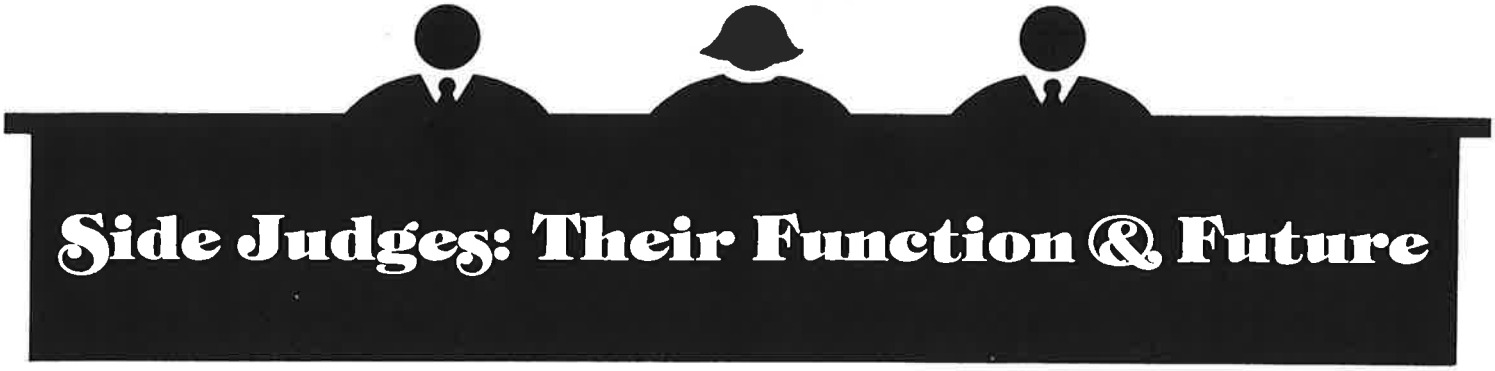

Side Judges: Their Function & Future

by Mark D. Oettinger, Esq.

1st Place Winner
VBA's 1984 Essay Contest

A Case For Lay Justice

In 1983, a change in position by the Vermont Supreme Court threw our judicial system into turmoil. Suddenly, large numbers of cases could be reopened. The underlying legal issue was whether a judgment which had been rendered by a Superior Court composed of a presiding judge and side judges was valid when the side judges had participated counter to statute, and thus, beyond their jurisdiction. Until 1983, the Vermont Supreme Court had held that such a judgment was valid, but in the landmark case of Soucy v. Soucy, it changed its mind. The ramifications were substantial.

The Vermont Legislature responded quickly, needing to stem a tide of reversals. It enacted legislation which, in a single stroke, drastically redistributed and severely limited the jurisdiction of side judges whose roles go back through two hundred years of Vermont history. This paper examines the historical role of Vermont's side judges, the effect of the Soucy decision, the legislative response to that case, the likely judicial reception of the new legislation and a proposal for an alternative, possibly better, solution.

In 1778, Vermont staffed its charter class of trial judges with non-lawyers. At that time, it was not assumed that lawyers would make particularly able judges. Eventually, a requirement arose that presiding judges be "learned in the law," but throughout Vermont's history, few of our side judges have been lawyers.

Lay judges were the rule in the early history of the United States, and in fact, many states still employ them. Vermont is the only state, however, in which lay judges still sit on a trial court of general jurisdiction. In most, although not all, other states, they tend to sit on ancillary tribunals and participate in more restricted capacities such as traffic court and small claims.

Vermont's side judges have limited jurisdiction and were forbidden, until recently, from participating in matters involving "equity." Equity, in this context, must be distinguished from "law," its mutually exclusive and complementary component part. Any claim for equitable relief by any party made a case entirely equitable in the sense that the side judges could not participate in its decision. Such cases were heard by the presiding judge alone.

The law-equity distinction is an elusive one, but basically, equity is a type of relief which must be fashioned on a case-by-case basis. Equitable relief is therefore sought in situations which cannot be dealt with by means of set principles of law. It is therefore counterintuitive that side judges, legally untrained as they are, should participate in decisions involving law, but not in those involving equity. If this law-equity distinction is to be made at all, it should be made along opposite lines.

