NATIONAL JUDICIAL ACADEMY

SEMINAR ON THE ROLE OF GUARDIAN JUSTICES

18TH – 20TH DECEMBER, 2015

READING MATERIAL

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Programme Coordinator: Sumit Bhattacharya, Research Fellow
National Judicial Academy, Bhopal; Version: 25-11-2015, 12:00 PM

DAY 1 **18th Dec, 2015 (Friday)**	10:00 AM – 11:00 AM Session 1 ***Standardization of Roles & Responsibilities of Guardian Judges: Uniformity Approach***	**TEA BREAK**	11:30 AM –12:30 PM Session 2 ***Challenges faced by Guardian Judges***	**LUNCH BREAK**	1:30 PM – 2:30 PM Session 3 ***Developing Standards for Evaluation of Judgments***	**TEA BREAK**	3:00 PM – 4:00 PM Session 4 ***Meaning & Scope of "Character Roll"*** Speakers	4:00 PM – 5:00 PM *Library Reading & Computer Skills Training*
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Session 1

Standardization of Roles & Responsibilities of Guardian Judges: Uniformity Approach

PRINCIPLES FOR JUDICIAL ADMINISTRATION

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PREFACE

Changing socioeconomic factors and shifting demands on our judicial institutions require courts to develop solutions that look beyond the short-term. To be relevant, courts must provide quality judicial services more efficiently. Court leadership and the legal profession have expressed a strong need for a set of principles to guide them as they seek to restructure court services and secure adequate funding. These principles relate to courts' governance structures, decision-making and case administration, and funding.

These are practical operational principles that are intended to assist chief justices and state court administrators—as well as presiding judges and trial court administrators in locally funded jurisdictions—as they address the long-term budget shortfalls and the inevitable restructuring of court services. The principles are designed for use by the judicial branch leadership of each state as a basis for establishing principles for judicial administration in their states. They are also intended to help members of legislative bodies and their staff understand the difficult structural and fiscal decisions required to enable courts to enhance the quality of justice while facing increased caseloads with fewer resources.

A number of groups have worked independently to develop these guiding principles. Principles relating to effective governance have been developed in conjunction with the National Center for State Courts (NCSC) Harvard Executive Session and the reengineering experience of several states. Decision-Making and Case Administration Principles have been completed through the High Performance Court Framework. Finally, Funding Principles have been developed using the Conference of State Court Administrators (COSCA) white papers, the Conference of Chief Justices (CCJ)/COSCA policy resolutions, the Trial Court Performance Standards, *CourTools* and recent NCSC reengineering projects.

This paper is intended to serve as a unifying document for all these principles. It is clear that these principles are interdependent. The first two sets of principles, which address governance and decision-making and case administration, are foundations that courts need in place to manage their resources efficiently and effectively.

These are necessary pre-conditions for the funding principles. These principles in their whole are intended to represent a comprehensive yet succinct set of ***Principles for Judicial Administration***. While these may be analogous to the *Court Administration Principles* adopted by the American Bar Association (ABA) in the 1970s, they are designed as operational guides to assist courts as they face the challenges of the twenty-first century.

This document has three sections. The first two address aspects of court administration that are foundations to pursuing adequate funding. The third section contains specific principles relating to funding. The funding principles are the means to connect the first two sets of principles.

This document and these principles have been and will continue to be vetted with the court community and the legal community. They will be refined over time in order to ensure and maintain their relevance, usefulness and appropriate application.

SUMMARY OF THE PRINCIPLES FOR JUDICIAL ADMINISTRATION

Governance Principles

- **Principle 1:** Effective court governance requires a well-defined governance structure for policy formulation and administration for the entire court system.

- **Principle 2**: Judicial leaders should be selected based on competency.

- **Principle 3:** Judicial leaders should focus attention on policy level issues while clearly delegating administrative duties to court administrators.

- **Principle 4**: Court leadership, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.

- **Principle 5:** The court system should be organized to minimize the complexities and redundancies in court structures and personnel.

- **Principle 6:** Court leadership should allocate resources throughout the state or local court system to provide an efficient balance of workload among judicial officers and court staff.

- **Principle 7**: Court leadership should ensure that the court system has a highly qualified, competent and well-trained workforce.

SUMMARY OF THE PRINCIPLES FOR JUDICIAL ADMINISTRATION

Decision-Making and Case Administration Principles

- **Principle 8:** Courts should accept and resolve disputes in all cases that are constitutionally or statutorily mandated.

- **Principle 9:** Court leadership should make available, within the court system or by referral, alternative dispositional approaches. These approaches include:

  - The adversarial process.
  - A problem-solving, treatment approach.
  - Mediation, arbitration or similar resolution alternative that allows the disputants to maintain greater control over the process.
  - Referral to an appropriate administrative body for determination.

- **Principle 10:** Court leadership should exercise control over the legal process.

- **Principle 11:** Court procedures should be simple, clear, streamlined and uniform to facilitate expeditious processing of cases with the lowest possible costs.

- **Principle 12:** Judicial officers should give individual attention to each case that comes before them.

- **Principle 13:** The attention judicial officers give to each case should be appropriate to the needs of that case.

- **Principle 14:** Decisions of the court should demonstrate procedural fairness.

- **Principle 15:** The court system should be transparent and accountable through the use of performance measures and evaluation at all levels of the organization.

SUMMARY OF THE PRINCIPLES FOR JUDICIAL ADMINISTRATION

Court Funding Principles—Developing and Managing the Judicial Budget

- **Principle 16:** Judicial Branch leadership should make budget requests based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models and the application of appropriate performance measures.

- **Principle 17:** Judicial Branch leadership should adopt performance standards with corresponding, relevant performance measures and manage their operations to achieve the desired outcomes.

- **Principle 18:** Judicial Branch budget requests should be considered by legislative bodies as submitted by the Judicial Branch.

- **Principle 19:** Judicial Branch leadership should have the authority to allocate resources with a minimum of legislative and executive branch controls including budgets that have a minimal number of line items.

- **Principle 20:** Judicial Branch leadership should administer funds in accordance with sound, accepted financial management practices.

SUMMARY OF THE PRINCIPLES FOR JUDICIAL ADMINISTRATION

Court Funding Principles—Providing Adequate Funding

- **Principle 21:** Courts should be funded so that cases can be resolved in accordance with recognized time standards by judicial officers and court staff functioning in accordance with adopted workload standards.

- **Principle 22:** Responsible funding entities should ensure that courts have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facilities guidelines.

- **Principle 23:** The court system should be funded to provide technologies needed for the courts to operate efficiently and effectively and to provide the public services comparable to those provided by the other branches of government and private businesses.

- **Principle 24:** Courts should be funded at a level that allows their core dispute resolution functions to be resolved by applying the appropriate dispositional alternative.

- **Principle 25:** Court fees should not be set so high as to deny reasonable access to dispute resolution services provided by the courts. Courts should establish a method to waive or reduce fees when needed to allow access.

INTRODUCTION

As a separate branch of government, courts have the duty to protect citizens' constitutional rights, to provide procedural due process and to preserve the rule of law. Courts are a cornerstone of our society and provide a core function of government—adjudication of legal disputes. An adequate and stable source of funding is required for courts to execute their constitutional and statutory mandates. While the judiciary is a separate branch of government, it cannot function completely independently. Courts depend upon elected legislative bodies at the state, county and municipal levels to determine their level of funding. Judicial leaders have the responsibility to demonstrate what funding level is necessary and to establish administrative structures and management processes that demonstrate they are using the taxpayers' money wisely. With these processes as a foundation, principles can be established that guide efforts to define what constitutes adequate funding.

As mentioned in the preface, this document is divided into three sections. The first two sections address aspects of court administration that form the foundation to pursue adequate funding: governance, decision-making and case administration. These are foundational in the sense that courts need to demonstrate that they are effectively managing public resources in order to pursue and compete successfully for adequate funding. The third section contains court-specific Funding Principles which connect the first two sets of principles. The Funding Principles cannot be successfully implemented if a receptive and supportive governance and organizational infrastructure is absent.

There are two parts to the Funding Principles. The first five principles relate to the responsibility of Judicial Branch leadership to develop and manage the judicial budget. The second five identify the principles policy makers—both within and outside the judicial branch—should take into consideration when determining adequate funding for the judiciary.

GOVERNANCE PRINCIPLES

Governance is the means by which an activity is directed to produce the desired outcomes. Good governance is necessary to accomplish the core purposes of courts: delivering timely, effective, fair and impartial justice.

State court systems operate under a number of different structural models. In some states, trial courts operate in accordance with local rules and procedures; any centralized authority within the state exercises limited power. Some states have a relatively complex trial court structure with local units bound together by a strong central authority. Other states have a fully consolidated, highly centralized system of courts with a single, coherent source of authority; no subordinate court or administrative subunit has independent powers or discretion.[1]

Some state court systems are funded entirely by the state, some are funded entirely by local government and some court systems are funded by both state and local funding bodies.

Each model for court organization presents its own distinctive challenges to effective governance. Some challenges are structural in nature while others are cultural. For example, the sense of individual independence possessed by judges generally poses a significant obstacle to creating a system identity, and in turn fidelity to the decisions of a governing authority. It has been said that "the conflict in professional organizations results from a clash of cultures: the organizational culture which captures the commitment of managers, and the professional culture, which motivates professionals."[2]

Striking the balance between self-interest and institutional interests, while binding separate units of an organization together, requires strategies that embrace three elements: a common vision of a preferred future, helpful and productive support services that advance the capabilities of the organization's component parts, and a shared understanding of the threat and opportunities facing the system.[3]

The following principles are set forth as unifying concepts which can be employed in all existing court organization models and all funding models. Further, they offer a means for addressing the tension between the self-interest orientation of those working within courts and the organizational culture of the courts. They do not presuppose or advocate for any particular court organization or funding model.

[1] Henderson, Thomas et al. (1984) The Significance of Judicial Structure: The Effects of Unification on Trial Court Operations. Washington DC: National Institute of Justice.

[2] Realin, Joseph A. (1985) The Clash of Cultures, Harvard Business School Press.

[3] Griller, Gordon A. (2010) "Governing Loosely Coupled Courts in Times of Economic Stress," *Future Trends in State Courts: 2010*, National Center for State Courts.

- ***Principle 1: Effective court governance requires a well-defined governance structure for policy formulation and administration for the entire court system.***

Commentary: The governance structure should be apparent and explicit with clearly defined relationships among governing entities, presiding judges, court administrators and various court committees. Both the public and those working in the system need to understand how the governance structure operates, who has authority to make decisions, how decisions are made, and how all component parts relate. It is particularly important that the authority of judicial leaders, administrators and managers for policy decision-making and implementation be well-defined and articulated. The purpose of a well-defined governance structure is twofold. First, it should enable development of statewide or court wide policies that ensure uniformity of customer experience throughout the state or court. Second, the governance structure should enable reasonably uniform administrative practices for the entire court system that provide the greatest access and quality at the least cost. While flexibility, discretion and local control are desirable as they encourage initiative and innovation, standardization fosters efficiency and uniformity of treatment. The challenge of any governance structure is to define the boundaries between the appropriate level of administrative discretion and the need to enforce minimum standards through policies and administrative practices that ensure efficient expenditure of public resources and uniformity of treatment of similarly situated customers.

The Judicial Branch must have a clearly articulated mission, must state the values by which it operates and must identify its strategic objectives and goals. A well-defined governance structure enables the court system to accomplish these ends and to present a unified message to the public as well as to legislative and executive branches. The court system benefits from the continuity, stability and consistency of an effective governance structure.

Inherent in this principle is the need for open communication with meaningful input from all court levels into the decision-making process. An effective system of governance does everything possible to foster excellent communication and to keep information flowing.

- ***Principle 2: Judicial leaders should be selected based on competency.***

Commentary: The complexity of modern court administration demands a set of skills not part of traditional judicial selection and training. Selection methods for judicial leaders should explicitly identify and acknowledge those skills.

The development of selection criteria may be useful in attracting specific skill sets or experience levels to these executive judicial positions. It may also help to steer courts away from the rotation, seniority or volunteer selection methods which often fail to account for a judge's general interest in the position or ability to perform the duties successfully.

States have established a number of methods for selecting chief justices and presiding judges. Whichever method is used, the selection process should take into consideration the skills and experience required to govern complex organizations.

The minimum effective term length for a chief justice or presiding judge is no less than two years. A term of less than two years does not allow the judicial leader to set goals and effectively implement action plans. Developing the necessary leadership and management skills takes time. A lesser term also impedes the development of relationships with leaders of the other branches of government, which is critical to securing funding.

A successful chief justice or presiding judge should be considered to serve renewable or successive terms in order to maintain continuity in the leadership of the court, as well as institutionalize effective management policies.

Because management responsibilities for leadership judges will continue to increase, educational opportunities to develop increased proficiency in technology, case, personnel and financial management should be available and encouraged.

- ***Principle 3: Judicial leaders should focus attention on policy level issues while clearly delegating administrative duties to court administrators.***

Commentary: Decisions about policy belong with the structural "head" of a judicial system, but implementation and day-to-day operations belong to administrative staff.

Effective governance requires a strong court management team comprising judicial leaders and court administrators. An avoidance of micro-management by the policy-maker and clear authority for implementation in the managers are both important for the credibility and effectiveness of court governance while minimizing opportunities for undermining policy at the operational level.

- ***Principle 4: Court leaders, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.***

Commentary: Fundamental to effective management is the control of resources. Court leadership must be given the authority to manage the available resources. While this authority can be shared with professional court administrative staff within the court system, it should not be exercised by anyone outside the court system. Courts must resist being absorbed or managed by the other branches of government.

The challenge for the court leadership is to ensure the availability of sufficient resources and to administer the use of those resources to meet all judicial responsibilities within a cost range that is acceptable to society and to do so without interfering with the independence of the judiciary in the decision-making process.

- ***Principle 5: The court system should be organized to minimize the complexities and redundancies in court structures and personnel.***

Commentary: While courts can be organized under one of several different models (see Governance Principles introduction), regardless of the model employed, every effort should be made to avoid overlapping or duplicative jurisdiction among courts within a given state. The quality of justice rendered by a court system correlates directly with citizens' ability to access the courts. The organization of the court system should promote access and the prompt, cost-effective and just discharge of the primary duty of dispute resolution. Removal of barriers such as multiple courts with similar or overlapping jurisdiction enhances citizen access while also reducing taxpayer costs. Clear and simplified structuring of the court system facilitates ease of use and engenders public understanding and ultimately support.

- ***Principle 6: Court leadership should allocate resources throughout the state or local court system so as to provide an efficient balance of workload among judicial officers and court staff.***

Commentary: Given the geographic distribution of the population, the workloads of courts throughout a state, region or district will vary. One of the most difficult challenges of court leadership is to equitably balance workloads among judges and staff and to ensure that these resources are assigned appropriately. Resource allocation to cases, categories of cases, and jurisdictions is at the heart of court management. Assignment of judges and allocation of other resources must be responsive to established case processing goals and priorities, implemented effectively and evaluated continuously. Objective workload models should be used to identify how many judicial officers and court staff are needed and to assist in allocating staff on an equitable basis. Through technology, workload from any court within a jurisdiction can be assigned to court staff working in other courts in order to balance the workload.

- ***Principle 7*: *Court leadership should ensure that the court system has a highly qualified, competent and well-trained workforce.***

Commentary: To earn the public's trust and confidence and to provide quality judicial services, courts need judges with the highest ethical standards, extensive legal knowledge, and complex and unique skills in leadership, decision-making, and administration. Courts similarly need highly professional, ethical and competent staff. The court management team should work to enhance the performance of the judicial system as a whole by continuously improving the personal and professional competence of all persons performing judicial branch functions. All judicial officers and court staff should have clear expectations of effective performance along with transparent systems to evaluate that performance. The evaluations should be used by court leadership to develop education and training programs that provide judicial officers and court staff the knowledge and skills required to perform their responsibilities fairly, correctly and efficiently while adhering to the highest standards of personal and official conduct.

DECISION-MAKING AND CASE ADMINISTRATION PRINCIPLES

The legal concept of procedural due process and the administrative aspect of efficiency are components of the manner in which courts process cases and interact with litigants. Caseflow management is central to the integration of these components into effective judicial administration. Defining quality outcomes is a difficult task, but with the emergence of the Trial Court Performance Standards (1990), the International Framework for Court Excellence (2008) and the High Performance Court Framework (2010), concepts and values have been developed by which all courts can measure their efficiency and quality via instruments such as CourTools (2005). These Principles of Decision-Making and Case Administration are imbedded in and fundamental to these performance management systems.

- ***Principle 8: Courts should accept and resolve disputes in all cases that are constitutionally or statutorily mandated.***

Commentary: Courts serve many functions. Primary among them is determination of legal status. Courts determine whether a defendant is guilty or innocent, whether one party owes money to another party, who owns a piece of property, and who has custody of a child. Thus it is obvious that courts must accept those cases that require the adjudication of legal status. One of the hallmarks of the American judicial system and particularly state judicial systems is the constitutional requirement that courts be open to give redress according to law.[4] This concept is expressed in most state constitutions or their statutes.[5] The ability to go to court is a fundamental right retained by the people. Consequently, court leaders have an obligation to structure their operational systems in a manner that promotes public access to the courts. Tight economic times do not justify the courts not accepting cases.

[4] In contrast to many state constitutions, the federal Constitution contains no "open courts" requirement. Thus it has been held in the context of federal litigation that except for those cases directly provided in the constitution, access to the federal courts is controlled by Congress, which has the authority to expand or limit access to the federal judiciary. Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) *citing* Cary v. Curtis, 44 U.S. (3 How.) 236 (1845).

[5] Maryland's open court provision, one of the earliest, states, "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land." Maryland Const. art. 19. Many other states have similar constitutional provisions that mandate that courts be open, all of them ultimately tracing their origins to 1215 and the adoption of the Magna Carta. The open court requirements are typically coupled with other language of the Magna Carta conferring a right to remedy in due course of law or a clause guaranteeing administration of justice without sale, denial, or delay. See, State ex rel. Herald Mail Co. v. Hamilton, 267 S.E.2d 544 (W. Va. 1980). Where found, open court requirements are usually contained in states' bills of rights and not the judicial articles. The implication to this placement is clear: the right to go to court is not an operational requirement placed on the judiciary but rather a fundamental right retained by the people. "The right to go to court to resolve our disputes is one of our fundamental rights." Psychiatric Assoc. v. Siegel, 610 So.2d 419, 424 (Fla. 1992).

- ***Principle 9: Court leadership should make available, within the court system or by referral, alternative dispositional approaches. These approaches include:***
  - *A. The adversarial process.*
  - *B. A problem-solving, treatment approach.*
  - *C. Mediation, arbitration or similar resolution alternative that allows the disputants to maintain greater control over the process.*
  - *D. Referral to an appropriate administrative body for determination.*

Commentary: Historically courts have been thought of as venues in which an adversarial process existed as the highest and exclusive means for case resolution in the United States. Over the years, however, there has been a growing recognition that the adversarial process need not be the exclusive means or even the best means for resolving some types of disputes. Increasingly courts, the bar, and the public have recognized that alternative means of dispute resolution could be more timely, more resource efficient, and produce more satisfactory results. The development of court mediation programs, the evolution of problem-solving courts, the use of court diversion options, and the growth of restorative justice principles all evidence a growing recognition by courts that a menu of options must be provided to litigants. Court proceedings may use a mixture of the court processes identified in this Principle. In many jurisdictions the single door court-focused courthouse has been replaced by a multi-door consumer-focused courthouse, one that affords litigants different options and opportunities for resolving their disputes. In short, the rise of "alternative" dispute resolution methods is no longer alternative; it has become mainstream.

- ***Principle 10: Court leadership should exercise control over the legal process.***

Commentary: For years judges and lawyers have debated who should control a case. Some contend that the case belongs to the litigant/lawyer who knows the case and is in the best position to manage the flow of the case activities. Others argue that the parties and lawyers control the case until it is filed with the court, thereby calling upon the court to resolve a matter which the parties have been unable to do. Those with this view believe that invoking the jurisdiction of the court renders the court responsible for managing the adjudicatory process thus avoiding legal gamesmanship and making obtaining a just outcome the goal. Effective management of the court's entire caseload demands that judges, with the assistance of court administrative staff, manage and control the flow of cases through the court.

Several factors have been demonstrated as key elements of effective judicial management of the docket. These include establishing a set of meaningful events, adopting a realistic schedule, creating expectations that events will occur as scheduled, exercising firm control over the granting of continuances, sharing information among the parties early in the process, and using data to monitor compliance with established case processing goals. Control of the process by the trial court management team is the basic principle upon which these evidenced-based practices are founded.

- ***Principle 11: Court procedures should be simple, clear, streamlined and uniform to facilitate expeditious processing of cases with the lowest possible costs.***

Commentary: Court leaders should adopt court procedures that reflect the practices that provide justice at the least expense to the litigants and taxpayers. Those procedures should be made uniform within the jurisdiction. Procedures should be proportionate to the nature, scope and magnitude of the case involved. One size does not necessarily fit all. While different rules may be required for different case types, redundancies or superfluous procedures must be eliminated.

- ***Principle 12: Judicial officers should give individual attention to each case that comes before them.***

Commentary: Procedural fairness guarantees certain basic rights to all parties in both civil and criminal cases. These rights include ensuring that all parties receive notice of the proceedings, have the right to be heard and to present evidence. A tenet of procedural fairness also involves the court giving individual attention to each case. Some courts use master calendars for routine, non-complex matters while employing individual calendars for complex cases in order to ensure the appropriate level of judicial attention and management of the case. Regardless of the calendaring method, court procedures must allow parties and attorneys to offer relevant information and to present their respective sides of the case. This Principle, coupled with Principle 10, calls upon courts to give individual attention to a case proportionate to the nature, scope and magnitude of the case while taking into account the aggregate nature of the court's entire caseload.

- ***Principle 13: The attention judicial officers give to each case should be appropriate to the needs of that case.***

Commentary: This Principle introduces the concept of proportionality when attempting to define the individual attention necessary for a case. Procedures should be proportionate to the nature, scope and magnitude of the case. The idea of proportionality also acknowledges that courts try individual cases within the context of their total caseloads. To a certain extent, courts have learned to reconcile the conflict between individualized attention and the overall caseload demands through the use of Differentiated Case Management. This formal, structured management strategy illustrates the concept of proportionality in a practical sense. It seeks to maintain equality and due process in the treatment of cases while recognizing the pressures of the overall court workload and the resources available. Without the proper balance, delays will occur and justice can be thwarted even when appropriate attention is given to an individual case.

- ***Principle 14: Decisions of the court should demonstrate procedural fairness.***

Commentary: Courts should provide due process and equal protection of the law to all who have business before them. Court decisions and practices should adhere to relevant laws, procedural rules and established policies. Adherence to established law and procedure assist in achieving predictability, reliability, integrity and the greater likelihood of justice in the individual case. Perceptions that procedures are fair and just influence a host of outcome variables, including satisfaction with the process, respect for the court and willingness to comply with court rulings and orders. When justice is perceived to have been done by those who directly experience the court's adjudicatory process and procedure, public trust and confidence increase and support for the court is enhanced.[6]

[6] Tom Tyler, a leading researcher in the field, suggests there are four expectations people have for procedurally fair court processes. The first expectation, *neutrality*, is that the law is applied in a consistent, impartial manner by unbiased decision makers. The second one is that all people are treated with *respect* and dignity, and court procedures serve to clearly safeguard individual rights. Third, individuals who are affected by a given decision have the chance to be heard (or *voice*) and to present information relevant to the decision. Finally, the judge is seen as *trustworthy* by listening to both sides, shows an understanding of the issues, and clearly explains the reasoning and implications of the decision. Implementing administrative practices to meet these expectations reinforces the perception of a court's commitment to procedural due process.

- ***Principle 15: The court system should be transparent and accountable through the use of performance measures and evaluation at all levels of the organization.***

Commentary: The right to institutional independence and self-governance necessarily entails the obligation to be open and accountable for the use of public resources. This includes not just finances but also the effectiveness with which resources are used. Such accountability requires a constant process of self-assessment and public scrutiny. Courts stand as an important and visible symbol of government. Compliance with the law is dependent to some degree upon public respect for courts. Public trust and confidence in courts stem from public familiarity with and understanding of court proceedings, actions and operations.

Courts must use available resources wisely to address multiple and conflicting demands. To do so they must continually monitor performance and be able to know exactly how productive they are, how well they are serving public needs and what parts of the system and services need attention and improvement. Courts must continually evaluate the effectiveness of their policies, practices and new initiatives. This requires the collection and use of relevant, timely and accurate information that must then be used to make decisions on how to best manage court operations to ensure the desired outcomes.

Assessments must rely on objective data and be methodologically sound. The evolution of court performance assessment led to the development of *CourTools*, a set of ten core court performance measures. These and other similar measures provide a means for self improvement and improved accountability to the funding entities and the public. Ideally courts that meet or exceed performance standards and share this information with the public will be recognized as doing so by the public. Where performance is good and public communications are effective, trust and confidence are likely to be present and support for the courts will increase.

COURT FUNDING PRINCIPLES

Under our tripartite system of government, the judicial system is dependent on the legislative branch for its funding. Given the high degree of interdependence among the branches and given that the courts often are competing with executive branch agencies for appropriations, it is critical that each branch understand and respect each others' constitutional roles in order to reach mutually accepted funding decisions. Further, as budget requests are prepared by the judicial branch for consideration by the legislative branch, it is useful to have a set of principles which can serve as a conceptual framework within which these actions are taken. These principles may be useful for all branches of government when exercising their respective duties and responsibilities regarding judicial budget requests and appropriations.

Developing and Managing the Judicial Budget

For the court system to exist as a preserver of legal norms and as a separate branch of government, it must maintain its institutional integrity while observing mutual civility and respect in its government relations. The Judicial Branch is necessarily dependent upon the other branches of government; thus they must clarify, promote, and institutionalize effective working relationships with all branches. Effective court management together with transparent budget requests supported by well-documented justification enhances the credibility of the courts and reduces obstacles to securing adequate funding. The following principles are aimed at establishing that credibility, discharging the responsibility of accountability, and maintaining necessary autonomy.

- ***Principle 16: Judicial Branch leadership should make budget requests based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models and the application of appropriate performance measures.***

Commentary: The Judicial Branch recognizes that there is fierce competition for scarce public dollars and that budget requests must be made based solely on need. The High Performance Court Framework (HPC) offers a comprehensive means to understand and assess how well courts are fulfilling their role and responsibilities. The HPC integrates key reform initiatives into a single view and offers insights into how courts can elevate the way they do business, consequently justifying the resources needed to succeed. It has been shown that credible and objective workload models, such as the NCSC's Workload Assessment Model, successfully identify how many judges and court staff are needed to handle the diversity of cases filed in the courts. Such a model tells policy

makers and court managers what the capacity of the current staffing structure is and can be related to performance measures (see Principles 15 and 17). This has been shown as a critical piece to building good communications and relations with the legislative branch. From the court manager's perspective, an objective workload model can be used to identify efficiencies in one location that can be adopted by others and measure the impact of changes, such as budget cuts and institution of technologies, on the capacity of courts to handle the caseload.

- ***Principle 17: Judicial Branch leadership should adopt performance standards with corresponding, relevant performance measures and manage their operations to achieve the desired outcomes.***

Commentary: In the past courts focused on their structures and processes not on their performance. Knowing whether and to what degree a court is high performing is a matter of results. A high performance court is evidence based. Performance standards, or targets, are established. Progress towards meeting those standards is measured by performance measures. Beginning in 1987, with the development by the National Center for State Courts of the Trial Court Performance Standards,[7] attention shifted to outcome-based measurable performance standards as a means of identifying what courts actually accomplish with the means at their disposal. The evolution of court performance assessment led to the development of *CourTools* (2005), a set of ten core court performance measures. By prescribing what courts should accomplish, appropriate emphasis can be placed on performance measurement and performance management. Performance assessment provides a means for internal evaluation, self-improvement, and improved accountability to the funding entities and the public. Courts acknowledge that with judicial independence comes the corresponding right and interest of the other branches of government and the public to hold the judiciary accountable for effective management of court operations. Accountability and transparency are critical to judicial governance and to the preservation and strengthening of an independent judiciary.

- ***Principle 18: Judicial Branch budget requests should be considered by legislative bodies as submitted by the Judicial Branch.***

Commentary: Courts are a separate branch of government responsible for executing their constitutional mandates in an efficient and effective manner. State and local legislative bodies should require that the judiciary's budget be presented directly to

[7] NCSC, (1987) ***Trial Court Performance Standards,*** *at* http://www.ncsconline.org/D_Research/TCPS/.

them by judicial leadership without prior approval of the executive. Too often, state and local legislative bodies consider the executive's budget submission and recommendations for the judiciary's budget as if the judiciary were one of the executive branch departments. This often arises as executives address their duty to manage a balanced budget. However, the executive is not responsible for administering the judicial branch and does not have the knowledge necessary to determine needed funding levels in the judicial branch. The court management team is in the best position to know what resources are needed to fulfill its constitutional mandates and how best to present and justify its need for those resources.

- ***Principle 19: Judicial Branch leadership should have the authority to allocate resources with a minimum of legislative and executive branch controls including budgets that have a minimal number of line items.***

Commentary: The Judicial Branch is dependent on the state and local legislative bodies for its budget. Notwithstanding that fact, under the separation of powers doctrine, no branch should exercise the powers properly belonging to the other branches. Inherent in the functioning of a branch of government is the ability to manage and administer its appropriated funds subject to the responsibility of being accountable for such management. Court leadership must have broad authority to administer the operation of the judicial branch, without being unduly directed through detailed budget line items, allow reasonable autonomy by the Judicial Branch to manage scarce resources.

- ***Principle 20: Judicial Branch leadership should administer funds in accordance with sound, accepted financial management practices.***

Commentary: Much like the measurement of court performance demonstrates a commitment to effective management, administering all funds in accordance with sound, generally accepted financial management practices maintains the court system's credibility. The other branches will not place confidence in the judiciary's ability to manage its own operations without external oversight. Effective and reliable financial management practices must be adopted and applied to all types of funds administered by the courts including appropriated funds, revenues and fees received, and trust funds held on behalf of litigants or other parties. To ensure transparency and accountability in financial operations, the courts should undergo regular internal and external fiscal audits in accordance with state or local requirements.

Providing Adequate Funding

The basic function of the court system is to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the Constitution. To fulfill this mission courts must:

- Provide proceedings that are affordable in terms of money, time and procedures.
- Process cases in a timely manner while keeping current with its incoming caseload.
- Adhere faithfully to relevant laws and procedural rules.
- Provide a reasonable opportunity for litigants to present all necessary and relevant evidence.
- Allow participation by all litigants, witnesses, jurors, and attorneys without undue hardship or inconvenience including those with language difficulties, physical or mental impairments, or lack of financial resources.
- Provide facilities that are safe, secure, accessible, and convenient to use.
- Make a complete and accurate record of all actions.
- Provide for inclusive and representative juries.

While these broad responsibilities of the courts are clear, it is more difficult to determine the level at which the judicial branch is adequately funded to accomplish these duties. Compounding this issue is the fact that funding for any given court system may vary because of jurisdictional, structural and operational differences. Principles that address the adequacy of court funding provide a useful context to aid judicial leaders and funders in assessing and addressing their respective budgetary responsibilities and promote development of more stable and adequate funding. Principles focus budget discussions on policy and program issues as opposed to line item detail. The set of principles below help define when a court system is adequately funded. Many of these principles can be supported by nationally accepted performance measures or by such measures adopted by the judicial leadership in each state.

q ***Principle 21: Courts should be funded so that cases can be resolved in accordance with recognized time standards by judicial officers and court staff functioning in accordance with adopted workload standards.***

Commentary: This principle must be taken in context with two earlier principles: courts must objectively demonstrate the need for resources (Principle 16) and have

performance measures (Principle 17) which include those that demonstrate the extent that courts are meeting time to disposition standards. Both timeliness and quality are requirements of satisfactory performance. Thus, having guidelines for timely case processing is fundamental to determining satisfactory performance. Workload models demonstrate when judges and staff are working to capacity. Courts should be funded so as to enable satisfactory performance by adjudicating cases in accordance with time standards with judges and court personnel working to capacity as measured by workload models.

- ***Principle 22: Responsible funding entities should ensure that courts have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facilities guidelines.***

Commentary: Existing national standards relating to courthouse facilities should be used to assess compliance with this principle. The physical structure of a courthouse is the most obvious factor affecting access to justice. To ensure that all persons with legitimate business before the court have access to its proceedings, court facilities need to be safe, accessible, and convenient to use. This principle applies to facilities funded by local units of government as well as those funded by the state.

