

The State and Direction of Vermont's Judicial System

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This month, a number of bar journals across the country are reporting on the condition and direction of their respective state judicial systems. The ABA is reporting on the federal system. The goal is to heighten the profession's awareness of the issues and problems, in the hope that by doing so, the system will be better funded and more efficiently designed.

Vermont's Recent Experience.

Adjusted for inflation, judicial funding in Vermont has remained more or less constant over the past several years. During the same period, filings have dropped significantly, and thanks to more efficient judicial administration, backlogs have been reduced even more. Temporarily reduced demand in Superior Court has permitted a redistribution of resources into Family Court, where demand has been increasing. As the recession comes to an end, however, we must prepare for the inevitable increase in Superior Court demand. The solution lies in increased use of ADR, and more intensive case flow management.

In order to understand the condition of Vermont's judicial system fully, each court must be considered separately.

Vermont Supreme Court.

The Vermont Supreme Court has no backlog. The Justices continue to close cases faster than they are filed. Their success is the result of hard work and 'differential case flow management'.

The theory behind case flow management in general is that the court exercises increasing control over its dockets, thereby decreasing the extent to which the lawyers control the process. This results in faster resolution of cases. "Differential" case flow management takes the principle one step further. Judicial resources are allocated to cases in differing degrees, depending upon the needs of the particular cases. At the Vermont Supreme Court, this is accomplished through differential allocation of both argument time, and justice and law clerk time. The Justices spend three-month rotations functioning as 'Screening Justice'. Cases are allocated oral argument of either five, fifteen or thirty minutes per side. All of the 'five-minute-per-side' appeals, and many of the remainder, are decided by brief entry order, rather than by full opinion. Screening, and subsequent tracking, of the cases is accomplished by means of the docketing statement. The

transcript production process is monitored and kept moving. Certain cases, such as those involving parental rights and responsibilities, parent-child contact and termination of parental rights, are advanced.

Superior Court.

Demand in Superior Court is way down, with filings at their lowest level since 1980. Superior Court demand is tied to fluctuations in the economy. In a depressed economy, a reduced level of commercial transactions produces a reduction in civil filings. When a recession ends, civil filings increase. In Superior Court, there is a lag between the filing of a case, and the time at which it begins to demand appreciable judicial resources. Since the period from filing to trial is between one and two years, the impending demand remains hidden for some time. Thus, even if we take an optimistic view of the future, and assume that the recession is over, the impact of the expected increase in civil filings will not be felt for some time.

Prudent fiscal management dictates that one plan ahead when demand can be anticipated. In the present legislative, executive and fiscal climate, however, it is difficult to generate interest in increased judicial funding. It is particularly difficult when backlogs are at their lowest point in many years.

District Court.

Criminal case filings are down slightly, although there is no discernible trend. In distinction to Superior Court, District Court demand turns less on fluctuations in the economy, and more on the level of funding for law enforcement. That funding, in turn, is driven by changing societal views on crime.

Small claims filings are down substantially, and the number of pending cases is down even more. The backlog is at its lowest level since 1984. This is due, in part, to an economy-driven demand curve. Credit also goes, however, to the acting judges, and the pro bono mediation projects, which have been implemented by several county bar associations.

Family Court.

Filings in Family Court have grown significantly, especially in the areas of post-judgment proceedings, abuse and URESA. Notwithstanding this fact, pending cases are down, reflecting effective management. Contrary to Superior Court, demand in Family Court is higher in hard economic

times, and the 'filing-to-resource demand' time is short.

The Big Picture.

In the words of Court Administrator Tom Lehner, our dockets are in the best shape in 25 years, and we are doing extremely well given available resources.

Judicial Nomination.

Efforts to improve the judicial nomination process are being made in a number of areas. Under consideration are the questions of when the identity of judicial candidates should become public, and whether the Judicial Nominating Board should be permitted broader access to Professional Conduct Board records, and greater latitude in contacting individuals other than the candidates' listed references.