Inevitably, mistakes were made in the composition of the Superior Court and the error became an issue on appeal. The Vermont Supreme Court was faced with two distinct types of appeals involving improperly composed courts. Some cases, equitable in any respect (and therefore all respects), were heard by the presiding judge and the side judges when, by statute, they should have been heard by the presiding judge alone. Other cases, entirely legal in nature, were heard by a presiding judge alone when, by statute, they should have been heard by the side judges as well.

The Vermont Supreme Court had consistently taken the position that the absence of side judges in a purely legal case was an incurable jurisdictional defect. As such, judgments rendered by such an improperly constituted court were declared void and new trials were ordered. These situations were, however, statistically rare. More often, side judges participated, counter to statute, in equity cases. In those cases, the Vermont Supreme Court presumed the error harmless unless the appellant could prove that the side judges, by their presence, had affirmatively changed the result. The Vermont Supreme Court presumed no such influence from a unanimous Superior Court, and as such, affirmed the vast majority of such cases. This became known as the "harmless error rule."

A harmless error rule in the context of an improperly composed court is not a particularly sound notion as a matter of law. A court has only that power conferred upon it by either constitution or statute. Furthermore, the assumption that the side judges of a unanimous court did not affect the decision of the court as a whole is extremely tenuous. As a result, with articulated misgivings about the inevitable consequences, in 1983, the Vermont Supreme Court gave in to its collective judicial conscience and retracted the harmless error rule in the Soucy case. It thereby opened a floodgate of appeals based on improperly composed courts. Because the defect was jurisdictional, the judgment could be attacked indefinitely and with almost inevitable success. Large numbers of cases could be reopened, even when the issue had not been raised either at trial or on appeal.

The reaction of the public to the resulting reversals was strong, if somewhat misdirected. The media carried the story prominently, making the sensational claim that up to a quarter of the state's judgments were at risk of reversal. The public perceived that the Vermont Supreme Court was trying to "bench" side judges entirely, and the resulting public outcry focused the Legislature on the issue, for better or worse.

The shift in the Vermont Supreme Court's position was not primarily motivated by a desire to limit the role of side judges in our judicial system. It was simply an attempt to conform court practice to the parameters which had been set out by the Legislature. Clearly, the Vermont Supreme Court foresaw the effect of its decision and knew that the Legislature could win any resulting legislative-judicial battle except to the extent that new legislation were to run afoul of the United States or Vermont Constitutions.

To date, the role of the United States and Vermont Constitutions in the side judge battle has been limited. The United States Supreme Court has ruled that a criminal defendant has a constitutional right to have a lawyer-judge decide all questions of law in any criminal proceeding in which he has a

constitutional right to a lawyer. A right to a lawyer, in turn, attaches whenever the defendant faces potential incarceration. This rule of law precludes the participation of side judges in almost any phase of any criminal case in which they might participate under the present state of the Superior Court's jurisdiction. Thus, the Legislature is powerless, from a constitutional standpoint, to expand the jurisdiction of side judges into questions of law in criminal cases in which the defendant faces potential incarceration. Through its past case law, the United States Supreme Court has taken this issue out of the hands of both the Vermont Legislature and the Vermont Supreme Court.

Certain members of the Vermont Supreme Court have indicated a desire to extend the constitutional prohibition on side judge participation to questions of law in civil cases. The United States Supreme Court case law does not mandate that result, however, and therefore, if the Vermont Supreme Court wished to do so, it would be forced to rely on the Vermont Constitution as its basis. There has been a recent trend by the Vermont Supreme Court to rely on the Vermont Constitution in a growing number of contexts. This trend is presumably a response to the United States Supreme Court's recent erosion of civil liberties which were once deemed to be protected by the Bill of Rights. Nonetheless, reliance on the Vermont Constitution in this context would be juridically unsound. Thus, whether or not side judge participation in questions of law in civil cases is desirable, the case law will not support precluding it on constitutional grounds. The remedy for such participation, if it is indeed considered undesirable, is legislative action, not judicial fiat. For the moment, of course, this issue has been rendered moot by the 1984 actions of the Vermont Legislature.

In 1984, the Vermont Legislature enacted legislation which has entirely changed the nature of side judge participation in Vermont's judicial process. Most strikingly, the old law-equity distinction was replaced by a superficially simpler and juridically sounder law-fact distinction. Side judges now participate in matters involving equity, but not in matters which involve questions of law to any degree.

