Passing the torch
It was with great sadness that, after more than 100 years advocating for integrity in American justice, the board of the directors of the American Judicature Society (AJS) decided to dissolve the society and wind up its affairs. For the past several years, our efforts to maintain a robust membership and sufficient funding for research activities had yielded unsustainable numbers. This prompted a thorough review of all options and the unpalatable yet unavoidable conclusion that it would be most respectful to our founders and the many people who have contributed to our great history to use our time and talents to preserve the various AJS assets, by finding them good homes with flourishing organizations.

While we took this difficult step with heavy hearts, we are now pleased to report that the crucial work of AJS will continue to live on through the work of others. Today, the Center for Judicial Ethics, Judicial Selection in the States, and the Jury Center are thriving as part of the National Center for State Courts, where they are receiving great care. As for our other crown jewel, Judicature, we were honored to pass the torch to Dean David Levi, John Rabiej, and the other distinguished scholars at Duke Law’s Center for Judicial Studies. The new Judicature is a beautiful, thoughtful publication and a very worthy reimagining of the magazine that AJS members have relied on for so many years. Judicature at Duke will continue to promote the ideals of AJS and its mission, advocating integrity in American justice, through excellent scholarship and practical information to assist our judges.

The pursuit of fair and impartial courts – the very foundation of American liberty – was fundamental to the work of AJS. We are delighted that Duke – where this is a shared value – has breathed new life into this publication that we hold so dear. Congratulations and thank you.

Tom Leighton, President, American Judicature Society
Judge Martha Jamison, Immediate Past President, American Judicature Society

A service to the judiciary
Congratulations on the wonderful first issue of Judicature under Duke auspices. I very much enjoyed participating on the panel with Chief Justices Tani Cantil-Sakauye and Nathan Hecht on the big challenges facing the legal system. I thought the other articles were first rate – thought-provoking, useful, and very well-produced. You are performing a great service to the judiciary.

Robert Katzmann, Chief Judge, U.S. Court of Appeals for the Second Circuit

High fives
I’ve now caught up with my “professional pleasure” reading and am sending my “high fives” to you for the reinvigorated Judicature! Thank goodness the Center stepped up to salvage, refurbish, and enliven this publication. It is needed and appreciated. This first issue portends well!

Gene E.K. Pratter, U.S. District Court Judge, Eastern District of Pennsylvania

Challenges and solutions
I found the articles in Judicature enlightening as well as relevant to judges, academics, and attorneys. I particularly appreciated the articles centering on Dean Levi’s UNLV lecture and the subsequent roundtable with Chief Justices Cantil-Sakauye and Hecht, and Chief Judge Katzmann addressing the topic of a sustainable justice system for all litigants.

Levi perfectly catalogs the many systemic problems currently facing the judiciary. And, accordingly, he proposes solutions to stem the ever-increasing demand on judicial resources. He correctly points out that the pressure on court resources, especially in addressing the needs of unrepresented litigants (a problem which limits access and undermines neutrality), must be approached by formulating and implementing changes in the process. Moreover, Levi offers thoughtful suggestions for criminal justice reform. As a trial judge, faced daily with these problems, I welcome any changes that will further the system’s goal of providing fair and efficient justice to all.

Finally, I read with enthusiasm Levi’s exchange with Cantil-Sakauye, Hecht, and Katzmann. Too often “solutions” to judicial problems come in the form of suggested budget cuts – a counter-solution that only serves to exacerbate the challenges set out by Levi and the panelists.

J. Garvan Murtha, U.S. District Judge, District of Vermont

Nonlawyers can help
Among Dean Levi’s challenges is that of extending justice to ordinary people. In scale and scope this challenge is large and complicated. Nevertheless, there may now be good opportunity to meet the challenge.