- ***Principle 23: The court system should be funded to provide technologies needed for the courts to operate efficiently and effectively and to provide the public services comparable to those provided by the other branches of government and private businesses.***

Commentary: As socio economic conditions change and caseloads continue to grow, and as the demands for access change as citizens' use of technology to interact with government grows, state-of-the-art technology is necessary for courts to meet future demands placed on them. Courts must provide services of a kind and convenience that the public has come to expect from their experiences with the other branches of government and the commercial world. Court systems need to continue to identify key technologies courts need in order to become more efficient and remain relevant in a constantly advancing technical society. Examples include electronic filing, effective case management systems, online jury services support, video conferencing of court hearings, centralized and automated payable processes, and virtual self-help centers to assist self represented litigants. Many states have created special technology earmark funds, consistent with Principle 25, to provide the necessary resources for these investments.

q ***Principle 24: Courts should be funded at a level that allows their core dispute resolution functions to be resolved by applying the appropriate dispositional alternative.***

Commentary: Principle 21 addresses the need to fund courts at a level that allows them to resolve cases that come before them in a quality fashion in accordance with time standards. Principle 9 addresses the need for courts to make the necessary alternative dispute resolution mechanisms available. This principle addresses the need to adequately fund those various dispute resolution mechanisms. For courts to function as efficiently as possible, the legislature needs to adequately authorize and fund the necessary dispositional methods. Research has revealed that one dispute resolution size does not fit all disputes. Some cases, such as criminal matters, may require the full adversarial process. Others, such as those with drug use as the underlying issue, may be more suited to a problem-solving, treatment approach. Some family cases may be amenable to mediation or some other similar resolution alternative where the disputants maintain greater control over the process and outcome. Still other cases can be resolved through purely administrative determinations. Appropriations must be sufficient to enable courts to offer various dispositional options as well as a triage process which allows courts to analyze the issues or causes of action in each individual case to determine the appropriate dispositional alternative. Without proper dispositional alternatives, legislative funding decisions may prevent courts from adjudicating entire case types that may arbitrarily be deemed a lower priority, when in fact all cases filed with the courts have constitutional standing to be properly adjudicated.

q ***Principle 25: Courts' fees should not be set so high as to deny reasonable access to dispute resolution services provided by the courts. Courts should establish a method to waive or reduce fees when needed to allow access.***

Commentary: Courts are a core function of government and as such should be primarily funded by general tax revenues. Citizens pay taxes to secure basic core services. However, most states also charge fees for court users. While circumstances occur where user fees are necessary, such fees should always be minimized and should never be used to fund activities outside the court system. Courts should not become a taxing vehicle of government for purposes extraneous to the courts. Court fees cannot be raised so high that they become a barrier to the public's access to justice. Recognizing that fees should be secondary to appropriations from general revenue funds, courts should be able to retain the major portion, if not all, of the revenue generated by those fees.

CONCLUSION

Judicial, legislative and executive branch leaders must understand the nature of the judicial function and the role courts play in the larger world. Courts are a core function of government and must always be so recognized: from maintaining a peaceful and orderly society, to providing stable resolution of business and commercial disputes—which is the basis for a vibrant economy, to maintaining the rule of law so fundamental to a democratic nation. The governance and the decision-making and case administration principles discussed above form the foundations that courts need in place to pursue adequate funding. Funding Principles cannot be successfully implemented unless courts have basic structural, management and administrative practices in place. These provide the foundation upon which court management and subsequent funding requests are based. The Funding Principles set forth herein provide a framework in which judicial and legislative leaders can secure stable and adequate funding so key to the successful discharge of the judicial branch mission.

Court leaders can use these Principles for Judicial Administration to critique existing models in place in both state and local court systems. Critiquing how a particular court system matches up to the principles of governance, decision-making and case administration, and court funding can lead to specific and tangible assessments about strengths and weaknesses and, in turn, to real reform. It is in the spirit of providing good government that these Principles for Judicial Administration are advanced.

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Chandra Singh v. State of Rajasthan[1]

Determining the Role of the High Courts through the Guardian Judges/Inspecting Judges/Administrative Judges/Zonal Judges/Portfolio Judges etc. the Supreme Court held that:

Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the deadwood. This constitutional power of the High Court cannot be circumscribed by any rule or order.

Dhyan Investments and Trading Co. Ltd. v. Central Bureau of Investigation[2]

The nature of power of superintendence of the High Courts over the subordinate Courts with the special reference to Tribunals and Special Court has been explained in this case. The Supreme Court clarifies two points:

- ✓ *That Articles 226 and 227 provides to the High Court only with the judicial control and there is no administrative control or superintendence. The administrative control flows from Article 235.*
- ✓ *That the even under Article 235, the High Courts do not have administrative control over the Special Court.*

Moreover, the Supreme Court has clarified that the "Jurisdiction should not be confused with status and subordination."

That the Special Court is not subordinate to High Court is also very clear from the case of *T. Sudhakar Prasad Case*[3]…. In this case this Court has held as follows:

> Subordination of Tribunals and courts functioning within the territorial jurisdiction of a High Court can be either judicial or administrative or both. The power of superintendence exercised by the High Court under Articles 227 of the Constitution is judicial superintendence and not administrative superintendence such as one which vests in the High Court under Articles 235 of the Constitution over subordinate court.

[1] [2003]Supp1SCR674, (2003)6SCC545, AIR2003SC2889; Full Bench of V.N. Khare, C.J., S.B. Sinha and AR. Lakshmanan, JJ.; Decided On: 22.07.2003.
[2] (2001)6SCC607, AIR2001SC2456; Division Bench of K.T. Thomas and S.N. Variava, JJ. Decided On: 31.07.2001.
[3] *T. Sudhakar Prasad v. Government of Andhra Pradesh*, [2000]Supp5SCR610, (2001)1SCC516.

> Vide para 96 of *L. Chandra Kumar case*[4] … the Constitution Bench did not agree with the suggestion that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall, as our constitutional scheme does not require that all adjudicatory bodies which fall within the territorial jurisdiction of any High Court should be subject to its supervisory jurisdiction. Obviously, the supervisory jurisdiction referred to by the Constitution bench in para 96 of the judgment is the supervision of the administrative functioning of the Tribunals as it spelt out by discussion made in paras 96 and 97 of the judgment.
>
> Jurisdiction should not be confused with status and subordination. Parliament was motivated to create new adjudicatory for a to provide new, cheap and fast-track adjudicatory systems and permitting them to function by tearing off the conventional shackles of the strict rule of pleadings, strict rule of evidence, tardy trails, three/four-tier appeals endless revisions and reviews - creating hurdles in the fast flow of the stream of justice." (emphasis supplied)

Thus from this judgment it is clear that only judicial superintendence is envisaged under Articles 226 and 227. there is no administrative control or superintendence. The High Court does not have administrative control over the Special Court under Article 235 of the Constitution of India. **…**

[T]he Special Court is not subordinate to the High Court.

Baradakanta Mishra v. High Court of Orissa[5]

Speaking on the scope of the word "control", "vest" and "deal" as used under Article 235 of the Constitution of India, the Supreme Court held that:

The scope of Article 235 has been examined by this Court in several decisions. The important decisions are *The State of West Bengal v. Nripendra Nath Bagchi*[6]. *The High Court of Calcutta v. Amal Kumar Roy*[7]; *High Court of Punjab and Haryana v. State Haryana* (In the matter of N.S. Rao[8]). The effect of the decisions is this. The word "control" as used in Article 235 includes disciplinary control over District Judges and Judges inferior to the post of District Judge. This control is vested in the High Court to effectuate the purpose of securing

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[4] *L. Chandra Kumar v. Union on India and others*[1997]2SCR1186, AIR1997SC1125, (1997)SCC(LS)577; Seven Judge Bench of A.M. Ahmadi, C.J.I., M.M. Punchhi, K. Ramaswamy, S.P. Bharucha, Saiyed Saghir Ahmad, K. Venkataswami and K.T. Thomas, JJ. Decided on 18.03.1997.

[5] [1976]SuppSCR561; AIR1976SC1899; (1976)3SCC327; Full Bench: A.N. Ray, C.J., Jaswant Singh and M. Hameedullah Beg, JJ. Decided On: 06.05.1976.

[6] (1968)ILLJ270SC.

[7] [1963]1SCR437.

[8] [1975]3SCR365.

independence of the subordinate judiciary and unless it included disciplinary control as well the very object would be frustrated. The word "control" is accompanied by the word "vest" which shows that the High Court is made the sole custodian of the control over the judiciary. Control is not merely the power to arrange the day-to-day working of the court but contemplates disciplinary jurisdiction on the presiding Judge. The word "control" includes something in addition to the mere superintendence of these courts. The control is over the conduct and discipline of Judges. The inclusion of a right of appeal against the orders of the High Court in the conditions of service indicates an order passed in disciplinary jurisdiction. The word "deal" in Article 235 also indicates that the control is over disciplinary and not mere administrative jurisdiction. The control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment including initial posting and promotion of District Judges and dismissal, removal, reduction in rank of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal subject however to the conditions of service to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by Clause (2) of Article 311 unless such an opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could make enquiries into disciplinary conduct.

In ***N.S. Rao's case*** (supra) this Court said "The Governor has power to pass an order of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High Court. The High Court of course cannot terminate the services or impose any punishment on District Judge by removal or reduction. The control over District Judge is that disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceeding any District Judge is to be removed from service or any punishment is to be imposed, that will be in accordance with the conditions of service.

Gauhati High Court v. Kuladhar Phukan[9]

Speaking on the scope of the word "control as used under Article 235 of the Constitution of India, the Supreme Court further held that the word is inclusive in its scope as it includes the control and superintendence of the High Court over the subordinate courts and the persons manning them, both on the judicial and the administrative side and in cases of service matters of subordinate judicial officers the action must originate from the High Court.

It is settled by a catena of decisions that the word "control" referred to in Article 235 of the Constitution has been used in a comprehensive sense and includes the control and superintendence of the High Court over the subordinate courts and the persons manning them, both on the judicial and the administrative side. Even in such matter in which the Governor may take a decision, the decision cannot be taken save by consultation with the High Court. The consultation is mandatory and the opinion of the High Court is binding on the State Government; else the control, as contemplated by Article 235, would be rendered negated.… In *Tej Pal Singh* v. *State of U.P. and Anr.*[10], it was held that in a matter affecting the service career of a judicial officer ordinarily the initiative for an action must come from the High Court and even otherwise in the absence of recommendation of the High Court an action taken by the Governor would be illegal and devoid of constitutional validity. Such error, if committed, would be incurable and even an *ex-post facto* approval would not cure the invalidity.

Chief Justice of Andhra v. L.V.A. Dixitulu[11]

In this case the Supreme Court reiterated the scope and ambit of Article 235 and reaffirmed the law as under:

The interpretation and scope of Article 235 has been the subject of several decisions of this Court. The position crystallised by these decisions is that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in

[9][2002]2SCR808, AIR2002SC1589 (2002)4SCC524. Division Bench of R.C. Lahoti and K.G. Balakrishnan, JJ. Decided On: 22.03.2002.
[10] [1986]3SCR428.
[11] [1979]1SCR26, AIR1979SC193 (1979)2SCC34. Constitution Bench of Y.V. Chandrachud, C.J., A.D. Koshal, A.N. Sen, N.L. Untwalia and R.S. Sarkaria, JJ. Decided on 12.09.1978.

extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes:

(a) (i) Disciplinary jurisdiction and a complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal, reduction in rank of District Judges, and initial posting and promotion to the cadre of District Judges. In the exercise of this control, the High Court can hold inquiries against a member of the subordinate judiciary, impose punishment other than dismissal or removal, subject, however, to the conditions of service, and a right of appeal, if any, granted thereby and to the giving of an opportunity of showing cause as required by Article 311(2).

(ii) In Article 235, the word 'control' is accompanied by the word "vest" which shows that the High Court alone is made the sole custodian of the control over the judiciary. The control vested in the High Court, being exclusive, and not dual, an inquiry into the conduct of a member of judiciary can be held by the High Court alone and no other authority. (***State of West Bengal v. Nripendra Nath Bagchi*** (supra); ***Shamsher Singh v. State of Punjab***[12]; ***Punjab and Haryana High Court v. State of Haryana*** (sub nom Narendra Singh Rao)[13].

(iii) Suspension from service of a member of the judiciary, with a view to hold a disciplinary inquiry.

(b) Transfers, promotions and confirmation of such promotions of persons holding posts in the judicial service, inferior to that of District Judge. (***State of Assam v. S.N. Sen***[14]; ***State of Assam v. Kuneswar Saikia***[15].

(c) Transfers of District Judges (***State of Assam v. Ranga Muhammad*** (supra); ***Chandra Mouleshwar v. Patna High Court*** (supra).

(d) Award of Selection grade to the members of the judicial service, including District Judges it being their further promotion after their initial appointment to the cadre. (***State of Assam v. Kuseswar Saikia*** (supra).

(e) Confirmation of District Judges, after their initial appointment or promotion by the Governor to the cadre of District Judges under Article 233, on probation or officiating basis. (***Punjab & Haryana High Court v. State of Haryana*** (supra).

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[12] (1974)IILLJ465SC.
[13] [1975]3SCR365.
[14] [1972]2SCR251.
[15] [1970] 2 S.C.R. 923.

(f) Premature or compulsory retirement of Judges of the District Court and of Subordinate Courts (***State of U.P. v. Batuk Deo Pati Tripathi and Anr***.)

The State of West Bengal v. Nripendra Nath Bagchi[16]

Articles 233 and 235 make a mention of two distinct powers. The first is power of appointments of persons, their postings and promotion and the other is power of control. In the case of the District Judges, appointments of persons to be and posting and promotion are to be made by the Governor but the control over the District Judge is of the High Court. We are not impressed by the argument that the term used is "district court" because the rest of the article clearly indicates that the word "court" is used compendiously to denote not only the court proper but also the presiding Judge. The latter part of Art. 235 talks of the man who holds the office. In the case of the judicial service subordinate to the District judge the appointment has to be made by the Governor in accordance with the rules to be framed after consultation with the State Public Service Commission and the High Court but the power of posting, promotion and grant of leave and the control of the courts are vested in the High Court. What is vested includes disciplinary jurisdiction. Control is useless if it is not accompanied by disciplinary powers. It is not to be expected that the High Court would run to the Government or the Governor in every case of indiscipline however small and which may not even require the punishment of dismissal 01 removal. These articles go to show that by vesting "control" in the High Court the independence of the subordinate judiciary was in view.

R.M. Gurjar v. High Court of Gujarat[17]

In this case the Supreme Court made it explicit that the word "control " under Article 235 of the Constitution of India extends to the ministerial officers and servants on the establishment of the subordinate Courts also.

[T]he learned single Judge referred the following … questions to be decided by a larger Bench:

(1) Whether the High Court on its administrative side has jurisdiction to enhance the penalty imposed by the District Judge upon a member of the ministerial staff of the subordinate

[16] [1966]1SCR771, AIR1966SC447. Constitution Bench of P.B. Gajendragadkar, C.J., K.N. Wanchoo, M. Hidayatullah, J.C. Shah and S.M. Sikri, JJ. Decided on 10.09.1965.

[17] [1992]3SCR775,AIR1992SC2000, (1992)4SCC10; Division Bench of Kuldip Singh and Dr. A.S. Anand, JJ. Decided on 11.08.1992.

Court in exercise of the powers of review conferred by Rule 23 of the Gujarat Civil Services (Discipline and Appeal) Rules, 1971?

(2) Whether the control vested in the High Courts under Article 235 of the Constitution is exercisable only over members of the judicial service of the State as defined in Article 236(b) or whether the ministerial officers and servants on the establishment of the subordinate courts are also ultimately subject to such control?

While the reference was pending before the Full Bench, the decision in Mashruvala case was set aside by this Court in *State of Gujarat v. R.C. Mashruvala*[18] and it was held that the Registrar of the Small Causes Court was a judicial officer in the judicial service of the State and came within the scope and intend of Articles 235 and 236 of the Constitution of India.

The Full Bench of the High Court speaking through the Acting Chief Justice primarily dealt with question No. 2 and came to the conclusion that the "control" under Article 235 of the Constitution of India extends to the ministerial officers and servants on the establishment of the subordinate Courts also. The second question was, accordingly, answered against the petitioners. On the interpretation of Article 235 and the rules the first question was also decided against the petitioners. This appeal by way of special leave is against the judgment of the Full Bench of the High Court.

High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal[19]

In this case the Apex Court clarified that the control vests in the High Court and not in any Judge or Judges or any Committee. Moreover, the Constitution, treats "High Court" and "Chief Justice" as two separate entities. The control over Sub-ordinate Courts vests in the High Court, but the High Court administration vests in the Chief Justice.

Article [235] shows that the High Court has to exercise its administrative, judicial and disciplinary control over the members of the Judicial Service of the State. The word "control", referred to in this Article, is used in a comprehensive sense to include general superintendence of the working of the sub-ordinate courts, disciplinary control over the Presiding Officers of the sub-ordinate courts and to recommend the imposition of punishment of dismissal, removal

[18] AIR1977SC1619.
[19] [1998]1SCR961,AIR1998SC1079, (1998)3SCC72; Division Bench of Saiyed Saghir Ahmad and G.B. Patnaik, JJ. Decided on 19.02.1998.

and reduction in rank or compulsory retirement. "Control" would also include suspension of a manner of the Judicial Service for purposes of holding a disciplinary enquiry, transfer, confirmation and promotion. See: *State of Haryana v. Inder Prakash Anand*[20], *State of U.P. v. Batuk Deo Pati Tripathi*,[21]. In *State of Gujarat v. Ramesh Chandra Mashruwala*[22], it was held that the "control" in Article 235 means exclusive and not dual control. (See also: *Chief Justice of Andhra Pradesh & Anr. v. L. V.A. Dikshitulu*[23]; *State of West Bengal v. Nripendra Nath Bagchi*,[24]

In *Tejpal Singh (Dead) by Lrs. v. State of U.P. & Anr*.[25], as also in *G.S. Nagmoti vs. State of Mysore*,[26] it was held that the "control", referred to in Article 235, vests in the High Court and not in any Judge or Judges or any Committee thereof. In a subsequent decision in *Registrar, High Court of Madras v. R. Rajiah*,[27], it was held that there is no bar to have an enquiry made by a Committee of several Judges against a member of the sub-ordinate judiciary provided the report of the Committee is circulated to all the Judges and the ultimate decision is taken in the meeting of the Full Court.

What is, therefore, of significance is that although in Article 235, the word "High Court" has been used, in Article 229, the word "Chief Justice" has been used. The Constitution, therefore, treats them as two separate entities in as much as "control over Sub-ordinate Courts" vests in the High Court, but High Court administration vests in the Chief Justice.

Ishwar Chand Jain v. High Court of Punjab and Haryana[28]

In this case the Supreme Court laid down that it is a Constitutional obligation of the "Guardian Judges" who represent the High Court to guide and protect the Judicial Officers from the adversaries. An independent and honest judiciary is a sine qua non for Rule of law.

Under the Constitution the High Court has control over the subordinate judiciary. While exercising that control it is under a *Constitutional obligation* to guide and protect judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts. If

[20] AIR1976SC1841.
[21] 1978CriLJ839.
[22] AIR1977SC1619.
[23] [1979]1SCR26.
[24] (1968)ILLJ270SC.
[25] [1986]3SCR428
[26] (1969)3SCC325
[27] AIR1988SC1388
[28] [1988]Supp1SCR396, AIR1988SC1395, (1988)3SCC370; Division Bench of E.S. Venkataramiah and K.N. Singh, JJ. Decided on 26.05.1988.

complaints are entertained on trifling matters relating to judicial orders which may have been upheld by the High Court on the judicial side no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a *sine qua non* for Rule of law. If judicial officers are under constant threat of complaint and enquiry on trifling matters and if High Court encourages anonymous complaints to hold the field the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is therefore imperative that the High Court should also take steps to protect its honest officers by ignoring ill-conceived or motivated complaints made by the unscrupulous lawyers and litigants.

Samsher Singh v. State of Punjab[29]

Speaking on the nature of control and supervision by the High Courts on the Subordinate Courts through the "Guardian Judges" Justice A.N. Ray held that:

The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court.

Tej Pal Singh v. State of U.P.[30]

In this case the power of the Administrative Committee and that of a Full Court in cases of premature retirement orders as against the Government has been held to be void.

[W]hile it may be open to the Government to bring to the notice of the High Court all materials having a bearing on the conduct of a District Judge or a subordinate judicial officer, which may be in its possession, the Government cannot take the initiative to retire prematurely a District Judge or a subordinate judicial officer. Such initiative should rest with the High Court.

…it has to be held that the… order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full Court is void and ineffective.

[29] [1975]1SCR814, AIR1974SC2192, (1974)2SCC831. Seven Judge Bench of A.N. Ray, C.J., A. Alagiriswami, D.G. Palekar, K.K. Mathew, P.N. Bhagwati, V.R. Krishna Iyer and Y.V. Chandrachud, JJ. Decided on 23.08.1974.
[30] [1986]3SCR428, AIR1986SC1814, (1986)3SCC604. Division Bench of E.S. Venkataramiah and Ranganath Misra, JJ. Decided on 05.08.1986.

B S Yadav v. State of Haryana[31]

On the question of who has the power to control the conditions of services of subordinate judiciary the Supreme Court held as under:

On a plain reading of Articles 235 and. 309 of the Constitution, it is clear that the power to frame rules regarding seniority of officers in the judicial service of the State is vested in the Governor and not in the High Court. The first part of Article 235 vests the control over district courts and courts subordinate thereto in the High Court. But the second part of that article says that nothing in the article shall be construed as taking away from any person belonging to the judicial service of the State any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. Thus, Article 235 Itself defines the outer limits of the High Court's power of control over the district courts and courts subordinate thereto. In the first place, in the exercise of its control over the district courts and subordinate courts, it is not open to the High Court to deny to a member of the subordinate judicial service of the State the right of appeal given to him by the law which regulates the conditions of his service. Secondly, the High Court can not, in the exercise of its power of control, deal with such person otherwise than in accordance with the conditions of his service which are prescribed by such law.

Who has the power to pass such a law? Obviously not the High Court because, there is no power in the High Court to pass a law though rules made by the High Court. In the exercise of power conferred upon it in that behalf may have the force of law. There is a distinction between the power to pass a law and the power to make rules, which by law, have the force of law. Besides, "law" which the second part of Article 235 speaks of, is law made by the legislature because, if it were not so, there was no purpose in saying that the High Court's power of control will not be construed as taking away certain rights of certain persons under a law regulating their conditions of service. It could not have been possibly intended to be provided that the High Court's power of control will be subject to the conditions of service prescribed by it. The clear meaning, therefore, of the second part of Article 235 is that the power of control vested

[31] [1981]1SCR1024, AIR1981SC561; Constitution Bench of Y.V. Chandrachud, C.J., A.N. Sen, P.N. Bhagwati, V.D. Tulzapurkar and V.R. Krishna Iyer, JJ. Decided on `05.11.1980.

in the High Court by the first part will not deprive a judicial officer of the rights conferred upon him by a law made by the legislature regulating his conditions of service.

Article 235 does not confer upon the High Courts the power to make rules relating to conditions of service of judicial officers attached to district courts and the courts subordinate thereto. Whenever it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See, for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1) and (2) 148(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2). Out of this fasciculus of Articles, the provisions contained in Articles 225, 227(2) and (3) and 229(1) and (2) bear relevance on the question, because these Articles confer power on the High Court to frame rules for certain specific purposes. Article 229(2)' which is directly in point provides in express terms that subject to the provisions of any law made by the legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by the rules made by the Chief Justice or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose. With this particular pro vision before them, the framers of the Constitution would not have failed to incorporate a similar provision in Article 235 if it was intended that the High Court should have the power to make rules regulating the conditions of ser vice of judicial officers attached to district courts and courts subordinate thereto.

Having seen that the Constitution does not confer upon the High Court the power to make rules regulating the conditions of service of judicial officers of the district courts and the courts subordinate thereto, we must proceed to consider, who, then, possesses that power? Article 309 furnishes the answer. It provides that Acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to posts in connection with the affairs of the Union or of any State. Article 246(3), read with Entry 41 in List II of the Seventh Schedule, confers upon the State legislatures the power to pass laws with respect to "State public services" which must include the judicial services of the State. The power of control vested in the High Court by Article 235 is thus expressly, by the terms of that Article itself, made subject to the law which the State legislature may pass for regulating the recruitment and service conditions of judicial officers of the State. The power to pass such a law was evidently not considered by the Constitution makers as an encroachment on the "control jurisdiction" of the High Courts under the first part of Article 235. The control over the district courts and subordinate courts is vested in the High Court in order to safeguard the independence of the

judiciary. It is the High Court, not the executive, which possesses control over the State judiciary. But, what is important to bear in mind is that the Constitution which has taken the greatest care to preserve the independence of the judiciary did not regard the power of the State legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of that independence. The mere power to pass such a law is not violative of the control vested in the High Court over the State judiciary.

High Court of Judicature at Allahabad through Registrar v. Sarnam Singh and Anr.[32]

In this case the Supreme Court elaborated on the role of "Guardian Judges" also known as "Inspecting Judges"the Court reiterated that Inspection of subordinate Courts is not a one day or an hour or few minutes affair. It has to go on all the year round by monitoring the work of the Court by the inspecting Judge. The casual inspection can hardly be beneficial to a Judicial system.

The role of Inspecting Judges and the manner in which they are to assess the work of the Judicial Officers were considered by this Court in High Court of Punjab and Haryana *through R.G. v. Ishwar Chand Jain* [33], in which one of us (Brother Wadhwa, J.), speaking for the Court, said (para 32):

> Since late this Court is watching the spectre of either judicial officers or the High Courts coming to this Court when there is an order pre-maturely retiring a judicial officer. Under Article 235 of the Constitution High Court exercises complete control over subordinate Courts which include District Courts. Inspection of the subordinate Courts is one of the most important functions which High Court performs for control over the subordinate Courts. Object of such inspection is for the purpose of assessment of the work performed by the subordinate Judge, his capability, integrity and competency. Since Judges are human beings and also prone to all the human failings, inspection provides an opportunity for pointing out mistakes so that they are avoided in future and deficiencies, if any, in the working of the subordinate Court, remedied. Inspection should act as a catalyst in inspiring subordinate Judges to give best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the Courts while working under great discomfort and hardships. A satisfactory judicial system depends largely on the satisfactory functioning of Courts at grass root level. Remarks recorded by the inspecting judge are normally endorsed by the Full Court and become part of the Annual Confidential Reports and are foundations on which the career of a judicial officer is made or marred. Inspection of subordinate Court

[32] (2000) 2 SCC 339, MANU/SC/1654/1999. Division bench of Saiyed Saghir Ahmad and D.P. Wadhwa, JJ.. Decided on 15.02.1999.
[33] AIR 1999 SC 1677.

> is thus of vital importance. It has to be both effective and productive. It can be so only if it is well regulated and is workman like. Inspection of subordinate Courts is not a one day or an hour or few minutes affair. It has to go on all the year round by monitoring the work of the Court by the inspecting Judge. The casual inspection can hardly be beneficial to a Judicial system. It does more harm than good. As noticed in the case of *R. Rajiah*[34]there could be ill conceived or motivated complaints. Rumour mongering is to be avoided at all costs as it seriously jeopardizes the efficient working of the subordinate Courts.

These are extremely important observations and constitute important guidelines for assessing the work of a Judicial Officer. These observations also indicate the attitude with which the Inspecting Judge should objectively consider the work and conduct of the Judicial Officers who sometimes have to work under difficult and trying circumstances. The same views were earlier expressed in *State Bank of India v. Kashi Nath Kher*[35]. (See also *Union of India v. N.R. Banerjee*[36] State of Uttar *Pradesh v. Yamuna Shanker Mishra*[37] as also *Swatantra Singh v. State of Haryana* [38] on the question as to what precisely is the object and purpose of writing Annual Confidential Report.)

We would conclude the discussion by referring to the observations of this Court in *M.B. Bindra v. Union of India*[39], which are as under (para 13):

> To dunk an officer into the puddle of "doubtful Integrity" it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertain able by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label "doubtful integrity".

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[34] AIR 1988 SC 1388.
[35] (1996) 8 SCC 762 : AIR 1996 SC 1328.
[36] (1997) 9 SCC 287, AIR 1997 SC 3761.
[37] (1997) 4 SCC 7, AIR 1997 SC 3671.
[38] (1997) 4 SCC 14 : AIR 1997 SC 2105.
[39] (1998) 7 SCC 310 AIR 1998 SC 3058.

Bishwanath Prasad Singh v. State of Bihar[40]

The Apex Court, while highlighting the importance of confidential records and their entries, emphasized the critical role of the High Courts in shaping the careers of the judges of the subordinate judiciary. Moreover, it held that the Constitutional power of the High Court is exclusive and independent in nature and the observations made by the Supreme Court are only as suggestions without any intentions to criticize the role and jurisdiction of the High Courts.

A number of decisions dealing with the object and purpose of writing confidential reports and care and caution to be adopted while making entries in the confidential records of Government officers have been referred to in the cases of *Sarnam Singh* (supra, vide para 31, 32) as also in the case of *Ishwar Chand Jain* (supra). We need not repeat the same. Suffice it to observe that the well-recognized and accepted practice of making annual entries in the confidential records of subordinate official by superiors has a public policy and purposive requirement. It is one of the recognised and time-tested modes of exercising administrative and disciplinary control by a superior authority over its subordinates. The very power to make such entries as have potential for shaping the future career of a subordinate officer casts an obligation on the High Courts to keep a watch and vigil over the performance of the members of subordinate judiciary. An assessment of quality and quantity of performance and progress of the judicial officers should be an ongoing process continued round the year and then to make a record in an objective manner of the impressions formulated by such assessment. An annual entry is not an instrument to be wielded like a teacher's cane or to be cracked like a whip. **The High Court has to act and guide the subordinate officers like a guardian or elder in the judicial family**. The entry in the confidential rolls should not be a reflection of personal whims, fancies or prejudices, likes or dislikes of a superior. The entry must reflect the result of an objective assessment coupled with and effort at guiding the judicial officers to secure an improvement in his performance where need be; to admonish him with the object of removing for future, the shortcoming found; and expressing and appreciation with an idea of toning up and maintaining the imitable qualities by affectionately patting on the back of meritorious and deserving. An entry consisting of a few words, or a sentence or two, is supposed to reflect the sum total of the impressions formulated by the inspecting Judge who had the opportunity of forming those impressions in his mind by having an opportunity of watching the judicial officer round the period under review. In the very nature of things, the process is complex and the formulation

[40] [2000]Supp5SCR718, (2001)2SCC305; Full Bench of Dr. A.S. Anand, CJI., R.C. Lahoti and Shivaraj V. Patil, JJ. Decided on 15.12.2000.

of impressions is a result of multiple factors simultaneously playing in the mind. The perceptions may differ. In the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in confidential rolls to judicial review**.** Entries either way have serious implications on the service career. Hence the need for fairness, justness and objectivity in performing the inspections and making the entries in the confidential rolls.

…

We are conscious of the fact that we are dealing with an administrative decision taken by a High Court occupying a place of supremacy under the Constitution. The High Court as an institution is administratively totally independent and is not subject to superintendence by any other institution. We hope our observations are read in the right spirit - these are by way of suggestions and not intended in any way to be criticism of the working of the High Court.

In the Matter of: K, a Judicial Officer[41]

A subordinate judge faced with disparaging and undeserving remarks made by a court of superior jurisdiction is not without any remedy - Control over the district courts and courts subordinate thereto has been vested in the High Court - The control so vested is administrative, judicial and disciplinary - The action so taken would all be on the administrative side - appeal filed for seeking deletion of adverse remarks passed by High Court in judgment delivered- appellant (Metropolitan Magistrate) contended that remarks made in judgment was not essential and adversely affect her career growth- remarks passed were not necessary for matter decided - they were not formed the part of reasoning given in judgment. The remarks have a potential to prejudice the career of the appellant - Held, petition allowed.

During the course of hearing we were informed by Shri Kapil Sibal, the learned senior counsel for the appellant that the observations so made in the judicial order of the High Court have found their way into the annual confidential records of the appellant and they are sure to affect her career ahead.

Several cases are coming to our notice wherein observations are being made against the members of subordinate judiciary in the orders of superior forums made on judicial side and judicial officers who made orders as presiding Judges of the subordinate courts are being driven to the necessity of filing appeals to this Court or petitions before the High Courts seeking

[41] [2001]1SCR959, AIR2001SC972, (2001)3SCC54, 2001(1)UJ685. Decided by Single Judge Bench of R.C. Lahoti, C.J. Decided on 08.02.200.

expunging of remarks or observations made and sometimes strictures passed against them behind their back. We would therefore like to deal with a few aspects touching the making of observations or adverse comments against judicial officers and methodology to be followed if it becomes necessary.

A judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four-corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of a judge.

The primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it. A judge is not expected to drift away from pronouncing upon the controversy, to sitting in judgment over the conduct of the judicial and quasi-judicial authorities whose decisions or orders are put in issue before him, and indulge into criticising and commenting thereon unless the conduct of an authority or subordinate functionary or anyone else than the parties comes of necessity under review and expression of opinion thereon going to the extent of commenting or criticising becomes necessary as a part of reasoning requisite for arriving at a conclusion necessary for deciding the main controversy or it becomes necessary to have animadverted thereon for the purpose of arriving at a decision on an issue involved in the litigation. This applies with added force when the superior court is hearing an appeal or revision against an order of a subordinate judicial officer and feels inclined to animadvert on him. The wisdom of a superior judge itching for making observations on a subordinate judge before ventilating into expression must pause for a moment and read the counsel of Cardozo - "Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter." (Essays on Jurisprudence, Columbia Law Review, 1963 at p.315).

The courts do have power to express opinion, make observations and even offer criticism on the conduct of anyone coming within their gaze of judicial review but the question is one of impelling need, justification and propriety. The following observation by Sulaiman, J. in *Panchanan Banerji Vs . Upendra Nath Bhattacharji*[42] was cited with approval before this Court in *Niranjan Patnaik Vs . Sashibhusan Kar and Anr.*[43]

> "The High Court, as the Supreme Court of revision, must be deemed to have power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it."