One of the reasons given by the Legislature for this change was the fact that the law-equity distinction was an elusive one, and that courts often made errors in its application. While the distinction is indeed elusive, similar confusion will undoubtedly arise, at least at the outset, over whether or not a given question is exclusively factual, and hence appropriate for side judge participation, or whether it involves questions of law to any degree, in which case its resolution would be exclusively within the purview of the presiding judge.

Notwithstanding the fact that the law-fact distinction may require a substantial amount of case law to flesh out its boundaries, it is a far more logical line along which to divide judicial responsibilities than along the law-equity line. Under the new system, side judges rule on questions which require no legal training, leaving to the legally trained presiding judge those questions which do. Certainly, in the abstract, this is a more appropriate allocation of judicial responsibilities, but given the extremely limited overall range of side judge participation which is authorized by the 1984 legislation, serious damage has been done in the realm of judicial efficiency.

It is inevitable in any multi-judge system involving both shared and divided responsibility that mistakes will be made in the composition of the court or the participation of its members. Therefore, to the extent that the Legislature wishes to minimize the incidence of reversals due to the improper participation or nonparticipation of side judges, its mission is not to redistribute judicial responsibilities among the judges, but rather, to make errors in the composition of the court, or the participation of its members, harmless. Although one gets the impression from the recently enacted legislation that this objective was intended, it was certainly not accomplished.

The side judge issue on appeal used to revolve around whether the side judges had participated in a proceeding which involved equity in any respect, or had failed to participate in a proceeding which did not. That question has now been supplanted, as a result of the 1984 legislative changes, with a different, but probably analagous, question of whether the side judges participated in decisions involving questions of law in any respect or failed to participate in decisions exclusively involving questions of fact. The old problem of errors in the composition of the court has thus been replaced by a new problem involving errors in the participation of the court's respective members.

Ironically, under the pre-1984 statutes, given the nature and mechanics of the judicial process, a "compositional" error could be made only once during any given trial. In contrast, under the post-1984 statutes, a "participational" error can be made whenever the court has to make a ruling during the course of a proceeding. Thus, under the new legislation, not only are there more opportunities for the court to falter, but it could conceivably do so many times in a given trial. If, by analogy to its recent ruling in the Soucy case, the Vermont Supreme Court rules that participational errors are jurisdictional in nature, not only will the problem of large numbers of reversals remain unsolved, but it will have been worsened by the expanded potential for error which has been built into the new system.

The last sentence of the new 4 V.S.A. § 112(b) anticipates participational errors and states that they will not be grounds for reversal unless a party makes a timely objection and raises the issue on appeal. Surely, it will become standard practice for lawyers to make the necessary objection and then raise the issue on appeal. Thus, few of the potentially numerous participational errors will escape review as a result of this provision. The more important portion of that sentence, however, is the reference to reversal. This reference seems to mandate a judicial interpretation of the statute which results in reversals on the basis of participational errors in some cases at least, and implies that the Legislature may have assumed that participational errors would result in reversals in all cases in which the error is made and in which the issue is properly preserved by way of timely objection and subsequent briefing on appeal.

4 V.S.A. § 112(b), which is at the heart of the various 1984 legislative changes, therefore threatens their viability as a whole. It sets the stage for large numbers of participational errors, and simultaneously precludes the simple, across-the-board harmless error solution to the problem. Thus, the only way for the Vermont Supreme Court to apply the 1984 legislative changes in a workable manner is for it to adopt a rule which presumes harmless error, as was in effect prior to Soucy. This would seem unlikely, however, since it would require an overruling of that 1983 decision.

The 1984 statutory changes have other shortcomings, but fortunately, none as central to the purpose of the changes as those just described. For example, under 4 V.S.A. § 112(c), the "two judge rule" is preserved. If one side judge is "unavailable," which is now expressly defined as physically absent from the courthouse, trial proceeds with the presiding judge and one side judge, as before. Also retained is the provision which requires a new trial in the event that the two judges do not agree on a decision. With side judges now participating in all questions of fact, however, the number of contexts in which a disagreement could arise, and a new trial therefore be required, is greater. For this reason, two-judge non-jury trials have been made less manageable.