The essence of the problem is the mismatch between the general public’s need for legal assistance and the rules governing how
such assistance can be provided. The need arises in the myriad encounters of ordinary people with courts and public agencies. These tribunals have procedures supposedly affording justice, but which are complicated beyond the competence of most ordinary citizens: What to put in the forms, what information or evidence to provide, what to say, how to get review from an initial adverse result? Most people can do pretty well with the motor vehicle department, but even that encounter can be baffling. The average citizen can also have difficulty with private agencies such as the telephone company.

The present rules allow the average citizen to act for himself, but they prohibit “practice of law” by anyone not licensed as a lawyer. There are some exceptions, for example in workers compensation matters. Also, the clerical staff in many agencies does a good job helping bewildered people, but that is not universal.

Washington state has recently broken new ground by establishing licensed paralegals. What is needed is a general approach like that in Washington – rules that allow trained nonlawyers to act as advisers and advocates. This need could be matched with evolving requirements that law students have practical training. Thus we could put advanced students, under supervision, in the misdemeanor courts, the license bureaus, and other points of interaction between ordinary citizens and the “justice system.”

Geoffrey Hazard, EMERITUS THOMAS E. MILLER DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA–HASTINGS COLLEGE OF THE LAW

A tradition worth keeping
Judge Alex Kozinski and John Major provide a thought-provoking look at the possibility of cameras in the jury room notwithstanding their acknowledgement that “the tradition of jury room secrecy is one of the oldest and most rigorously protected in the American justice system.” . . .

We conscript citizens to serve as jurors, sometimes for weeks at a time and for little per day in pay. Voir dire is already an invasion of jurors’ privacy. Now we would add to that by recording them. To increase this invasion, our need must be solidly justified. I do not find the justification of motivating the jurors to better service by recording their every word and action to be a valid justification. In my experience jurors are very conscientious and take their task very seriously . . .

The premise of the article that the video will be sealed seems to be inconsistent with the goal of satisfying the public’s curiosity about the reasons for a particular verdict. Thus, that particular advantage does not appear to actually be advanced. . . .

Additionally, once we embark on this adventure, won’t every dissatisfied litigant seek access to the video to fish for some form of error? . . .

Indeed if lawyers can seek the video, won’t there develop a standard of practice which requires that they obtain and review it? A lawyer’s failure to do so may have malpractice, bar discipline, or ineffective assistance-of-counsel consequences.

We should constantly be in pursuit of a fair jury trial. This proposal seems aimed at pursuit of the perfect jury trial. How many retrials can the system stand?

James A. Teilborg U.S. DISTRICT COURT JUDGE, DISTRICT OF ARIZONA

Jurors do their jobs well
I respectfully disagree with the proposal to allow cameras in the jury room. . . . As an empirical researcher I have been studying, writing about – and occasionally testifying about – juries since the 1970s. Of especial importance is the fact that in the late 1980s I was co-principal investigator, with Prof. Shari Diamond of Northwestern Law School, on a project, funded by the National Science Foundation and other sources, in which we videotaped 50 Arizona civil jury trials and the ensuing jury deliberations. A condition for the study, clearly explained to the jurors, was that the deliberation tapes would be strictly confidential, used only for research, and, most important, would have no impact on their verdict. We concluded that juries are dedicated to their assigned tasks; they carefully weigh the evidence – and they even verbally sanction the rare jury member who attempts to stray from the rules set forth by the judge . . . .

If jurors are told, or otherwise learn, that their deliberations are open to scrutiny by the court, the disclosure will inhibit the jurors’ free exchange of interpretations of the evidence and erode the trust that they now perceive is given them.

Neil Vidmar, RUSSELL M. ROBINSON II PROFESSOR OF LAW, DUKE LAW SCHOOL

Cameras in chambers next?
. . . If recording [jurors’ deliberations] is appropriate, why not also place cameras in chambers, recording a judge’s debate with his law clerks, or discussions about draft opinions?