This Court went on to add :-

> "It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before Court of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct. We hold that the adverse remarks made against the appellant were neither justified nor called for.
>
> Having regard to the limited controversy in the appeal to the High Court and the hearsay nature of evidence of the appellant it was not at all necessary for the Appellate Judge to have animadverted on the conduct of the appellant for the purpose of allowing the appeal of the first respondent. Even assuming that a serious evaluation of the evidence of the appellant was really called for in the appeal the remarks of the learned Appellate Judge should be in conformity with the settled practice of Courts to observe sobriety, moderation and reserve. We need only remind that the higher the forum and the greater the powers, the greater the need for restrain and the more mellowed the reproach should be."

A subordinate judge faced with disparaging and undeserving remarks made by a Court of superior jurisdiction is not without any remedy. He may approach the High Court invoking its inherent jurisdiction seeking expunction of objectionable remarks which jurisdiction vests in the High Court by virtue of its being a court of record and possessing inherent powers as also the power of superintendence. This view is settled by the law laid down in *Dr.Raghubir Saran Vs. State of Bihar and Anr.*[44]. However, if a similar relief is sought for against remarks or observations contained in judgment or order of High Court the aggrieved judicial officer can, in exceptional cases, approach this Court also invoking its jurisdiction under Article 136 and/or 142 of the Constitution. With the law laid down by this Court in *Dr. Raghubir Saran (supra)* and the *State of Uttar Pradesh Vs. Mohammad Naim*[45] -it is well-settled that the power to

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[42] AIR1927All193.
[43] 1986CriLJ911.
[44] 1964 (2) SCR 330.
[45] [1964]2SCR363.

expunge remarks exists for redressing a kind of grievance for which the law does not provide any other remedy in express terms though it is an extraordinary power. Any passage from an order or judgment may be expunged or directed to be expunged subject to satisfying the following tests :- (i) that the passage complained of is wholly irrelevant and unjustifiable; (ii) that its retention on the records will cause serious harm to the persons to whom it refers; (iii) that its expunction will not affect the reasons for the judgment or order.

Though the power to make remarks or observations is there but on being questioned, the exercise of power must withstand judicial scrutiny on the touchstone of following tests :- (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. The overall test is that the criticism or observation must be judicial in nature and should not formally depart from sobriety, moderation and reserve *[See Mohammad Naim (supra)]*.

It was so said by a Special Bench of three-Judges presided over by Tek Chand, J. in *Philip William Ravanshawe Hardless Vs. Gladys Isabel Hardless and Ors.*[46]:

> "A passage which is not necessary to the conclusion of the Judge nor even necessary to his argument and is likely to militate seriously against party's earning a living in his profession should be expunged from the judgment."

In *A.M. Mathur Vs . Pramod Kumar Gupta*[47] - this Court sounded a note of caution emphasising a general principle of highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct and said :-

> "Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restrain in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the State, the executive, and legislature. There must be mutual

[46] AIR 1940 Lahore 82.
[47] [1990]2SCR110.

respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process."

In the case at hand we are concerned with the observations made by the High Court against a judicial officer who is a serving member of subordinate judiciary. Under the constructional scheme control over the district courts and courts subordinate thereto has been vested in the High Courts. The control so vested is administrative, judicial and disciplinary. The role of High Court is also of a friend, philosopher and guide of judiciary subordinate to it. The strength of power is not displayed solely in cracking a whip on errors, mistakes or failures; the power should be so wielded as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly. "Pardon the error but not its repetition". The power to control is not to be exercised solely by wielding a teacher's cane; the members of subordinate judiciary look up at the High Court for the power to control to be exercised with parent-like care and affection. The exercise of statutory jurisdiction, appellate or revisional and the exercise of constitutional power to control and supervise the functioning of the district courts and courts subordinate thereto empowers the High Court to formulate an opinion and place it on record not only on the judicial working but also on the conduct of the judicial officers. The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied, however, the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities. **Firstly**, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard. **Secondly,** the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in open and therefore becomes public. The same judge who found himself persuaded, sitting on judicial side, to make observations guided by the facts of a single case against a subordinate judge may, sitting on administrative side and apprised of overall meritorious performance of the subordinate judge, may irretrievably regret his having made these observations on judicial side the harming effect whereof even he himself cannot remove on administrative side. **Thirdly,** human nature being what it is, such criticism of a judicial officer contained in the judgment of a higher court gives the litigating party a sense of victory not only over his opponent but also over the judge who had decided the case against him. This is subversive of judicial authority of the deciding judge. **Fourthly,** seeking expunging of the observations by a judicial officer by filing an appeal or

petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court -- a situation not very happy from the point of view of the functioning of the judicial system. May be for the purpose of pleading his cause he has to take the assistance of a legal practitioner and such legal practitioner may be one practising before him. Look at the embarrassment involved. **And last but not the least**, the possibility of a single or casual (SIC) of an otherwise honest, upright and righteous judge being caught unawares in the net of adverse observations cannot be ruled out. Such an incident would have a seriously demoralising effect not only on him but also on his colleagues. If all this is avoidable why it should not be avoided?

We must not be understood as meaning that any conduct of a subordinate judicial officer unbecoming of him and demanding a rebuff should be simply overlooked. But there is an alternate safer and advisable course available to choose. The conduct of a judicial officer, unworthy of him, having come to the notice of a judge of the High Court hearing a matter on the judicial side, the lis may be disposed of by pronouncing upon the merits thereof as found by him but avoiding in the judicial pronouncement criticism of, or observations on the 'conduct' of the subordinate judicial officer who had decided the case under scrutiny. Simultaneously but separately in-office proceedings may be drawn up inviting attention of Hon'ble Chief Justice to the facts describing the conduct of the subordinate judge concerned by sending a confidential letter or note to the Chief Justice. It will thereafter be open to the Chief Justice to deal with the subordinate judicial officer either at his own level or through the inspecting judge or by placing the matter before the Full Court for its consideration. The action so taken would all be on the administrative side. The subordinate judge concerned would have an opportunity of clarifying his position or putting-forth the circumstances under which he acted. He would not be condemned unheard and if the decision be adverse to him, it being on administrative side, he would have some remedy available to him under the law. He would not be rendered remediless.

The remarks made in a judicial order of the High Court against a member of subordinate judiciary even if expunged would not completely restitute and restore the harmed judge from the loss of dignity and honour suffered by him. In 'JUDGES' by David Pannick (Oxford University Press Publication, 1987) a wholesome practise finds a mention suggesting an appropriate course to be followed in such situations:

> "Lord Hailsham explained that in a number of cases, although I seldom told the complainant that I had done so, I showed the complaint to the judge concerned. I

> thought it good for him both to see what was being said about him from the other side of the court, and how perhaps a lapse of manners or a momentary impatience could undermine confidence in his decision."

Though the learned author observes that such a private discussion, uncommunicated to the complainant, would be unlikely to remove his sense of grievance, the resolution is to be found in the same book elsewhere in the following passage (though in a different context) :-

> "Lord bridge gave a similar explanation in 1984: 'If one Judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging (SIC) in the exercise of their proper jurisdiction'."

Session 2

Challenges faced by Guardian Judges

Helping Judges in Distress

Isaiah M. Zimmerman[*]

Judges are subject to a wide range of physical and emotional problems and stresses but often don't get the help they need. A "wellness initiative" in the courts could help overcome the unique barriers they face in obtaining assistance.

Judges come from the ranks of lawyers, and lawyers, as a group, are reliably estimated to include a steady minority of 15 to 18 percent[1] who suffer from problems with substance abuse and related disorders. Programs designed to help lawyers in distress have been established throughout the United States, as well as in Canada, Ireland, and the United Kingdom. These programs have a fine record of outreach and help, and are now an accepted part of intra-professional responsibility. However, the sections of these programs that are also meant to help judges have not attracted the level of requests for service that would be reasonable to expect. What are the reasons for the low use of these widely available services, and what can be done about it? My own experience as a clinical psychologist, in a metropolitan area adjacent to four states, who has seen a significant number of judges over the past 30 years confirms that judges do indeed seek help with a whole variety of personal and family problems. But they do so outside the available bar programs. When asked why, they cite the need for strict privacy and confidentiality. They are willing to pay a premium in fees, and to not utilize their health insurance coverage. Can there be a broader and less expensive way for judges to get help when they need it?

Range of problems

Let us review the situations in which most judges privately seek help.

Health and medical. Medical and surgical care often involves dealing with the disruption of family routines and responsibilities. The illness of children, spouses, and aging parents can entail arranging for home care, clinic visits, physical therapy appointments, and other collateral arrangements. Whether under a direct or master calendar, most judges have to work out backup

[*] A clinical psychologist at Washington School of Psychiatry (isaiahzimmerman@sbcglobal.net). JUDICATURE Volume 90, Number 1 July-August 2006, page 10; Available at: http://www.judicialfamilyinstitute.org/pdf/Zimmerman_901JudgesDistress.pdf. Last accessed on: 18-11-2015.

[1] . Idaho Lawyer Assistance Program, Idaho State Bar and Idaho Law Foundation, Inc., SURVIVAL GUIDE FOR LAWYERS, (2000).

for an already overloaded docket. Welfare clients sometimes have the help of medical social workers— judges do not. Between the presiding judge, calendar clerk, and court administrator, something is usually arranged. But the emotional toll on the judge and family is rarely addressed.[2] Most judges live in dread of these situations, because, ultimately, the caseload balloons and must be handled by extended hours on the bench and work at home. A chronic, long-term illness in the family places the judge in an indefinitely prolonged caregiver role, For all of the foregoing, the services of a health counselor or social worker would be most appropriate.

Mental health. Judges are subject to a normal spectrum of psychological issues, including depression, anxiety, and mid-life crises. These can underlie a reduction in productivity, tardiness in opinion writing, clashes within the judicial administration and hierarchy, and intemperate and inappropriate behavior on or off the bench. Psychiatric treatment still carries stigma in our society. Despite a more widespread acceptance of mental health diagnosis and treatment, psychiatric care is still not reimbursed on a par with medical and surgical care. CEOs, high officials, political leaders, and judges shun the suggestion of possible mental illness, diminished capacity of judgment, and the charge of malingering to evade misconduct charges. As a result, judges either put off seeking treatment until symptoms can no longer be denied, or obtain medication from their general practitioner. When they do seek psychological care, they employ safeguards such as seeing a practitioner out of their area, requesting telephone sessions, and asking the psychiatrist to schedule them away from the session of any local lawyer or newsperson. All this freights their psychotherapy with unfortunate burdens, and some quit counseling before they should. Group psychotherapy, a very effective modality of care, is virtually closed to them, as well as to other public figures, since confidentiality cannot be assured, and membership in a group cannot be totally selective. Group therapy for couples, another effective mode of marital help, is likewise unavailable to judges for the same reasons.

Substance abuse and addiction. Though a subset of psychiatric conditions, the prevalence and publicized nature of addictions in the legal professions warrant a separate listing. However, this is often referred to as a "dual-diagnostic"[3] area because concomitant psychological and medical conditions are usually involved. Alcohol abuse and addiction is the most frequent category. It can profoundly affect temperament and behavior on and off the bench, the quality

[2] I.M. Zimmerman, Dealing with professional stress, 31 B. B.J. 39 (1987).
[3] American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed. (2000)

of collegial relations, and caseload productivity. It can also affect staff morale and efficiency. Clerks and staff often cover for a judge who has such a problem. This creates enormous stress for everyone.

When media attention focuses on a judge in such circumstances, harsh reactions issue from legislators and op-ed writers, with negative reflections on the entire court and judiciary. Clearly this problem area has wide repercussions of public shaming.[4] The treatment of alcohol disorders requires a combination of in-patient care, medication, individual and group psychotherapy, family counseling, and long-term group follow-up. These are the most important factors in preventing relapse. Where judges are concerned, group treatment for alcohol disorder with lawyers or a mixed population is not an option, except in the rarest of cases where hardy souls have "gone public" and braved public humiliation or recall.

Career and organizational stressors. In mid-career, a number of judges experience a kind of pause. They know their options to re-enter law practice, government service, or academic life are waning. They have fully experienced the rewards as well as the vicissitudes of the judicial career. It is time to review: should they continue and seek another term, whether it be by appointment, election, or retention? They also ask themselves "What have I achieved? Was the financial and family sacrifice all worth it? Will it get any better in the second half of my career?"

In states where election is highly politicized and considerable campaign funds must be raised, this is not a trivial halfway point. Campaigning for a judgeship imposes extremely paradoxical judicial demands. Funds usually come from large law firms or affluent solo practitioners and political parties. Though judges are shielded by a campaign committee from the identity of donors, they generally know who they are. Judges also are pressured to present themselves, their records, and their positions on major`local issues in a way that telegraphs their ideological tilt. The family often is drawn into multiple evening and weekend appearances, and the judge may acquire substantial debt. Having treated judges in the throes of an election and its aftermath (successful or not), I have witnessed what can be described as a post-traumatic stress reaction that extends to the family. Will that judge consult a local therapist? Of course not.

Another area in which judges occasionally seek help is organizational and collegial conflict. This is an intensely private area of concern. The issues range from pure personality clashes

[4] A. Morrison, Shame and the Psychology of the Self, in P. Stepansky and A Goldberg, (eds.) KOHUT'S LEGACY: CONTRIBUTIONS TO SELF PSYCHOLOGY (Hillsdale, N.J: The Analytic Press, 1992).

with a colleague or appellate panel, to power struggles with the administrative office or the presiding judge. Gossip may appear in local bar publications, and can be quite nasty. To obtain assistance and calm guidance in these circumstances is invaluable, and discretion is absolutely essential.

Marital and family issues. When a judge experiences marital and family conflicts, the size of his or her community matters. In smaller and rural communities, judges have little or no privacy outside of their homes. A judge in a one-judge court is especially vulnerable.[5] In larger or metropolitan jurisdictions, the media are interested in publicizing what may be occurring in the life of the judge and the court. In a divorce proceeding, judges, in my experience, tend to appease the spouse in contested custody and financial matters to minimize public scrutiny. These are severe stresses on the equanimity and working ability of the judge and his or her staff. The hidden posttraumatic consequences may continue for a considerable period.

The children of judges face challenges at school and on the playground that are remarkably similar to those of the offspring of the clergy. Often these children are held to a higher standard by teachers and coaches. Peer pressure may involve them in delinquent behavior. In the rebellious teenage years, a judge's child may engage in problem behavior to embarrass the parents.

Disputes with neighbors can be compromised. A judge may choose not to sue or dispute a problem with a neighbor over a property line or with a local contractor. The role of the family is linked to the judge's public image, especially in electoral office states. Recall that in those areas, judges often campaign with their families by their sides. Though they may deny it publicly, judges tend to feel vulnerable in publicized disputes.

The life of the unmarried judge is another area that sometimes can benefit from counseling. The single woman on the bench is often an object of outright curiosity and chatter. Who does she date? If she doesn't date, is she gay or are there other issues? Many single judges choose to socialize in some distant county or to maintain a second home where they can be more relaxed. At their primary residence, they may create a high social wall around themselves. These are matters that even collegial friendship does not easily admit to discussion, so outside supportiveness can be appropriate and sustaining.

[5] I.M Zimmerman, Isolation in the judicial career, 36 CT. REV. 4 (2000).

Aging and retirement. Most federal and state judiciaries offer pre-retirement orientation concerning benefits, health insurance, and the options for senior status and parttime judicial duties, as well as the new field of "private judging" and mediation. A number of programs include information for spouses, as well as a briefing on the personal emotional transition from active, full-time judging to retired or substitute status. For the majority, these presentations are adequate and suffice.

For a number of judges, however, this presents a serious tipping point in self-image and public esteem. Though it may be scoffed at and treated as unimportant, most deeply enjoy and covet their esteemed title of judge or justice as well as their standing in the community. Into retirement their title stays with them and remains cherished. That is quite understandable. In our society, the equivalent nomination continues past retirement from public office when we address individuals as "Governor" or "Mr. or Madam Secretary," or "Senator," over a lifetime. Taken all together, it is extremely helpful for a retiring judge to discuss this freely and to integrate it in the transition process.

The dynamics of retirement (or entry to a new occupation) in general are well understood now. However, the specific needs of judges are not understood. The common reaction is that this appears to reflect an inflated ego as well as a certain shallowness. Because of the centrality to self esteem of the customary use of these appellations, this issue is definitely not trivial to the retiree.

Interestingly, judges collude in maintaining an image that evokes ambivalent reactions. Most of what has been advanced above can elicit public reactions of "Poor baby! The judge needs so much support and soothing! All on a high salary, great benefits, prestige and power . . . what on earth can he need help for? Ridiculous!" As a result of society's mixed image, assistance for judges does not gather sympathy from the press, legislators, or even the majority of lawyers.

Aging presents a new set of issues. Due to the gravity and responsibility of their work, mandatory retirement terms are in place in most jurisdictions, except in the federal courts. When a sitting judge on active service begins to exhibit signs of cognitive or physical decline, it is quickly noted and guardedly discussed within the court family and bar. At the same time, ranks close around the judge, and there arises a great disinclination to question the judge's capabilities. It is easier to help judges in senior status, as most face periodic re-certification. However, an older full-time judge may suffer for a considerable period and operate marginally and in denial before help arrives. The federal circuits have issued guidelines for chief district

and bankruptcy judges who may face this matter. A wellness based judge-to-judge assistance program might help the spouse or family of the judge in question to obtain discreet medical and psychological guidance to deal with the massive denial and indignation often involved. The properly oriented presiding or chief judge can develop procedures for a graceful and dignified departure by a marginally functioning older judge.

Judicial culture and self-identity

Working as a psychotherapist and advisor to administrative law, state, and federal judges for many years has impressed upon me how insular the world of the judiciary really is, and how little is known about its inner culture and life circumstances. I have been impressed by how little accurate information the public and bar has about what it is like to be a judge. Fictional accounts about judges abound, but very little is to be found about the realities of judicial life. As a result, judges are distanced from the very group from which they originate.

Most judges in medical, emotional, family, or career difficulties soldier on without

Further, there is a widespread duality in how judges and the judicial system are perceived. On the one hand, great respect is shown to judges, and many lawyers aspire to that status despite obvious hurdles and costs. At the same time, the lawyer-judge relationship is ambivalent and burdened by formality and the strictures of the ethical code. Thus, even long-standing friends can feel a subtle inhibition in their relationship.

Figures of power and importance often inspire both envy and criticism. The media are quick to report questionable behavior or decisions. Practicing lawyers keenly observe and comment on all aspects of court life and share their opinions of sitting judges.

A profound change occurs as a lawyer becomes a judge.[6] He or she gradually loses the empathy and collegiality of most lawyers. While the judicial career is deeply satisfying and rewarding, it also includes the accumulation of feelings of guardedness, isolation, and vulnerability, all of which are kept hidden behind the public persona.

Therefore, when placed in a mixed treatment or recovery group, judges, for both objective and subjective reasons, feel too vulnerable to participate. If questioned, they are not likely to offer reasons beyond the obvious: their political vulnerability and right to privacy. Rarely will a judge even agree to be interviewed for such a treatment referral. The reaction brings on the fear

[6] M. Rosenberg, CONCEIVING THE SELF (New York: Basic Books, 1979).

of loss of privacy and the specter of shame, of being found unworthy of the title and office, and of public humiliation. As a result, most judges in medical, emotional, family, or career difficulties soldier on without help, turn to other judges for advice, or seek help totally outside the system.

Being a judge at any level of court is totally unlike serving in other roles, with the possible exception of holding high public office. In this comparison, there are also significant differences. High officials can strike back in word and print if attacked. Judges normally do not. Others can endlessly explain and justify their actions and decisions. Judges do not. Others can socialize and behave with greater latitude. Most judges gradually experience an irreducible isolation and restriction in their public speech and behavior. This also extends to their families to some degree.

Where judges do share the life of other high officials is in their extensive visibility, as well as in the unrealistically high expectations placed on their performance. As official problem solvers and models of wisdom, they are presumed to have little need of therapy or other help, because they are expected to self-correct if troubled or overburdened.

It is not surprising that we seldom hear high officials or judges disclose that they are in any form of treatment or care, other than for totally non-perjorative medical conditions. Both groups scrupulously avoid any sign of impairment of judgment or capability.

Widening assistance

Existing lawyer and judge assistance programs are staffed by able and dedicated professionals and volunteers (see "Judges in lawyers' assistance programs, page 20). Their reported results are impressive. The ideas advanced in this article are offered to increase assistance to judges and to encourage use of bar programs designed for judges. The following suggestions seek to improve the existing situation, taking into account specific facts of judicial culture and identity.

Sustained culture shift by leaders. A profound culture shift has to be gradually installed and promoted by the leaders—the chief justices, the chief federal circuit judges, state judicial councils, and chief judges at all levels of court. The goal would be to establish a "Wellness Initiative," a gradual and sustained culture change in the way assistance to judges is viewed and delivered. The key message would be to assure that all judges and their close family members can get assistance for a wide range of problems in total confidentiality. This policy would be rooted in a positive wellness model that promotes preventive practices for health,

positive collegiality, and early provision of help in a program specifically designed for the judicial ethos.

Confidentiality assured by court rules. The highest authority of each court system should establish by rule that all transactions and records pertaining to a judge's referral, treatment, and follow up are considered confidential. When a health delivery system is under contract to provide evaluation and referral for treatment it would also be covered by that rule, in addition to the usual medical and psychological safeguards of confidentiality and privilege.

Recovery counseling and group treatment. Contracts with health provider networks should stipulate that care would be exercised not to place a judicial officer in a treatment or recovery or counseling group composed of mixed public, nonjudge members. The judge would be included in a mixed group only after being advised that this is the treatment of choice and that confidentiality in such a group is voluntary and unenforceable. The important point here is that under current mental health practice, substance abuse and recovery require group counseling,[7] group education, and orientation. Group methods are excellent and valid treatment modalities,[8] but the fact remains that high officials and judges overwhelmingly elect not to participate. They choose individual care even though in many cases it may be slower, less effective, and less supportive.

There is nothing novel in proposing that "judge only" programs may work best in our society. Throughout the country and in Europe, groups exist composed exclusively for medical doctors with alcohol or alcoholism problems, for members of the clergy, or for mental health professionals.[9] All of these address a focal issue such as addiction and are led by either members of that profession, or counselors who are knowledgeable about that group and its culture.[10] Thus, modules of care solely for judges would encourage their voluntary participation, and offer the necessary understanding and privacy.

Liaison with conduct commissions. Allegations of judicial misconduct and ethical breaches should routinely be screened by a joint liaison group including Wellness Initiative committee members. Experience with complex cases can be shared with anonymity and built up as a

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[7] Nebraska Bar Association, MEMBER SERVICES N.L.A.P. (2005)

[8] R..J. DeRubeis and P. Crits-Christoph, Empirically Supported Individual and Group Psychological Treatments for Adult Mental Disorders, 66 J. OFCONSULTING AND CLINICAL PSYCHOLOGY 1 (1998).

[9] W.E. Piper et al, Cohesion as a basic bond in groups, 36 HUM. REL. 93 (1983).

[10] D.J. Martin et al, Relation of the therapeutic alliance with outcome and other variables: A meta-analytic review, 68 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 438 (2000); J.A. Gillaspy et al, Group alliance and cohesion as predictor of drug and alcohol abuse treatment outcomes,12 PSYCHOTHERAPY RES. 2 (2002).

resource bank. Panels responsible for dealing with misconduct allegations, and the chief judges who deal with colleagues with problems, have much to learn from each other. This would be a challenging intersection of the disciplinary and health responsibilities of judicial administration. The purpose would be to assist a judge as early as possible in a potentially destructive situation, and steer him or her to appropriate care. Such joint committees should have sufficient tenure to benefit from their case-by-case experience and resolution. In many cases, knowing that impartial counseling help is available may motivate a judge to cooperate more actively in the resolution of his or her difficulties.

System-wide orientation and education. The Wellness Initiative would establish and administer an annual program (for continuing legal education credit) on the full range of help available to judges and their families. DVDs and pamphlets would be provided outlining assistance that is available and how to obtain it. Vignettes would be presented as examples of help with, for instance, common family, medical, career, and aging issues. New judges would receive a full orientation by lecture and by talks with their chief and mentor judges.

An annual report would describe the activities of the Wellness Initiative and provide objective data on patterns of use and suggestions for improvement. A panel of outside consultants representing the various areas would be helpful. A wellness website with information and links to resources should also be established and frequently updated.

Training and orientation of chief and presiding judges. Each chief judge should attend an intensive brief course on "People Management." This would include such topics as morale maintenance for court and chambers staff and positive collegial relations on a trial or appellate court. Practice sessions would demonstrate how to evaluate reports of a possibly troubled judge and how to select alternative ways to offer help.

Volunteers. Because the appointment and tenure of chief judges varies widely among the states, experienced and temperamentally suited judges should be invited to become a corps of volunteers. They can help the chief judge when called upon and also participate in circuit-wide or state-wide education programs. Every instance of actual help provided should be studied (with appropriate anonymity) to build a knowledge base that will promote the Wellness Initiative's quality goals. A judge in difficulty does not automatically require a referral to the Employee Assistance Program network. Many can be helped by several private talks with an experienced and well-prepared colleague. Therefore, the Wellness Initiative would include the

screening, selection, and training of volunteer judges who are motivated and temperamentally suited to be short-term counselors within each court.

The Lawyers Helping Lawyers programs use such volunteers from the bar very successfully and can also be a resource. They have assembled a core of recovering lawyers and judges who can be paired with a new entrant to the program to provide guidance on an ongoing basis.

In my own work with court systems and new judge orientation, I have encouraged judges to acquire one or two "buddy judges" with whom they maintain a mutually helpful collegial dialogue and relationship. These can occur within a particular court or across jurisdictions. A buddy judge may keep up a friendly periodic contact by email or telephone with a judge in another state or circuit. The key elements of such an important relationship require that both members of the duo (1) not have a competitive personality tendency, (2) fully respect confidentiality, (3) be reasonably available to communicate even across time zones, and (4) be a patient listener. Many such productive buddy judge relationships are best formed when new judges attend "Baby Judge" courses.

The Wellness Initiative will add a court-wide set of oriented and prepared helpers who know the culture and the World of the courts

Referral networks. A system embracing a wide range of issues, and serving a prestigious and sensitive clientele, must be open and flexible.[11] It must be assumed that some judges will continue to search out helpers and treatment facilities in the open market of private practitioners or from religious and voluntary groups. The Wellness Initiative will add a court-wide set of oriented and prepared helpers who are judges or retired judges, and know the culture and the world of the courts. Not only will a judge have a qualified chief or presiding judge to turn to, but also a volunteer judge/counselor, or an existing group of judges he or she can join to discuss problems. The training of mentor judges would include sensitivity to problems that may arise in a new judge's career. Another part of the available network would be several telephone hotlines where a judge can ask anonymously about an ethical dilemma, a personal problem, or any other issue. All volunteer judges participating in the Wellness Initiative would thus be learning by experience and transmuting it into a database of help options.

[11] S.S. Glazer et al, The role of therapeutic alliance in network therapy: A family and peer-supported treatment for cocaine abuse, 24 SUBSTANCE ABUSE 2 (2003).

Publicity and public relations. For today's media, with its focus on sensationalism, the courts are a frequent and easy target. A judge's behavior during a trial or conflicts with the bar can easily attract partially informed comment and speculation.

A program such as the Wellness Initiative could easily be portrayed by critics as "coddling" judges, giving them preferential health benefits, offering excuses to be off the bench, or allowing errant judges to escape censure or removal. Opponents in elections can also use some of the issues to "smear" a sitting judge. Thus, the program must be set up and guided with the advice of the court's chief press or public relations person. In some jurisdictions it might be best to launch a wellness program gradually, without fanfare or even assigning a name to it.

Funding. As regards to funding, such a program should not impose significant additional costs because it would operate within the existing employee assistance program referral contracts and bar programs and use continuing judicial education programs for its promotion and training. In some cases, grant money could be available from foundations that support health initiatives and judicial administration.

What is crucial in launching and sustaining such an initiative is the leadership at the top and a cadre of motivated judges. Together they can design a program most appropriate to their state or circuit and serve as key supporters and stake-holders as it unfolds.

Summary

To improve the use of health and collateral services by judges and their families, certain key elements should be considered in the spirit of a Wellness Initiative.

1. The range of services should be quite broad, and include mental health treatment and education, as well as help with stress management, substance abuse and addiction, family relations, physical fitness, career satisfaction, aging, and retirement, among others.

2. Due to the strictures of the judicial role and function in society, great care should be employed in the way that assistance is provided, taking into particular account the need for sensitivity, confidentiality, and privacy.

3. In accord with current best practices in the health sector, the approach best described as positive wellness should be employed. Outreach, supportiveness, and good organizational morale should characterize the network of services offered.

Judges work at the convergence of powerful demands, quite unlike those that confront other high officials. Heavy dockets, restrictions on their public speech and behavior, intense media exposure, wide public ignorance of the role of the courts, and the relative isolation of the judicial position all contribute to their unique personal and occupational stresses. The current body of knowledge and practice in positive health maintenance and psychology can inform and help judges. A Wellness Initiative program would contribute immeasurably to the quality of life of judges, their families, and coworkers.

The Integration of Judicial Independence and Judicial Administration: The Role of Collegiality in Court Governance

R. Dale Lefever[*]

Can courts have both judicial independence and effective court administration? A collegial approach might be the best way to resolve this "conflict."

As Chief Justice Warren E. Burger stated, "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. . . . Can each judge be an absolute monarch and yet have a complex judicial system function efficiently?" (quoted in Clifford, 1998: 56-57).

If we accept the rhetorical nature of the question, then the appropriate answer is "no, they cannot." Independent of the logic of this conclusion, however, there continues to be a dynamic tension between judicial officers and those responsible for the administration of the court over what judicial independence can and should mean as it relates to the effective efficient administration of justice. The intent of this article is to examine the impact of judicial independence on court administration and to propose a model of governance, under the label of collegiality, which arguably strengthens both judicial independence and management efficiency.

As a starting point, it is important to recognize every organization has a culture—a set of values and traditions that influences areas such as policy development, decision making, resource allocation, and organizational communications (Ostrom et al., 2007). In most organizations, this culture is established and reinforced by those in key leadership positions as they convey their vision and goals for what they believe the organization should become and do, and then delegate the responsibility for achieving these goals to their subordinates.

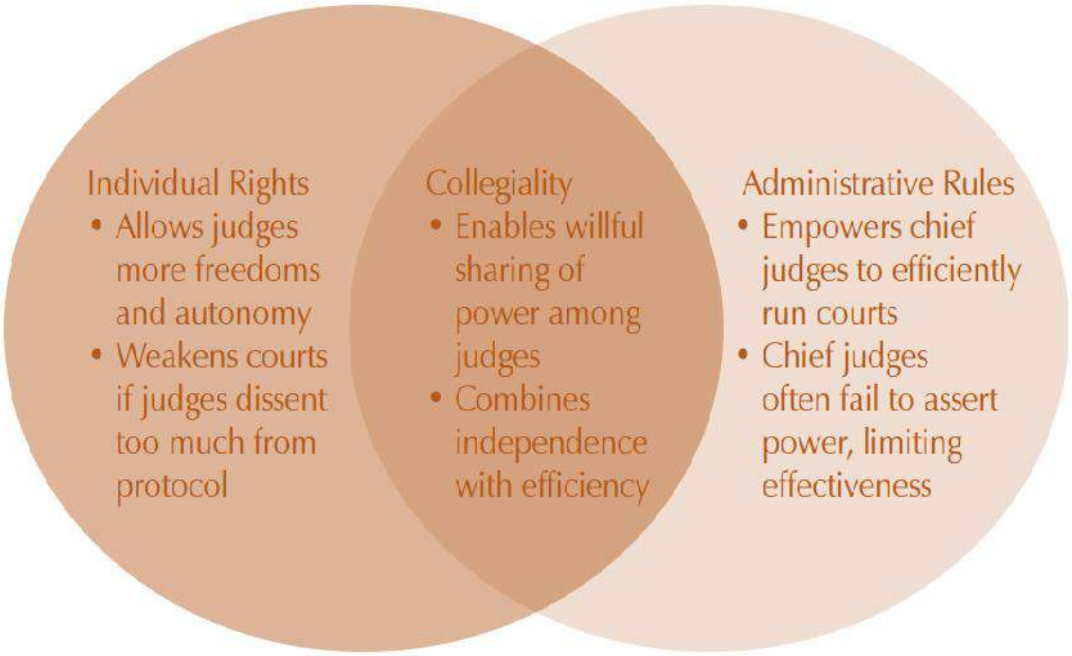
[*] Faculty Emeritus, Department of Family Medicine, University of Michigan, Ann Arbor. Future Trends in State Courts 2010; Reengineering Concepts, 66 (2010). Available at: http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=305. Last accessed on 15-11-2015.

> *. . . there continues to be a dynamic tension between judicial officers and those responsible for the administration of the court over what judicial independence can and should mean as it relates to the effective and efficient administration of justice.*

In the classic professions of law, medicine, and religion, however, those in leadership not only define the vision, determine the goals, and set the policies for achieving them, they also are the ones who have the primary responsibility to deliver the core services prescribed. For example, in medicine, physicians not only serve as policy makers and hold formal roles such as department chairs and service chiefs, they also provide the clinical care within the scope of the policies they themselves set for providing such care. In religious organizations, the clergy not only cast the vision for their congregation, they also teach their "flocks" the theology and model the lifestyles required for living out this vision within the church and the various communities served. Similarly, in the judicial system, the judges, through their local governance process, determine the administrative policies and then proceed to deliver the justice services defined in these policies. In essence, judges determine both the ends and the means of their work and expect to have the authority and autonomy to do both along the lines of their personal judicial philosophy and preferences.

