407 S. Harrison, East Lansing, MI 48823-5239, 517-353-8603, Fax: 517-432-3965; e-mail jeritt@ssc.msu.edu.

4 The movement to provide judicial education started in 1956 with the Appellate Judges Seminar sponsored by the Institute of Judicial Administration and New York University School of Law. This centerpiece of judicial education later became the National Judicial College, formerly the National College of Trial Judges established in Reno in 1964 as an emanation of ABA seminars for trial judges that started in 1961 under the sponsorship of the joint committee for the effective administration of justice.

5 J. Hudzik, *Issues and Trends in Judicial Education* (Lansing: Michigan State University, Judicial Education Reference, Information and Technical Transfer Project, 1995).

6 The complete Guidelines can be found on the NACM Web site: http://www.nacmnet.org/CCCG/cccg_homepage.htm.

JUVENILE JUSTICE SYSTEMS ARE ISSUING ACCOUNTABILITY REPORT CARDS TO THEIR COMMUNITIES

H. Ted Rubin
Retired Juvenile Court Judge, Consultant, National Center for State Courts

Report cards inform communities on how well their juvenile justice systems are working. More and more courts will be developing and publishing these accountability measures in the future.

Beginning in the late 1970s, state legislatures began to insert juvenile accountability as a court objective into their juvenile codes. In earlier decades, the purpose clause of the juvenile code focused on the best interests of the child and of the community.

Judicial sanctioning of a juvenile offender added several approaches to accountability. One approach directed restitution payment to a victim; another required performance of community-service hours as symbolic restitution to the community whose quality of life had been negatively impaired by the offender; and a third, less universally applied application involved a conference between the victim and the offender, usually moderated by a trained volunteer mediator. Outgrowths of the conference often included an apology by the offender and the payment of restitution or performance of community-service hours, sometimes at the business or residence of the victim.

The publication in 1988 of *Juvenile Probation: The Balanced Approach* (by the National Council of Juvenile and Family Court Judges) led to another important development—Balanced and Restorative Justice (BARJ), which integrated juvenile accountability with community protection and juvenile competency.

More recently, several juvenile-justice-system entities have started to issue report cards to their policymakers and communities that describe how accountable they have been in restraining adjudicated youth from reoffending, in fulfilling restitution and community-service requirements for these youth, and in furthering juvenile competencies.

Federal funds awarded to the American Prosecutors Research Institute (APRI) initially assisted the development of report cards in three communities (Bend, Oregon; Pittsburgh, Pennsylvania; and Chicago, Illinois) and one state (South Carolina), while 19 other communities and states experienced the APRI training program in 2005 and 2006. The National Council of Juvenile and Family Court Judges' *Juvenile Delinquency Guidelines* (2005) also recommend that all juvenile delinquency courts produce an annual report card that measures progress toward a variety of goals. The report should be two to four pages, be limited to six to eight primary measures, and report data through graphs that show performance over time. The remainder of this article highlights essential aspects of the four pilot projects.

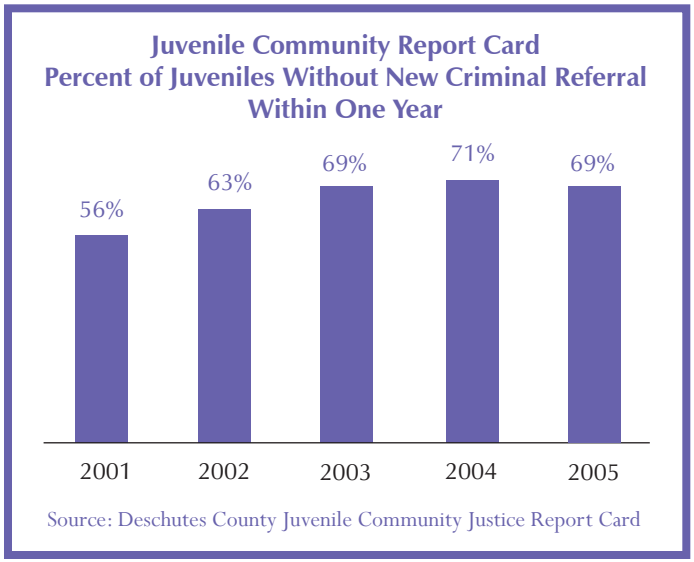
The Report Card in Deschutes County (Bend), Oregon

Dennis Maloney, prime author of *Juvenile Probation: The Balanced Approach*, directed juvenile and adult court and correctional services in Bend. There he created highly recognized innovations that blended juvenile accountability and competency development. For example, delinquent juveniles gained competencies as primary workmen in constructing Habitat for Humanity homes. He renamed his agency the Department of Community Justice Services and laid the groundwork for the juvenile-justice-system report card. Today he travels the country stimulating implementation of report cards and a range of BARJ applications.