David J. Beck, BECK REDDEN LLP

Jurors deserve privacy
Jury deliberations are conducted in secret for sound reasons. Jurors need to be frank with each other and free of any concern that what they say or do is going to be dissected later by others. That judges and lawyers might peer over a jury’s shoulder could undermine the confidence that we instill in jurors that they are the sole finders of fact. The mere existence of video would impair the finality of jury verdicts and spawn applications for its disclosure simply because it exists.

Many citizens are already reluctant to serve on juries because of the burdens such service places on them, including the inevitable invasion of privacy that comes with voir dire and social media research by counsel. Cameras in the jury room would only add to the chill.

William H. Pauley III, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

WE WANT TO HEAR FROM YOU!

SUBMISSIONS ARE WELCOMED. Judicature explores all aspects of the administration of justice and its improvement. We publish articles based on empirical research as well as articles based on fact and opinion from members of the bench, the bar, and the academy. Complete submission guidelines, including instructions for length and format, may be found on our website at www.law.duke.edu/judicature.

LETTERS TO THE EDITOR ARE ENCOURAGED. Email your letter, including your full name and title, with Attn: Editor in the subject line, to judicature@law.duke.edu.
Opening a floodgate

. . . [I]f cameras improve the public’s right to view a trial, why shouldn’t we use unobtrusive equipment to give the public the same right to view jury deliberations? . . . If deliberations are recorded, it will be just a matter of time before the recordings are available on the Internet.

One answer is that jury deliberations are not already public. And, unlike trials themselves, where formalities must be observed, we permit juries to render a verdict for almost any reason they care to. Absent some prohibited influence, we do not overrule verdicts because some number of jurors just did not get it right. Or even because they refuse to follow instructions.

. . . There is a big difference between filming what is already public, i.e. trials, and what is not and never has been: jury deliberations. Important social science research indicates that people change their behavior when they know they are being observed. . . .

Unless we are prepared to permit review of jury deliberations for all kinds of things, it is probably better not to record them at all. For all kinds of things, it is probably better not to record them at all. It is probably better not to record them at all.

William W. Taylor

Post-trial jury contact prohibited in some locales

. . . One of the observations related to permissible jury contact would get you in hot water here in the Middle District of Florida. Judge Kozinski and Mr. Major state “Lawyers, the media, and anyone else can interview jurors following their deliberations and ask whatever they please.”

Our Local Rule 5.01(d) expressly prohibits any attorney or party from directly or indirectly interviewing any juror after any civil or criminal trial absent an order of the court. Jurors are informed of this prohibition upon their discharge from service. I suspect that our district is not unique in having this prohibition.

Roy B. ‘Skip’ Dalton, Jr., U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF FLORIDA

Judicial orderrrrrrs

The state of Oklahoma was stunned when the immortal Justice Opala died five years ago this October. No one has ever left a bigger imprint on the Oklahoma judiciary, and I’m skeptical that anyone ever will.

One did not read his writings without a dictionary nearby. He taught us that a common law marriage was, in fact, a “pra-Tridentine canonical consensual marriage.” The motel guest was bitten during the night by a brown recluse spider or the “offending arachnid,” if you will.

His brilliance was tempered by a puckish sense of humor. My wife and I were checking into a fine Tulsa hotel one afternoon many years ago when Justice Opala arrived next and stood behind us in line. “What brings you to Tulsa?” he asked. When I answered that we were celebrating our anniversary, Justice Opala arched his eyebrows and said (rolling his r’s, as always), “Then you must also celebrate your second honeymoon. And that’s a judicial day!”

Justice Opala, who stood 5’4”, was a giant of a man. He is irreplaceable, and will remain unforgettable.