It is this exercise of personal autonomy, along with the relative absence of a management hierarchy, that creates a special set of challenges for chief judges and court managers (i.e., generic terms for judges and administrators in formal leadership positions) as they seek to integrate the needs of judges for autonomy with the needs of the court for administrative coherence. In fact, it is not too extreme to suggest that one of the most difficult, and most important, roles of court leaders is to manage these equally important but competing values.

One approach for satisfying the constructive application of each value is to create an explicit court governance model—one that respects the independence of each judge to render independent case decisions, recognizes the importance of the role of the chief judge, and engages all the judges in the judicial administration process. This model, and the challenges involved in achieving it, will be described next.



Three Models

Basically, there are three forms of "self-governance" active within the typical trial court: (1) a model based on rights, which requires the exercise of personal power; (2) a model based on administrative rules, which requires the exercise of authority; and (3) a model based on relationships, which requires the exercise of collegiality. It is understood these are ideal types and unlikely to be applied in their pure form in any given court or across every issue. For example, judges likely will promote the model based on rights in debates over case management issues but yield to the authority of the chief judge regarding court budget issues.

It also is important to note many judges are not conscious of the actual governance model in place and would be ready to discuss alternatives if the opportunity was available and the desire to change was shared by their colleagues. The following analysis is designed to promote and guide such discussions and to encourage the judiciary to assess their current model, along with alternatives, against the standard of how well it contributes to the effective and efficient administration of justice.

Model Based on Individual Rights

The first option (i.e., a model based on rights) is not unique to the courts. As mentioned above, physicians, clergy, and most academic faculty members have a strong sense of individual discretion and "academic freedom." There are two special features within the courts, however,

which make this model especially relevant to the work of judicial administration. The first is the way each judge comes to hold his or her judicial position, and the second is the way in which the constitutional form of judicial independence is interpreted and applied to administrative affairs.

The way a judge assumes office is a critical factor in any discussion of court governance. Regardless of whether a judge is elected, appointed, or appointed and then retained in an unopposed election, the selection of a new judge most often results from the choice of a person or group external to the court in which they will serve. For example, the chief judge does not, as do senior executives in other organizations, create a position description, note the preferred qualities, interview, along with other judges, the top candidates, and ultimately select the next judge. Most accurately, the chief judge wakes up one morning and reads whom the governor appointed, the state legislature selected, or the citizens elected. Each new judge, therefore, initially enters the organization of the court with her or his own sense of legitimacy apart from the court in which they will function and independent of the chief judge and other judge with whom they will associate (i.e., the vast majority of judges don't recruit their colleagues; they inherit them).

There are several important ramifications of this factor for governance that deserve mention. The first is the relatively low sense of organizational identity that results from the selection process. The argument, which is not illogical, is that if the court does not select the judge, then it should have little to do with respect to how a judge administers his or her own affairs. Consequently, the initial allegiance of many judges often is stronger toward the electorate or the appointing authority than it is to the court as an organization. This certainly can change over time and be mitigated by the selection process if it is skillfully implemented in appointed and even elective systems. Regardless of the way in which a judge comes to office, this specific aspect of independence explains the low interest many judges exhibit in the administrative affairs of the court and why they believe they have the "right" to operate, administratively, with their own sense of what is best for them and their chambers. In many ways, each judge functions as a private law firm within the context of the larger court. This is why some judges, when confronted with a proposed court reform to which they are opposed, will state, "If the people who elected or appointed me don't like the way I function, they can end my term. Otherwise, I plan to function as I see fit."

In addition to a relatively low sense of organizational identity, the selection process also influences the attitude of many judges toward the chief judge or other judges attempting to serve in a governance role. As *Doris Provine* states, "A tradition of concern for preservation of the sovereignty of judges circumscribes policy initiatives at each level. In our country, judicial independence means not just freedom from control by other branches of government, but freedom from control by other judges. This ideal of autonomous judges, with roots deep in American legal culture, powerfully influences contemporary debates about efficiency and accountability within the judicial branch" (Provine, 1990: 247). As an example of this phenomenon, a large, general jurisdiction trial court voted overwhelmingly to adopt a court-designed sentencing guideline program for misdemeanor cases. However, several of those who dissented decided not to participate, which indicates that even the consensus of colleagues is not always compelling on any one individual judge.

The second factor, which tends to promote a governance model based on the individual rights of judges, is the interpretation and application of judicial independence in the area of judicial administration. Beyond the separation of powers, as it relates to the third branch of government concept, judicial independence at the individual level refers essentially to the freedom of judges to render impartial rulings based solely on the law and the facts in each case. This decisional autonomy is regarded as sacred, and when efforts to gain administrative efficiencies at the expense of this value collide, the judicial demand for independence most often does and should prevail. As one frustrated judge stated, "If they want me to be more efficient, the next time I conduct an arraignment I will say to the first person, 'you have the right to remain silent, pass it on.'"

However, while it is recognized that due process is not inherently efficient, this does not mean that decisional autonomy should be regarded as the ultimate goal. As Alexander Hamilton stated, "The Constitutional protections of judicial independence were instrumental and expedient to secure a steady, upright, and impartial administration of the laws. Judges need independence, not for their own sake (author's emphasis), but because an essential protection of public liberty was having judges decide cases on the basis of legal principles alone" (quoted in Wheeler, 1998: 13). The group Justice at Stake (www.justiceatstake.org) echoes this concern as they have placed their focus on the fair and impartial administration of justice (the end) rather than on judicial independence (the means).

The relevance of this point to court governance is that the area of decisional autonomy is best viewed as a means to an end and not as an end in itself. In other words, judges are free from something (i.e., interference in rendering their decisions), in order to be free to do something (i.e., dispense meaningful justice). If individual judges and court leaders can agree to start from this premise, then the test of any proposed court reform can be its ability to enhance the fair and impartial administration of justice (the end), which requires decisional independence on the part of the judge (the means). This focus on the goal and means as they relate to judicial independence is a more accurate and healthier foundation for court governance than "I am an independent constitutional officer and free to function as I please."

Clearly, there are legitimate elements to a model based on individual rights, especially as they relate to decisional autonomy, which must be protected even when some administrative inefficiencies result. However, individual judges need to understand while they can hold the court hostage through non-cooperation in the areas of judicial administration, this only weakens the court as the third branch of government, creates a governance model best described as an adhocracy, and even can undercut the prime value of equal protection. As John Gardner stated, "Our pluralistic philosophy invites each organization, institution, or special group to develop and enhance its own potentialities. But the price of that treasured autonomy and self-preoccupation is that each institution concern itself with the common good. That is not idealism, it is self-preservation. The argument is not moralistic. If the larger system fails, the subsystems fail. That should not be such a difficult concept for the contending groups to understand" (Gardner, 1993: 95).

Model Based on Rules

The second option for judicial self-governance is a model based on administrative rules—which requires the exercise of some form of organizational authority to enforce. One of the most common approaches for integrating the needs of the court to operate with administrative coherence is to elevate a member of the bench to the position of chief judge and to appoint a court manager with whom s/he can partner in the management of the administrative work of the court (e.g., budget, technology, space). And, independent of the process by which a judge comes to this leadership position (e.g., election, seniority, rotation, appointment by the state supreme court) and the preparation and interest they might have for and in the position (including "my turn in the barrel"), the important factors are this person is a judge and not a "non-judicial officer" and is a member of her or his respective court (i.e., a colleague).

While this governance structure is common in both state and federal courts, and at most levels of jurisdiction, this form of governance often operates with limited effectiveness. In fact, even though many states have worked to strengthen the role of the chief judge by crafting new documents outlining their authority (i.e., a new chief judge rule), most chief judges still are reluctant to exercise the authority behind the stronger words (e.g., "all judges *should* to all judges *will*"). There are several possible explanations for this.

First, the exercise of authority among colleagues is understandably awkward and potentially damaging to a relationship between peers. What most chief judges understand is they are "a first among equals" (state courts) or "an equal among firsts" (federal courts). They might try to cajole or persuade, but the idea of exercising direct authority over a colleague usually is viewed as the last resort, unless the issue rises to the level of referral to a board of judicial qualifications. While the bench often will view the chief judge as someone who needs to protect them from outside interference and the one responsible for garnishing important resources, they rarely view the chief judge as their "boss."

Second, many chief judges often continue to carry a relatively full caseload and simply don't have the time and emotional energy to expend on administrative affairs and the related conflicts that often emerge with their colleagues over these issues. Even when chief judges, usually in a larger court, are granted the option of a reduced caseload, many refuse to accept this for fear of appearing not to be "pulling their own weight" in the case management system. Therefore, it is much easier, and more comfortable, for chief judges to focus on their individual calendars and reserve administrative matters to the 30 minutes routinely scheduled for these issues at the quarterly judges' meetings.

Third, in many courts, the term for the chief judge is relatively brief in comparison to the time required to learn the position and exercise the leadership required in relationship to the growing complexity of issues that now confront the court (e.g., the economic crisis; the increase in attacks on judges for making unpopular decisions). In fact, the stress of the position and the fact there most often are no monetary incentives attached to it combine to make a limited term a condition for some judges to even accept this leadership role.

Fourth, and related to the issue of term length, is the concern of other judges that if any one individual serves in this role "too long" they will develop a power base that might threaten the autonomy of the other judges. The incumbent chief judge, therefore, is reluctant to challenge a

colleague who could be the future chief judge—an informal détente where the understanding is "If I don't mess with you, you won't mess with me."

And, lastly, many chief judges do not believe their respective supreme court "has their back," if they should choose to challenge a colleague on an administrative issue. Waving the new chief judge rule in front of a colleague simply is unlikely to be compelling unless there is strong support for the chief judge who has the courage to challenge another judge on her or his manner of doing their judicial business.

Again, while a model based on rules—which requires the exercise of authority—is a common structure in court governance, its successful application among the judiciary is random at best unless codified into a more formal governance structure, including written bylaws, and supported by a judicial consensus regarding the court's direction in the areas of court reform (discussed further below).

Model Based on Collegiality

The third option for court governance, and the one which has the greatest potential for integrating judicial independence and judicial administration, is a model based on relationships—which requires the exercise of collegiality. In order to evaluate this option, however, it is important to understand what collegiality means in the context of governance as used in this article. Quite often, the word collegiality is viewed as synonymous with civility—demonstrating a professional courtesy to other judges or refraining from public criticism of other judges. While this definition and application certainly are worthy ones, they don't carry the full measure of what is intended. Collegiality is a governance concept that refers to the (willful) sharing of power and authority among colleagues. It is an approach that recognizes the importance and reality of individual rights as well as the need for a modicum of administrative authority. It also conveys the sense that neither of these is sufficient in itself nor should they be imposed on others (i.e., neither an adhocracy nor a bureaucracy is a viable model for sustainable governance).

Collegiality, however, should not be viewed as a soft compromise between adhocracy and bureaucracy that is designed to appease any one person or group. As Jim Collins explains in Built to Last, the goal in structuring an effective organization, in any sector of our society, is to replace the tyranny of the "or" with the genius of the "and." In other words, it is not meaningful judicial independence "or" effective judicial administration, but meaningful judicial independence "and" effective judicial administration that should be the goal of court

governance. As Collins states, “We’re not talking about mere balance here. ‘Balance’ implies going to the midpoint, fifty-fifty; half and half. A visionary organization doesn’t simply balance between preserving a tightly held core ideology and stimulating vigorous change and movement; it does each to an extreme” (Collins and Porres, 1997: 44). Therefore, collegiality is recommended as the most robust form of court governance; it is the model that can go beyond balance and compromise and actually integrate the needs and rights of individual judges with the needs and rights of the court for effective and efficient judicial administration.

The application of collegial governance should be viewed as a comprehensive model that cuts across such issues as case disposition decisions; trial/courtroom practices; administrative activities; and personal/off-the-bench conduct. And, in each of these areas, it is critical for the judges to discuss and decide the degree to which individual rights, the authority of the chief judge, and the consensus of the bench should prevail. In this regard, it is important these decisions be codified so they transcend the individual term of any one chief judge and become the “best practices” for governance of the court. In one sense, these governance principles should serve as a set of bylaws for the court with respect to judicial administration.

Steps to Achieve Collegial Governance

There are several steps that would assist in this process. First, a shared set of institutional standards should be developed with full participation by the bench in each of the four areas mentioned above: *case disposition decisions; trial/courtroom practices; administrative activities; and personal/off-the-bench conduct*.

In the area of case *disposition decisions*, where the sensitivity to violations of judicial independence is understandably the greatest, uniform practices likely will be minimal. This area, however, should not be ignored, since the criterion for the value of any proposed court reform or claims of judicial independence should be its contributions to the impartial administration of justice and not the individual rights of judges or the arbitrary exercise of authority. For example, in one threejudge court, one judge sentenced every first-time DUI offender to a weekend in jail. The result was that the other two judges ended up with a calendar packed with DUI cases. In another instance, one judge allowed a partial payment of fees, but the others did not, which brought claims of unfair treatment by attorneys on behalf of their clients. The point behind both of these examples is not the rightness of either practice, but that the action of any one judge has implications for other judges, for the court as an organization, and for the need to guarantee equal protection. This factor, in itself, should be sufficient to

warrant an open and civil discussion on the absolute power of a judge in the area of case disposition decisions.

The same case could be made in the other three areas as well. For example, in the area of *trial/courtroom practices*, issues regarding voir dire and the number of jurors that need to be called might be worth discussion, since this has a direct impact on the court's budget. Is it really the appropriate application of judicial independence, for example, to have the court policy be 40 jurors with one or more judges insisting on 100? There already are national efforts on preparing judges in trial court management and groups that focus on jury management in an effort to improve the performance of the court in both areas. As Doris Provine writes, however, "No two judges, it seems, do anything in precisely the same way in such areas as scheduling procedures, motion practice, alternative dispute resolution programs, and voir dire. Litigators ignore these local idiosyncrasies at their peril" (Provine, 1990: 247).

In the area of *court administration*, there are case management issues with respect to managing such things as the time to disposition, the role of continuances, and the equitable distribution of cases. Interestingly, in the court culture, the reward for a judge being current with her or his cases is the assignment of more cases from those judges who are not—an interesting reward system. There are similar issues in the areas of personnel, budget, and technology. The main point is that the consequences of a lack of consistency in administrative procedures often are:

it increases the complexity and costs of administration and adds confusion for those outside the court who need to use its services. If the core values of the court include costeffectiveness and stewardship, the impact of numerous, individual administrative practices by judges warrants some discussion. The underlying question in these discussions is whether in a seven-judge court, for example, there are seven courts with one judge each or there is one court with seven judges?

On the topic of administrative inefficiencies that can result from a misapplication of judicial independence, it is important to note many judges are not aware of the administrative procedures of other judges or the impact of their own decisions on the administration of the court. Judges enter the system laterally rather than working their way up through the management ranks where the impact of a lack of uniformity is felt most acutely. They also tend to work in relative isolation from the central administration of the court, focused most on their chambers, and simply never see the larger consequences for the court. This is why it is recommended, especially in developing a consensus on court administration procedures, that the court executive officer be included in these discussions. While, as Ralph Waldo Emerson stated [in his essay "Self-Reliance], "a foolish consistency is the hobgoblin of little minds," there are areas where procedural consistency is an important application of collegiality and results in the common good.

The final area that should be covered by discussion on governance in an effort to reconcile judicial independence and judicial administration is *personal/off-the-bench conduct*. While some of this is covered by the canons on ethics, there are many other "gray areas," which would be worthwhile to review. For example, the scheduling of vacations can be "surprisingly" volatile. In fact, one chief judge who advocated that any judge who planned to be gone for more than five consecutive days should notify the chief judge was removed from office. Apparently, the "slippery slope" argument prevailed—today it is notification, but tomorrow it will be approval. As the chief judge noted, "all I was trying to do was serve the public by making sure there were enough judges present to meet the demands of the docket. If we cannot manage a vacation policy, we are doomed." While it is unlikely the court is doomed, this situation does point to the difficulty managing the personal time of judges can entail. A second common area of contention involves a judge leaving for the day once his or her calendar is complete rather than being available to the court to assist other judges or litigants. And a third example involves the frequent issue of who should represent the court with respect to the media? It is not uncommon for a chief judge to read in the morning paper a scathing criticism

of the court or to have a local or state political official receive a private communication challenging a position taken by the local or state court.

One of the maxims of any governance model is to debate with many voices but govern with one. The first step, therefore, in developing a sustainable governance model in the court is a healthy debate over how best to reconcile a judge's need for independence and the court's need to function with administrative coherence. These debates should take place at least in the four areas of case disposition decisions, trial/courtroom practices, court administrative activities, and personal/ off-the-bench conduct, with advancing the meaningful dispensation of justice serving as the primary criterion for resolving any conflicts.

Conclusion

As Alexander Hamilton stated, "The administration of justice contributes, more than any other circumstance, to impressing upon the minds of people affection, esteem, and reverence towards their government" (quoted in Wheeler, 1998: 2). This is a high calling and one every judge should take personally and seriously as they decide on the form of judicial self-governance they desire and are willing to support. If the goal of judicial independence is the fair and impartial administration of justice, than the goal of court governance needs to align with this priority. A court that is not well-governed will never be well-administered. A collegial form of governance, with its practical focus on the common good, offers one solid option for achieving this important integration.

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It is All About the People Who Work in the Courthouse

Hon. Kevin S. Burke[*]

Tough budgetary times mean lower morale at the courthouse. What can judges do to improve staff morale and, thus, the administration of justice?

In 1906 one of the founding fathers of judicial administration, Professor Roscoe Pound, gave a speech: "The Causes of Popular Dissatisfaction with the Administration of Justice." Although there have been enormous improvements to the administration of courts since then, courts continue to have challenges that cause popular dissatisfaction with the justice system. Pound said one reason that drove dissatisfaction was a belief that the administration of justice is an easy task to which anyone is competent. Nothing has changed since Pound's speech on that belief, but for those of us who are in the field of judicial administration, we know how painfully complex this system has become.

The most effective court leaders will challenge their courts to face problems for which there are no simple, painless solutions.

During the last several years there has been a sea change in the funding for courts and in attitudes toward public employees. Regardless of how courts are funded, with rare exception courts are facing budget challenges that dwarf any that they have seen before. Courts have laid off and furloughed employees, frozen hiring and salaries, and complained loudly about the lack of funding. Budgets are critical, but courts are in an era in which the political mantra for many is to question the work ethic and commitment of public employees in language that can hurt. Vitriolic language about public employees may be good politics, but that language has a negative effect on the morale of those who work in the courthouse. Public-employee bashing compounds the courts' budget challenges.

One of the assumptions of public employment has been that there was job security that would be followed by a reasonable pension. The pay that public employees received may not have been as good as what the private sector was offering, but there was safety, security, and the prospect of a decent retirement. To illustrate where we are, this year 75 percent of the nation's school districts will lay off teachers. That is not great job security. Public-sector workers earn less than their private-sector counterparts with equal educational backgrounds. Although state

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pension benefits are frequently better than those of the private sector, most public employee pensions are not lavish. Now those wages and benefits are being challenged. There is no safety in continued employment or in retirement. Many states are questioning whether they can offer the pensions that were offered in the past, and some are even suggesting rather dramatic steps to change the pension benefits that employees have already accrued. There are proposals, for example, to allow states to go through bankruptcy, which would allow them to dramatically renegotiate public-employee pensions.

The thrust of this article is not to argue what should be done with respect to budget decisions. States have managed to close $170 billion in budget gaps since 2009, but the next fiscal year is expected to be even worse, with budget shortfalls projected to be in excess of $140 billion. There is a time and a place for courtfunding discussion. Court leaders cannot print their own money, but they can have enormous positive (or negative) impact on the morale of the courthouse workforce. Many of the funding debates and discussions are conducted in forums in which court leaders are not able to unilaterally dictate the ultimate results. Where court leaders can have an influence is courthouse-employee morale.

There has been a suggestion that there is a clash of cultures in a courthouse—the professional culture (judges) and the organizational culture (everyone else). But when it comes to analysis of courthouse morale, there may be a troika of entities to consider: judges; court administration, such people who join national and local associations or may have professional degrees in court administration; and line workers, who perform many tasks not even peculiar to the judiciary. Line workers perform data entry, staff magnetometers at the courthouse entrance, and perform a myriad of other essential tasks. But the role they play is not particularly glamorous, and line workers may not even be aware that what they do contributes to the court's mission to dispense justice.

There are no reliable statistics on courthouse morale, but if the courthouse workforce reflects the nation as a whole, courts are in trouble. Worker happiness in America is the lowest in history. Public-sector employee morale has reached a new level of discontentment. One study showed a dramatic drop in public-employee morale just in the last six months. There is worry, disorder, alienation, and discouragement. All three parts of the courthouse troika (judges,

senior court administration, and line staff) feel like they are being asked to do more for less—not just in terms of salary, but also in terms of the psychic compensation or a positive work environment that is essential for motivating the best in all of us. The danger in the current economic situation is that court leaders will hunker down. They will try to solve the budget problem with more short-term fixes, such as tightening controls or enacting across-the-board cuts, wage freezes, or furloughs. The most effective court leaders will challenge their courts to face problems for which there are no simple, painless solutions. Courts face problems that will require everyone, including lawyers, to learn new ways. There really is not an option to defend every legacy practice to the end. Effective court leaders will use the present turbulence to build for the future and bring closure to part of the past. To survive these times, courts will need to change the key rules of the game, but to do that they need a workforce that is prepared to effect change. Panic, fear, and low morale are not conducive to creative change. Courts need a workforce that can think creatively.

To survive these times, courts will need to change the key rules of the game, but to do that they need a workforce that is prepared to effect change. Panic, fear, and low morale are not conducive to creative change

The economy presents courts with many challenges. There are technical challenges, such as how to deal with fewer dollars or how to introduce technology that is efficient and effective for the court. Those challenges, as complex as they seem, can be answered by technical experts. But the biggest challenge courts face is the ability to adapt, to focus on significant and

sometimes painful shifts in people's habits, status, role, identity, and way of thinking. This is true for judges, senior court administrators, and line staff.

In this period of turbulence, the most difficult topics must be discussed. It is not an easy era to be a leader, and a natural tendency is not to welcome dissent or embrace task conflict. Dissenters can be obstructionists and a pain to deal with, but dissenters who provide a different perspective need to be heard. Court leaders need to listen to unfamiliar voices and set a tone for candor and risk taking. Now, more than ever, tone is important in the courthouse.

The subject of motivation or employee morale is not clearly understood and, all too frequently, poorly practiced. To understand motivation, one must understand human nature and therein lies the problem. Many courts have become reasonably good at thinking about how to motivate people who appear before judges, or are eager to understand concepts like procedural fairness in the courtroom. There is interest in how social science can assist judges in decision making. Evidence-based sentencing and procedural fairness are hot topics in judicial education. What courts need is evidence-based court leadership and procedural fairness for those who work in the courthouse. Quite apart from the beneficial and moral imperative of treating colleagues and employees with respect and dignity, all the research shows that well-motivated employees are more productive and creative. People need positive reinforcement. People thrive if there are high expectations. The most successful courts are willing to think about how to satisfy employee needs.

. . . Research shows that well-motivated employees are more productive and creative. People need positive reinforcement. People thrive if there are high expectations.

Although social scientists can tell us a lot about motivation, fostering great morale is an art, not a science. Within the field there are different schools of thought. With rare exception, many judges and some court administration leaders may not be particularly well grounded in what the social scientists tell us makes a difference and what does not. Court leaders cannot allow themselves to be guided through this turbulent era by their own myths about employee morale. Today's court leaders need to ask how they view the courthouse work staff, what biases they bring to the analysis, and what theory about human behavior in the workplace best suits their courthouse needs.

Because the troika of court employees is quite disparate, different motivational theories may apply to each group. Court leaders need not be able to teach a course in motivational theory,

but they need to understand how to apply such thinking in the courthouse. For example, Frederick Herzberg's motivational theory, reduced to its simplest form, is people work first and foremost on their own self-enlightened interest because they are truly happy and mentally happy through work accomplishment. Assuming that theory is true, it is a great theory for judges, but may not explain how best to deal with line staff.

A second example is Abraham Maslow's motivational theory. He argues that there is a ranked order of motivating factors: (a) interesting work, which is likely to be found for judges and senior court administrators and perhaps less likely for line staff; (b) good wages, which is something that court leaders cannot unilaterally provide; (c) full appreciation for the work done, which can be provided for the whole troika; (d) job security, which is a big issue for line staff and perhaps court administration, but probably less so for judges; (e) good working conditions, which are necessary for the whole troika; (f) promotions and growth in the organization, which are least likely a concern for judges, but more so for court administration and line staff; (g) feeling of being in on things, which is a concern for all of the troika, but a challenge to accomplish; and (h) personal loyalty to fellow employees or camaraderie, which is important for the whole troika but potentially a challenge in trying to get everyone to view themselves as a comrade.

Even if court leaders' knowledge about motivational theory is suspect, at a minimum court leaders need to be disabused about common courthouse-morale myths.

Myth 1. I'm the leader; I can motivate people. Frankly, many court leaders are charismatically challenged. For the most part, people need to motivate themselves, but a good court leader can establish an environment where employees motivate and empower themselves. The more an individual or a group of people understand the nature of a problem, the more effective they will be in solving it. Put another way, the difference between hallucination and vision is how many people see it. Courts cannot be led by people with hallucinations. Effective court leaders must articulate a vision everyone can see and set up that environment where people feel motivated and empowered.

Myth 2. Fear is a good motivator. At best, fear is a good motivator for a very short period. Fear of judges plagues many courthouses and contributes to low morale in court administration and line staff. It is hard for line staff to feel like a judge is a colleague if they are afraid of the person. The power imbalance between the troika explains why fear occurs, but it does not justify permitting that fear to exist or continue. Jody Urquart says there are three ways to

motivate people to work harder, faster, and smarter: threaten them, pay them a lot of money, or make their work fun. The first two are ineffective. But making work fun has a track record of effecting real change. Creativity, intuition, and flexibility are keys to successful court operations today.

Myth 3. I'm okay; it is them I need to worry about. Motivating court employees starts with court leaders motivating themselves. If court leaders hate their job, it is likely everyone else will hate their jobs, too. If court leaders are stressed out, everyone else is also. Enthusiasm is contagious. It can start at the top with the attitude of court leaders; regrettably, it can end there too.

Myth 4. Increased pay is all we need to keep the courthouse happy. Money is important, but human motivation is more complex than a lack of salary. What motivates one person does not necessarily motivate another. Recently, the New York Times had a story about the salary situation for judges. The article described some of the anger and rage many New York judges feel about their predicament. For over a decade the New York judges have had neither raises nor cost-of-living adjustments. Situations like frozen pay can initially be an irritant, but if it happens for a decade there are real consequences economically for the employee. With rare exception, a lot of judges have historically had a difficult time with salary issues. Now the judges' misery has been visited upon the rest of the courthouse employees. Situations like the judges in New York face can create anger and resentment. The economy will someday get better, and courts then will face pent-up demand for wages. In the meantime, the wage issue is a present problem of morale. Court leaders need to continue to advocate for fair wages for everyone in the courthouse, but until that day they cannot in frustration say, "There is nothing we can do about the morale around here."

Myth 5. People are good, honest, and will always perform to the best of their ability. For the most part, that is true, but there are times in which people are human, fallible, and prone to mistakes. The effective court leader is not delusional. A demoralized judge, court manager, or line worker can infect the atmosphere. Effective court leaders need to know how best to change the behavior of those whose actions threaten to infect the institution.

An effective court leader can learn from Booker T. Washington, who said few things can help an individual more than to place responsibility on him and let him know that you trust

Supporting employee motivation is a process, not a task. It can be enjoyable, rewarding, and integral to the effectiveness of an organization. Leadership on the issue of morale is, however,

not just about good intentions. Court leaders need to work with employees to ensure that their motivational concerns are considered.

A court is a dynamic organization. Problems, issues, and concerns will arise. Being an effective colleague is one way to enhance the performance of a court. For the troika within the courthouse, however, collegiality among all three is a challenge. An effective court leader can learn from Booker T. Washington, who said few things can help an individual more than to place responsibility on him and let him know that you trust him. Sustaining court collegiality means investing in trust, developing a mutual understanding, and building commitment and joint ownership. Trust is the ability to have honest communication no matter what. Communication between the troika is not always premised on the perception that judges want honest communication from court administration and line staff. Even between judges, there are court leaders who do not embrace honest communication.

Steven Covey in *The Speed of Trust* says, "Simply put, trust means confidence. The opposite of trust, distrust, is suspicion." In today's environment, no courthouse can survive if there is rampant suspicion. Trust means that there is a willingness to be vulnerable to the actions of others. Trust means confidence and faith that positive expectations will be met. Fundamentally, trust is a belief in the goodwill of the people with whom you work One of the most difficult problems facing organizations is what some commentators have termed "auditmania" (the urge to have some independent inspection, which in the extreme is a virus infecting our society). Auditmania exists, they argue, because we no longer trust people to act for anything but their own short-term interests. As trust tends to decline, the demand for accountability (auditmania) increases. The absence of trust can feed on itself, simply breeding more and more suspicion. Employees who function under stifling oversight perform sluggishly so trust continues to stagnate. Robert Shaw said that a high level of trust allows people to say what is on their mind and not feel that it will come back to hurt them. Trust in the workplace ensures that lines of communication are open and that no one is hiding information or wasting time trying to decide the political implications of his or her views.

Integrity is an important element of effective court leadership. Honoring your word is important. You either keep your word, or as soon as you know you cannot, say that you cannot keep your word to those who are counting on it and clean up any mess you have caused. That is what integrity is about. Actions must clearly match your expectations. Good court leaders ask, Do my behaviors model my beliefs?

Courthouse morale is not easy to change. Some courthouses have great morale, and others have room for improvement. There are steps to creating a fun and vibrant court workplace:

1. Understand yourself.
2. Ask questions and then take first steps. Are you satisfied with the level of motivation that exists in your court? If not, what could be changed? Can you identify barriers to motivating people within your court? What motivational activity could be done that has not been thought of before?
3. Consider writing a list of three to five things that motivate judges, court administration, and line staff.
4. Give up the notion that professionalism and the nature of the mission of the courthouse means being serious all of the time.
5. Encourage employees to leave work behind them at the end of the day.
6. Recognize the necessity of balance between individual contribution and group support. The goal is an open, honest, and healthy courthouse where judges and staff can be candid about their views and experiences and take greater responsibility for their actions.
7. "TGIM"—Thank God It's Monday. Do what it takes to ensure that judges, court administration, and line staff look forward to coming to work.

Resources:

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- National Center for State Courts (2005). "Measure 9: Court Employee Satisfaction." In CourTools: Trial Court Performance Measures. Williamsburg, VA: National Center for State Courts. www.ncsconline.org/D_Research/CourTools/Images/courtools_measure 9.pdf Ostrom, B. J., R. Hanson, and M. Kleiman (2005). "Examining Court Culture," 11:2 Caseload Highlights: Examining the Work of State Courts. http://contentdm.ncsconline.org/cgibin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=664
- Ostrom, B., R. Hanson, C. Ostrom, and M. Kleiman (2005). "Court Cultures and Their Consequences," 20:1 Court Manager 14. http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=986

- Pearson, E. (2010). “Only 45 Percent of American Workers Are Happy with Their Jobs, Survey Finds,” New York Daily News, January 6.
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Bullies on the Bench

Douglas R. Richmond[*]

When judges move beyond occasional displays of anger, frustration, or impatience and intentionally abuse or denigrate those who appear before them, they may be fairly described as bullies. Although some intemperate behavior from judges is to be expected if not welcomed, and not all judicial discourtesy or undignified behavior merits professional discipline, there is no place for bullies on the bench. This Article examines the limits on intemperate behavior by judges. (http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Stress/Resource-Guide.aspx)

... It is therefore no wonder that judicial conduct commissions and supreme courts do not wish to micromanage judges' courtroom activities or scour their writings for evidence of possible misconduct. ... Part III addresses the phenomenon of judicial bullying in more detail, first offering obvious examples of such misconduct and then exploring the misuse of humor in judicial opinions, arguing that when attempts at judicial humor turn into ridicule they also count as bullying. ... Judge Parker, like so many other judges disciplined under Canons 2 and 3(B)(4), was a serial bully. ... Although the Michigan Supreme Court did not condone Judge Hocking's intemperate comments to Maas, it determined that the comments did not rise to the level of judicial misconduct. ... In addition, lawyers or litigants sometimes provoke judges' intemperate behavior. ... Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States pitted Northern District of Texas District Judge John McBryde against the Judicial Council of the Fifth Circuit. ... After that comparatively gentle rebuke, Judge Kent turned to Bradshaw's supplemental briefing, which, while containing relevant authority, still failed to explain why Bradshaw's claim against Phillips sounded in maritime law. ... That relatively light penalty for arguably impeachable misconduct hardly inspires confidence that the Council would have sanctioned Judge Kent for his distemper in Bradshaw.