4 V.S.A. § 112(c) concludes by stating that "the unavailability of an assistant judge shall not constitute reversible error." This provision suggests that the Legislature did not accomplish what it intended. The "unavailability" of a side judge has never been grounds for reversal. The absence of an available side judge, on the other hand, is reversible error under existing caselaw, and it seems likely that it was this rule which the Legislature intended to change. In this respect, it has failed.

As the Vermont Supreme Court clearly recognized, Soucy was destined to create large numbers of reversals of decisions

made by improperly constituted courts. It was therefore sure to create a need for remedial legislation to put an end to the resulting threat to the vitality of Vermont's judicial system as a whole. Interestingly, however, rather than to declare all compositional errors harmless, the Legislature did so only relative to judgments rendered prior to the Soucy decision. It thereby created different results on appeal in cases involving compositional errors depending upon when these errors were made. Compositional errors made before Soucy are now deemed harmless, whereas those made after Soucy but before the effective date of the 1984 legislation remain subject to reversal.

Presumably, the rationale behind this disparate treatment was that decisions rendered after Soucy were rendered with constructive knowledge of its holding, and thus, without an excuse to justify foregiveness of the compositional error. This logic is faulted, however, in at least two respects. First, the mere fact that a Vermont Supreme Court decision has been rendered does not mean that attorneys, or even courts, are immediately made aware of it. Second, if the Legislature saw fit to proclaim compositional errors harmless, there is no logical reason to exclude a few random cases. Once again, the facts suggest a Legislative oversight, and that the result which the statutory language would seem to dictate was not intended. Presumably, the Legislature thought that compositional errors would be logically and practically precluded by virtue of the Soucy decision. Unfortunately, this is not true, and as a result, otherwise identical cases may generate opposite results on appeal solely on the basis of whether or not they were rendered within the critical, and largely arbitrary, window.

The impact of the 1984 legislative changes is most noteworthy in two respects. First, gone is the amorphous and inappropriate law-equity distinction. Side judges now may, and presumably must, participate in all purely factual questions. They may, and again presumably must, not participate in decisions which involve questions of law to any degree. This is a positive step. It makes sense to have lay judges decide questions of fact while leaving questions of law to the legally trained presiding judges. Second, however, the new statutes create the potential for great numbers of participational errors, and a harmless error exception is notably absent, if not outright rejected by implication. Thus, if the Vermont Supreme Court rules on the issue of participational error in a manner analagous to that in which it ruled on compositional error, the problem of massive numbers of reversals is not over. In fact, it may have been made worse.

The Legislature can prevail over the judiciary through the law-making process in all matters of side judge jurisdiction except for those of constitutional dimension. Thus, even if the Vermont Supreme Court wanted to curtail the role of side judges in the civil context, which does not appear to be the case, it could only do so by using the Vermont Constitution as a basis. As stated before, the legal soundness of such a position would be suspect from a constitutional point of view, and hence, the Vermont Supreme Court is unlikely to adopt it. The Legislature will therefore almost undoubtedly succeed in its apparent endeavor to preserve an active role for side judges, at least in the civil realm.

Given the fact that the Legislature appears determined to preserve the role of side judges in the Vermont judicial system, it behooves them to do so in the manner most conducive to the effective administration of justice. The American court system is presently dangerously overburdened with work, and our society appears to be becoming more litigious by the day. In this respect, Vermont is no exception. This problem has created waiting periods, in some Superior Court cases, of several years. By the time a case reaches trial, witnesses are often no longer available, or at least, have memories which are far less clear. Once a victim finally does receive compensation, the financial and emotional hardship through which he has been placed by the delay can have been ruinous. It is in this respect that justice delayed is so often justice denied.

There are two solutions to this problem which come readily to mind. States could empower more judges and build more courts. This option costs large amounts of money, and in a political climate which favors reduced governmental spending, is not a practical solution. Alternatively, states could decrease the judicial resources which are allocated to each case. This could be accomplished in a variety of ways. Limitations could be placed on numbers of witnesses or the duration of trials. Rights of appeal could be limited or taken away altogether in civil cases. Changes such as these go to the very heart of the American judicial system, however, and their implementation and public acceptance is therefore unlikely, if desirable at all.