Allen Welch, SPECIAL JUDGE, DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA
ON THE HILL: PATENT Act Aims To Curb Patent Trolls

On Apr. 29, a bipartisan coalition of Senate Judiciary Committee members led by Senators John Cornyn (R-TX) and Chuck Schumer (D-NY) introduced the Protecting American Talent and Entrepreneurship Act of 2015 (“PATENT Act” — S. 1137, 114th Cong. (2015)). The bill aims to reform perceived abuses of the patent litigation system by so-called patent assertion entities (“PAEs”). According to those who oppose PAEs, these entities abuse the system by asserting low-quality patents against operating companies in order to secure quick, nuisance-type settlements.

The PATENT Act increases the risk associated with asserting low-quality patents in a demand letter or lawsuit. It directs district courts to determine whether the losing party’s conduct and position were “objectively reasonable in law and fact.” If the district court finds that the losing party’s conduct or position were not objectively reasonable, the court must assign reasonable attorney fees to the prevailing party.

Although the PATENT Act does target low-quality patents through fee shifting, it gives the district court more discretion than the Innovation Act (H.R. 9, 114th Cong. (Feb. 5, 2015)), a House bill proposed in February by a bipartisan coalition led by Rep. Bob Goodlatte (R-VA-6). Under 35 U.S.C. § 285(a) as revised by the Innovation Act, the PATENT Act has only limited provisions for staying discovery and also gives the Judicial Conference discretion to develop discovery rules.

As legislation moves through the Senate and House, another hotly contested issue is what changes, if any, should be made to the post-grant review proceedings established at the U.S. Patent and Trademark Office by the American Invents Act of 2011. A recent roundtable sponsored by the Duke Law Center for Innovation Policy reviewed the empirical evidence relevant to this question. Details are available online at www.law.duke.edu/innovationpolicy/ptabroundtable.

— ARTI K. RAI is the Elvin R. Latty Professor of Law at Duke University and former administrator of the Office of External Affairs at the U.S. Patent and Trademark Office.

Compared to the Innovation Act, the PATENT Act takes stances on pleading and discovery that are more favorable to patent owners. How it believes the claims are infringed, it does not require the owner to show where “each element of each claim” is found in the accused product. Additionally, in contrast to the Innovation Act, the PATENT Act has no provisions for staying discovery and instead gives the Judicial Conference discretion to develop discovery rules.

As legislation moves through the Senate and House, another hotly contested issue is what changes, if any, should be made to the post-grant review proceedings established at the U.S. Patent and Trademark Office by the American Invents Act of 2011. A recent roundtable sponsored by the Duke Law Center for Innovation Policy reviewed the empirical evidence relevant to this question. Details are available online at www.law.duke.edu/innovationpolicy/ptabroundtable.

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JUDICIAL HONORS

CURTIS L. COLLIER, Senior U.S. District Court Judge for the Eastern District of Tennessee, received the 2015 American Inns of Court Professionalism Award at the Sixth Circuit’s Annual Judicial Conference. The award honors a lawyer or judge of sterling character, unquestioned integrity, and dedication to the profession. Judge Collier serves on the Judicial Conference of the United States Criminal Law Committee and the Federal Judicial Center’s District Judge Education Advisory Committee.

KAREN A. THOMAS, District Court Judge, Campbell County, Kentucky, received the Civic Leadership Award from the Northern Kentucky chapter of Kids Voting in recognition of her commitment to Kentucky youth. Judge Thomas presides over the Northern Kentucky Teen Court in Campbell County, has served as a member of the National Task Force for Youth Courts, and is a founding member of the National Association of Youth Courts.


**The Law, the Legal System, or the Administration of Justice**

**When can judges serve on commissions or engage in political activity?**

Many provisions in the code of judicial conduct refer to “the law, the legal system, or the administration of justice” to define aspects of judges’ ethical obligations, often using the term to create an exception to a rule. Although the parameters of the phrase may seem self-evident, exceptions would become rules if the phrase were read to cover any undertaking involving a law, any social problem affecting the courts, or any political issue playing out in the legal system. Further, a broad interpretation could confuse the public about distinctions between the judiciary and other branches.