Maloney emphasizes that justice systems should develop and report to their communities on how well they are accomplishing their objectives. He notes that school systems have introduced, or have had forced on them, accountability protocols in the form of student performance testing, and believes this will become required of courts and justice systems in the future. Therefore, he posits, courts should proactively develop objective data and show this to policymakers and communities. He adds, "Performance measures can be the salvation of the juvenile justice system."

In Bend, the Juvenile Community Justice report card has been published and distributed annually and countywide in the local newspaper since 2001. Its 2005 report card included such categories as restitution owed and paid; community-service hours ordered and performed; percentage of court youth who had no new offense within one year after the initial offense; percentage of court youth who were tested for drugs and alcohol during supervision and tested positive; percentage of youth in school, who graduated, or who were employed at case closure; percentage of youth who turned 18 and had no criminal arrest within two years; and a crime-

victim survey that rates satisfaction with the system's intervention (50 percent rated this as a 5, the highest satisfaction level). The 2005 report listed current measures and those of the four prior years. For example, as the agency views juvenile crime as a community challenge, it relies on citizen volunteers to help with its work. In addition, it explains that 6,294 volunteer hours were contributed in 2001; 5,655 in 2002; 3,397 in 2003; 3,486 in 2004; and 3,920 in 2005. The report explains this decreasing trend as the result of an expanded focus on the supervision of youth, which requires less staff time compared to developing a volunteer base.



The Report Card in Pittsburgh

The Allegheny County Juvenile Court has issued three report cards. In its most recent report, "To the Citizens of Allegheny County," information is provided on probationer adherence to requirements, to restitution payments, and to completion of community service hours. Other performance measures, being collated but not yet promulgated, involve an assessment of probation-staff effectiveness, branch-office interventions, victim satisfaction, and even judicial dispositions, as well as other data that will show how well the system is working.

The Report Card in South Carolina

This report card accounts for juvenile fulfillment of BARJ principles but on a statewide basis. The Department of Juvenile Justice (DJJ) is responsible for all juvenile probation services, public juvenile institutions, several evaluation centers, and juvenile parole or aftercare across the state. It began the large task of obtaining and presenting information on all its program entities. DJJ reports information such as restitution payment rates, completion rates for community-service hours ordered, satisfaction by victims with the juvenile justice system, drug and alcohol abuse, rates of hours donated by volunteers, and the recidivism rates following juvenile incarceration.

The reports also list important trend information not related to performance measures, such as the number of youth committed annually to DJJ custody and the number of violent and serious juvenile offenders.

The Fourth Report Card in One Division of the Cook County (Chicago) Juvenile Court

Chicago mapped out its report card to cover a range of key items, such as per capita rate of juvenile offenders who are adjudicated by the juvenile court and who are waived to adult court, the percentage who successfully complete a diversion agreement or probation term, restitution ordered and paid, community-service hours ordered and performed, a victim-satisfaction survey, drug and alcohol testing, percentage in school or vocational training or working, and citizen-volunteer hours. This project was abandoned reportedly due to other programs, staffing, and timing priorities.

Summary

Report cards are designed to inform communities on how well their juvenile justice systems are functioning. Common to all are measures consistent with objectives of community protection, juvenile accountability, and juvenile competency development. However, different juvenile courts are making it clear that they will gather and present additional data they feel are particularly important to their communities. Several states, such as Pennsylvania, are preparing the foundation for a statewide juvenile court/justice system report card. APRI has issued a report-card implementation guide and reports that requests for training have expanded sizably. The development of report cards is now on track to become quite widespread in the state courts.

PERFORMANCE MEASUREMENT GAINS MOMENTUM THROUGH COURTOOLS

William E. Hewitt, Brian Ostrom, and Richard Schauffler
Principal Court Research Consultants and Director, Research Services
National Center for State Courts

From the one-judge/two-magistrate Morrow County Court of Common Pleas in Ohio to the trial courts of Washington, from statewide policy initiatives of the judicial branch in Arizona, California, North Carolina, and Utah to locally imposed "audits" by county funding authorities in Lake County, Indiana, and Milwaukee, Wisconsin, performance measurement in courts is an important, rapidly emerging trend.