The obvious solution to the problem in Vermont is a form of this second alternative. We must make more efficient use of our side judges. The practice of having three judges sitting simultaneously, often in extremely simple cases, two of whom are doing very little, is shockingly wasteful. In many other states, lay judges hear certain simple types of cases by themselves. If this practice were to be employed in Vermont, the efficiency of the Superior Court could be vastly improved at very little, if any, additional cost to the public.

The 1984 legislative changes totally rearrange the function of side judges. Since they no longer participate in decisions involving questions of law to any degree, their practical experience, and the legal education which they have assimilated in the process, have been rendered largely useless. They now function purely as factfinders. In non-jury trials, the presiding judge makes all rulings of pure law and of mixed fact and law. As to questions of pure fact, the court sits essentially as a three-person jury. One has to wonder what, if any, role this leaves for side judges in jury cases. Although the 1984 legislative changes reassign judicial responsibilities along more juridically defensible lines, they compound the underlying problem of judicial underutilization. We are getting less judging for our money, and threatening to worsen the problem of our overcrowded courts.

Side judges should be given jurisdiction to hear certain types of simple cases on their own. In this way, with all three judges working separately, and presumably still sometimes together, the Superior Courts could accomplish far more. Gradually, the backlog of cases would diminish and the waiting times for trial dates in all cases would be shortened. Witnesses' memories would be fresher and therefore more reliable. Justice would be dispensed more quickly, and so, almost by definition, better.

It is likely that these quantitative gains would be accompanied by a slight concomitant decrease in the quality of the resulting rulings in the designated areas of side judge jurisdiction. This would certainly be true if Vermont were to continue its policy of providing essentially no substantive formal legal education for its side judges. It is interesting to note, in this regard, that Vermont, whose side judges appear to enjoy a broader involvement in the judicial process than do those of any other state, provides an almost nonexistent legal education program for its side judges. Ironically, Vermont's legally trained presiding judges are required to participate in such programs.

First-time side judges should be required to attend comprehensive introductory training programs in their designated areas of jurisdiction. Continuing education should also be made mandatory. Educational programs of this sort could be run in seminar form by the presiding judges at the state-wide judges' meetings. Substantive bench manuals could be written, and regularly updated, covering each major area of side judge jurisdiction. This is a job which could be undertaken by the Superior Court law clerks under the supervision of the various presiding judges.

There are categories of cases which may be very broadly classified as "simple." These types of cases tend to have repetitive fact patterns and straightforward questions of law, and tend to require prompt attention. In the following five areas of the law, as well as many others, side judges sitting alone might be profitably employed: residential landlord and tenant disputes;

uncontested divorces; small claims; any other civil case in which the parties so stipulate; and any criminal case, such as traffic tickets, where there is no potential for incarceration.

Under the present jurisdictional parameters which govern the Vermont courts, small claims cases are heard in District Court. I would recommend doing away with the $200 "minimum amount in controversy" rule in Superior Court, and giving the Superior Court small claims jurisdiction concurrent with that of the District Court. Side judges could thereby potentially be used to handle all small claims cases. Consideration could even be given to taking small claims jurisdiction (if not all civil jurisdiction) away from the District Court in order to free it up for its principal function as a criminal court.

The suggestion which has been made by some that side judges should perform the roles of arbitrator and mediator has, I feel, little merit. Arbitration and mediation are already taking place in both the public and private sectors. Certainly, this endeavor should be encouraged and supported, but as an alternative to the judicial process, not as a part of it. The entire premise of arbitration and mediation is to provide litigants with decision makers who have special knowledge within the field of expertise bearing on the particular case at hand. This is simply not what the court system was designed, or could be easily adapted, to accomplish.

On a related note, I would recommend that Vermont adopt the Uniform Arbitration Act. The Vermont Supreme Court caselaw presently provides that agreements to arbitrate are unilaterally revocable until the decision of the arbitrator is rendered. This rule creates an environment in which arbitration and mediation are discouraged. Understandably, few are willing to run the risk, expense and uncertainty of an arbitration proceeding in which a party-opponent who does not like the way in which the evidence was submitted can back out of his agreement to arbitrate with impunity.