The phrase has been extensively interpreted in the context of government boards or commissions where judicial ethics advisory committees have had to define “the law, the legal system, or the administration of justice” to determine which commissions are appropriate for judicial membership. The advisory committee for federal judges has distinguished between commissions directed toward “improving the law, qua law, or improving the legal system or administration of justice” and those “merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.” (U.S. Advisory Opinion 93 (2009)). The committee emphasized that service on a commission is more likely to be appropriate if it “enriches the prestige, efficiency or function of the legal system itself” or “serves the interests generally of those who use the legal system, rather than the interests of any specific constituency.”

A similar test adopted by other advisory committees analyzes whether the government commission has an articulable connection to the law, the legal system, or the administration of justice, rather than an indirect or incidental relationship. For example, the Massachusetts committee stated that, to come within the exception, a commission must have a “direct nexus” to how “the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business.” (Massachusetts Advisory Opinion 1998-13.)

**Political activity**

Canon 5C of the 1990 American Bar Association Model Code of Judicial Conduct prohibited judges from engaging in political activity but created an exception “on behalf of measures to improve the law, the legal system or the administration of justice.” Canon 4 of the 2007 model code provides that a judge “shall not engage in political . . . activity that is inconsistent with the independence, integrity, or impartiality of the judiciary” but does not include an express exception for political activity related to the administration of justice.

Although such activity may still be implicitly permitted as not “inconsistent with the independence, integrity, or impartiality of the judiciary,” the absence of explicit permission may discourage judges from engaging in such activity and subject them to criticism if they do. (Several states that have otherwise adopted much of the 2007 model code have retained the exception, including Arizona, Connecticut, Missouri, New Hampshire, New Mexico, Pennsylvania, and Wyoming.)

Interpreting the 1990 exception, advisory committees have allowed judges to publicly support or oppose ballot initiatives, bond questions, proposed legislation or constitutional amendments, and funding plans on matters such as judicial compensation, court structure, court budgets, new courthouses, judicial selection, and sentencing. On behalf of or in opposition to such measures, a judge may, for example, write newspaper editorials; appear on radio and television talk shows; make presentations to civic, charitable, and professional organizations; take part in panel discussions with other officials at public meetings; and contribute personal funds to and participate in nonprofit organizations involved in the effort.

The phrase also defines when judges may appear at public hearings or consult with executive or legislative branch officials. The California committee identified appearances addressing the legal process as “the clearest examples of permissible activities.” (California Advisory Opinion 2014-6.) With respect to substantive legal issues, the committee stated, a judge may “advocate only on behalf of the legal system — focusing on court users, the courts, or the administration of justice,” not any particular cause or group. Further, the committee concluded that judicial comment should be limited to the judicial perspective and not “insert a judge’s views on economics, science, social policy, or morality into the official public discourse on legislation” or encroach “into the political (policy-making) domain of the other branches.”

-- CYNTHIA GRAY is director of the Center for Judicial Ethics of the National Center for State Courts. The full version of this column appeared in the spring 2015 Judicial Conduct Reporter, which can be found, with cited advisory opinions, at www.ncsc.org/jce.

MARY E. STALEY, Cobb County, Georgia Superior Court, received the 2015 Woman of Distinction Award from the Cobb Chamber of Commerce. Judge Staley presides over Cobb’s Mental Health Accountability Court, which provides an alternative to jail time for those with mental health issues. FERNANDE (NAN) R.V. DUFFLY, Associate Justice of the Massachusetts Supreme Judicial Court, received the Margaret Brent Women Lawyers of Achievement Award from the ABA Commission on Women in the Profession.

RICHARD L. YOUNG, Chief District Court Judge for the Southern District of Indiana, received the Evansville Bar Association’s James Bethel Gresham Freedom Award. Judge Young is the Seventh Circuit District Court’s judge representative to the Judicial Conference of the United States and has served on its Committee on the Administration of the Magistrate Judges System.