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A Case For Lay Justice, Part II

*by Mark D. Oettinger, Esq.**

The way in which Vermont's assistant judges are being used is extremely inefficient. As a result of legislation responsive to the Vermont Supreme Court case of *Soucy v. Soucy*, the judicial duties of assistant judges were drastically curtailed. Where assistant judges once had jurisdiction over "legal" cases, and no jurisdiction over "equity" cases, they now have jurisdiction over questions of pure fact, but no jurisdiction over questions of law, or over mixed questions of law and fact. The presiding judge alone makes the threshold determination of whether a particular question is purely factual, purely legal, or mixed.

Effectively, the new legislation has left no areas of assistant judge jurisdiction in jury trials. Even in court trials, the maximum potential impact of the assistant judge is very limited. Furthermore, the presiding judge has substantial control over the assistant judge's participation, or lack of participation, through the ability to classify the issue in question. Given the apparently increasing reluctance of presiding judges to encourage the participation of assistant judges, the actual (as opposed to potential) scope of the assistant judges' participation, even in a non-jury trial, is extremely limited.

The Vermont Supreme Court has identified one other area of assistant judge jurisdiction. Criminal sentencing, having been classified as "discretionary" still involves assistant judges (see *State v. Hunt*). Since the post-*Soucy* statutes make no mention of a "discretionary" function, the Vermont Supreme Court apparently views sentencing determinations as involving questions of pure fact, and equates the process with the exercise of "discretion". Nonetheless, few criminal cases are filed in Superior Court, and as such, this area of jurisdiction adds little to the assistant judges' current sphere of judicial influence.

The manner in which assistant judges are presently used is therefore, from the standpoint of judicial efficiency, very wasteful. Assistant judges have been stripped, by the post-*Soucy* statutes, of most of their judicial authority. The same is not true with respect to the administrative role of the assistant judge as county executive, a role which has remained unaffected by the *Soucy* decision.

The legislative response to *Soucy* was the product of a misconception that the Vermont Supreme Court was trying to judicially curtail the office of assistant judge. The resulting legislation compounded the problem. It was a session-ending political compromise which had timely adjournment as its principal purpose.

Now that the passage of time has borne out the shortcomings of the post-*Soucy* legislation, we must have further legislative change. These proposals are intended to improve Vermont's judicial system from an administration-of-justice standpoint. As advocates of judicial efficiency, we must be advocates of reforming, improving and restructuring the office of assistant judge.

In the present legal environment, two forces compete. We have litigation of increasing volume and complexity without a corresponding increase in financial resources. As a result, we have growing backlogs and resulting trial delays. Witnesses disappear, or can no longer be located when the trial date finally arrives. Memories of remaining witnesses are less clear, and the injured parties suffer hardship as a result of long-term inaction on their cases. Inevitably, justice delayed is justice denied.

There has been criticism, from within the judiciary, about the current ineffectiveness of assistant judges. This criticism is directed at the inefficiencies of the system, not at the assistant judges themselves. Nonetheless, when the intrajudicial debate airs in the press, the perception is left with the public that the assistant judges themselves are the problem. Furthermore, the infighting undermines public confidence in the judiciary. The solution is to restructure the system so that the assistant judges can perform a useful and much-needed function.

There are areas of the law which are straightforward, high-volume and time-consuming. In these areas, it is not necessary for the judge to have a law school education. This is not to say that the judge needs no training whatsoever. If assistant judges are to be given plenary authority within certain areas of the law, appropriate training must be given, so that they can perform their functions well.

We should identify these straightforward, high-volume, time-consuming types of legal proceedings and have individual assistant judges handle them on their own. This will increase judicial productivity, putting three courts to work in the place of one. It will free up the presiding judge for cases involving difficult evidentiary and substantive legal issues. It will reduce the backlog, and it will produce a larger body of judicial work product at essentially no increased cost. The public will get more, faster and cheaper justice.

The first area ripe for assistant judge involvement is that of traffic tickets. Any non-lawyer judge involvement in criminal matters raises constitutional questions. The case law forbids a non-lawyer judge from sitting individually on a case which places the defendant at risk of incarceration. The Sixth Amendment affords a defendant a right of counsel if there is risk of incarceration. It is inconsistent with that right to place

the defendant before a judge who lacks the legal training which is required of defense counsel.