I. INTRODUCTION

Former United States District Judge Samuel B. Kent, who sat in Galveston, Texas, had little patience for lawyers he perceived as careless or incompetent. [n1] He freely chastised such lawyers in his orders and, thanks to the legal media and the internet, some of his more colorful decisions attracted wide attention among members of the bar. Consider, for example, his order denying a defendant's motion to transfer venue in *Labor Force, Inc. v. Jacintoport Corp.*, [n2] in

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which the hapless defense lawyer confused the transfer of a matter within divisions of a judicial district with a motion to transfer venue between districts, and, in doing so, apparently misread a federal venue statute. As Judge Kent angrily wrote in his order: "Manifestly, any person with even a correspondence-course level understanding of federal practice and procedure would recognize that Defendant's Motion [was] patently insipid, ludicrous and utterly and unequivocally without any merit whatsoever." [n3] Continuing, Judge Kent quoted the portion of the statute that the defendant "hopelessly incorrectly interpreted and cited" and emphasized the relevant language, as the emphasis was "apparently needed by blithering counsel." [n4] He then "emphatically" denied the defendant's "obnoxiously ancient, boilerplate, inane" motion and disqualified the defense lawyer "for cause . . . for submitting [such] asinine tripe." [n5] Consistent with his tone in the *Labor Force* case, Judge Kent allegedly used to brag about his ability to intimidate people and [*326] reportedly boasted that "'everyone was afraid of him.'" [n6] His judicial career eventually flamed out in spectacular fashion. He was accused of sexually assaulting two women on his staff and was sentenced to nearly three years in prison after he pled guilty to one count of obstruction of justice as part of a plea bargain in exchange for the dismissal of multiple sex crime charges. [n7]

Another federal judge in Texas, Sam Sparks, caused a stir in August 2011 when his order concerning a party's poorly-conceived motion to quash a subpoena quickly went viral. [n8] "You are invited to a kindergarten party," he announced in the order, a sarcastic mandate necessitated by the lawyers' inability "to practice law at the level of a first year law student." [n9] He further wrote: "Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshals have beds available . . . so you may wish to bring a toothbrush in case the party runs late."[n10] Judge Sparks's sarcasm drew an e-mail rebuke from a Fifth Circuit colleague, who found the order "not funny," and described it as "so caustic, demeaning, and gratuitous" that it "cast[] more disrespect on the judiciary than on the now-besmirched reputation of the counsel." [n11] Judge Sparks was unrepentant, saying he had received supportive e-mails from hundreds of federal and state judges. [n12]

Mississippi Chancery Court Judge Talmadge Littlejohn achieved notoriety in October 2010 when he jailed a lawyer for criminal contempt after the lawyer failed to stand and recite the pledge of allegiance in court. [n13] The lawyer, Danny Lampley, spent [*327] approximately five hours in jail before Judge Littlejohn released him so he could appear on behalf of another client. [n14] As Judge Littlejohn later acknowledged, his action clearly violated Lampley's First Amendment rights. [n15] The Mississippi Commission on Judicial Performance concluded that

Judge Littlejohn violated five canons of judicial conduct and a section of the Mississippi Constitution. [n16] Based on Judge Littlejohn's admission of error and his promise to make the recitation of the pledge in his courtroom voluntary in the future, the Commission recommended to the Supreme Court of Mississippi that it publicly reprimand Judge Littlejohn and fine him $ 100. [n17] After expressing what might be viewed by some observers as insincere concern about the gravity of the judge's misconduct in light of the outcome, [n18] the Mississippi Supreme Court adopted the disappointingly weak sanctions recommended by the Commission. [n19]

Finally, consider the remarks of Justice Frederick L. Brown of the Massachusetts Appeals Court at oral argument in *Edwards v. Labor Relations Commission.* [n20] In *Edwards*, George Edwards sued the National Association of Government Employees ("N AGE") for breaching its duty of fair representation when it did not represent him in an earlier proceeding. [n21] The Massachusetts Labor Relations Commission dismissed Edwards's complaint against NAGE, and Edwards appealed. At oral argument, Justice Brown made a series of comments to the Commission's counsel critical of NAGE, its president, Kenneth Lyons, and Lyons's family. [n22] Justice Brown [*328] stated that Lyons kept his entire family on NAGE's payroll, complained that Lyons and his family were feathering their nests financially while NAGE members received nothing for their dues, claimed NAGE was a union run amok, and asserted NAGE did not truly represent anyone--its leaders collected members' dues "'and [kept] on stepping and [bought] more condos and [had] more expense accounts and [had] fancy banquets.'" [n23] Lyons learned of Justice Brown's comments and, despite the fact the court affirmed the Commission's judgment for NAGE, complained about Justice Brown to the Massachusetts Commission on Judicial Conduct. [n24] Ultimately, the Massachusetts Supreme Judicial Court publicly reprimanded Justice Brown for his misconduct at oral argument, calling his remarks "intemperate, excessive, unjustified by anything properly before the court, and gratuitously insulting of persons directly and indirectly implicated" in the *Edwards* case? [n25]

Judges wield considerable power over lawyers and litigants who appear before them. As one judicial ethics scholar has explained:

> In litigation, the judge is the maximum boss. Everyone else is a supplicant, compelled to engage in stylized demonstrations of obeisance. We stand when the judge enters and leaves the room. Our "pleadings" are "respectfully submitted." Before speaking, we make sure that it "pleases the court." We obey the judge's orders and we even say "thank you" for adverse rulings. n26

As the foregoing examples regrettably illustrate, however, these required trappings of respect do not ensure respectable behavior by the judges to whom they are offered. [n27]

Regulating judges' demeanors is a difficult task. Judges are human and may occasionally display anger or annoyance. The crowded dockets and scarce judicial resources common to many courts seemingly assure some intemperate conduct from judges. [n28] Even judges who enjoy impressive self-control and gracious bearings may sometimes lose patience with incompetent or uncivil lawyers, or especially difficult or disruptive litigants. Lawyers and [*329] litigants sometimes incite judges. [n29] Moreover, judicial candor is a highly-valued trait and judges must be allowed some flexibility in criticizing the performance of lawyers who appear before them. In the same vein, trial and appellate lawyers are generally considered to have thick skins; indeed, tolerating judicial criticism is an ordinary rigor of litigation practice. It is therefore no wonder that judicial conduct commissions and supreme courts do not wish to micromanage judges' courtroom activities or scour their writings for evidence of possible misconduct. At the same time, judges are held to high standards of conduct, [n30] and their inability to comply with established professional norms erodes public confidence in the judiciary. [n31] As the *In re Brown* [n32] court explained:

> For every litigation at least one-half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day he might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well. . . . An impartial manner, courtesy, and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess.
>
> [*330] Finally patience and courtesy are required of a judge toward those he deals with in his official capacity for the additional reason that a judge in that official capacity is granted the power to command silence and respect in his presence . . . . When a judge berates or acts discourteously to those before him--even if he cannot affect their interests as litigants--he abuses his power and humiliates those who are forbidden to speak back . . . . [T]here are times when a judge must and should admonish and express harsh judgment to those before him, but they must be limited to the necessities of the occasion, being neither gratuitous nor irrelevant to it. [n33]

When judges move beyond occasional displays of anger, frustration, or impatience and intentionally abuse or denigrate those who appear before them, they may be fairly described as bullies. This label is apt because bullying is characterized by a power imbalance between

bullies and their targets, and judges unquestionably wield great power over lawyers, litigants, jurors, and witnesses. When individual judges bully, they expose all judges to public contempt. [n34] Although some intemperate behavior from judges is to be expected if not welcomed, and not all judicial discourtesy or undignified behavior merits professional discipline, there is no place for **bullies** on the **bench.** This does not mean that every abusive judge must be removed from the bench. But judicial conduct commissions and superior courts must deal convincingly with judges who are bullies. In some cases that may require the imposition of substantial discipline, including suspensions without pay and removal. More fundamentally, judges and lawyers who are inclined to find guilty pleasure in the sort of gratuitous abuse Judge Kent dished out in the *Labor Force* case need to adjust their thinking.[n35]

This Article examines the limits on intemperate behavior by judges. Part II discusses the applicable rules of judicial ethics and the means by which judges' conduct is regulated. Part III addresses the phenomenon of judicial bullying in more detail, first offering [*331] obvious examples of such misconduct and then exploring the misuse of humor in judicial opinions, arguing that when attempts at judicial humor turn into ridicule they also count as bullying. In doing so, it uses one of Judge Kent's best-known opinions to illustrate the point.

II. REGULATING JUDICIAL COURTESY

Judges are required to treat all who appear before them with courtesy and dignity, and to similarly exhibit patience. Judges must also perform their duties fairly and impartially. A judge's failure in these respects may (a) subject the judge to discipline; or (b) cause a higher court to reverse the judge's decision and reassign the case upon remand.

A. Judicial Conduct Rules Governing Abusive, Discourteous, or Intemperate Behavior

The Model Code of Judicial Conduct furnishes standards for the ethical conduct of judges and establishes a basis for the regulation of judicial behavior by judicial conduct commissions and courts. [n36]The Model Code is the successor to the Canons of Judicial Ethics adopted by the American Bar Association in 1924. [n37] The ABA substantially revised the Model Code in 2007. Before the 2007 revision, the Model Code had not been comprehensively revised since 1990, although specific provisions were amended in 1997, 1999 and 2003. [n38] The Model Code has long included provisions intended to aid in the regulation of judges' discourteous and intemperate behavior. [n39] Prominently, Canon 3(B)(4) of the 1990 version of the Model Code established that a judge "shall be patient, dignified, and courteous to litigants, jurors, witnesses,

lawyers and others with whom the judge deals in an official capacity." [n40] In 1999, the ABA amended Canon 3(B)(4) [*332] to require judges to mandate "similar conduct of lawyers, and of staff, court officials, and others subject to the judge's control." [n41] Rule 2.8(B) of the 2007 Model Code contains the identical requirement. [n42] More generally, earlier versions of the Model Code provided in Canon 2(A) that a judge "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." [n43] This requirement is captured in Rule 2.2 of the 2007 Model Code, which states that a judge "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." [n44]

The Code of Conduct for United States Judges contains similar provisions. Canon 2A of the Federal Code tracks both 1990 Model Code Canon 2(A) and 2007 Model Code Rule 2.2. [n45] Canon 3B(3) of the Federal Code tracks Canon 3(B)(4) of the 1990 Model Code and Rule 2.8(B) of the 2007 Model Code. [n46]

Judges have been sanctioned under these rules for engaging in a variety of discourteous behaviors. [n47] In *Disciplinary Counsel v. [*333] Parker*, [n48] for example, an Ohio municipal court judge, George Parker, was conducting a probation violation hearing when the defendant's mother, who was in the gallery, raised her hand. [n49] Judge Parker emphatically instructed the woman to leave the courtroom. [n50] When she gently protested, he again told her to leave and threatened to jail her if she did not. [n51] When she muttered in disbelief on her way out of the courtroom, Judge Parker immediately called her back, found her in contempt of court, sentenced her to one day in jail, and then allowed officers to take her away in handcuffs. [n52] The Ohio Supreme Court concluded that Judge Parker "stained the integrity" of the judicial system through his "intemperate, unreasonable, and vindictive" decision to eject the woman from his courtroom and jail her for contempt, and determined that in doing so he violated Canons 2 and 3(B)(4), among others. [n53]

[*334] Judge Parker, like so many other judges disciplined under Canons 2 and 3(B)(4), was a serial bully. [n54] In another case, he attempted to intimidate a prosecutor into accepting a guilty plea to a misdemeanor charge, a lower charge than the prosecutor was willing to accept. [n55] In a domestic violence case, he both humiliated the victim and demonstrated bias against her husband in open court. [n56] In many other cases over a two-year period, Judge Parker "routinely mistreated those who appeared before him." [n57] Among other bizarre incidents, he asked a teenage defendant, who was Jewish, why he attended a Catholic high school; forced defendants

who were accused of alcohol-related offenses to admit in open court that they were alcoholics; refused to return the cane of a defendant--who therefore had to request assistance to leave the witness box--on the basis that the defendant had used the cane to damage a vehicle, was a repeat offender, and was "snake-bit mean;" belittled a prosecutor in a drunk-driving case and essentially called her stupid in open court; repeatedly insulted a victim-witness advocate; and finally, insisted that a victim of domestic violence tell him whether she had forgiven her husband. [n58]

For Judge Parker's many violations of Canons 2 and 3(B)(4), the Ohio Supreme Court suspended him from practice and from serving as a municipal judge for eighteen months without pay. [n59] In an interesting attempt to mitigate his discipline, Judge Parker established that his misconduct was attributable to a mental disability--narcissistic personality disorder ("NPD"). [n60] Because his expert psychologist testified that NPD was not readily treatable, however, the Court declined to afford it significant mitigating effect. [n61]

Similarly, the judge in *In re Sloop* [n62] committed several serious acts of misconduct, one of which involved a "condescending [*335] tirade" directed at a defendant, Ms. Mercano. [n63] Judge Sloop was "rude, abrupt, and abusive" in his dealings with Ms. Mercano, and acted more like a prosecutor than a judge during her appearance. [n64] He oddly defended his conduct as purposeful and also argued that he had not lost his temper. [n65] The Florida Supreme Court was unsure which explanation was worse, but concluded that, either way, he had violated Canon 3(B)(4) of the Florida Code of Judicial Conduct. [n66] Although Judge Sloop's conduct toward Ms. Mercano, standing alone, might have warranted punishment short of removal, that incident was "merely the latest episode in a judicial career marred by displays of anger that ha[d] resulted in warnings by the [Judicial Qualifications Commission] and fellow judges to Judge Sloop concerning his temper." [n67] Accordingly, and because more serious misconduct followed this incident just two months later, the Court removed him from office. [n68]

Although *Parker* and *In re Sloop* involved judges who were accused of multiple instances of misconduct, courts are sometimes willing to sanction judges for single incidents of intemperate behavior that are sufficiently serious. [n69] For example, in *In re Ochoa*, [n70] an Oregon judge, Joseph Ochoa, became enraged when a defense lawyer, Edward Dunkerly, went "behind his back" to obtain a continuance of a trial so that Dunkerly could accompany his family on a European trip. [n71] Judge Ochoa left Dunkerly a voicemail message rescinding the continuance, ordered Dunkerly's client to appear unrepresented while Dunkerly was in Europe, and at that

hearing disparaged the lawyer to his client. [n72] Judge Ochoa [*336] told the client that Dunkerly wanted a continuance so that he could go to Europe "and was probably using the thousands of dollars paid to him by the [client's] family to go to Europe rather than try the [client's] case." [n73] Dunkerly rushed back from Europe as soon as he retrieved Judge Ochoa's message, but he was forced to withdraw from the representation because the judge's conduct irreparably harmed his relationship with his client. [n74] When charged with misconduct as a result of this incident, Judge Ochoa admitted his misconduct and consented to censure. [n75] The Oregon Supreme Court approved the agreement and censured him. [n76]

In re Hannigan [n77] is another case in which a single instance of intemperate behavior by a judge justified discipline. The opinion in *In re Hannigan* resulted from an administrative proceeding before the New York Commission on Judicial Conduct. The judge had presided over plea discussions between a prosecutor and a teenage defendant in which he called the defendant's life a "garbage pit," accused her of being stupid and dishonest, mocked her receipt of public assistance, and "sarcastically referred to the defendant's 'constitutional right[s] to leave school, to have the community support you, to relax, to lay back, . . . to have babies, [and] . . . to be stupid." [n78] The Commission determined that through "this intemperate diatribe" the judge had breached his duty "to be patient, dignified, and courteous and conveyed the appearance of bias." [n79] Declaring it "wrong for a judge to engage in name-calling and dehumanizing remarks, particularly to a litigant," the Commission observed that "[e]ven a single instance of intemperate language" may support a finding of misconduct. [n80] Because the judge had enjoyed a long and unblemished career on the bench and the charged misconduct was an isolated incident, the Commission concluded a public warning or admonition was an appropriate sanction. [n81]

Despite their broad wording, Canons 2(A) and 3(B)(4), and Rules 2.2 and 2.8(B), are rules of reason. [n82] Not all discourteous or [*337] undignified behavior by judges directed at lawyers, parties, witnesses, or others will justify discipline or even charges of misconduct. [n83] Courts and judicial conduct commissions weighing judges' alleged violations should generally consider the context in which the challenged conduct took place. [n84] In *Turner v. Turner*, [n85] for example, the Alaska Supreme Court determined that although a trial judge had expressed anger and frustration with a pro se litigant during a divorce proceeding, the judge's conduct did not cross the "threshold of impropriety." [n86] The Court reached this conclusion for two reasons. First, the litigant provoked the judge's comments. [n87] Second, the litigant took some of the judge's

comments out of context and misconstrued others. [n88] The remarks the litigant misconstrued were in fact awkward attempts at humor intended to demonstrate empathy. [n89]

In re Hocking [n90] nicely illustrates courts' consideration of the facts surrounding judges' alleged intemperance and their willingness to accommodate some unfortunate conduct. In that case, the Supreme Court of Michigan evaluated two instances in which Judge Hocking's discourtesy was allegedly unethical. [n91] The first incident involved an exchange between the judge and the prosecutor during a sentencing hearing in a sexual assault case. [n92] The hearing proceeded properly for substantial time; both sides fully argued their positions without interruption. [n93] As is often the case, the prosecution argued the court should adhere to Michigan sentencing guidelines, which would result in a long prison term for the defendant, and the defendant urged the court to deviate from the guidelines and impose a much lighter sentence. [n94] Although the defense and the prosecution had scored the sentencing guidelines [*338] identically, it was apparent that "Judge Hocking had decided to lower the scoring." [n95] As Judge Hocking began to pronounce the sentence, it became clear he intended to depart significantly from the sentencing guidelines because he believed they did not adequately address the facts of the case. [n96] The prosecutor, Pamela Maas, argued "the scoring of the guidelines was not at issue." [n97] In a flash, Judge Hocking angrily ordered Maas to sit and stated that she could appeal if she did not like what he had to say. [n98] Then, just as quickly, the judge's demeanor returned to normal and he explained why he believed that the sentencing guidelines did not control his decision in this case. [n99]

The second incident involved Judge Hocking's treatment of a lawyer, Elaine Sharp, in post-judgment custody proceedings. Sharp represented the father in the case and, after the judge terminated the father's joint custody, she filed a motion for reconsideration. After losing that motion, she moved to reinstitute joint custody. [n100] While the parties were arguing the second motion, Judge Hocking immediately told Sharp that he considered her latest motion to be "simply a disguised second motion for rehearing," and he demanded to know in what way the motion was different. [n101]Sharp responded, "[a]ll right, fine," and then brusquely asked the judge what evidence supported his custody determination and inquired whether he considered the father's relationship with the child in reaching his decision. [n102] Saying "that's enough," Judge Hocking denied the motion to reinstitute joint custody as a frivolous motion for reconsideration, and ordered Sharp to pay the mother's attorney's fees and costs as a sanction. [n103] Sharp and Judge Hocking then embarked on a series of disagreeable and disrespectful exchanges, in which both accused the other of being on or from another planet

(the judge made the first such remark), and which concluded with Judge Hocking sentencing Sharp to five days in jail and imposing a $ 250 fine for contempt of court. [n104]

A majority of the Michigan Judicial Tenure Commission concluded that Judge Hocking was guilty of misconduct for being rude and discourteous to Maas and Sharp, and that those events [*339] and other misconduct not presently relevant warranted a 30-day unpaid suspension from office. [n105] Judge Hocking challenged the commission's recommendation in the Michigan Supreme Court. [n106]

Returning to the Maas exchange, Judge Hocking and the Court agreed that the judge lost his temper and should have handled Maas's interruption of his pronouncement more graciously. [n107] But, the court noted, not every "angry retort or act of discourtesy" from a judge qualifies as misconduct. [n108] Rather, the facts of each incident must be evaluated separately, and judges are subject to discipline only if their conduct is "clearly prejudicial to the administration of justice." [n109] That was not the case here. [n110] Maas, who had been given ample opportunity to explain her views to the court on an appropriate sentence, breached established courtroom decorum when she interrupted the judge. [n111] This lapse was perhaps understandable given her surprise at the judge's apparent intent to depart downward from the confinement range specified in the sentencing guidelines, but her interruption of the judge's remarks clearly breached the "unwritten rules of courtroom etiquette." [n112] Judge Hocking's reaction to the interruption, although admittedly too strong, was understandable under the circumstances. [n113] Although the Michigan Supreme Court did not condone Judge Hocking's intemperate comments to Maas, it determined that the comments did not rise to the level of judicial misconduct. [n114]

Judge Hocking's "caustic and abusive" exchange with Sharp was another story. [n115] While agreeing that the judge had not abused his contempt authority, the court characterized his behavior as "shockingly injudicious." [n116] The court found that Judge Hocking instigated the confrontation with Sharp by challenging her to explain why her motion was not frivolous, made "caustic comments in an abusive tone, and personally attacked" her. [n117] Unlike his exchange with Maas, in which he was abrupt and [*340] momentarily biting, the judge's persistent exchange with Sharp reflected "a total lack of self-control and an antagonistic mindset predisposed to unfavorable disposition." [n118] Although Sharp behaved improperly, the judge unquestionably had the ability to regulate her conduct through traditional means, up to and including citation for contempt. [n119] Instead, Judge Hocking behaved so rudely that his misconduct was prejudicial to the administration of justice. [n120]

The Maas and Sharp incidents were but two of six instances of the judge's alleged misconduct that the court reviewed. [n121] Principally for his conduct toward Sharp, the supreme court suspended the judge from office for three days without pay. [n122] A dissenting justice would have exonerated Judge Hocking altogether, inasmuch as he lost his temper but once and only then with a lawyer who was herself contemptuous and discourteous. [n123] "An isolated incident of rudeness," the dissent contended, should be privately reprimanded and, "hopefully, prevented from recurring." [n124] Although the dissenting justice did not condone Judge Hocking's behavior, and would certainly censure drastic or repeated instances of discourteous behavior, he reasoned that the court did the judiciary a disservice when it "condemn[ed] human failings as judicial misconduct." [n125] What the generally thoughtful dissent apparently failed to recognize, of course, is that *any* act of misconduct can be characterized as a "human failing."

B. Reassignment of Cases Based on Abusive, Discourteous, or Intemperate Conduct

Courts may also police judges' intemperate conduct outside the disciplinary process. For example, an appellate court in remanding a case may order that the case be transferred to a different judge.[n126] [*341] In other instances, an appellate court may actually reverse a trial court judgment as a result of judicial misconduct. [n127] Two recent cases, *In re United States*, [n128] and *People v. Leggett*, [n129] are illustrative.

In re United States arose out of an evidentiary dispute. The district court had repeatedly refused to admit certain evidence the government offered, thus leading the government to petition for a [*342] writ of mandamus. [n130] On appeal, the Seventh Circuit observed that the transcript of the district judge's remarks revealed "a degree of anger and hostility toward the government that [was] far in excess of any provocation" discernible from the record. [n131] The judge suspected the government of tampering with evidence, although he acknowledged that his supposition of misconduct was "speculative," which the Seventh Circuit branded "an understatement," [n132] and later described as "implausible speculation." [n133] Outside the presence of the jury, the judge repeatedly accused the prosecutors of lying, and he further threatened to convene hearings concerning the prosecutors' perceived misconduct. [n134] Moreover, the judge apparently failed to consider the prosecutors' explanations for why his suppositions were mistaken. [n135]

The Seventh Circuit concluded the challenged evidence should be admitted and, more importantly for present purposes, determined that on remand the case should be reassigned to a different district judge. [n136] The court reasoned reassignment was required because "[n]o

reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his unreasonable fury toward the prosecutors." [n137]

While the decision in *In re United States* was based on the district judge's extraordinary anger, *People v. Leggett* involved a trial judge's pervasive denigration of a defense lawyer in front of the jury. [n138] As a result, the court in *Leggett* reversed the defendant's conviction for carjacking and ordered a new trial. [n139]

Problems began during defense counsel's cross-examination of the sole eyewitness to the carjacking. The judge interposed his own objection to the defense lawyer's questions, calling the examination of the witness "irrelevant" and "silly." [n140] By calling the cross-examination "silly," the judge disparaged the defense lawyer and negated the line of questioning. [n141] Things further deteriorated during the parties' closing arguments. During closings, the judge told the defense lawyer that his argument over [*343] the prosecutor's speaking objections was "turning . . . into a comedy." [n142] When the defense lawyer objected during the prosecutor's closing, the judge not only overruled the objection but said to the defense lawyer, "[w]ould you behave like a professional, please and not a clown." [n143] When the defense lawyer subsequently moved for a mistrial and protested that the judge's treatment of him during closing arguments was outrageous, the court denied the motion and further responded, "you're outrageous." [n144] The judge also improperly asked the defense lawyer in the jury's presence whether he "wished to behave like a gentleman" or be escorted out of the courtroom. [n145]

The *Leggett* court acknowledged that trial judges are sometimes required to admonish lawyers but explained that judges should either do so at a sidebar or first excuse the jury. [n146] The court further explained that when a judge errs and makes an injudicious remark about a lawyer in front of the jury, he should issue a curative instruction. [n147] In *Leggett*, the judge's many intemperate remarks about defense counsel in the jury's presence, and especially the comment that the defense lawyer was acting like a clown, were "simply inexcusable" and mandated a new trial before a different judge. [n148]

C. Summary

Judges are required to be patient, dignified, and courteous when interacting with jurors, lawyers, parties, witnesses, and others in an official capacity. [n149] More generally, judges must perform their duties fairly and impartially. [n150] Despite their absolute and seemingly inflexible wording, judicial conduct rules governing courtesy do accommodate some intemperate behavior by judges.[n151] [*344] Courts are more likely to find a judge guilty of misconduct

where the judge has exhibited a pattern of discourteous or abusive behavior. [n152] Isolated incidents of discourtesy or abuse generally must be quite serious to justify discipline by state authorities or the reassignment of a case by a higher court. In addition, lawyers or litigants sometimes provoke judges' intemperate behavior. [n153] The trend, however, is to hold judges strictly accountable for intemperate conduct in court, and it is plain that judges' disrespectful conduct toward parties and bullying of counsel are increasingly "meeting with zero tolerance." [n154] These are positive tendencies, as judges themselves agree. [n155]

The next step, then, is to ask what type of response by judicial conduct commissions and higher courts "zero tolerance" describes. To their credit, state supreme courts have in a number of cases significantly punished judges who bullied lawyers, parties, and others. [n156] In too many other cases, though, high courts have [*345] responded timidly to proven misconduct. [n157] Judges who admit misconduct and promise to reform are allowed to stipulate to light sanctions that higher courts uphold. [n158] Unfortunately, courts credit apologies and promises of personal transformation in cases where the judge's misconduct is so obviously wrong that remorse and reformation are no answer. [n159]

There is certainly room for compassion, flexibility, leniency, and rehabilitation in judicial discipline. All judicial discipline cases, like all lawyer discipline cases, rise and fall on their facts. It is also true that agreed resolutions of disciplinary matters are a necessity for disciplinary systems to function efficiently. But judicial conduct commissions and courts must recognize that protecting the public and the bar, and inspiring confidence in those groups, requires firmness when confronting judicial bullying.

III. RAW JUDICIAL BULLYING TO PURPORTED HUMOR

At some point, a judge's anger, annoyance, or impatience with a lawyer, litigant, juror, or witness crosses from simply regrettable or unfortunate conduct to judicial misconduct. In most cases this transformation is obvious; much like pornography, judicial conduct [*346] commissions and higher courts know bullying when they see it. Instead of simply expressing emotion, the judge under scrutiny has intentionally denigrated someone or purposefully trampled on a person's rights. The more frequent or extreme a judge's intemperance, the greater the likelihood of intervention by responsible authorities or higher courts. [n160] In other instances, a judge's conduct ostensibly presents a closer call, as when an attempt at humor in a proceeding is better characterized as ridicule.

A. Judges Bullying Lawyers, Parties and Others

It seems likely that an appreciable percentage of cases in which judges bully lawyers are not reported to judicial conduct commissions or appealed on that basis because the lawyers appear before the offending judges with sufficient frequency that they must be concerned about possible retribution. [n161] As an alternative to reporting or appealing, lawyers may respond to judicial misconduct by using procedural mechanisms to avoid those judges in subsequent cases. [n162] Most lawyers have to be pushed quite hard before they will consider reporting judges' uncivil behavior to authorities.[n163] It takes "significant courage" for lawyers who appear in front of abusive judges, and who may be required to do [*347] so again, to report those judges' misconduct to judicial conduct commissions or similar authorities. [n164] Litigants who feel that a judge bullied them are more likely to complain, perhaps because they are not repeat players in the accused judge's court and thus do not fear retaliation as a lawyer might, or because they believe the judge's conduct impaired their rights and they are determined to achieve vindication. In any event, there are a disturbing number of reported cases in which judges have plainly bullied lawyers, litigants, and others. Some exemplary cases follow.

McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States pitted Northern District of Texas District Judge John McBryde against the Judicial Council of the Fifth Circuit. [n165] The Council sanctioned Judge McBryde after hearing evidence of his abusive treatment of other judges and lawyers spanning many years. [n166] United States Attorneys from two affected districts made the complaint of abuse that triggered these proceedings. [n167] The *McBryde* decision is predominantly focused on the judge's constitutional challenge to his discipline, but one of the incidents of misconduct described in the opinion is illustrative.

Judge McBryde had a standing pretrial order which required that all parties appear at settlement conferences. [n168] A lawyer had defended a corporation and its employee in a sexual harassment case. [n169] The lawyer did not have the individual defendant attend the settlement conference because she justifiably thought his presence would be counterproductive, he had no assets that would enable him to contribute to any settlement, and he had authorized the lawyer to settle on his behalf. [n170] Nonetheless, Judge McBryde was displeased and sanctioned the lawyer for her client's failure to [*348] appear. [n171] After chastising the lawyer, he ordered her to attend a reading comprehension course and submit an affidavit swearing to her compliance. [n172] The

lawyer obeyed and submitted an affidavit attesting to the fact she had attended a course for three hours per week for five weeks. [n173] This did not satisfy the judge, who questioned her truthfulness and required her to submit a supplemental affidavit listing each day that she attended the course, identifying the location of the course on each day of her attendance, specifying the duration of her attendance each day, and providing the name of a person who could confirm her attendance on each day listed. [n174] The lawyer again complied. [n175] The special committee of the Council that investigated Judge McBryde's conduct characterized this incident "as reflecting a 'gross abuse of power and a complete lack of empathy.'" [n176] The court accepted the committee's assessment, describing the lawyer as "hapless counsel bludgeoned into taking reading comprehension courses and into filing demeaning affidavits, all completely marginal to the case on which she was working." [n177]

Judge McBryde's mandate that parties attend settlement conferences generally promotes settlement and is common practice. The lawyer should have recognized the need to file a motion asking that the court forego the individual defendant's appearance, or to have otherwise sought to have him excused. Failing that, Judge McBryde might reasonably have been expected to scold the lawyer or to reschedule the settlement conference to permit the individual defendant's attendance and perhaps even require the lawyer to bear any delay-related expenses. The judge's angry reaction, however, was wildly disproportionate to the lawyer's misjudgment. The sanction he imposed was designed to humiliate the lawyer rather than to induce compliance with his standing pretrial order, and his requirement of the second affidavit defied all reason. Sadly, this incident was perfectly in character with Judge McBryde's alleged reputation. [n178]

[*349] The New York judge in *In re Mulroy* resorted to bullying a prosecutor because he did not like sitting in Utica, where the underlying case was tried, and wanted to return to his home in Syracuse. [n179] Describing Utica as a "'f--ing black hole,'" the judge accused the prosecutor of over-charging the case as a felony and pressed her to accept a guilty plea to a misdemeanor so that he could get back to Syracuse for a "'men's night out.'" [n180] The judge threatened to declare a mistrial if the prosecutor refused to plea bargain. [n181] The prosecutor apparently held her ground and the judge never made good on his threat of a mistrial. When charged with misconduct, the judge acknowledged that he had not acted in a courteous and dignified manner, but contended that his "banter" was merely an expression of concern about a possible trial error. [n182] The referee assigned to the matter rejected the judge's argument and the court upheld that determination. [n183] The court ultimately removed the judge from the bench. [n184]

Many cases of judicial discourtesy involve denigration, ridicule, or other mistreatment of parties and, in particular, pro se litigants. [n185] Misdemeanor criminal defendants and litigants and witnesses whose lifestyles displease some judges are also frequent targets of bullying, as *In re Hammermaster* [n186] illustrates. The municipal judge charged with misconduct in *In re Hammermaster* regularly asked Hispanic defendants if they were "legal" and frequently "ordered them to enroll in English classes." or to either become citizens or leave the country within specified times. [n187] The judge often threatened defendants with life imprisonment or indefinite incarceration until they paid fines or costs. [n188] He ridiculed a defendant who was suffering from bipolar disorder when the defendant attempted to explain his condition at sentencing. [n189] In another case, he criticized a defendant's [*350] "meretricious relationship" with his fiancee, which supposedly impaired the defendant's ability to pay his fine because the woman was "freeloading off him. [n190] To encourage what he considered to be more responsible behavior by the defendant, the judge threatened to order the fiancee to sell her car if it was not timely licensed and insured. [n191] For these and other instances of bullying, the Washington Supreme Court suspended the judge without pay for six months. [n192]

In *In re Judicial Disciplinary Proceedings Against Michelson*, [n193] a defendant appearing before Wisconsin municipal court judge Robert Michelson told the judge she could not pay her fine because she had to care for her two grandchildren as a result of her daughter's illness. [n194] Judge Michelson responded that he could not accept that excuse because the woman had no legal obligation to support her grandchildren. [n195] The judge then asked the woman why the children's father could not support them. [n196] The woman responded that the older child's father could not be located and the identity of the younger child's father was unknown. [n197] Upon hearing that response, Judge Michelson "became angry and said, 'I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut.'" [n198] Judge Michelson then declared the daughter should not have had children if she could not support them. [n199] He ultimately established a monthly payment plan to allow the woman to pay her fine. [n200] Agreeing with a judicial conduct panel that the judge's remarks were discourteous, intemperate, and undignified, and further evidenced socioeconomic bias, the Wisconsin Supreme Court reprimanded him. [n201]

B. From Humor to Ridicule

The judicial bullying described in the *McBryde*, *In re Mulroy*, *In re Hammermaster*, and *Michelson* opinions was glaring. Other [*351] instances of bullying may be less obvious initially, as where judges use purported humor in their opinions to cruel effect. This is not to

say that humor in judicial opinions is uniformly undesirable. [n202] Humor and figurative language may demystify the law, crystallize issues or illustrate points, help place issues in context, animate facts, and make opinions more readable. [n203] Unfortunately, judges' attempts at humor often suggest to some litigants that the court did not take their cases seriously or decide them fairly, serve only to offend or ridicule the participants, or are at best insensitive. It is a rare judge who can effectively employ humor in an opinion. [n204] On the other hand:

> If one accepts the proposition that a judge who directs biting humor at a litigant or an attorney commits an act of aggression, it is easy to see why humor is offensive. It is not a fair fight: The judge gets to have the first and last word on the matter. The subject of the judge's ridicule has no recourse but to accept the joke and the accompanying humiliation. n205

High courts generally discourage and disfavor humor in opinions. As the Iowa Supreme Court once observed, "[f]lamboyance in decorum and attempts at clever ridicule are not admired characteristics" in a judge. [n206]

For a textbook example of judicial bullying in the guise of humor, we return to the court of former U.S. District Judge Samuel B. Kent to examine his caustic opinion in *Brads haw v. Unity Marine Corp.* [n207] In *Bradshaw*, Judge Kent persistently ridiculed two lawyers whose performance he considered inadequate. The plaintiff, John [*352] Bradshaw, was a seaman on a tugboat who was injured when he attempted to climb from the boat onto a Phillips Petroleum Company dock. [n208] Phillips initially moved for summary judgment, arguing that Bradshaw's first amended complaint, which brought Phillips into the case, was untimely because it was filed after the Texas two-year statute of limitations for personal injury claims had run. [n209] Bradshaw, on the other hand, insisted his claim against Phillips was timely because it was governed by the three-year federal statute of limitations for maritime personal injuries. [n210] This left the court to decide whether maritime law or state law controlled Bradshaw's claims. [n211] In short, this was a straightforward personal injury case requiring simple application of the *Erie* doctrine. Many cases like it had surely come before. Indeed, as Judge Kent noted, the answer to the question presented at summary judgment could be "readily ascertained." [n212] It is therefore reasonable to question why Judge Kent would designate his opinion for publication unless he wanted to publicly humiliate the lawyers for Bradshaw and for Phillips. [n213] Humiliate them he did.