It has been suggested that the names of all 'qualified' (or better) candidates should be sent to the Governor. It has also been suggested that qualified candidates be rated in two or three levels of perceived competency, as they are in the ABA model. Gender issues exist in relation to the composition and operation of the Judicial Nominating Board.

Judicial Retention.

The 1992-93 legislative retention process caused substantial introspection within the judiciary. The process is fundamentally political, and therefore difficult to control. Certain judges were surprised, however, by the critical testimony of lawyer-witnesses. Their surprise is both unnecessary and undesirable. In an attempt to solve this problem, the Vermont Supreme Court appointed a committee which recommended an intra-judicial system for providing timely performance feedback to judges. The data would be garnered from juror and lawyer questionnaires. The recommended solution came with a \$25,000 annual price tag, however, and as yet, has not been implemented.

The VBA has also taken a role in facilitating the judicial retention process. It has disseminated surveys through the county bar associations. Unfortunately, the percentage of returned surveys is low, and inconsistent from county to county. At times, there was reluctance to provide the respondents' comments to the Legislature. Testimony by VBA and county bar association witnesses was, nonetheless, well received.

The VBA is working to facilitate better,

and more regular, feedback between judges and lawyers. A mechanism through which we could honestly and constructively do so would make the retention system less opaque, more accountable, and more effective.

Recurrent Issues

Alternative Dispute Resolution.

The use of ADR is on the increase, both within and without the court system. Superior Court judges are increasingly using special masters under the authority of V.R.C.P. 53. ADR is also growing in the private sector.

Vermont lawyers continue to donate an increasing number of *pro bono* hours in service of ADR. There are questions, however, as to how long this trend can continue. Volunteer mediation projects, both with respect to small claims and Family Court, exist in a number of counties.

Assistant Judges and State-County Interaction.

Many of the old governance inefficiencies remain, and as a result, Assistant Judges continue to be an underutilized resource. There has been a trend toward increased utilization, with pilot programs in small claims and child support modification. Both

of those programs have been 'sunsetting', however, after disappointing results.

As a result of the just-concluded legislative session, there will be increases in Assistant Judge judicial responsibilities in a number of counties. Contingent upon successful completion of pre-approved training, Assistant Judges in Rutland County will be permitted to handle uncontested final hearings in divorce cases. In Essex County, they will be permitted to preside over uncontested divorces, parentage proceedings, small claims cases, municipal ordinance violations and traffic ticket hearings. In Orleans County, they will be permitted to handle uncontested divorces and parentage proceedings.

There are concerns about the overall skill level of the Assistant Judges, and about the cost of their training. Nonetheless, in many states, non-lawyer judges have proven to be a valuable resource in various narrowly-drawn subject matter areas.

Vermont's non-unified state/county judicial structure presents particular problems with respect to budgeting. In Chittenden County, a management team has been assembled pursuant to Administrative Order 34. It is composed of members of the Court Administrator's office, the presiding Judges, the Assistant Judges, and the Court Clerks. Although this unprece-

dent state/county cooperative effort has potential, the process continues to be hampered by an 'us-and-them' attitude. For example, the Superior Court Clerk has withdrawn from participation, contrary to the wishes of the Assistant Judges.

Indigent Criminal Defense.

Reduced funding of indigent criminal defense has had serious consequences. Cuts to the Defender General's budget have caused an increase in ad hoc assignments. Until July 1, 1994, lawyers who were assigned on an *ad hoc* basis were paid at a rate of \$25 per hour, well below even a modest law office's overhead. Compensation caps for particular types of cases were also modest, and it sometimes took as much as ten months to get paid. When analyzed in hourly terms, fixed-rate 'conflict contract' compensation has also been inadequate.

This state of affairs raised two fundamental problems. The first relates to quality of representation. Because of the low rates of compensation, the work tends to go to the least experienced lawyers with the lowest overhead. Second, the displacement of work from the Public Defenders' offices into the private bar is less cost-effective, and arguably, of lesser quality.