These constitutional restrictions have no application where the possibility of incarceration is precluded. This permits assistant judges to preside over traffic ticket cases, or over any other criminal matter in which incarceration is precluded. Aside from traffic tickets, certain types of less serious criminal cases could be pre-screened by the presiding judge and, upon a finding that incarceration was inappropriate, referred to an assistant judge for adjudication. Assistant judges could also be used for certain procedural aspects of criminal matters such as arraignments and status conferences.

This constitutional analysis would change, of course, if the Vermont Supreme Court were to interpret the Vermont Constitution more restrictively than the United States Supreme Court has interpreted the United States Constitution. There is, however, no indication that will happen, and the *Hunt* case suggests quite to the contrary.

The fact that the Superior Court currently handles few criminal cases is an historical quirk. The Superior Court has subject matter jurisdiction over all criminal matters, coextensive with that of the District Court. As such, there is no existing jurisdictional impediment to assistant judge involvement in criminal matters.

Debate has also recently focused on using assistant judges to a greater degree in family matters. Under the current system, family-related legal matters are badly fragmented throughout the Superior, District and Probate Courts. The Superior Court handles divorce and abuse prevention. The District Court handles abuse prevention (coextensively with the Superior Court), URESA and juvenile matters (of both a criminal and CHINS nature). The Probate Court handles guardianships, relinquishments and adoptions. As a result, one family can have legal matters pending in all three courts. The potential for inconsistent determinations, judicial duplication and unnecessary expense is self-evident. Somehow, these matters should be handled on a more consolidated basis.

Family matters are one area in which a law degree may have little correlation to the judge's ability to reach a fair decision. Typically, these areas involve considerations of fairness, equity and best interests. Expertise is required, but not necessarily legal expertise. Experience with supporting a family and raising children may be more important in this area than an understanding of the rules of evidence.

Within the area of family law, at least uncontested divorces and juvenile matters lend themselves well to assistant judge participation. We must integrate assistant judges into existing areas of family law, regardless of the particular courthouse in which the resolution of the dispute takes place. The objective of court unification in the family area is worthy, but extremely difficult, and secondary to this analysis.

Both with respect to criminal and domestic matters, if assistant judges are to participate more actively, they will have to go through appropriate initial and ongoing legal education. The present practice of providing little substantive legal education for assistant judges is a reflection of the current system. Why train the assistant judges if they have no practical application for their knowledge? The type of training which would be necessary under the proposed system could be accomplished on an intrajudicial basis. The Superior and District Court judges could provide seminar-style continuing legal education, both at regular judicial conferences and at other times. The procedures would be analogous to mandatory continuing legal education for lawyers. Assistant judge manuals, topically subdivided, could be prepared and periodically updated by the Superior and District Court judges and their judicial clerks.

There are many other areas in which assistant judges could be effectively used, once again keeping in mind the overall objective of involving them in straightforward, high-volume, time-consuming legal matters, and particularly those with a degree of inherent urgency. Residential landlord-tenant disputes are another such area. This area was recently codified in Vermont, and presents repetitive, straightforward, urgency-laden circumstances in contexts such as evictions and habitability violations. Assistant judges could be effectively used to adjudicate such cases.

Small claims is another area in which assistant judge utilization has been given consideration. Nonetheless, even in a low-stakes case, complicated legal issues can arise. One can find complicated cases being tried in small claims court simply because of the small amounts of money involved. This makes adequate training of assistant judges difficult. In these types of cases, a law school degree will often prove helpful, if not indispensable, to the judge's reaching a reliable result.

From a utilitarian standpoint, it can be argued that assistant judges could be effectively employed in small claims cases. They could adjudicate large numbers of these cases. The increase in case-flow volume would arguably outweigh the anticipated loss of product quality. The overall objective of substantial justice would be served notwithstanding certain subpar results from a jurisprudential standpoint. All in all, if adequate other responsibilities are available for assistant judges, small claims court is an area in which it is best to retain the lawyer judge.

Assistant judges could also be used in civil procedural matters of various sorts. Some discovery motions, default judgment motions, most calendar-related motions, and many others, could be routinely handled by assistant judges. This type of delegation to assistant judges could be undertaken on an *ad hoc* basis, under the direction of the Superior or District Court judges.

How much more productivity could be effected by this type of restructuring? For purposes of this analysis, we must consider the abstract notion of comparative, potential judicial productivity, as between lawyer judges and non-lawyer judges. We must assign some type of comparative value, mak-

ing the assumption that the non-lawyer judge's work, from the standpoint of judicial efficiency, is equivalent to some percentage of that of a lawyer judge's work.