Modern courts are busy places. A vast array of different case types compete for the time and attention of judges and staff. Satisfying the expectations of court customers who vary in their roles and goals is a daunting challenge for court leaders. Moreover, judges and court administrators have only limited opportunities to view their work in perspective. The press of caseloads, along with everyday operational problems, often seems all consuming.

Against this busy background, an increasing number of courts are making an effort to *evaluate* what they do by using performance assessment. Does this just add more work to an already overworked crew? To the contrary, performance assessment is helping court managers to ease the burdens of everyday work by setting goals and to understand and manage organizational performance. With performance indicators in place, judges and court managers can gauge how well the court is achieving basic goals, such as access and fairness, timeliness, and managerial effectiveness.

Does each court need to reinvent the wheel to incorporate performance assessment into management or to answer a directive from a funding agency? No. CourTools, developed by the National Center for State Courts and practitioners from across the country, provides all courts a small common set of meaningful indicators and clear methods to measure performance.

What Are the Tools?

CourTools is a set of ten trial court performance measures that offer court managers a balanced perspective on court operations. Obviously, just ten specific performance measures cannot fully capture all of the important ways in which courts serve the public. So, why these particular ten measures? The answer lies somewhere in the gray area between application of rigorous methodology and the intuitions of highly experienced practitioners. In designing the CourTools, the contributing practitioners integrated the major performance areas defined by the *Trial Court Performance Standards* with relevant concepts from other successful public- and private-sector performance measurement systems (e.g., "balanced scorecard"). Over a period of several years "candidate" measures were considered in working groups, discussed, partially developed by contributors, discussed again, refined by their champions, and eventually either included or rejected by a working group for final development and publication. While many factors influenced the final decisions about which measures to include, and which to table for later development, the core principles guiding the process were that the measures need to:

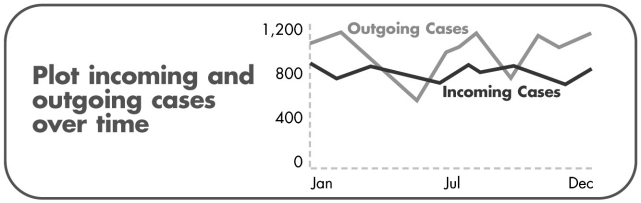
- be few in number;
- be feasible and practical for day-to-day management;
- focus on outcomes; and
- reflect important aspects of the fundamental mission and vision of the courts.

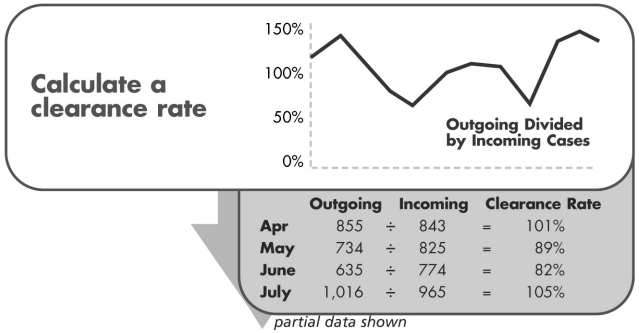
The measure of *access and fairness* emphasizes the fundamental importance of individuals and how they are treated in the American legal system. The degree to which these values are achieved in the real world is measured by ratings given by court customers in **Measure 1: Access and Fairness**, which surveys individual satisfaction with access to the court's dispute resolution services and the fairness of the legal process.

Timeliness emphasizes the concern of court participants, the public, and policy-makers that the legal process is controlled and well-managed. Four measures highlight the general requirement that trial court functions be performed within a proper and reasonable timeframe.

- **Measure 2: Clearance Rates** examines court productivity in keeping current with the incoming flow of cases.
- **Measure 3: Time to Disposition** calculates the length of elapsed time from case filing to case resolution with a comparison to some agreed-upon case-processing time standard.

- **Measure 4: Age of Active Pending Caseload** is the amount of time cases have been pending or awaiting resolution. A court can show expeditious processing of disposed cases, yet still have undesirably high figures for the age of its pending caseload. This happens when routine cases move smoothly through the court system while problematic cases are allowed to continue aging. Moreover, an increase in the age of pending cases foreshadows difficulties a court might have in continuing its past degree of expeditiousness.
- **Measure 5: Trial Date Certainty** provides a tool to evaluate the effectiveness of calendaring and continuance practices. Trial postponement delays case resolution and frustrates the constitutional guarantee of a speedy trial.