These funding problems were partially addressed in the recently-concluded leg-

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islative session. Ad hoc compensation was increased to \$40 per hour, and caps were raised. Supplemental monies were appropriated to bring the payment of *ad hoc* vouchers current. The Legislature now recognizes the comparative inefficiency of ad hoc assignments, and as a result, increased funding for conflict contracts. Funding for the Defender General's Office, however, which is responsible for all of the Public Defenders' offices, was increased a mere 1%, thereby losing ground to inflation.

There has been talk of additional *pro bono* activity by lawyers in this area. The legal community sees this potential transfer of responsibility as an abdication of the state and federal governments' constitutional responsibility. The efficient administration of justice demands an effective system of defense.

Pro Bono.

Sign-ups with the Vermont Volunteer Lawyers' Project are up. A substantial amount of ADR is being provided by volunteer lawyers. Lawyers also provide *pro bono* services through reduced-compensation work. Anecdotally, however, volunteer resources are near the breaking point.

Notwithstanding all of the *pro bono* efforts, the number of *pro se* litigants is climbing rapidly. 60% of Vermont Family Court cases have at least one *pro se* litigant. This is a long-term national trend. The *pro se* rate in New York and Los Angeles exceeds 90%. This trend is also present in small claims, and even in Superior Court.

Non-Lawyer Practice.

Incursions into the practice of law by non-lawyers are always met by the profession with concern. OCSS paralegal practice under Family Rule 10 has raised questions about quality assurance, training and accountability. In recent case law, the Vermont Supreme Court has condoned the representation of certain 'interest groups', under certain circumstances, by their non-lawyer members. Recent legislative initiatives propose to expand this privilege further.

Curative Measures Already Implemented

How the Budget was Balanced.

Expenses have been cut in a number of areas. For quite some time, there were multiple judicial vacancies. During those periods, salary and other employee-related costs were not incurred. As a result of the funding levels in the just-concluded legislative session, one open judge position will remain vacant until at least July of 1995. Other vacancies within the system, such as

those arising within the District and Family Court Clerks' offices, were held open for 8-12 weeks for the same reason, and a number of positions within the Court Administrator's Office were eliminated.

Juror mileage was eliminated, and jurors are now paid on a modified hourly basis, rather than receiving a full per diem regardless of the amount of time which they actually spend in service. Equipment purchases were deferred, and consultant fees were cut. The burden of paying for witness fees was shifted to the prosecutors and public defenders. Fees for psychiatric evaluations were shifted either to human services or to the parties. The funds to support these last two activities were also shifted, but growth in demand is now absorbed by the responsible agencies. State support for Superior Courts, Probate Courts and defender services all received 2% across-the-board cuts.

On the revenue side, filing fees were increased to fund the Family Court. Although these increases were substantial, Vermont's filing fees before the increases were among the lowest in the nation, and are still on the low side. An administrative proposal for further increases in filing fees to pay for general judicial services failed in the last legislative session.

Better Use of Existing Resources.

There is a trend away from court reporters, to court recorders and video. Recorders are cheaper, and although the video option requires a substantial initial capitalization, it is cheaper in the long run. Vermont now boasts several video courtrooms, and the Vermont Supreme Court has a procedure for its developing stream of video appeals.

Computer systems are being improved throughout the courts. Computers reduce the need for additional employees, with resulting budgetary benefits. This trend is consistent, of course, throughout the profession. Five Superior Courts have installed computer systems which are compatible with the state system.

Other Trends and Possible Solutions

More money would certainly help, but it is unlikely to come soon. Public willingness to spend money for private contract and tort litigation is diminishing. Our duty as professionals, given our greater familiarity with the issues, is to educate the public. Efficiency is good, but it can only go so far. The public must understand where savings are possible, and where expenditures are necessary. We must all advocate for adequate judicial funding.