Assume, for the sake of illustration, that an assistant judge's judicial productivity would be fifty percent that of a Superior or District Court judge. There are roughly as many assistant judges as there are Superior and District Court judges combined. Thus, by restructuring the present system, we could arguably produce fifty percent more judicial product at no additional cost. Even though the assistant judges' judicial sphere of influence has been drastically curtailed by the post-*Soucy* legislative amendments, their rates of compensation have stayed the same. From a judicial standpoint, the current system pays the assistant judges to do very little.

Interestingly, if one then considers that a Superior or District Court judge earns approximately four times as much as an assistant judge, it follows that the assistant judge is producing the same quantum of judicial product for half the cost. Clearly, when effectively used, the assistant judge can be a bargain.

Assistant judge salaries are an issue for at least two reasons. Currently, assistant judges are paid $55.50 per day. If an assistant judge were to work every working day of the year, he or she would earn slightly over $13,000. Instead, compensation should be salary-based, and increased to a more realistic level. Attendance should be made mandatory. Of course, money is only one of many incentives for seeking judicial office. Other motives include prestige and social responsibility. Nonetheless, increased salaries would have the effect of attracting strong candidates to the position.

In conclusion, frustration with the current system should not be directed at the assistant judges themselves. They are not the problem. The problem is the system. The office itself has strong public support, as has been repeatedly borne out by opinion polls, and by history itself. There is good reason for this. Notwithstanding their lack of formal legal training, the assistant judges bring wisdom and experience to the bench. These traits can be effectively applied to many areas of the law, in ways which can bring renewed economic efficiency to a system badly in need of improvement.

The administrative function of the assistant judge is limited. Over time, it is being diminished by the growth of state and local government to the exclusion of county government. If this aspect of the assistant judges' role is curtailed by the evolution of the political process, so be it. On the other hand, with respect to the judicial functions of the assistant judge, the statutes and rules must be amended to give them the opportunity to adjudicate certain types of cases on their own. Vermont has an obvious solution to its overworked courts in its assistant judges. All we need to do is to put them to work.

**Mark Oettinger, partner in Bloomberg and Oettinger, Burlington, was VBA's 1985 Essay Contest Winner for his article on Side Judges in Vermont. This article was presented at a conference, sponsored by the Vermont Association of Assistant Judges, entitled Vermont's Assistant Judges: An Examination of Their Responsibilities and Functions, held June 20, 1987.*

Disorder in the Court
(continued from page 41)

Q. Do you know how far pregnant you are right now?

A. I will be three months November 8th.

Q. Apparently then, the date of conception was August 8th?

A. Yes.

Q. What were you and your husband doing at that time?

• • •

Q. Mrs. Smith, do you believe that you are emotionally unstable?

A. I used to be.

Q. How many times have you committed suicide?

A. Four times.

• • •

Q. Doctor, how many autopsies have you performed on dead people?

A. All my autopsies have been on dead people.

• • •

Q. Were you acquainted with the decedent?

A. Yes, sir.

Q. Before or after he died?

• • •

Q. Officer, what led you to believe the defendant was under the influence?

A. Because he was argumentary and he couldn't pronunciate his words.

• • •

Q. What happened then?

A. He told me, he says, "I have to kill you because you can identify me."

Q. Did he kill you?

A. No.

• • •

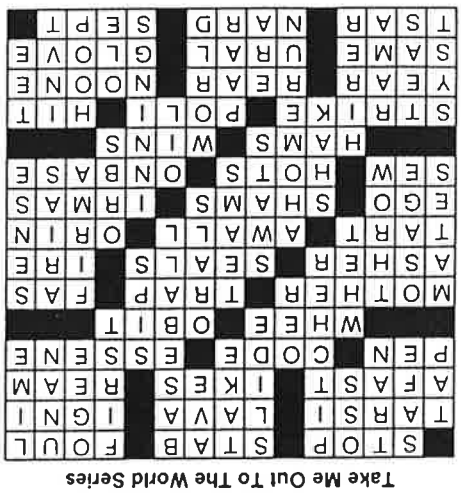
Q. Mrs. Jones, is your appearance this morning persuant to a deposition notice which I sent to your attorney?

A. No. This is how I dress when I go to work.

• • •

Q. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to, gone also, would he have brought you, meaning you and she, with him to the station?

Mr. Brooks: Objection. That question should be taken out and shot.



Take Me Out To The World Series