

JUDICATURE

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 for 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,

Thank you!

We received a flood of compliments and comments about our inaugural issue. "Jurors on Film," by Judge Alex Kozinski and John Major, particularly struck a chord with readers who appreciated the concerns raised by the authors but mostly rejected the idea of filming juror deliberations. We've reprinted many of the letters here, with some edits to minimize repetition. Thank you for your feedback and your kind words about our first issue. We hope to continue to impress and inspire conversation.

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

— *Publisher*

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 juror 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.

William W. Taylor, ZUCKERMAN SPAEDER LLP

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 orrderrrrrrs

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 "pre-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 orrderrrrr."

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

Save the date

A NATIONWIDE BENCH-BAR EDUCATIONAL PROGRAM

addressing the

**DECEMBER 2015
FEDERAL RULES
AMENDMENTS**

*Sponsored by
Duke Law Center for Judicial Studies
and ABA Section of Litigation*

This series of three-hour master programs is designed to help lawyers and judges understand and implement the Federal Rules amendments taking effect on Dec. 1, 2015. The program will particularly focus on the new Discovery Proportionality amendments to Fed. R. Civ. P. 26, which comprise the most significant changes to discovery and case-management practice in over a decade.

Judge Lee H. Rosenthal, former chair of both the Civil Rules Committee and the Committee on Rules of Practice and Procedure, and Professor Steven Gensler, former Civil Rules Committee member, will lead a faculty of local district and magistrate judges and leading practitioners. The agenda will rely on the text of amended Rule 26 and accompanying Committee Notes and the Standards, Guidelines, and Practices Implementing 2015 Discovery Proportionality Amendments, which the Judicial Studies Center is developing with help from 40 volunteer judges and practitioners under the leadership of Judge Rosenthal and Professor Gensler.

Details including cost, cities, locations, dates, and faculty, as well as registration instructions, are available at law.duke.edu/judicialstudies/conferences/ and ambar.org/litigation/rulesprograms/.

CHICAGO 10-29-15 * ST. LOUIS 10-30-15
* NEW YORK 11-10-15 * PHILADELPHIA
11-12-15 * MAPLE GROVE, NJ 11-12-15
* WASHINGTON D.C. 12-3-15 * ATLANTA
12-4-15 * SAN FRANCISCO 1-8-16 *
LOS ANGELES 1-29-16 * SAN DIEGO 1-30-16
* PHOENIX 3-3-16 * DENVER 3-4-16
* DALLAS 3-31-16 * MIAMI 4-1-16