After briefly outlining the facts of the case and framing the issue for decision, Judge Kent launched his assault on the lawyers. He began:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact--complete with hats, handshakes and cryptic words--to draft their pleadings entirely in crayon on the back side of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care [*353] laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins. [n214]

Continuing, Judge Kent stated the standard for granting summary judgment and briefly explained the burden-shifting that takes place at summary judgment. He then resumed his assault on the lawyers, asserting that Phillips's counsel had begun a "descent into Alice's Wonderland" by citing but a single case in Phillips's summary judgment motion--a case that basically stated the *Erie*doctrine--without explaining its relevance. [n215] Moreover, the judge complained, Phillips's lawyer did not even cite to the Texas statute of limitations that Phillips claimed governed the case. [n216] "A more bumbling approach [was] difficult to conceive," Judge Kent wrote before signaling his intent to criticize Bradshaw's lawyer by stating, "but wait folks, There's More!" [n217]

Bradshaw reportedly answered Phillips's "deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument," although Judge Kent did acknowledge that Bradshaw's lawyer at least cited the federal statute establishing the limitation period for maritime personal injury claims. [n218] Bradshaw's lawyer's work was hardly stellar, however, as Judge Kent made clear:

> Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision . . . . The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal reporter (remarkably enough hitting a nonexistent volume!). [n219]

After that comparatively gentle rebuke, Judge Kent turned to Bradshaw's supplemental briefing, which, while containing relevant authority, still failed to explain why Bradshaw's claim against Phillips sounded in maritime law. Bradshaw seemed to argue that he had

sufficiently pled a maritime personal injury claim [*354] against Phillips because he had adequately alleged such a claim versus his employer and the vessel on which he worked. That reasoning was doomed to fail because admiralty law must be invoked against each defendant individually. [n220] Despite this critical flaw, Judge Kent sarcastically commended Bradshaw "for his vastly improved choice of crayon--Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about [Bradshaw's] briefing." [n221] "But at the end of the day," the court continued, "even if you put a calico dress on it and call it Florence, a pig is still a pig." [n222]

Finally, Judge Kent reached the core of Philips's motion, introducing his analysis by writing, "[n]ow, alas, the Court must return to grownup land." [n223] Describing the pivotal issue as whether state law or maritime law controlled Bradshaw's claim against Phillips--an answer that could be "readily ascertained"--Judge Kent explained that under Fifth Circuit precedent, a dock owner's duty to the crew of a vessel using its dock is clearly defined by state law. [n224] As a result, Bradshaw's claim against Phillips was subject to the two-year statute of limitation provided by Texas law and was therefore time-barred. [n225] The court mockingly sustained Phillips's summary judgment motion.

> After this remarkably long walk on a short legal pier, having received no useful guidance whatsoever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes that it has satisfactorily resolved this matter. [n226]

That conclusion did not terminate Judge Kent's torment of Bradshaw's counsel, however, since Bradshaw still had a claim against his employer, Unity Marine Corporation.

> Plaintiff retains, albeit seemingly to his befuddlement and/or consternation, a maritime law cause of action versus . . . Unity Marine . . . . However, it is well known around [*355] these parts that Unity Marine's lawyer . . . has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type . . . . [0]ut of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action. [n227]

The court concluded this passage with a footnote containing yet another insult of Bradshaw's lawyer derived from the "No. 2 pencil" and crayon-sharpening comments: "[T]he Court

cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand--he could put his eye out." [n228]

There is nothing funny about the *Brads haw* opinion. It is principally a collage of mixed metaphors and disconnected juvenile taunts. Several of the judge's attempts at humor make no sense whatsoever. [n229] The opinion is discourteous, disrespectful, and undignified, and in writing it, Judge Kent plainly violated Canon 3A(3) of the Code of Conduct for United States Judges. [n230] It is worth examining the opinion further, however, to understand why its issuance is properly characterized as bullying.

To start, let's assume that the quality of the summary judgment briefing in the *Bradshaw* case was as amateurish as Judge Kent suggested. Further assume that grossly substandard legal writing imposes a burden on courts for the simple reason that even the most diligent courts rely on counsel for the parties to provide the majority of the legal argument in litigated cases. [n231] Judge Kent had options short of public ridicule to improve the quality of the lawyers' work and, in so doing, enhance the quality of his decision-making. For example, he could have required the parties [*356] to withdraw their motion papers and resubmit them, or he might have ordered them to file supplemental briefing and, either way, made clear in respectful terms his great unhappiness with the quality of the work originally submitted. He could have held oral argument on Phillips's motion and forced the lawyers to clearly articulate their positions and to substantiate them with citations to authority. If he simply wanted to penalize the lawyers for their abysmal efforts, he possibly could have sanctioned them using his inherent powers, [n232] or perhaps he could have invoked 28 U.S.C. § 1927 to sanction them. [n233] A show cause order requiring the lawyers to demonstrate why they should not be sanctioned for their slipshod briefing probably would have been equally effective. [n234]For that matter, if the judge thought that the lawyers' performance was truly incompetent, he could have filed ethics complaints against them. [n235] Milder, but nonetheless significant, punitive options might have included castigating them in a letter, or chastising them at oral argument or in a chambers conference. [*357] Shunning all those reasonable alternatives, Judge Kent settled on public shaming, which principally served to showcase his wit.

The two lawyers who were the target of Judge Kent's derision were unable to effectively defend themselves, as the judge certainly knew. There was no hearing at which the lawyers could address the court in their defense. Had they filed a motion to reconsider or some other pleading challenging the court's characterization of their performance, they would have exposed

themselves to further ridicule. Any related suggestion that the judge had violated judicial ethics rules by denigrating them might well have provoked some form of retribution by the judge. Although lawyers may appeal from final orders imposing non-monetary sanctions, critical statements in opinions generally cannot be appealed under the final judgment rule. [n236] Even appellate courts that take comparatively lenient approaches to allowing lawyers to appeal from scoldings administered by lower courts still require (1) that judicial criticism be expressly denominated as a reprimand and thus appropriately characterized as a sanction; or (2) that the trial court make specific findings of professional misconduct. [n237] At the time of the *Brads haw* decision the Fifth Circuit followed the second approach, as it does to this day. [n238] In any event, Judge Kent did neither of those things in his summary judgment order. No courts permit lawyers to appeal from routine judicial criticism or commentary on their performance. [n239]

Bradshaw must have been stunned by the opinion. Judge Kent's snide comment about a "remarkably long walk on a short legal pier" had to be particularly galling since Bradshaw was injured when disembarking from a boat onto a dock. [n240] The judge's reference to the "odor of wet dog" [n241] that emanated from the parties' pleadings trivialized Bradshaw's claims. [n242] Little in the opinion would have suggested to Bradshaw that Judge Kent even took his case seriously. Instead, the opinion might well have ruined Bradshaw's relationship with his lawyer, who Judge Kent had [*358] clearly and publicly branded incompetent. Any such harm would have had immediate consequences, inasmuch as Bradshaw had to consider the prospects of success on his claims against the remaining defendant, Unity Marine. Given Judge Kent's opinion, how could Bradshaw reasonably have confidence in his lawyer going forward? Regardless, Bradshaw could not force Judge Kent to vacate his opinion. [n243] Because Judge Kent's grant of summary judgment to Phillips appears to have been legally correct, [n244] Bradshaw had no valid basis for appeal. There being no apparent ground for reversal, this was not a case in which the Fifth Circuit could have used its supervisory powers to assign a different judge upon remand.

Granted, the lawyers or Bradshaw could have complained about Judge Kent's conduct to the Judicial Council of the Fifth Circuit, but that option was unlikely to afford them satisfaction. From the lawyers' standpoint, the damage was done as soon as the opinion became available on Westlaw and LexisNexis; the Council would never have acted so hastily as to prevent the opinion's electronic publication or, for that matter, its print publication in the Federal Supplement--assuming the Council would have in fact determined that Judge Kent committed misconduct and that the opinion should be withdrawn. With all due respect to the many fine judges on the Fifth Circuit, that is not a reliable assumption. Consider that when Judge Kent

was originally found to have committed two acts of serious sexual misconduct involving his former case manager, Cathy McBroom, which ultimately led to his indictment, the Council reprimanded him, suspended him with pay for four months, and relocated his chambers from Galveston to Houston. [n245] That relatively light penalty for arguably impeachable misconduct hardly inspires confidence that the Council would have sanctioned Judge Kent for his distemper in *Bradshaw*. Furthermore, the lawyers had to be concerned that making a complaint against Judge Kent would expose them and their clients to his wrath in any other cases that came before him. They could not have avoided that risk by seeking his recusal in those cases. Although 28 U.S.C. § 455(b)(1) requires a district judge to [*359] disqualify himself "where he has a personal bias or prejudice concerning a party," [n246] such an infirmity must arise from an extrajudicial source. [n247] That was not the case here. [n248] While 28 U.S.C. § 455(a) requires a judge to disqualify himself where "his impartiality might reasonably be questioned," [n249] Judge Kent's denigration of *both* lawyers in *Bradshaw* militated against any claim of partiality. [n250]

Long story short, the lawyers and plaintiff in *Bradshaw* were essentially powerless to prevent their deliberate humiliation by Judge Kent. Judge Kent held all the cards. Although there are cases in which lawyers may be embarrassed deservedly by a court's comments on their conduct, as where sanctions are imposed or contempt is found, there is a vast difference between a judge's necessarily harsh condemnation of a lawyer's work or conduct and the publication of gratuitous insults. [n251] There is never a place for the latter. No matter how flawed the lawyers' performances in*Bradshaw*, their errors were mild in comparison to Judge Kent's. [n252]

IV. CONCLUSION

Regulating judges' demeanors is a difficult task. Judges are human, and they may occasionally display anger or annoyance. Even judges who enjoy impressive self-control may sometimes lose patience when dealing with incompetent or uncivil lawyers, or unusually difficult or disruptive litigants. Lawyers and litigants sometimes incite judges. Moreover, judicial candor is a highly valued trait and judges must enjoy some flexibility in criticizing the performance of lawyers who appear before them. We generally consider trial and appellate lawyers to have thick skins; indeed, tolerating judicial criticism is an ordinary rigor of trial and appellate practice. At the same time, judges are held to high standards of conduct, and their inability to comply with professional norms erodes public confidence in the judiciary.

If some intemperate behavior by judges is to be expected and even tolerated up to a point, there is no justification for judges [*360] behaving like bullies. Judges who abuse lawyers, litigants,

jurors, witnesses, and others who appear before them do great damage to the judiciary as a whole. Parties, jurors, and witnesses who do not regularly appear in court and who are bullied when they do are likely to form lasting negative impressions about the justice system. Targets of judicial bullying may be left with the impression that they were treated unfairly, that the court did not take their cases seriously, or that "justice" is the province of a privileged few. Judicial bullying may chill zealous advocacy. For example, lawyers who reasonably apprehend abuse or ridicule by a judge known for such behavior may be tempted to avoid making good faith arguments for the extension, modification, or reversal of existing law out of the concern that their reward for doing so will be denigration or public humiliation. [n253] Lawyers who do confront judicial bullies risk retaliation against them and their clients in that case and others.

Fortunately, courts and judicial conduct commissions are increasingly demonstrating their willingness to curb the bullying of the minority of judges who engage in it. They must continue to do so. In some cases, significant disciplinary action such as suspension without pay and removal from the bench may be required. It is clearly insufficient, for example, for a vengeful judge such as Talmadge Littlejohn, who jailed a lawyer for refusing to recite the pledge of allegiance, to escape with a public reprimand and a paltry $ 100 fine. [n254] Among other problems, the failure to meaningfully discipline judges who engage in serious misconduct discourages lawyers from reporting such incidents to appropriate authorities. It is also worth considering whether there is a need for more proactive measures, such as continuing education programs, that may be effective in avoiding or reducing abusive conduct by judges. One way or the other, there is simply no room for bullies on the bench.

FOOTNOTES:

n1 *See, e.g.*, Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670-72 (S.D. Tex. 2001) (mocking the work of the lawyers for both parties).

n2 Order Denying Defendant's Motion to Dismiss or Transfer Venue and Ordering Substitution of Counsel-of-Record, Labor Force, Inc. v. Jacintoport Corp., et al., Civ. Action No. G-01-058 (S.D. Tex. June 7, 2001) (on file with the author).

n3 *Id.* at 1.

n4 *Id.* at 2.

n5 *Id.*

n6 *Kent Sentenced to Almost 3 Years in Prison*, GALVESTON COUNTY DAILY NEWS, May 12, 2009, *available at* http://galvestondailynews.com/story/137512(quoting Judge Kent's former case manager).

n7 *Id.* (noting that Judge Kent had faced five charges for alleged federal sex crimes in addition to the obstruction of justice charge); *see also* Brenda Sapino Jeffreys, *Former Judge Samuel B. Kent Sentenced to 33 Months in Prison*, TEXAS LAWYER (May 11, 2009), http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202430610099 (reporting the history and resolution of the case against Judge Kent).

n8 Order, Theresa Morris v. John Coker et al., Case Nos. A-11-MC-712-SS to -715-SS (W.D. Tex. Aug. 26, 2011) (on file with the author).

n9 *Id.* at 1-2.
n10 *Id.* at 2.
n11 John Council, *5th Circuit Judge Takes U.S. District Judge Sam Sparks to Task in an Email*, TEXAS LAWYER (Sept. 12, 2011), http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202514158040.
n12 *Judge Defends Kindergarten Order*, WALL ST. J. LAW BLOG (Sept. 27, 2011, 2:33 p.m. ET), http://blogs.wsj.com/law.
n13 Holbrook Mohr, *Attorney Jailed for Not Reciting Pledge of Allegiance*, LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202473224805; Holbrook Mohr & Adrian Sainz, *Recite Pledge or Go to Jail? Mississippi Lawyer Locked Up*, TULSA WORLD, Oct. 8, 2010, *available at* http://www.tulsaworld.com/news/article.aspx?subjectid=13&articleid=20101008_13_A8_TUPEL0336814.
n14 Mohr, *supra* note 13; Mohr & Sainz, *supra* note 13.
n15 *See* Phil West, *Tupelo Judge Reprimanded for Pledge of Allegiance Incident*, THE COMMERCIAL APPEAL, June 10, 2011, http://www.commercialappeal.com/news/2011/jun/10/tupelo-judge-reprimanded-for-pledge-incident/?print=1; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").
n16 Commission Findings of Fact and Recommendation, Inquiry Concerning a Judge at 3, No. 2010-216 (Miss. Comm'n on Judicial Performance Nov. 30, 2010) (on file with the author).
n17 *Id.* at 3-4.
n18 *See* Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968, 971-72 (Miss. 2011) (discussing the judge's misconduct).
n19 *Id.* at 973.
n20 660 N.E.2d 395 (Mass. App. Ct. 1996).
n21 *In re* Brown, 691 N.E.2d 573, 574 (Mass. 1998).
n22 *Id.*
n23 *Id.* at 575 (quoting Justice Brown).
n24 *Id.*
n25 *Id.* at 576.
n26 Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12 (2001).
n27 *Id.*
n28 *But see* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 3.02, at 3-8 (4th ed. 2007) ("Reviewing courts generally have been unwilling to consider in mitigation the notion that the judge's conduct was caused by the pressures of heavy court caseloads.").
n29 A recent *New York Times* story described "a blistering courtroom session" in a priest abuse case in Philadelphia in which defense lawyers "engaged in shouting matches" with Court of Common Pleas Judge Renee Hughes. Katharine Q. Seelye, *Prosecution Requests Granted in Priests' Abuse Case*, N.Y. TIMES, Mar. 26, 2011, at A14, *available at*http://www.nytimes.com/2011/03/26/us/26philly.html. Judge Hughes reportedly "erupted in fury several times, accusing some of the defense lawyers of attacking her integrity and telling them to 'shut up.'" *Id.*
n30 Disciplinary Counsel v. Russo, 923 N.E.2d 144, 147 (Ohio 2010) ("Judges are subject to the highest standards of ethical conduct."); *see also In re* Dempsey, 29 So. 3d 1030, 1033 (Fla. 2010)(stating that judges "'should be held to higher ethical standards than lawyers by virtue of their position in the judiciary and the impact of their conduct on public confidence in an impartial justice system'") (quoting *In re* McMillan, 797 So. 2d 560, 571 (Fla. 2001)); *In re* Alessandro, 918 N.E.2d 116, 122 (N.Y. 2009) (observing that judges are held to standards of conduct higher than those imposed on the public at large) (quoting *In re* Mazzei, 618 N.E.2d 123 (N.Y. 1993)).
n31 Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1108 (2004).
n32 *In re* Brown, 691 N.E.2d 573 (Mass. 1998).
n33 *Id.* at 576 (footnote omitted).
n34 *See* McBryde v. Comm. to Review Cir. Council Conduct & Disability Orders of the Judicial Conf. of the United States, 264 F.3d 52, 66 (D.C. Cir. 2001) ("Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt.").

n35 *See* Lubet, *supra* note 26, at 12 (observing that many lawyers enjoyed Judge Kent's caustic wit and that judges delighted in his similarly harsh opinion ridiculing the lawyers for both parties in*Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668 (S.D. Tex. 2001), discussed in detail at *infra* Part III.B).
n36 MODEL CODE OF JUDICIAL CONDUCT Preamble at 1 (2011).
n37 Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 524 (2008).
n38 MODEL CODE OF JUDICIAL CONDUCT Preface at xii (2011).
n39 Although such cases are rare, judges may be disciplined for abusive or intemperate conduct directed at other judges. *See, e.g.*, *In re* Inquiry Concerning a Judge, 566 S.E.2d 310, 314, 316 (Ga. 2002) (retaliating against a subordinate judge); Nebraska *ex rel.* Comm'n on Judicial Qualifications v. Jones, 581 N.W.2d 876, 883-92 (Neb. 1998) (removing a judge from office for, among other offenses, repeated abuse of a fellow judge).
n40 MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (1990).
n41 MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (1999).
n42 MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2007) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers . . . and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.").
n43 MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) (1999).
n44 MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).
n45 CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A (2009).
n46 *Id.* Canon 3A(3).
n47 *See, e.g.*, *In re* Flournoy, 990 P.2d 642, 645 (Ariz. 1999) (finding that the judge's regular and well-known temper tantrums, frequent abuses of lawyers, and improper treatment of staff and witnesses, violated Canons 2(A) and 3(B)(4), among others); Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1269-70 (Cal. 1995) (rejecting judge's defense that his rudeness and disrespectful behavior merely evidenced his "assertive judicial style"); *In re* Newton, 758 So. 2d 107, 108-09 (Fla. 2000) (reprimanding a former judge who was repeatedly abusive, demeaning, rude, sarcastic and even vengeful toward lawyers, parties and witnesses who appeared before her); *In re* Shea, 759 So. 2d 631, 632-33, 638-39 (Fla. 2000) (finding that a judge violated Canon 3(B)(4), among others, through a pattern of abusive and hostile conduct toward lawyers, parties, witnesses, court personnel and other judges, and accordingly removing him from the bench); *In re*Perry, 586 So. 2d 1054, 1054-55 (Fla. 1991) (reprimanding a judge who "engaged in verbal abuse and intimidation of attorneys, witnesses, and parties" for violating Canons 2(A) and 3(A)(3), the latter being identical to Canon 3(B)(4) of the Model Code); *In re* Inquiry Concerning Fowler, 696 S.E.2d 644, 646, n.8 (Ga. 2010) (removing from office a probate judge who "routinely used rude, abusive, and insulting language towards parties"); *In re* Inquiry Concerning Holien, 612 N.W.2d 789, 793-98 (Iowa 2000) (removing a judge who had "frequent conflicts with almost all of the people with whom she came in contact" and whose broad and deep hostilities "must have touched every aspect of her judicial services," for violating, inter alia, Canon 3(A)(3), which is identical to Model Code Canon 3(B)(4)); *In re* Pilshaw, 186 P.3d 708, 709-12 (Kan. 2008) (censuring judge for angry outbursts at jurors); *In re* Lamdin, 948 A.2d 54, 65-68 (Md. 2008) (suspending judge for 30 days without pay for repeated instances of discourteous and intemperate behavior); *In re* Brown, 691 N.E.2d 573, 576-78 (Mass. 1998) (finding that judge violated Massachusetts Canons 2(A) and 3(A)(3), the latter being identical to Canon 3(B)(4) of the Model Code, for harshly critical comments directed at a non-party involved in the litigation); *In re* Moore, 626 N.W.2d 374, 392-93 (Mich. 2001)(suspending a judge for among other violations, "impatient, discourteous, critical, and sometimes severe attitudes toward jurors, witnesses, counsel, and others present in the courtroom"); *In re*Ramirez, 135 P.3d 230, 231, 234 (N.M. 2006) (disciplining a judge who "raised his voice" with a defense attorney appearing before him, "prevented the attorney from making her full objections for the record, and admonished her in front of her client"); Disciplinary Counsel v. Campbell, 931 N.E.2d 558, 564 (Ohio 2010) (finding that a judge who became angry with lawyer in a chambers conference and told the lawyer that he was "behaving like a horse's ass" violated Canons 2 and 3(B)(4)); *In re* Walsh, 587 S.E.2d 356, 360-61 (S.C. 2003) (removing a judge for repeated incidents of intemperance for violating Canons 2(A) and 3(B)(4), among many others); *In re* Fuller, 798 N.W.2d 408, 413-15, 421-22 (S.D. 2011) (disciplining a trial court judge who was demeaning, disrespectful and rude to lawyers and others in his court, including one incident in which gave a lawyer "the bird" in open court, causing the lawyer's

client great concern about the judge's fairness);*In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 882-83 (Wash. 2010) (suspending a judge for the repeated verbal abuse of pro se litigants).
n48 Disciplinary Counsel v. Parker, 876 N.E.2d 556 (Ohio 2007).
n49 *Id.* at 560.
n50 *Id.*
n51 *Id.* at 560-61.
n52 *Id.* at 561.
n53 *Id.*
n54 *See* ALFINI ET AL., *supra* note 28, § 3.02, at 3-5 (noting that "most judges who have been sanctioned for violating Canon 3 exhibited a pattern of misconduct"); *see also supra* note 47 (listing numerous cases in which the judge being disciplined was a serial offender).
n55 *Parker*, 876 N.E.2d at 561-62.
n56 *Id.* at 563-64.
n57 *Id.* at 565.
n58 *Id.* at 565-66.
n59 *Id.* at 574.
n60 *Id.* at 567-69. NPD is "a condition in which people have an inflated sense of self-importance and an extreme preoccupation with themselves." Narcissistic Personality Disorder, PUBMED HEALTH (Nov. 14, 2010), http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001930.
n61 *Parker*, 876 N.E.2d at 569-70.
n62 946 So. 2d 1046 (Fla. 2007).
n63 *Id.* at 1057.
n64 *Id.*
n65 *Id.*
n66 *Id.*
n67 *Id.*
n68 *Id.* at 1058-60.
n69 Judges have also been disciplined for a single incident of intemperate behavior where they had a prior disciplinary history. *See, e.g.*, *In re* Ellender, 16 So. 3d 351, 358-60 (La. 2010)(suspending a judge for a single incident of discourteous behavior while noting that it was the judge's third disciplinary sanction, which the court described as "most troubling").
n70 51 P.3d 605 (Or. 2002).
n71 *Id.* at 606. Dunkerly had attempted to obtain a continuance from Judge Ochoa, even going to the courthouse to hand-deliver his motion. When Dunkerly learned that Judge Ochoa had left the courthouse and would not return for five days, however, he was in a tough spot because he needed a speedier ruling on his request for a continuance in order to make his travel plans. He thus approached the presiding judge who, in turn, directed him to another judge. That judge granted Dunkerly's request for a continuance in Judge Ochoa's absence. *Id.*
n72 *Id.*
n73 *Id.*
n74 *Id.*
n75 *Id.* at 607.
n76 *Id.*
n77 1997 WL 809945 (N.Y. Comm'n Jud. Conduct, Dec. 17, 1997).
n78 *Id.* at *1-3.
n79 *Id.* at*4.
n80 *Id.*
n81 *Id.*
n82 *See* MODEL CODE OF JUDICIAL CONDUCT Scope [5] (2011) (stating that "[t]he Rules of the Model Code of Judicial Conduct are rules of reason"); *see also* Green & Roiphe, *supra* note 37, at 541-542 (elaborating on this view).
n83 *In re* Ellender, 16 So. 3d 351, 359 (La. 2010).

n84 MODEL CODE OF JUDICIAL CONDUCT Scope [5] (2011) (stating that the rules contained in the Model Code should be applied "with due regard for all relevant circumstances").
n85 No. S-12405, 2009 WL 415586 (Alaska Feb. 18, 2009).
n86 *Id.* at *8.
n87 *Id.* at *9.
n88 *Id.* at *9 n.32.
n89 *See id.* at *9 n.32 (discussing one of the offending remarks).
n90 546 N. W.2d 234 (Mich. 1996).
n91 The judge was accused of violating several Michigan canons of judicial conduct, including Canon 3(A)(3), which provided in pertinent part that a judge "should be patient, dignified and courteous . . . to lawyers," and Canon 3(A)(8), which provided that a judge should "avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of. . . a premature judgment." *Id.* at 246 nn. 31-32.
n92 *Id.* at 238-39, 241.
n93 *Id.* at 241.
n94 *Id.*
n95 *Id.*
n96 *Id.* at 238.
n97 *Id.*
n98 *Id.*
n99 *Id.*
n100 *Id.* at 243.
n101 *Id.*
n102 *Id.* at 244.
n103 *Id.*
n104 *Id.*
n105 *Id.* at 236-37.
n106 *Id.* at 237.
n107 *Id.* at 241.
n108 *Id.*
n109 *Id.* at 242 (quoting MICH. CT. R. 9.205 (West, Westlaw through 2011)).
n110 *Id.* ("Having reviewed the videotape of the . . . sentencing, we find that the exchange with Ms. Maas was not clearly prejudicial to the administration of justice.").
n111 *Id.*
n112 *Id.*
n113 *Id.*
n114 *Id.* at 245.
n115 *Id.* at 243.
n116 *Id.* at 244.
n117 *Id.*
n118 *Id.* at 245.
n119 *Id.*
n120 *Id.* at 245-46.
n121 *Id.* at 236-37.
n122 *Id.* at 246.
n123 *Id.* at 247 (Cavanagh, J., concurring in part and dissenting in part).
n124 *Id.* (Cavanagh, J., concurring in part and dissenting in part).
n125 *Id.* (Cavanagh, J., concurring in part and dissenting in part).
n126 Federal appellate courts have the authority to reassign cases to different district judges as part of their general supervisory powers. Cobell v. Kempthorne, 455 F.3d 317, 331 (D.C. Cir. 2006)(quoting United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995)). Statutory authority for reassignment rests in 28 U.S.C. § 2106 (2005), which states: "The Supreme Court or any other court of appellate jurisdiction may . . . remand the

cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *See* Arthur D. Hellman, *The Regulation of Judicial Ethics In the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 204 (2007) (stating that section 2106 provides statutory authority for appellate courts' reassignment of cases to different district judges upon remand). Judicial reassignment may be appropriate where personal bias or unusual circumstances are established. TriMed, Inc. v. Stryker Corp., 608 F.3d 1333, 1344 (9th Cir. 2010) (citing Smith v. Mulvaney, 827 F.2d 558, 562 (9th Cir. 1987). In determining whether unusual circumstances exist, a court considers (1) "whether the original judge would reasonably be expected upon remand to have substantial difficulty" disregarding previously-expressed findings or views "determined to be erroneous or based on evidence that must be rejected"; (2) "whether reassignment is advisable to preserve the appearance of justice"; and (3) whether any duplication or waste attributable to reassignment would outweigh "any gain in preserving the appearance of fairness." *Id.* (quoting Smith v. Mulvaney, 827 F.2d 558, 563 (9th Cir. 1987)). Reassignment may further be required if "reasonable observers could believe that a judicial decision flowed from the judge's animus toward a party rather than from the judge's application of law to fact." *Cobell*, 455 F.3d at 332. Appellate courts tend to exercise their reassignment authority sparingly. *Id.* (reserving such authority for "extraordinary cases").

n127 *See, e.g.*, Simmons v. State, 803 So. 2d 787, 788-89 (Fla. Dist. Ct. App. 2001) (reversing conviction and remanding case for a new trial where the trial judge's rebuke of the defense lawyer prejudiced the jury against defense counsel and deprived the defendant of a fair trial); State v. Hayden, 130 P.3d 24, 35 (Kan. 2006) (reversing defendant's convictions because trial judge's pervasively intrusive, rude, and sarcastic behavior directed at lawyers deprived the defendant of a fair trial); Schmidt v. Bermudez, 5 So. 3d 1064, 1074 (Miss. 2009) (reversing and remanding case for a new trial before a new judge based on the then-presiding judge's "combative, antagonistic, discourteous and adversarial" treatment of the plaintiff, which deprived her of a fair trial and was "wholly inconsistent with substantial justice"). Of course, not every comment by a judge indicating displeasure with a lawyer constitutes grounds for reversal. State v. Hak, 963 A.2d 921, 929-30 (R.I. 2009) (quoting State v. D'Alo, 477 A.2d 89, 92 (R.I. 1984)). For a judge's intemperate treatment of a lawyer to require reversal, the judge's comments must so prejudice the jury against the lawyer's client that the client is deprived of a fair trial. People v. James, 40 P.3d 36, 42-43 (Colo. App. 2001); *Schmidt*, 5 So. 3d at 1074; Commonwealth v. Jones, 912 A.2d 268, 287 (Pa. 2006)(quoting Commonwealth v. England, 375 A.2d 1292, 1300 (Pa. 1977)).

n128 614 F.3d 661 (7th Cir. 2010).

n129 908 N.Y.S.2d 172 (N.Y. App. Div. 2010).

n130 *In re United States*, 614 F.3d at 664-65.

n131 *Id.* at 665.

n132 *Id.*

n133 *Id.* at 666.

n134 *Id.* at 665.

n135 *Id.*

n136 *Id.* at 666.

n137 *Id.*

n138 908 N.Y.S.2d 172 (N.Y. App. Div. 2010).

n139 *Id.* at 173.

n140 *Id.* at 173-74.

n141 *Id.* at 174.

n142 *Id.*

n143 *Id.*

n144 *Id.*

n145 *Id.*

n146 *Id.*

n147 *Id.* at 175.

n148 *Id.*

n149 MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2011).

n150 *See id.* R. 2.2.