CourTools available online at www.courtools.org.

Managerial effectiveness highlights the nexus between operating procedures that are strictly internal and outcomes important to the court's customers. Success in meeting this key value is assessed in the five remaining *CourTools* measures.

- **Measure 6: Reliability and Integrity of Case Files** is vital to the public interest in that the records of court decisions and actions officially determine the rights and responsibilities of individuals and the government, and inaccessible or incomplete case files seriously compromise the court's integrity and undermine the judicial process.
- **Measure 7: Collection of Monetary Penalties** focuses on the extent to which a court takes responsibility for the enforcement of monetary penalties.
- **Measure 8: Effective Use of Jurors** addresses a court's ability to effectively manage jury service.
- **Measure 9: Court Employee Satisfaction** uses a survey, drawn from contemporary management literature, to gauge employee perspective on the quality of the work environment and relations between staff and management.
- **Measure 10: Cost per Case** provides information essential for deciding how to allocate funds within the court and for understanding the link between costs and outcomes.

Why Use CourTools?

Not everyone sees and accepts the benefits of court performance measurement. Skeptical reactions range from "performance measurement won't tell us anything we don't already know" to "we're happy with the way things get done now" to "we just don't have the time and money to even try this." Simply stated, an understandable response to the call for a new set of responsibilities is "why shouldn't we just continue to try to do a good job, rely on our sense of how we're doing, and strive to minimize daily problems as much as possible?" Following are five reasons why the bench and court managers are well-advised to devote energy to the systematic and ongoing task of court performance.

First, court insiders' beliefs about how well work is getting done are often based on perceptions that are not always complete and accurate. As a result, positive anecdotes and personal accounts by insiders are dismissed by "outsider" court critics who see what is happening in terms of their own personal, and perhaps negative, experiences. In contrast to endless debate over conflicting images, performance data allow everyone to test the reality of their assumptions of how well things are going. Performance evaluation sorts out whether what court insiders think is going on is, in fact, taking place.

A second attractive aspect of performance assessment is the capacity to identify and focus on areas of greatest importance to a broad and diverse audience. Multiple indicators permit courts to respond to the varied concerns of constituents, including litigants, attorneys, witnesses, jurors, the public, and funding authorities. Certainly, the bench and court staff are in a prime position to assess internal operating procedures, but court customers might use different criteria when they evaluate the quality of service. By clarifying and measuring key outcomes relevant to the individuals and groups being served, the court avoids making incorrect assumptions about what will best satisfy the public.

Fostering greater creativity among court staff is a third reason for being clear on desired outcomes. When court leaders and managers explicitly state what matters most, court staff more easily engage in determining how to make it happen. This is done by standardizing the ends rather than dictating the means to achieve them. Clear measures of desired outcomes (e.g., 90 percent of case files should be retrieved within 15 minutes) help staff better understand their individual contributions and empower them to devise creative means to achieve the desired outcome.

The value of performance data for preparing, justifying, and presenting budgetary requests is a fourth reason why chief judges and senior administrators should consider performance assessment as a standard management practice. Focusing on multiple goals and corresponding measures makes it clear that courts use resources to achieve multiple ends. Information on how well the court is doing in different work areas indicates whether goals are reasonably being achieved, which ones are being met more fully than others, and which ones are marked by poor or unacceptable performance. As a result, courts can articulate why some activities need tighter management oversight, improved administrative practices, more resources to support promising uses of new technology, or different configurations of personnel. In this manner, performance assessment is critical for building evidence-based requests for new initiatives and additional resources. Performance assessment across a spectrum of goals establishes a natural priority of emphasis and shields courts from the criticism that budget requests are the product of some individual judge's or administrator's personal preference. Instead, budget proposals flow from meeting agreed-upon goals.

Finally, attention to the results of court activities is more than just a polite gesture to the outside world. For the nation's courts, failure to highlight performance goals and measure them undermines the judiciary's proclaimed ability and need to govern its own affairs. Formal performance assessment signals a court's recognition, willingness, and ability to meet its critical responsibilities as part of the third branch of government. Effective judicial governance and accountability require courts to identify their primary responsibilities. Since courts use public resources, taxpayers and their elected representatives are legitimately entitled to raise questions about efficiency and effectiveness in the expenditure of court funds. Performance assessment provides the means for courts to demonstrate the value of services delivered.