At a time at which American courts are uniformly searching for ways in which to cope with chronically overcrowded dockets, Vermont finds itself uniquely well situated to address the problem. The Vermont Legislature, whose prerogative it is to make such decisions, has assured a continuing role for side judges in civil matters. It behooves our lawmakers to use them to best advantage.

In the worsening economic times which appear to lie before us, it is unlikely that we will be able to afford either enough new courts or enough new judges to address the problem. It is therefore the side judges who represent the only real hope for greater efficiency in our judicial process. Curtailing their participation will thus almost certainly compound the problem.

Not all aspects of judicial responsibility in the Superior Court require the attention of a judge who has been admitted to practice before the Vermont Supreme Court. With a reasonable amount of theoretical training and with the skills which come from practical experience, many judicial functions can be handled admirably by side judges. In this way, a greater number of cases could be handled by existing personnel, and the delays incident to overcrowded court dockets could be substantially reduced.

Some would argue that the quality of judging would suffer as a result of this proposal. In the abstract, and to a small degree, this is probably true. Occasionally, a side judge would face a problem which could be better solved by someone with a formal, institutional legal background. This can admittedly happen in the superficially simplest of legal proceedings. Nonetheless, by limiting the types of cases which are handled by side judges, the number of such incidents can be kept to a minimum. Furthermore, on the other side of the equation, many results will likely be superior to those which would be achieved under the present system because the reduction in trial delays would reduce both the problem of forgetful or absent witnesses and that of the financial and emotional hardship to which the litigants are subjected by the delay. On balance, if we assume that our objective is to maximize the overall quality of the justice which is being dispensed by our state's court system, the proposed reorganization is a bargain.

The recent actions of the Legislature were largely reactionary, designed primarily to stem the tide of reversals which followed the Vermont Supreme Court's decision in the Soucy case. That objective is commendable, but the legislative solution is not particularly responsive to the problem. Eventually, the Vermont Supreme Court will begin to issue decisions on the question of which trial issues are entirely factual and which are not. It will then probably begin to reverse cases on the basis of participational errors. If and when this takes place, the problem of overcrowded court dockets will worsen, and eventually, the Legislature will be forced to deal with the issues again.

When this time of legislative reconsideration arrives, a study committee should be formed. Its function should be to examine the problem and to offer its recommendations to the respective judiciary committees of the House and Senate. The committee should include legally trained judges, side judges, lawyers, court clerks, court administrative personnel and lay people. The issues are complicated ones, and the solutions are of such scale and import that substantial time and consideration should be given to them. The problem will not be solved through a legislative process which adopts one of a variety of vastly divergent proposals in the feverish closing moments of a legislative session.

The changes which I propose are substantial, and the stakes are high. The ever-increasing workload which the judiciary faces threatens to frustrate its very purpose. We must not permit a wholesale failure of justice by refusing to concede a small degree of academic and theoretical quality in our judicial product. With its existing system of side judges, Vermont is uniquely situated to address the problem of overcrowded court dockets. As such, it is clearly wrong for the Legislature to curtail the role of the individuals in whose hands lies our brightest and best hope. The future of our Superior Court, and indirectly, that of our juridiciary as a whole, has been and continues to be inextricably linked to the vitality and effective utilization of its side judges. Two hundred years of history should not be lightly cast aside.

ABOUT VBA'S ESSAY CONTEST

"Side Judges: Their Function and Future" was selected as the topic for VBA's competition after joint deliberation by the Publications and Continuing Legal Education committees.

The goal of the competition was to improve writing skills and spur research and thought into an important legal issue confronting our state and society.

One thousand dollars was awarded to Mr. Oettinger for his essay which was judged best in scholarship, reasoning and clarity. Cash prizes were also awarded to the second prize essays — one jointly written by Francine Tilewick and Charles Barra, Burlington attorneys and the other by David Orrick of Montpelier. Honorable mentions went to Frederick deGroat Harlow of Rutland and Burlington lawyer Richard Cassidy.

The contest, open to all residents of Vermont (lawyers and non-laywers) and to all Vermont students, was judged on a blind basis by a distinguished panel of lawyers and non-lawyers.

Encouraged by the response to this year's competition, the VBA hopes to offer this exciting contest on an annual basis. Members are encouraged to send the VBA suggested topics for another contest!