n151 *See, e.g.*, *In re* Disqualification of Corrigan, 826 N.E.2d 302, 303-04 (Ohio 2004) (deciding that while "[t]he judge's use of the word 'jackasses' when evidently referring to attorneys who behave foolishly or who resolve cases too slowly was unfortunate, and his reference to the clothing and jewelry worn by some attorneys who practice in the domestic-relations field was unnecessary," such remarks did not justify the judge's disqualification); *In re* Hamrick, 512 S.E.2d 870, 872-73 (W. Va. 1998) (declining to discipline a family law master who angrily rebuked a litigant who apparently misrepresented facts, while cautioning that the master's actions "were not appropriate and definitely bordered on the need for discipline").

n152 *See, e.g.*, *In re* Inquiry Concerning Fowler, 696 S.E.2d 644, 646 & n.8 (Ga. 2010) (involving a probate judge who "routinely used rude, abusive and insulting language towards parties"); *In re*Jenkins, 503 N.W.2d 425, 426-27 (Iowa 1993) (reprimanding a judge for multiple instances of demeaning and cruel characterizations of persons who appeared before him and offering as an example the judge's description of a witness as "a 'beer-bellied, full-bearded, unemployed, seedy, coverall-clad lout'"); *In re* Walsh, 587 S.E.2d 356, 361 (S.C. 2003) (removing judge from the bench for his history of intemperate courtroom behavior and his failure to modify his behavior despite being given the opportunity to do so); *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 879 (Wash. 2010) ("One or two rude, impatient, or even condescending comments might be understandable--after all, no jurist is perfect. But more than a dozen such instances is not understandable; rather, it evidences an unacceptable pattern of misbehavior.").

n153 *But see* McCartney v. Comm'n on Judicial Qualifications, 526 P.2d 268, 287 (Cal. 1974) (rejecting judge's defense that public defender's practice of filing affidavits challenging his fairness and accordingly seeking his recusal provoked his hostility toward members of that office), *overruled on other grounds by* Spruance v. Comm'n on Judicial Qualifications, 532 P.2d 1209 (Cal. 1975); *In re*Barnes, 2 So. 3d 166, 171 (Fla. 2009) (stating that alleged misconduct by others does not excuse a judge's departure from the Code of Judicial Conduct).

n154 Miner, *supra* note 31, at 1122.

n155 *Id.*

n156 *See, e.g.*, *In re* Shea, 759 So. 2d 631, 632-33, 638-39 (Fla. 2000) (finding that a judge violated Canon 3(B)(4), among others, through a pattern of abusive and hostile conduct toward lawyers, parties, witnesses, court personnel and other judges, and accordingly removing him from the bench); *In re* Inquiry Concerning Fowler, 696 S.E.2d 644, 646 & n.8 (Ga. 2010) (removing from office a probate judge who "routinely used rude, abusive and insulting language towards parties . . . ."); *In re* Inquiry Concerning Holien, 612 N.W.2d 789, 793, 797 (Iowa 2000) (removing a judge who had "frequent conflicts with almost all of the people with whom she came in contact" and whose broad and deep hostilities "must have touched every aspect of her judicial services," for violating, inter alia, Canon 3(A)(3), which is identical to Model Code Canon 3(B)(4)); *In re* Lamdin, 948 A.2d 54, 65-68 (Md. 2008) (suspending judge for 30 days without pay for repeated instances of discourteous and intemperate behavior); *In re* Walsh, 587 S.E.2d 356, 360-61 (S.C. 2003) (removing a judge for repeated incidents of intemperance for violating Canons 2(A) and 3(B)(4), among many others).

n157 *See, e.g.*, *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 882 (Wash. 2010) (suspending for a mere five days a judge who had been previously reprimanded, who defended her abusive behavior as a matter of judicial philosophy, and who stated that she did not "believe that the canons [of judicial conduct] [were] binding on her behavior in the courtroom").

n158 *See, e.g.*, *In re* Perry, 586 So. 2d 1054, 1054 (Fla. 1991) (accepting stipulation to a public reprimand where the judge "apologize[d] for his conduct and agree[d] to refrain from similar conduct in the future"); Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968, 972-73 (Miss. 2011) (accepting very light sanctions agreed upon by the parties where the judge admitted his serious misconduct and promised not to do it again).

n159 *See, e.g.*, *Littlejohn*, 62 So. 3d at 970 (involving a judge who jailed a lawyer for criminal contempt after the lawyer refused to say the pledge of allegiance in open court).

n160 *See* ALFINI ET AL., *supra* note 28, § 3.02, at 3-4 ("Generally, a reviewing body will sanction a judge not only for major incidents, but also for an accumulation of minor, seemingly innocuous incidents that, when considered together, demonstrate a pattern of conduct unbecoming a member of the judiciary.").

n161 *See* David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 934 (2009) ("'Suicidal' is the adjective that comes to mind when thinking about an attorney's report of judicial misconduct. While that term is certainly hyperbolic . . . the consequences of filing complaints against judges could well threaten an attorney's career."); *see also Attorneys Say They Fear Retribution From Tenn.*

Judges, LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202473228336 (reporting that Tennessee lawyers were afraid to file complaints against some judges or to move to recuse them because judges retaliated by dismissing cases, accusing lawyers of civil contempt, and filing complaints against lawyers).

n162 Rules of civil procedure in some states permit parties to take a change of judge as a matter of right. *See, e.g.*, Mo. SUP. CT. R. 51.05(a) ("A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party.").

n163 *See* Pimentel, *supra* note 161, at 920 ("The reluctance of attorneys to complain about judicial misconduct appears throughout the history of judicial ethics."); Don Sarvey, *Confronting Judicial Misconduct*, PA. LAW. (Nov./Dec. 2009), at 97 (noting "the natural and understandable caution lawyers feel about speaking up against judges, especially local judges, given the power they wield").

n164 *In re* Fuller, 798 N.W.2d 408, 419 (S.D. 2011).

n165 264 F.3d 52 (D.C. Cir. 2001).

n166 *Id.* at 54.

n167 Pimentel, *supra* note 161, at 931.

n168 *McBryde*, 264 F.3d at 67.

n169 *Id.*

n170 *Id.* The lawyer's belief that the individual defendant's presence at the settlement conference would be unhelpful was objectively valid. The plaintiffs were a mother and her ten-year old daughter. The individual defendant was accused of terrorizing the child by popping out his glass eye and putting it in his mouth in front of her. *Id.* Given those facts, many lawyers might think that the individual's presence might alarm the child or anger the mother or both, and thus inhibit settlement. Moreover, the individual defendant was not financially able to contribute to a settlement. *Id.*Any settlement would have to be paid by the corporate defendant, which presumably sent a representative with settlement authority to the conference as required.

n171 *Id.*

n172 *Id.* at 68.

n173 *Id.*

n174 *Id.*

n175 *Id.*

n176 *Id.*

n177 *Id.*

n178 *See generally* Christine Biederman, *Temper, Temper*, DALLAS OBSERVER (Oct. 2, 1997), *available at* http://www.dallasobserver.com/1997-10-02/news/temper-temper (discussing Judge McBryde's reputation and, to acknowledge his supposed fairness, quoting a lawyer who described the judge as "an equal opportunity tyrant").

n179 731 N.E.2d 120, 122 (N.Y. 2000).

n180 *Id.* at 122 (quoting the judge).

n181 *Id.*

n182 *Id.*

n183 *Id.* at 122-23.

n184 *Id.* at 123.

n185 *See, e.g., In re* Moroney, 914 P.2d 570, 571-72 (Kan. 1996) (finding that the judge violated Canon 3(A)(3), which tracks Model Code Canon 3(B)(4), when he belittled a pro se litigant); *In re*Ellender, 16 So. 3d 351, 352-53 (La. 2010) (involving a judge's rude and impatient treatment of pro se litigants); *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 879 (Wash. 2010)(involving judges' repeated abuse of pro se litigants).

n186 985 P.2d 924 (Wash. 1999).

n187 *Id.* at 927, 933-34.

n188 *Id.* at 928.

n189 *Id.* at 932-33.

n190 *Id.* at 933.

n191 *Id.*

n192 *Id.* at 943.

n193 591 N.W.2d 843 (Wis. 1999).

n194 *Id.* at 844.
n195 *Id.*
n196 *Id.* at 844-45.
n197 *Id.* at 845.
n198 *Id.*
n199 *Id.*
n200 *Id.*
n201 *Id. at* 845-46.
n202 *See* Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 699-701 (1987) (offering some benefits of employing humor and figurative language in judicial opinions).
n203 *Id.* at 700-01.
n204 One who does effectively employ humor in opinions is Judge Alex Kozinski of the Ninth Circuit. *See* Gerald Lebovits, *Judicial Jesting: Judicious?*, 75 N.Y. ST. B.J. 64 (Sept. 2003) (discussing Judge Kozinski's rare talent and suggesting that most judges should not attempt to write like: him). The late Terence Evans of the Seventh Circuit was another.
n205 Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 272 (2008) (footnotes omitted).
n206 *In re* Jenkins, 503 N.W.2d 425, 427 (Iowa 1993).
n207 Bradshaw v. Unity Marine, 147 F. Supp. 2d 668 (S.D. Tex. 2001). Many lawyers who read Judge Kent's opinion in *Bradshaw* found it humorous. One who did not was Northwestern University law professor Steven Lubet, a judicial ethics expert, who characterized Judge Kent as a "martinet" and properly described his opinion in *Bradshaw* as "bullying." Lubet, *supra* note 26, at 15, 12.
n208 *Bradshaw*, 147 F. Supp. 2d at 669.
n209 *Id.*
n210 *Id.*
n211 *Id.* at 671-72.
n212 *Id.* at 671.
n213 *See* Lubet, *supra* note 26, at 13 ("[T]he only possible purpose for publication was to add to the embarrassment of the attorneys.").
n214 *Bradshaw*, 147 F. Supp. 2d at 670.
n215 *Id.*
n216 *Id.*
n217 *Id.*
n218 *Id.*
n219 *Id.* at 670-71.
n220 *Id.* at 671.
n221 *Id.*
n222 *Id.*
n223 *Id.*
n224 *Id.*
n225 *Id.* at 672.
n226 *Id.*
n227 *Id.* (footnote omitted).
n228 *Id.* n.4.
n229 Why, for example, would summary judgment briefing so bad as to be described as "child-like" cause the judge to offer or experience "a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration"? *Id.* at 670.
n230 CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(3) (2009) ("A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.").
n231 *See* DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 462 (2011) ("No matter how diligent they may be, judges and law clerks can never know as much about cases as the

lawyers do. As a result, courts necessarily rely on lawyers to present most facts and argument."). This assumption does not actually apply here because the issue presented at summary judgment could be "readily ascertained." *Bradshaw*, 147 F. Supp. 2d at 671. Even so, the assumption is worth making for illustrative purposes.

n232 Courts have inherent authority to sanction the misconduct of lawyers practicing before them. Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991) (discussing inherent powers of federal district courts); Kaina v. Gellman, 197 P.3d 776, 782-83 (Haw. Ct. App. 2008) (quoting Bank of Haw. v. Kunimoto, 984 P.2d 1198, 1213 (Haw. 1999)); Cimenian v. Lumb, 951 A.2d 817, 820 (Me. 2008); Dronen v. Dronen, 764 N.W.2d 675, 693 (N.D. 2009). The scope of courts' inherent authority varies between jurisdictions. *See, e.g.*, Vidno v. Hernandez, 92 Cal. Rptr. 3d 178, 186 (Cal. Ct. App. 2009) (noting that California trial courts' inherent powers do not include imposing monetary sanctions). In extreme circumstances, however, it may include the discretion to dismiss a case. Salmeron v. Enter. Recovery Sys., Inc., 579 F.3d 787, 793 (7th Cir. 2009) (quoting Montano v. City of Chicago, 535 F.3d 558, 563 (7th Cir. 2008)).

n233 Lubet, *supra* note 26, at 13. That statute provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (2006).

n234 Presumably the lawyers would have defended against the imposition of sanctions on any basis by arguing that they had not acted in bad faith in filing their deficient motion papers. *See In re*Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 188 (3d Cir. 2002) (requiring "willful bad faith" to impose attorneys' fees under § 1927); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 518 (D. Md. 2010) (stating that a district court's inherent authority "only may be exercised to sanction 'bad-faith conduct'") (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991)).

n235 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

n236 *See* United States v. Williams (*In re* Williams), 156 F.3d 86, 90 (1st Cir. 1998) (stating the "abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees--not opinions, factual findings, reasoning, or explanations").

n237 Douglas R. Richmond, *Appealing from Judicial Scoldings*, 62 BAYLOR L. REV. 741, 771 (2010).

n238 Walker v. City of Mesquite, 129 F.3d 831, 832-33 (5th Cir. 1997).

n239 Richmond, *supra* note 237, at 783.

n240 Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 672 (S.D. Tex. 2001).

n241 *Id.*

n242 Lubet, *supra* note 26, at 14.

n243 David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 573 (2001).

n244 *Bradshaw*, 147 F. Supp. 2d at 671-72.

n245 Order of Reprimand and Reasons at 2, In re Complaint of Misconduct Against United States District Judge Samuel B. Kent Under the Judicial Conduct and Disability Act of 1980, Docket No. 07-05-351-0086 (5th Cir. Judicial Council Sept. 28, 2007) (on file with the author); *Judicial Panel to Reopen Kent Misconduct Probe*, GALVESTON COUNTY DAILY NEWS (Feb. 14, 2009), *available at*http://galvestondailynews.com/story/131578.

n246 28 U.S.C. § 455(b)(1) (2006).

n247 Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996).

n248 *See* ALFINI ET AL., *supra* note 28, § 4.05A, at 4-17 (indicating that "occurrences in the context of a court proceeding" are not extrajudicial sources that would support a judge's disqualification).

n249 28 U.S.C. § 455(a) (2006).

n250 Lubet, *supra* note 26, at 12 n.2.

n251 *See id.* at 13 (making this point in reference to the *Bradshaw* opinion).

n252 *See id.* at 16 ("[S]lipshod lawyering can be a problem. But in the end, an incompetent lawyer is far less dangerous than a judicial bully.").

n253 *Id.* at 15.

n254 See *supra* notes 13-19 and accompanying text.

K.P. Tiwari .v State of M.P[12]

The Hon'ble High Court reversed the order passed by the lower court making remarks about interestedness and motive of the lower court in passing the unmerited order, this Court observed that one of the functions of the higher court is either to modify or set aside erroneous orders passed by the lower courts.

The higher courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to erred. It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly upto their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make not of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary than when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy

[12] [1993]Supp3SCR497, AIR1994SC1031,1994 SCC Supl. (1) 540. Division Bench of P.B. Sawant and Yogeshwar Dayal, JJ. Decided On: 29.10.1993

the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill.

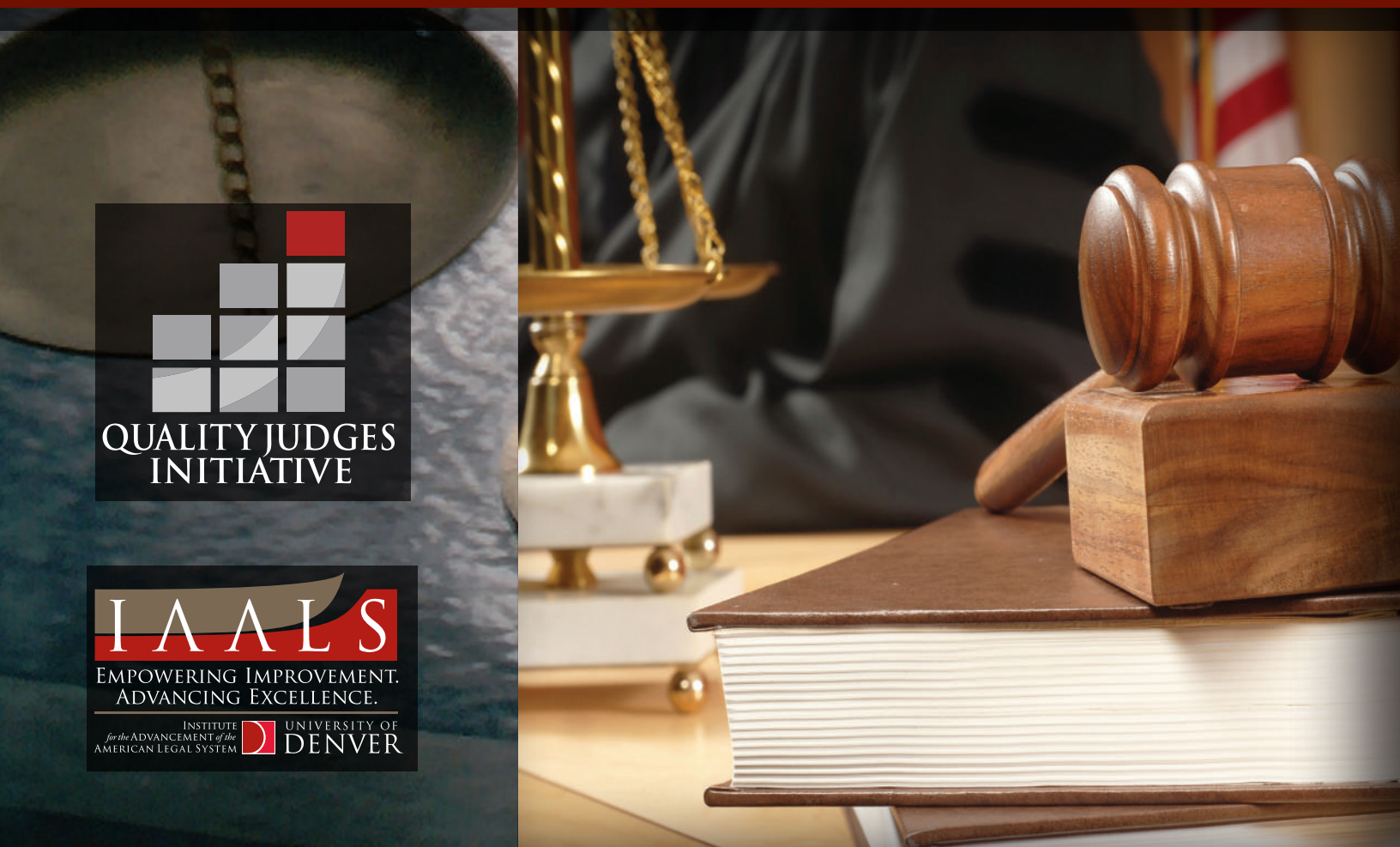
Our legal system acknowledges fallibility of judges. It has to be kept in mind that a subordinate judicial officer works mostly in a charged atmosphere. He is under a psychological pressure -- contestants and lawyers breathing down his neck. He does not enjoy the detached atmosphere of the higher court. Every error, however gross it may be, should not be attributed to improper motives. The Judges of the High Court have a responsibility to ensure judicial discipline and respect for the judiciary from all concerned. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary if the higher courts express lack of faith in the subordinate judiciary for some reason or other. That amounts to destruction of judiciary from within

Session 3

Developing Standards for Evaluation of Judgments

An Opinion on Opinions:

Report of the IAALS Task Force on Appellate Opinion Review



An Opinion on Opinions:
Report of the IAALS Task Force on State Appellate Court Opinion Review

I. Background

In August of 2011, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver convened a national conference on appellate judicial performance evaluation (JPE)—*Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability*. Throughout the course of the conference, participants returned to the issue of evaluating appellate opinions. In a pre-conference survey, 89% of appellate judges indicated that opinion review should be part of the evaluation process. Participants agreed that, as the primary work product of appellate judges, written opinions should be reviewed as part of the evaluation process. What was less clear was exactly how such a review should be undertaken, by whom, and using what criteria. A few states with official JPE programs have processes in place for direct opinion review, but the majority of states with JPE programs for appellate judges rely primarily on indirect opinion review, which consists of survey questions for attorneys, judges, and court staff on the clarity and quality of judges' written opinions.

In response to the need voiced at the IAALS conference for an impartial, efficient and meaningful method for evaluating appellate opinions as part of the JPE process, IAALS formed a Task Force on Appellate Opinion Review. Membership consists of the following individuals:

- Honorable Richard Gabriel, *Colorado Court of Appeals*
- Jane Howell, *Colorado Office of Judicial Performance Evaluation, Executive Director*
- Honorable Steve Leben, *Kansas Court of Appeals*
- Professor Penelope Pether, *Villanova University School of Law, Professor of Law*
- Stephen Portell, *Arizona Commission on Judicial Performance Review, Vice Chair & Attorney Member*

Facilitated by IAALS, the Task Force was charged with considering existing opinion review processes, discussing the merits of various approaches, and establishing guidelines and recommendations for both states with existing programs for opinion review and those interested in establishing such a program. Given the diversity in state JPE programs with respect to size of the evaluation commission, diversity of commission membership, the number of evaluated judges in each cycle, and the number of opinions to be reviewed for each judge, the Task Force decided against a "one size fits all" approach to evaluating appellate opinions. Rather, what follows is a set of recommendations and guidelines concerning how opinions might be selected, who should undertake the review, and according to what criteria the opinions should be reviewed.

II. Underlying Assumptions

These recommendations and guidelines are equally applicable to independent JPE commissions, state judicial branches, and other evaluating bodies that have been state sanctioned to undertake judicial performance evaluation. For the purposes of this report, the term "commission" is used to signify any of these evaluating bodies.

If not directly undertaken by the full commission or a subset of commission members, opinion review should be managed by the official performance evaluation commission, to ensure adequate training of reviewers, consistency in the process, and objectivity of the review.

Opinion review should supplement other methods of performance evaluation for appellate judges and justices, such as surveys of attorneys and court staff, courtroom observation, and self-evaluation.

It is essential that any program for opinion review be structured to focus on the quality and clarity of the written opinion rather than the particular outcome(s) reached in the case.

III. Recommendations & Guidelines

Selection of Opinions:

The number of opinions selected for review may vary depending on the size of the commission. Larger commissions might consider identifying ten opinions for review, while smaller commissions may find five opinions more manageable. The Task Force recommends that at least five opinions be reviewed for each judge/justice.

The judge, commission, or both may select opinions for review. Where the judge is tasked with selecting all opinions for review, the commission should retain the right to ask for additional opinions, or choose additional opinions on its own initiative, where doing so would be beneficial to the evaluation.

The opinions chosen by the judge for review should be representative of the judge's work and ideally should address a variety of case types. It is recommended that one of the opinions is a dissent or concurrence and, for intermediate appellate judges, one is an unpublished opinion. Where evaluated judges are required to complete self-evaluations or where interviews of evaluated judges are undertaken, the commission should consider asking judges why they selected the opinions they did.

The opinions chosen by the commission for review, if any, should be selected at random, but it is recommended that they be representative of the judge or justice's full term (e.g., selected across a term, rather than within a two-year period).

Individuals Undertaking the Review:

It is recommended that more than one commission member be charged with reviewing the opinions for each judge. The Task Force was divided as to whether the full commission or a subset of the commission should be tasked with reviewing opinions. For the most comprehensive review, each commission member may independently read and assess the opinions of each evaluated judge. There

were concerns, however, among some members of the Task Force that, depending on the number of opinions reviewed per judge and the number of judges being evaluated, this arrangement could create a significant workload for individual commissioners. Other members of the Task Force thought a more manageable, yet also thorough and careful evaluation, would entail a two- or three-person team—selected randomly and assigned to judges randomly—that would review the opinions of particular judges and report back to the full commission. The Task Force recognizes that some commissions, by virtue of statute or court rule, may be unable to delegate this task to a subset of the full commission.

Having a combination of attorneys and non-attorneys review the opinion is optimal. Non-attorneys are in the unique position of being able to assess whether an opinion is clear to laypersons and can best ascertain whether the judge or justice's opinions may be understood by the parties to the case. Attorneys are best able to gauge whether the legal issues were sufficiently addressed and explained in the opinion.

Where not precluded by statute or court rule, commissions might consider using independent reviewers (i.e., a legally trained reviewer who does not run the risk of having to appear before the judge/justice subject to evaluation). For example, law professors are capable of reviewing appellate opinions on a level commensurate with attorneys. The Task Force recommends that law professors involved in the opinion review process should be limited to those who have practical appellate court experience. A commission might also consider using retired judges as reviewers, either from the same jurisdiction as the judge/justice being evaluated or from a different jurisdiction. It is optimal for the retired judge reviewers to have sat on an appellate bench during their judicial tenure. Commissions might also consider recommending the appointment of law professors and/or retired judges as members.

Criteria for Evaluating Opinions:

To ensure thorough and consistent review, the commission should develop criteria for opinion review. Pre-established criteria provide a consistent framework for all reviewers to follow in addition to serving as a useful training tool.

The criteria for opinion review should focus analysis of the opinion on clarity, structure and adequate explanation, among other criteria. Model criteria developed by the Task Force are attached as Appendix A. Opinion review criteria should *not* touch on the merits of the opinion, which is the sole province of a higher court, or on agreement or disagreement with the case outcome.

Commissions and evaluators may want to consult the National Center for State Courts' *Writing Opinions and Orders in Controversial Cases* course and accompanying materials. Specifically, "Basic Principles for Writing All Opinions, Highly Controversial or Not," "Checklist for Writing an Opinion in a Highly Controversial Case," and "Checklist for Critiquing an Opinion" may prove useful background materials for commissions during the opinion review process.

Training for Opinion Reviewers:

Coordinators of performance evaluation programs should provide adequate training to opinion evaluators, to ensure consistency both in conducting the evaluation and in understanding the purpose of the evaluation—i.e., to assess the quality and clarity of the opinion rather than to revisit the particular outcome(s) reached.

Special consideration should be given to each type of evaluator (lay, attorney, professor, etc.) during the training process. For lay evaluators, the commission should consider providing a glossary of legal terms included in the opinion review criteria—e.g., standard of review, fact-finding, case law, etc., as well as terms the evaluators may commonly encounter in appellate opinions—e.g., precedents, remanded, concurrence, etc. The commission might also educate lay evaluators on appellate court functions and the opinion-writing process, and might consider bringing in retired justices and judges for this purpose. Attorney and law professor evaluators should be reminded to focus on the evaluation criteria and not substantive issues raised by the opinion or outcome(s).

During training, the commission should encourage all evaluators to be active and vocal participants in the review process, so that all perspectives are represented.

One possible approach to training is to work through sample opinions as a group and discuss the application of the pre-established opinion review criteria to the opinions. The commission might consider bringing in retired judges and justices to assist with this process.

Guidelines for Narrative Profiles:

The portion of the narrative profile that addresses opinion review should be tailored to each judge/justice, rather than following a pre-determined formula that is applied to all judges. For example, if the reviewers of the opinions do not identify weaknesses (or strengths) in a judge's opinion writing, they need not feel obligated to include weaknesses (or strengths) in the narrative profile purely as a matter of form. The value of the opinion review process recommended here is that the opinions of each judge/justice can be thoroughly and carefully examined, and that areas in which the judge excels and/or needs improvement can be identified, with the ultimate goal being to provide useful information to the judge being reviewed and the citizens who will vote on the judge's retention.

The profiles should be substantive and closely tied to the opinion review criteria, but there should not be a numerical rating or grade applied to the criteria.

Supplementing Direct Opinion Review:

In addition to the product-based criteria (i.e., criteria relating to the appellate opinion itself) discussed above, commissions might also consider criteria relating to the opinion writing process. For example, process-based criteria might include adherence to court rules for publishing opinions, use of law clerks, and ensuring reasonable training and supervision of court staff. Though not traditionally considered in the judicial performance evaluation process, these criteria speak to larger accountability and court culture issues. Commissions interested in incorporating this aspect in appellate judicial performance evaluation can do so through relevant questions in surveys, judge/justice interviews and self-evaluations (discussed below). They may also consult the work of Villanova Law Professor and Task Force member Penelope Pether on this topic.[1]

Commissions should consider including questions relating to the quality and clarity of appellate opinions in performance evaluation surveys for various respondent groups. Commissions should

[1] For an example of Professor Pether's scholarship on this topic, see *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law,* 39 ARIZ. ST. L.J. 1 (2007).

consider the following respondents, each of whom offers a unique perspective on the appellate opinion:

- **Attorneys** who appear before appellate judges/justices are in a unique position to comment specifically on the opinions issued in their case(s). Attorneys more broadly can also be a helpful resource, as both trial and appellate attorneys must interpret and cite to appellate opinions in the course of their practice; however, the Task Force recognizes the problem with low response rates for this group of respondents. Model survey questions for attorney respondents regarding appellate opinions are attached as Appendix B.

- **Trial judges** must apply appellate opinions and can provide a judicial perspective in assessing opinions. Trial judges whose rulings have been appealed can speak specifically to the attributes of the opinions issued in these cases. Recommendations for questions relating to appellate opinions that may be incorporated into JPE surveys of trial judges are attached as Appendix C.

- **Peer judges** can provide a judicial perspective on opinions. They are also in a unique position to speak to how their peers' perform their primary authorship and participant responsibilities. Sample questions that may be asked of peer judges about written opinions are attached as Appendix D.

Commissions should consider having the judge/justice subject to evaluation undertake a self-evaluation that includes questions on his/her written opinions and approach to opinion writing. Such an evaluation can include similar questions asked in surveys of other respondents, allowing the judge/justice to compare his/her own performance assessment on certain factors against the assessments of other respondents. Doing so can highlight disconnects in how the judge/justice views his/her performance in this area and how others view that performance. The self-evaluation might also contain open-ended questions allowing the judge/justice to provide detailed explanation. Such questions are particularly useful when the evaluation process has an interview component. Examples of both types of questions relating to opinions that may be incorporated into a self-evaluation questionnaire are attached as Appendix E.

IV. Conclusion

This report represents the consensus of the Task Force, which was in full agreement that the appellate opinion review process is a vital component of appellate judicial performance evaluation and, if done appropriately, can be an essential tool for self-improvement and an invaluable source of information for voters and other decision makers. Ultimately, programs for appellate opinion review will necessarily be tailored to the specific circumstances and needs of individual jurisdictions. It is the hope of the Task Force and IAALS that jurisdictions looking to establish or improve an existing process can take these guidelines into consideration and use them as a tool to assist in developing/improving/perfecting this aspect of judicial performance evaluation programs.

IAALS commends Task Force members for their diligence and thorough consideration of the issues involved in reviewing appellate opinions and for their commitment of time and effort to this project.

APPENDIX A

Model Opinion Review Criteria

Individuals designated to review the opinions of appellate justices and judges should do so based on the following criteria:

- **Adherence to standard of review**
  - Does the opinion follow an applicable standard of review for the case?

- **Clarity of expression**
  - Are the facts necessary to decide the case clearly and understandably presented?
  - Is the ruling readily understandable or ambiguous?
  - Is there minimal legalese so that a layperson can make sense of it?
  - Could a layperson understand the reasons for the court's ruling?
  - Is the ruling clear and concise?

- **Logical reasoning**
  - Is the decision adequately supported by the facts presented?
  - Does the opinion acknowledge the losing party's arguments and explain why they were rejected?
  - Does the opinion logically show how B follows from A, or does the justice or judge assert something without explaining how he or she got there?

- **Application of the law to the facts presented**
  - Does the opinion contain a fair statement of the pertinent facts and a discussion of the applicable legal principles and case law?
  - Does the judge or justice adequately explain how important facts relate to the law?
  - Does the application of the law to the facts of the case reasonably support the result?

APPENDIX B

Model Attorney Survey Questions on Appellate Opinions

- Writes opinions that are clear.
- Writes opinions that adequately explain the basis of the Court's decision.
- Writes opinions that address the merits of the legal issues advanced by the parties.
- Writes opinions that set forth rules of law to be used in future cases.
- Writes opinions that refrain from reaching issues that need not be decided.
- Writes opinions that clearly present the facts needed to decide the case.
- Writes opinions that fairly address the issues raised by the parties.
- Writes opinions that follow an applicable standard of review for the case.
- Writes opinions that are faithful to evidence in the record.

APPENDIX C

Model Trial Judge Survey Questions on Appellate Opinions

- Writes opinions that are clear.
- Writes opinions that adequately explain the basis of the Court's decision.
- Writes opinions that address the merits of the legal issues advanced by the parties.
- Writes opinions that set forth rules of law to be used in future cases.
- Writes opinions that provide clear direction to trial court when reversed in whole or part.
- Writes opinions that refrain from reaching issues that need not be decided.
- Writes opinions that appear fairly to address the issues raised by the parties.
- Writes opinions that follow an applicable standard of review for the case.

APPENDIX D

Model Peer Judge Survey Questions on Appellate Opinions

- Writes opinions that are well structured and clear.
- Writes opinions that clearly address the merits of the legal issues advanced by the parties.
- Writes opinions that clearly set forth rules of law to be used in future cases.
- Performs primary authorship responsibilities with diligence.
- Performs primary authorship responsibilities with proficiency.
- Performs participant responsibilities with diligence.
- Performs participant responsibilities with proficiency.
- Approaches cases with an open mind.
- Gives and receives feedback constructively.
- Engages in collegial decision-making/discussion.
- Follows court guidelines regarding whether to publish or not publish opinions.
- Satisfies minimum court-adopted requirements for content in issuing unpublished and shorter opinions.