So, the Trend Is . . .

Courts, like many other organizations, are shifting managerial attention from paying attention primarily to internal processes to delivering quality and value for the taxpayer dollar to court customers. However, actually establishing measures of value in the courts is a complex task. No single best measure for assessing high performance (like profitability in the private sector) exists to guide court leaders. Traditional court management typically measures a blend of inputs (e.g., the number of court staff employed) and outputs (e.g., the number of cases processed by court staff). But measures that focus on outcomes—the ones that allow people to say, "Yes, I see the value delivered for the investment"—are much more difficult to craft.

CourTools proposes a small but well-considered set of outcomes that appear to be widely accepted as valuable. Outcome measures should, however, be supplemented and tempered by measures that relate to cost-effectiveness. Court leaders who are focused solely on outcomes risk investing money past the point of diminishing returns. If improvements in performance fail to increase proportionately to additional outlays of time and resources, new money would be better distributed to another activity, function, or program. At some point, for example, the impact on case-processing time of adding more staff will be negligible. Therefore, performance measurement should be conducted with an eye on two fundamental criteria: the outcomes the court delivers to its customers and the cost-effectiveness the court achieves in distributing resources. Both kinds of measures are included in CourTools.

NCSC SERVICES AND RESOURCES

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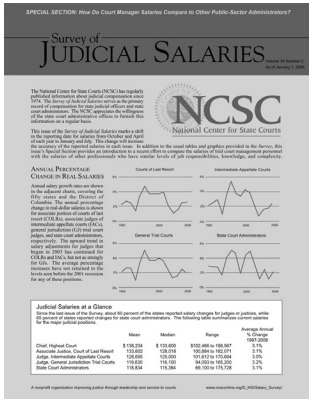

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The NCSC regularly gathers information about the salaries of judges and state court administrators with the assistance of the state court administrative offices. The *Survey of Judicial Salaries* provides comparative analysis and serves as the primary record of state judicial salaries. Each edition includes a special section that addresses current judicial issues, such as judicial salary comparisons to other professions, judicial compensation commissions, and judicial leave.

COURTOOLS—GIVING COURTS THE TOOLS TO MEASURE SUCCESS

CourTools is a realistic set of 10 performance measures that are practical for courts to implement and to use. CourTools supports efforts to improve court performance by helping to:

- Clarify performance goals
- Develop a measurement plan
- Document success

Download a copy of CourTools at www.courtools.org.

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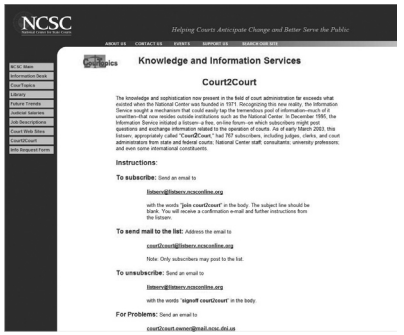

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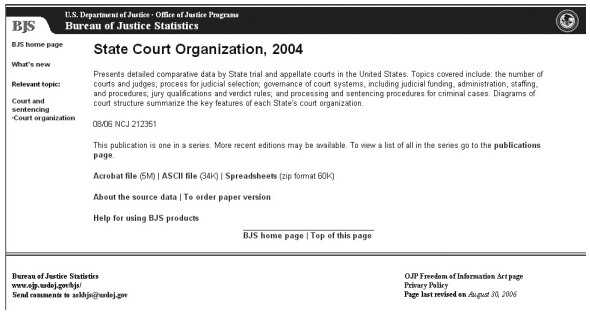

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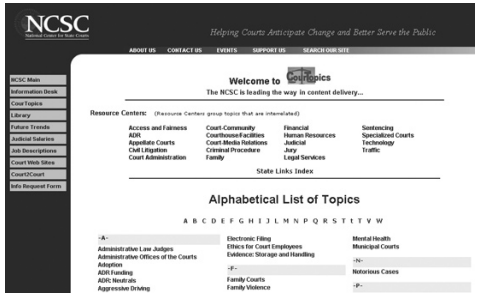