If more money were to be made available,

how should it be spent? Current theory funds more judges and more ADR first. Increased utilization of ADR within the court system is in the works. Early post-filing mediation has the demonstrated ability to settle cases. The results are faster, more consensual, and more satisfying for the litigants. This trend will continue, both in the courts, and through the 'privatization of civil litigation'.

The VBA and county bar associations have done much in recent years to promote the efficient operation of the judicial system. *Pro bono* conferencing of civil cases, and mediation of small claims cases, are but two of the many worthy projects which have been designed and implemented. The bar associations have also played an important role in the judicial retention process, but there are limits on what can be accomplished through this means.

The Governor and Legislature must communicate a greater appreciation of the importance of a strong and independent judiciary. The system works best when the branches of government are independent and strong. This fundamental point needs to be understood by the public. It is the job of our profession as a whole to bring that about.

The courts of the future will benefit from an increasing usage of technology. Networking, paperless electronic litigation, electronic research, and increasing use of videotape transcripts and video transmission will revolutionize the system. Video arraignments, directly from jail, have been proposed, and are used in a number of states. This proposal has its critics, and for the moment, seems to be stalled in Vermont. The criminal dockets could be streamlined if prosecutors and public defenders were 'on line'.

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Case flow management will continue, and presumably be improved. Implicit in this process is the continuing transfer of control over case progression from the bar to the courts. The trend is toward 'differential case management', such as that practiced by the Vermont Supreme Court. By focusing on the particular needs of each case, better use is made of finite resources.

A likely trend over the next few years is the continuing evolution of an increasingly two-tiered judicial system. In addition to the comparatively highly-compensated trial judges of general jurisdiction, there are already several types of judicial officers in Vermont who have limited areas of subject matter jurisdiction. Examples include Family

ly Court Magistrates and Traffic Ticket Hearing Officers. As a by-product of this trend, over the last several years, the average age of Vermont's judges has dropped by 15 years. Judicial economy can be served by having an increasing percentage of lower-compensated specialized judicial officers.

Under such a system, one might question whether the quality of the judicial product would suffer. On the one hand, 'second tier judges' would attract less qualified applicants, whose work product might be of less than the highest quality. On the other hand, the opportunity for greater specialization could improve the quality of the judicial product. Although the judiciary has been moving in this direction, with the

creation of the Family Court Magistrates and Traffic Ticket Hearing Officers, the Legislature recently went in the opposite direction, by converting the Environmental Judge into a Superior Judge, effective in two years.

Some argue that 'civil dispute centers' are not necessary in every county. They envision regionalized 'Superior Courts', with a heavy dose of ADR, located in three or four of Vermont's population centers. The vast majority of the lawyers who are involved in these cases work in those cities anyway, or so the argument goes.

From an 'economy of scale' point of view, some suggest that prosecution is not best accomplished by means of a county-based prosecutor system. Others would expand the Family Court by locating, at the same place, a full range of related social and human services. In this 'Human Services Center' of the future, the Family Court would be increasingly designed for *pro se* litigants, and would operate in a less adversarial model. All actions would become 'family proceedings', each receiving the differential case management it deserves. The duplication of proceedings which has been the bane of the Family Court, would be reduced. Especially in family proceedings in which the State is a party, the potential for increased efficiency is still substantial.

Conclusion

Court statistics must be studied over time. In this respect, they are like vital signs. A single set of vital signs affords little information. The regular taking of vital signs, however, discloses trends. The trends must be noted, and their causes debated.

But even statistical trends, in isolation, are not enough. We must develop a collective qualitative impression of the system. In this effort, the legal profession must take the lead. As the legal system evolves, the lawyers are the first to identify the challenges and opportunities. We must warn of the dangers, and point out the opportunities.

To date, we have been fortunate. Efficient management, coupled with recession-driven decreases in civil filings, have left us well positioned . . . for the moment. When the economy recovers, however, and the increased civil demand is eventually felt, we must be ready. Efficiency is one answer, and ADR is another, but adequate judicial funding is a must.

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