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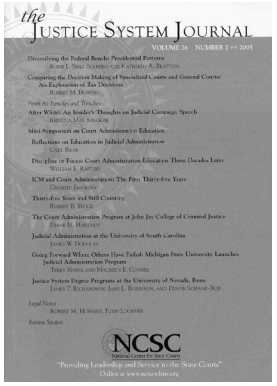

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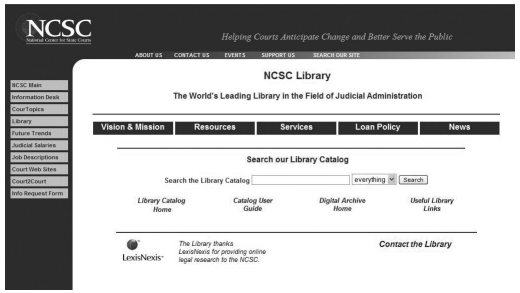

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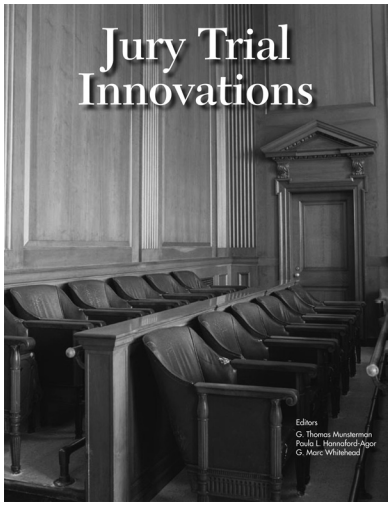

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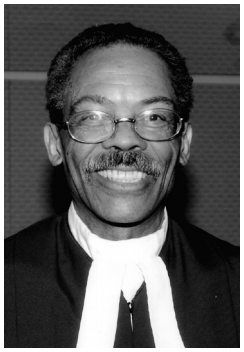
VOICES OF COURT LEADERSHIP



"Now, more than ever, our courts are called to address attacks on judicial independence, a real threat to democracy. A strong and independent judiciary is necessary as a separate coequal partner in the system of checks and balances, which also is so integral to our system. That system envisions three coequal, separate, and independent branches. While, in truth, neither is entirely separate nor entirely independent, the purpose behind the system of checks and balances is the protection of the citizens against one branch becoming too powerful and the guarding against the potential for excesses and abuses of power. This is achieved by each pursuing its constitutional mission, asserting, as and when required, its constitutional independence. Especially now, the courts have an obligation to try to educate the public and increase their awareness, understanding, and appreciation for judicial independence."

The Honorable Robert M. Bell, President of the Conference of Chief Justices
Chief Judge, Maryland Court of Appeals

"I have a serious concern that our tendency during times of state budget shortfalls to either support or at least acquiesce in the creation of new or increased court fees and surcharges was done at the expense of the public's access to our courts. We need to examine the impact of this trend of increasing costs and reassert the principle with our friends in the legislative branch that an adequately funded judiciary is a core function of state government, which should be supported with state general funds, not dependent upon user fees that may impede access."

J.D. Gingerich, President of the Conference of State Court Administrators
Director, Supreme Court of Arkansas

"Judges will continue to be attacked by special interest groups. We must continue to educate the public on the role of the courts: protecting constitutional rights, providing access to justice, and being fair and impartial. In addition, I see as a continuing trend, human trafficking of children and women in the United States. This is not just an international issue. Trial judges will have to be educated on this topic in the very near future as the victims and defendants appear before them."

Brenda S. Loftin, President of the National Association of Women Judges
Associate Circuit Judge, St. Louis County Circuit Court, Missouri

"The public is going to demand more specialty courts, such as drug and business courts. People want to feel their cases are heard by judges who have expertise in these areas and a justice system that can help them better deal with their problems. I believe the public is realizing that coupling judicial authority with treatment sanctions works."

Howard "Skip" Chesshire, President of the National Association for Court Management
Court Administrator, Cobb County Superior Court, Georgia

"Doing our own jobs as well as we can is the best thing we can do to insulate ourselves from outside attack. If the people who come through our courts for jury duty, family cases, and traffic cases feel they have been treated well, listened to, and heard clear explanations of what happened to them, criticisms of isolated judicial decisions will not resonate with them. There are enough people coming through our courts in these areas to make a difference. We should look carefully at ourselves, especially in areas like these that involve large numbers of people, and ask how we can improve our own performance. We should also have discussions with court critics and take fair criticisms to heart."

Steve Leben, President of the American Judges Association
Kansas District Court

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