APPENDIX E

Model Self-Evaluation Survey Questions on Appellate Opinions

Scaled Questions (consistent with respondent survey questions):

- Writes opinions that are clear.
- Writes opinions that adequately explain the basis of the Court's decision.
- Writes opinions that address the merits of the legal issues advanced by the parties.
- Writes opinions that set forth rules of law to be used in future cases.
- Writes opinions that are faithful to evidence in the record.
- Writes opinions that refrain from reaching issues that need not be decided.
- Performs primary authorship responsibilities with diligence and proficiency.
- Performs participant authorship responsibilities with diligence and proficiency.
- Approaches cases with an open mind.
- Gives and receives feedback constructively.
- Engages in collegial decision-making/discussion.
- Follows court guidelines regarding whether to publish or not publish opinions.
- Satisfies minimum court-adopted requirements for content in issuing unpublished and shorter opinions.

Open-Ended Questions:

- What do you think makes a clear written opinion?
- Please describe how you manage your workload to ensure that opinions are issued promptly?
- To what extent do you conduct your own legal research and write your own opinions, and to what extent do you rely on law clerks and other personnel for those tasks?
- What has been the greatest challenge during your term and how did you meet it?
- Please describe your overall performance over the current team.

HOW JUDGES DECIDE CASES:

READING, WRITING AND ANALYSING JUDGMENTS

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REASONING, ARGUMENT AND LEGAL LOGIC

> "The more experienced the judge the more likely it is that he may display the virtue of brevity...the essential test is: does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings, and then his conclusions?"[1]

> "Precise and accurate use of ordinary language is not enough in itself to win cases. Where there is no emotional language to attract the jury, more attention must be paid to the argument. For success in advocacy, therefore, elegance of language must be supplemented by elegance of reasoning...Elegance to the Roman jurists was not a matter of words but ideas."[2]

Cases are decided by rational or objective means, but with a pragmatic, purposive approach to the facts. Judgments are based on reasoned principles, whether of general expediency, the balance of convenience, moral standards, or whatever other legitimate principles a court might have recourse to: law is or should be a rational process.[3]

Unlike the continental system, the order of precedent in the common law means that judges are not compelled to follow close patterns of logic to arrive at their conclusion, which might act as a straightjacket. Unlike the application of fixed rules, a case-by-case examination of facts does not give rise to abstract formulae, or lead to unwanted, undesirable and unjust directions in the law, even if certainty of application and the consistency of results are desirable.

In this jurisdiction, the House of Lords debated over 60 years ago the place of pure logic in the judge's approach, and concluded that consistency had to give

[1] *Re B* [2003] 2 FLR 1035 per Thorpe LJ @ 1040 para [11].
[2] Prof Peter Stein, *Elegance in Law* (1961) 77 LQR 242.
[3] See Dennis Lloyd *Reason and Logic in the Common Law* (1948) 64 LQR 468 for this *et seq.*

way to practical application in each case: see per Lord Wright in *Liebosch Dredger* v *Edison*[4] and Lord Macmillan[5] and Viscount Simons[6] in *Read* v *Lyons*[7] rejecting the suggestion of the Court of Appeal in *Read* that:

> "though law was not logic, the nearer one could get to logic the better, and there was an inherent illogicality in the defendant's contention, which should be rejected as the plaintiff's contention made for consistency."

Lord Macmillan said in *Read*,

> "Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life."

The common lawyer will readily understand the reluctance of the court to apply a strictly logical methodology in deciding cases, logic being a method of reasoning where deductions are rigorously and necessarily inferred from general premises. The claims with which courts are concerned require the judge to make deductions from particular facts, not generalities that have to be hedged around with endless qualifications. While the law is concerned with elucidation of general propositions and their application to particular cases, courts can never construe propositions as pure generalities unrelated to the facts of life into which they must be integrated. The judge is not so much concerned with logic or reason but with 'reasonableness', which is a matter of opinion. You are conducting an exercise in assessing whether that opinion has a proper basis, and is not merely capricious or arbitrary.

At first instance the findings of fact are applied to broad, established principles to do practical justice between the parties as the court sees it. On appeal, the intervention of policy matters guides the ebb and flow of such principles in accordance with the needs of contemporary society more generally, and is not confined to the specific wishes of the parties. But for both the advocate seeking to persuade the judge, and the court to justify its decision, at each level the argument must follow a process of logical and progressive reasoning. Bentham said,[8] "Good laws are such laws for which good reasons can be given."

[4] [1933] AC 460.
[5] [1947] AC 160 @ 175.
[6] [1947] AC 160 @ 180.
[7] [1947] AC 160.
[8] Jeremy Bentham *Works* ix 357.

Let us start by preparing the context in which to analyse the judge's reasoning or his application of logical principles.

- Identify the scope of the dispute.
- Distinguish the material facts – find those facts in issue, the determination of which will form the basis of judge's decision: a fact is relevant if it enables the judge to conclude an issue.
- Assess their materiality by reference to the legal issues involved in the case, bearing in mind that even material facts are not of equal importance.
- Understand the relationship between the facts and the law: identify not just relevant facts, but legally relevant facts.
- Overlay the rules of evidence.
- Apply the burden of proof.

There is no essential difference between a legal argument and any other kind of argument. The principles of logic or rational thought are the same whether they be applied by lawyers or laymen. Lawyers do not possess a monopoly of the arts of demonstration, interpretation, comparison and logical analysis; though perhaps they should be able to articulate them better than most. If two doctors were to argue a moot point of their science in a public court they would set about it in much the same way as lawyers do. The cases they would cite would be patients and experiments. They would appeal to writers of authority, to common sense, to principles of natural science in general and medical science in particular. But naturally they would deal chiefly in actual cases of medical experience. This is reflected in expert evidence provided to the court. So in a legal discussion counsel are concerned chiefly with actual cases of legal experience, and very often such cases cover all the necessary ground. However it does not follow that cases and decisions are the only essential materials allowed by the lawyer in building up the structure of his argument.

As Justice Oliver Wendel Holmes put it,[9]

> "the life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

[9] Holmes *Common Law* (1881) p. 1.

> Coke said "the Common Law of England is the perfection of reason, gotten by long study, observation, and experience."[10]

In a system of law founded on binding precedent courts are severely limited in applying a rational process by the necessity to conform with earlier precedents. As we shall examine, there is scope for the judge to draw distinctions of fact between the case before him and earlier cases. In this sense the law reduces itself to the art of drawing distinctions, and in the case of the practitioner, anticipating the distinctions the judge is likely to draw: for present purposes we must consider whether the judge was correct in drawing a particular distinction since such distinctions may often be in the nature of hair-splitting, this being the only method to hand for avoiding the consequences of an earlier decision which the court considers unreasonable or as laying down a principle which is not to be extended.

Start then, by assuming that the judge has based his own argument on a process that is both rational and of practical application in the sense that his intended result has a practical effect. Examine the judge's reasoning in stages: the judgment is a path along which to proceed empirically and gradually, testing the ground at each step and not worrying about the absence of any broad theoretical principles or to feel any dismay or discomfort because the facts of a situation could not be moulded into any pre-established and consistent theoretical framework. It is not unlike the kind of incremental development in the law of negligence considered by Lord Bridge in *Caparo Industries* v *Dickman*.[11]

[10] Sir Edward Coke *Inst.*Pt.I § 138.
[11] [1990] 2 AC 605 @ 618.

5.1
LOCATING THE ARGUMENTS

Identify in the judgment the most important paragraphs and sentences. This is not a matter of length. It is a question of the relationship between language and thought. Nor is it always the case that the argument will be contained in one unit of writing.

The logical unit is a sequence of propositions, some of which give rise to further development; but it is not uniquely related to any recognizable block of writing, as terms are related to words and phrases, and propositions to sentences. An argument may be expressed in a single complicated sentence. Or it may be expressed in a number of sentences that are part only of one paragraph. Sometimes an argument may correspond with a paragraph, but it may also happen that an argument runs through several or many paragraphs.[12] Equally there are many paragraphs in any judgment that do not express an argument at all, nor even part of one. These may consist of collections of sentences that detail evidence or report how the evidence has been gathered. They are of secondary importance.

If the argument is not expressed in self-contained paragraphs it may be necessary to draw it together by taking discreet sentences from different paragraphs until a sequence can be made of all those sentences containing the propositions which form the argument. After discovering the leading sentence the construction of such a paragraph should be relatively easy.

Modern judgments tend either to have a formal summary of the argument or a paragraph or section in which the argument is recapitulated. A well-reasoned judgment usually summarises itself as its arguments develop. If the judge summarises his arguments for you at the end of a section you should be able to look back over the preceding paragraphs and find the materials he has brought together in summary. If you have undertaken an inspectional reading before beginning to read the judgment analytically, you will know whether summary passages exist and if so where they are.

[12] See *Adler op.cit.* p. 129.

A sign of a poorly reasoned or loosely constructed judgment is the omission of steps in an argument. Sometimes they can be omitted without damage or inconvenience because the propositions left out can generally be supplied from the common knowledge of the reader, either because the judge is aware that a party or his lawyer does not or should not require them. Sometimes the omission is misleading and occasionally intentional. One of the familiar tricks of the orator or propagandist is to leave certain things unsaid, things that are highly relevant to the argument, but that might be challenged if they were made explicit. The omission may prevent you from identifying a logical flaw. Careful reading should uncover whether every step in an argument is made explicit.

5.2
UNITS OF REASONING

Good argument in a simple case ought to be put in a nutshell. In the course of a more elaborate analysis one proposition may be established in order to prove another and this may be used in turn to build a further point. The units of reasoning are, however, single arguments. If you can find these you are not likely to miss the larger sequences. Usually an argument will involve a number of statements. Of these, some give reasons why you should accept the conclusion the judge is proposing. If you find the conclusion look for the reasons; if you find the reasons, first see where they lead.

It is trite to suggest that every line of argument must start somewhere: there are two basic starting places – an agreed assumption of fact or law, or a self-evident proposition that may not be denied. You must beware, however, of an assumption which, irrespective of the words used or linguistic conventions, is merely tautologous.

5.3
FINDING THE SOLUTION

Having located those passages containing the judge's reasoning you may now reflect of what he has achieved:

- Did the judge solve the major problem he was addressing in the course of his judgment?
- In the course of doing so did he raise new ones?
- Did he acknowledge problems he could not solve?

An interpretative reading is concerned with finding out what the judge's solutions are, and how he has argued those solutions. It is by argument that a court acquaints itself sufficiently intimately and accurately with the material facts of the case; from such facts will emerge certain possible rules which may be applied to them. The parties contend for either a different interpretation or a different application of such rules to the facts.

The task of the advocate is to establish a certain proposition by a series of logical steps. In order to do so he will press into service any material that may assist the logical process. Nothing can be more conclusive for his purpose than to show that the proposition for which he contends has previously been established in the same or similar circumstances. Thus counsel will rely as much as possible on precedents as being the shortest and clearest way to his objective. But he will seldom find an exact analogy in previous cases. If he is fortunate enough to do so he has disposed of the matter, assuming the analogy is exact, because the logical process is completed at once. But in the very great majority of cases there is no precise authority. He must then find other analogies and turn to arguments from other sources, legal, historical, formal or material, or whatever else it may be which reasonably support his contention and are logically relevant.

Effective legal argument is not confined to binding precedent. It may have recourse to the opinion of reputable writers, decisions of other countries, history, common sense, natural justice, convenience and utility, to the etymology and interpretation of words, to anything that may legitimately

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come within the ambit of dialectical demonstration. Providing he builds up his thesis consistently the Court will not greatly care whether he culls his arguments from dry propositions of law or the flowers of rhetoric and poetry.[13]

Once the judge has absorbed, considered, determined, adopted and/or rejected counsel's argument, his own reasoning itself comes under scrutiny.

- Did he discriminate between the kind of argument that points to one or more particular facts as evidence for some generalisation (*i.e.* did he apply inductive reasoning) or the kind that offers a series of general statements to prove some further generalisation (deductive reasoning)? For the purpose of close analysis of the units of reasoning it is important to discriminate between those two.
- Did he recognise that logical elements are not all of equal weight? If it is a man's business to adjudicate between rival contentions he will soon develop guiding rules, explicit or implicit, for distinguishing degrees of cogency in the arguments addressed to him, in the same way that if it is a man's business to argue habitually he will soon learn to discriminate between the stronger and the weaker of his materials.[14] If so, was his weighing of the rival contentions correct?
- Was his acceptance or rejection of a proposition based on its proof by reasoning or its establishment by experiment? Sometimes it is possible to support a proposition by both reasoning from other general truths and by offering experimental evidence. Sometimes only one method is available. This may be of particular importance in a case that turns on, or is largely influenced by expert evidence outside the immediate experience of the judge.
- Consider the judge's approach to the proof of a fact or proposition: observe what things the judge says he must *assume*, what he says has been *proved*, and what need not be proved because they are self-evident. He may honestly try to tell you what all his assumptions are or he may just as honestly leave you to find them out for yourself. Not everything can be proved just as not everything can be defined. Such things as axioms and assumptions or postulates are needed for the proof of other propositions. These, if proved, can be used as premises in further proofs.
- Is the logical basis for the judge's argument sound? The role of the advocate is to persuade. Psychologically it is much more effective in arguing a case to dress up sentiment with logic. In delivering judgment there is a tendency on the part of judges to do the same. This is particularly so where the judge starts with a conclusion and afterwards tries to find some premise which will substantiate it.

[13] See *Precedent and Logic* C.K.Allen (1925) CLXIII LQR 332.
[14] Ibid 333.

- Is the validity of the argument based on the width of a major premise? There is a real danger when applying syllogistic reasoning to law that an attractive but wide proposition obscures the real question at issue: thus, for example in *Rose* v *Ford* [1937] AC 826 the House of Lords criticises the Court of Appeal for its logic in awarding separate personal injury damages in a fatal accident case:

> "This way of looking at the case involves in my judgment a failure to give effect to s. 1 of the Act of 1934. The moment before the girl died there was, as I think, apart from her actual death a cause of action vested in her for deprivation or loss of expectation of life. Before the Act, that cause of action would have ceased with her death. That same cause of action, by force of the Act, now survives in the administrator. It is not correct to say that the administrator acquires under the Act a new or changed cause of action, as would be the case if he were a third party suing for the deceased's death. Obviously she could not have sued herself for her own death. The administrator simply stands in the shoes of the deceased, and in a sense may be said to continue her life. The damages for loss of expectation of life are indeed on a different footing from those for loss of the leg. The former damages are to be based on her state as a young and healthy woman with the use of both legs at the moment before she was struck down. if in addition she got damages for the loss of her leg for the period of the normal expectation of life, she would be getting pro tanto damages twice over. *But on the view of the Court of Appeal the defendant would be in the paradoxical position of being entitled to plead in mitigation of damage that he had not merely maimed but killed the plaintiff. It was some such idea that before the Act of 1934 inspired the cynical comment that it was cheaper to kill than to maim or cripple.* The Act has, however, not merely stated that it is amending the law as to the effect of death in relation to causes of action, but has done so. The fact that the plaintiff has died before judgment is now in truth an irrelevant circumstance, save that it obviates to some extent the necessity of medical evidence that the accident has shortened the person's life. The damage claimed is not for the death, for which the victim herself could not have sued, any more than the administrator can who merely stands in her shoes. I venture respectfully to think that the view of the Court of Appeal illustrates a tendency common in construing an Act which changes the law, that is, to minimize or neutralize its operation by introducing notions taken from or inspired by the

> old law which the words of the Act were intended to abrogate and did abrogate.
>
> *A similar tendency is illustrated, I think, by the references to a dogma of somewhat obscure import and uncertain application, that in a civil court the death of a human being cannot be complained of as an injury..."*[15]

Or consider the logic of Simonds J in determining whether the sale of cigarettes in a tea shop in 1940 rendered the tenant in breach of the terms of its lease:

> "In these circumstances the question which I have to determine is this. First, does the ABC shop carry on, on these premises, the business of the sale of tobacco, cigars and cigarettes? Secondly, if such a business is carried on on these premises, have the defendants permitted or suffered the premises to be used so that they are liable on their covenant with the plaintiffs?
>
> I think that I may fairly say, as was said in a somewhat similar case, that this is a very puzzling point. Ultimately, I think that it is to be solved by asking oneself whether, on the fair meaning of the covenant and according to the ordinary use of language, it can be predicated of the ABC tea-shop that there is there carried on the business of the sale of tobacco, cigars and cigarettes. It is, I think, at least clear that it cannot be predicated of the ABC that they carry on on these premises the business of tobacconists. Nobody, on being asked the question whether they carry on there the business of tobacconists, would answer that question in the affirmative.
>
> I ask next whether there is any difference for this purpose between carrying on the business of a tobacconist and carrying on the business of the sale of tobacco, cigars and cigarettes. One must give a meaning, if possible, to every part of an instrument carefully drawn and entered into between the parties. Since the words "business of a tobacconist" and "business of the sale of tobacco, cigars and cigarettes" occur in immediate proximity in the same clause, I must assume that some difference was intended between the two phrases. I am disposed to think that here there is some difference between the two and that, even though the business of tobacconist as a whole was not carried on, yet the provision would be infringed if it could fairly be said that the business of the sale of tobacco, cigars and cigarettes was carried on. I have therefore to consider that question.

[15] Per Lord Wright @ 845.

> I find it difficult to take the view that anybody being asked this question: "What is the business which the ABC carry on at this shop?" would reply: "They carry on several businesses; they carry on the business of selling refreshments; they carry on the business of selling confectionery; they carry on the business of selling tobacco, cigars and cigarettes."
>
> In my view, what is done at these premises is the carrying on of the business of a tea-shop, and that involves, among other things, the sale of cigarettes. It is common – indeed, I was told that it was almost universal – that in tea-shops of this character cigarettes should be sold. Accordingly, it appears to me that it is no more right to predicate of this shop that there is carried on there the business of the sale of tobacco, cigars and cigarettes than to say of it that there is carried on the business of the sale of milk, or the business of the sale of confectionery. There is there carried on the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold."

- Did the judge consider the impact and wider effect of his judgment and use the process to reality test?

5.4
THE DOMESTIC APPROACH

Sir John Salmond wrote[16] that the English judge is not merely a mechanic who broadcasts rules of law to the community. To administer law is to administer justice and justice is wider than law, containing those principles of natural justice, practical expediency, or common sense and so supplement existing law. On the whole the method of common law judicial reasoning combines a conscientious search for true justice with the logical application of legal conceptions to actual circumstances. It is open to persuasive influences which have a good claim to respect and consideration.

Judges of an English common law background are readily able to determine questions concerning the existence of a rule, or the choice between two competing rules, or the validity of a rule, as questions of law, and the credibility of a witness or inference to be drawn from evidence as matters of fact. Likewise their approach to evidential and procedural questions, and the grant or refusal of remedies in the exercise of a discretion is based on experience drawn from practice.

Since the principal task of the judge is to adjudicate upon disputes that have already occurred, with his attention being fixed on the past, a judge's methodology in dealing with a variety of cases may be inconsistent, but it is ascertainable. This is true not only in relation to his approach to the facts, but also in relation to the standards which it is appropriate for him to apply to the dispute. Just as it would be wrong for the judge to apply to the dispute the superseded standards of a past age, so it would be incorrect to apply standards merely because they might seem appropriate to circumstances likely to exist in the future. In general justice requires that the solution to a dispute be forged from such considerations as could and should have guided the parties conduct when the dispute arose.

[16] *Jurisprudence* Salmond 7th edn. (P&MI) 187 note 2.

Analysis is more difficult when judgments are collegial, as in the experience of European courts in particular, where there is no provision for dissenting judgments, a stylised format, and the prose used, even allowing for the vagaries of translating professional jargon, is stylistically flat. Joint decisions may reflect something of a compromise by tribunal members who would like to offer at least some dissent, but see no useful purpose in doing so. But of greater concern is the fact that collegial judgments have a tendency to lack the detailed factual and legal analysis of English courts in favour of very logical development where a point follows each point in the order of logical sequence. Other commentators have suggested[17] that this is advantageous and an approach which domestic tribunals would be better to develop as these judgments are easier to read and understand.

What you need to unearth, either properly to understand the judge's thinking, or to challenge him intellectually, are those points of uncertainty or argument that do not fit into the rational deductive process. Unlike their counterparts in Europe, common law judges are not reluctant to explore the implications of their judgments or their impact on the boundaries of the law beyond issues directly raised by case in hand, even if they shy away from making policy indications on questions lacking general importance. Frequently our judges speculate on the scope and implications of their judgment as a valuable part of the process of reasoning. It is here that the most valuable material is likely to be available to the analytical reader.

[17] *Learning Legal Rules* J.A.Holland & J.S.Webb 5th edn. OUP 2003 p.83.

5.5

JUDICIAL REASONING AND THE ROLE OF PERSUASION

In reading any judgment you must consider: what is the judge's objective, and what means for achieving this is he proposing? His objective is to persuade you that his decision is justified; the method he uses is advocacy, just as much as those who appear before him. His argument appeals to the mind, to reason, to the senses and to emotion, to gain direction of your will. Ultimately the effect of the judgment will turn on whether or not you accept his argument.

In the nature of practical things men have to be persuaded to think and act in a certain way.[18] The person who reads intelligently and knows basic terms, propositions and arguments, will always be able to detect oratory and to spot passages that make an emotive or overelaborate use of words. You yourself will look for reasoning, and assess whether it is either good or not, in relation to the material facts.

For the purpose of fair criticism we need to consider, in broad terms, the questions, what does the judge want to prove? Whom does he want to convince? What special knowledge does he assume? What special language does he use? Does he really know what he is talking about – enough to give a fair and balanced view of the situation? We recognise that a judge cannot suppose, guess, hypothecate or estimate except under very carefully controlled circumstances. We are therefore entitled to investigate his assumptions, starting from the position that there may always be a doubt whether they are reasonable or not, particularly in circumstances where historical facts prove elusive; or where there has been a condensation of the detailed evidence or information provided in the judgment, such that it is possible to argue what has been left out becomes critical.

[18] See *Adler op. cit.* p.198.

5.6

DISTINGUISHING GRAMMATICAL AND LOGICAL INTERPRETATION

You must distinguish between your grammatical or linguistic analysis of a judgment, and your interpretation of the judge's logic and reasoning. To do this:

- First divide up the judgment into convenient units and assess their contents;
- See how the arguments are worked up in logical progressions or towers, as propositions become grouped together as terms;
- Identify whether assumptions are supported by reasons;
- By contrast, note separately the use of specific legal language:

Sentences and paragraphs are grammatical units and units of language. Propositions and arguments are logical units or units of thought and knowledge.[19] Because language is not a perfect medium for the expression of thought, particularly the use of legal language where one word may have many meanings and two or more words can have the same meaning, or at least closely similar meanings, the relationship between a judge's vocabulary and his terminology is complicated. One word may represent several terms, such as 'immunity', and one term may be represented by several words, for example 'fair, just and reasonable'. The difficulty with language becomes important when one remembers that to data search a judgment or report it is the language that is applied in the search, not legal concepts.

[19] *Ibid* p. 117.

5.7
POSITIVE JUDICIAL ARGUMENT

Judgments are opinions based on reasoned propositions. A proposition is an expression of the judge's judgment about something: he either affirms something he thinks is true or denies something he judges to be false. A proposition of this sort is a declaration of knowledge, not intention. Therefore you should not be satisfied with knowing what the judge's opinions are. His propositions are nothing but expressions of personal opinion unless they are supported by reasons. You should want to know not merely what his propositions are but why he thinks you should be persuaded to accept them.

Adler suggests[20] that an argument is always a set or series of statements of which some provide the grounds or reasons for what is to be concluded. A common example contained in judgments is the use of related statements: *this* is said *because* of *that*; if *this* is so then *that* must follow; or, since *this* therefore *that*; it follows from this, that that is the case.

A paragraph or at least a collection of sentences is required to express an argument. The premises or principles of an argument may not always be stated first, but they are the source of the conclusion, nevertheless. If the argument is valid, the conclusion follows from the premises. For these purposes you must consider each of the premises, since even if you accept that a conclusion must flow from two or more premises, you must consider whether one or all of the premises that support it may be false.

[20] *Ibid* p.115.

5.8
AIDS TO REASONING

Despite strong media assertions that members of the judiciary live in ivory towers, most judges share the common experiences of the litigants they are called upon to judge: they read newspapers and watch television; they use public transport; they share the experiences of being spouses, parents and grandparents; they are consumers like everyone else; they have health problems like everyone else; and they indulge in social recreation, including popular recreation. In his reasoning a judge will apply what he regards as common sense and his daily observation of the world in which we live.

Common experiences do not have to be shared by everyone in order to be common. *Common* is not the same thing as ***universal***. One does not need the extrinsic aid of special experiences in order to understand them. But such experiences, whether common or special, give rise to a recognised standard, whether of behaviour or performance, to which a judge is properly entitled to have regard.

The application of what is called common sense, being a presumed rational and general if unexpressed understanding about a matter, has long been recognised as an aid to judicial reasoning. Often, with the benefit of hindsight, practitioners will regard a decision as a matter of common sense; equally on occasion they will protest that by a particular decision the law offends against common sense.

The question of special experience is mainly relevant to the use of expert opinion, often in the reading of scientific or technical works. Judges require such special experience in order to come to a proper understanding of scientific or technical expert reports, the basis for the arguments they contain, and at its most basic level, to be able to follow scientific or other expert evidence.

5.9

THE JUDGE AND THE EXPERT

Judges are called upon daily to determine disputes whose subjects may be scientific, technological or highly specialised so far as a particular trade, profession or industry is concerned. These may require an explanation of some or all of the material trade or technical jargon, methodology, professional standards, custom and practice, and both national and internationally recognised norms and models. Often the issue centres upon what is the relevant professional standard or trade practice, and whether liability occurs because a defendant has departed from such a standard or usage.

Where such matters are outside the experience or knowledge of the court, evidence of expert opinion in connection with the material issues will be called on if it will assist the judge in his decision-making process. There are three fundamentals of which we occasionally lose sight:

- The expert is *not* the judge, and does not perform his function;
- Although based on recognised qualification and experience, ultimately expert evidence is only opinion;
- Like any other evidence that is received, the judge is free to reject it.

The judge should not be in awe of an expert, and should try and treat such evidence with as much measured detachment as he would any other. Making allowances for the inherent respect due to expertise, experience and authority, the judge should nonetheless deal with weight and materiality with great care. In assessing the regard he has had to an expert when delivering judgment, you will wish to analyse whether the judge has ascertained:

- The relevance of the expert's qualifications to the facts in issue;
- The relevance of the expert's experience to the facts in issue;[21]

[21] *National Justice Compania Naviera SA* v *Prudential Assurance Co Ltd ('The Ikarian Reefer')* [1995] 1 Lloyd's Rep 455 CA per Stuart-Smith LJ @ 496.497.

- Whether the evidence has been given with true impartiality and lack of partisanship. If there is a dispute between experts of similar relevant standing, is it a 'genuine' or 'partisan' conflict?
- Whether the evidence has been of primary assistance to the court, or whether it is being used to corroborate evidence of fact or assertions of method;
- The true weight that should properly be attached to it.

Essentially the judge should have asked the questions:

- Is the expert neutral?
- Is the expert reliable?
- Is the expert representative?
- Is the expert's evidence relevant and material?

The area in which judges meet most criticism concerning experts is in case management. Part 35 of the Civil Procedure Rules 1998 was intended to reduce the number of experts and have those appointed come to a consensus. It was also designed to reduce the risk of bias by requiring experts to certify their understanding of their overriding duty to the court. In assessing the outcome of any case involving experts you will wish to examine how the judge's case management impacted on expert evidence, particularly in terms of the four criteria referred to above, and even more so when evidence of expert opinion was taken from a single joint appointee. Certainly the conduct of experts can now be the subject of almost as much examination as the substance of what they have said.[22]

For ease of reference judges like experts to provide them with a norm or constant against which they can measure the conduct of the defendant. This enables them to both rationalise and simplify their decision making. However, although produced for the assistance of the court, expert evidence is not always designed or shaped for the contingencies of litigation, particularly in areas of science, technology and medicine. Here, and in other areas where new developments and continuing research may challenge existing benchmarks of expert opinion, the idea of a normal standard tends to be idealised by the courts. There is a presumption that research results are open and accessible, and that scientific or technical knowledge is shared communally with all working for the common good, and thus that each expert has access to the same material.

[22] See for example *Selman* v *Vijay Construction (UK) Ltd* [2003] EWHC TCC 1100 HH Judge Thornton QC unrep. 8 May 2003.

This is a somewhat naïve approach. Experts may be in competition with each other, particularly in a narrow field. They will wish to protect research work. They may have personal, cultural, financial or professional reasons for attaining primacy through presenting or publishing an opinion based on incomplete, partial or under-theorised results. This may be unknown to the client as well as the courts.

The judge has to determine whether the witness is providing evidence of expert opinion which is representative of the norm, or whether his evidence is novel and maverick, or in some other way only recognised by a small minority in the relevant scientific or technical community. The evidence may have been taken out of context; it may have been drawn from abstract statements, or statements only relevant where certain background assumptions, facts and interpretations are vital. As 'novel' evidence it may not altogether be accepted by the wider scientific community, or, at a slightly lower level, there may not exist anything approximating to universal support among, for example, scientists for a particular interpretation.

There has to be general acceptance of a scientific or medical principle for it to be admitted into evidence in the United States. In Australia[23] and England[24] courts have been willing to admit evidence purportedly accepted by a minority in a particular field, if it comes within the compass of a 'recognised body of opinion'.

The judge, then, has to fall back on the analytical and reasoning skills he applies to other categories of evidence, namely assessing materiality, reliability and weight, in viewing the expert. He may wish to consider such matters as:

- Are the norms used by the experts consistent or inconsistent with each other or with any other published measured standards?
- What is the degree of certainty being espoused?
- Whether any boundaries been crossed between different professional activities?
- The impression given by the demeanour and authority of the expert?
- Whether the expert is being dogmatic or flexible in his opinion?
- Notwithstanding that the expert has all relevant professional information, has he taken in the facts of the case adequately?

[23] *R* v *Gilmore* [1977] 2 NSWLR 935 @939–941; *Runjanjic and Kontinen* v *The Queen* (1991) 56 SASR 114, 119; *R* v *Rose* (1993) A Crim R 1, 9; *R v J* (1994) 75 A Crim R 522, 535–6; *R* v *Jarrett* (1994) 62 SASR 443.

[24] *Maynard* v *West Midlands Regional Health Authority* [1984] 1 WLR 634 @ 639; *Bolitho* v *City and Hackney Health Authority* [1998] AC 232, 238–239, 241–242.

You will recognise that judges are faced with entirely novel evidence as science and technology makes advances. A good example is the use of DNA as receivable evidence in criminal cases. The use of a specific advance in technology had to be considered by the courts: once a number of decisions have been made concerning the use of specific technology it becomes easier for subsequent courts to base their decisions on earlier authority. Each subsequent decision tends to reinforce the development of a judicial consensus. This can refer to a body of knowledge rather than a separate single advance in medicine or computer science or an industrial process.

Finally one of the judge's basic tasks is to choose between experts of differing opinion. He must be able to show that has a reasoned basis for his preference: the factors by which he has drawn a distinction may be categorised as:

(i) What the witnesses have actually said;
(ii) The extent to which what they have said is lent authority by their respective qualifications and experience;
(iii) The relationship between their respective qualification and experience and the task in hand;
(iv) Where the weight of the evidence in terms of general principle lies, i.e. the novelty of the propositions being advanced, and the relative support of the technical or scientific community to which the expert is attached to their norm or model.

5.10
THE USE OF PRECEDENT

> "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to flow logically from it. Such a mode or reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."[25]

> "Judging is a practical matter, and an act of will. Notwithstanding all the apparatus of authority, the judge nearly always has some degree of choice"[26]

The use of a system of binding precedent is more recent than you would think. The hierarchy of authority did not finally establish itself until comparatively late in the nineteenth century. This appears not to have been by the result of any single direction or framework imposed by the higher courts, but as the natural consequence of the enormous growth of printed decisions and regularisation of semi-official laws reports in 1865. In our own era the scope and range of law reports have undergone a huge expansion over the last 20 years, even before the development of electronic reports, the use of daily alerters and media-neutral citation. In order to prevent being swamped with authority the courts now try to cap the list of citations produced by counsel.[27] What will result from the ongoing further expansion of available authority remains to be seen.

The debate over the rigidity of a system of binding authority went on throughout the twentieth century, much of it being concerned with whether judge-made law was a good thing.[28] In 1925 Carleton Kemp Allen wrote.[29] "the

[25] Lord Halsbury LC *Quinn v Leathem [1901] AC 506.*
[26] *Legal Essays and Addresses* Lord Wright 1939 p 25.
[27] *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194 para 2.5; *Practice Direction (Court of Appeal: Citation of Authorities)* [2001] 1 WLR 1001; CPR Part 52 PD (30th June 2004) para 15.11(2)(a); and see *Scribes West Ltd v Relsa Anstalt (No 1) [2004] EWCA (Civ) 835* per Brooke LJ.
[28] "There is in fact no such thing as judge-made law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable" *Williams v Baddeley [1892] 2 QB 324* per Lord Esher MR @ 326.
[29] *Precedent and Logic* C.K.Allen 1925 CLXIII LQR 329.

conspicuous advantage of a system of precedents is that legal principles are framed, not merely as conceptions *in abstracto*, but as practical rules operating *in concreto*. Granted that a judgment is the construction of a legal proposition, and not a mechanical application of sovereign commandments already formulated, there can be no better foundation for the process than the collation and analysis of previous workings of the rule in actual cases. Not only is the law kept elastic by the greater scope left to the trained faculties of the judges...we come as near to that uniformity of law which is said to be more desirable than ideal but uncertain justice...Judgments give rise to binding standards... It is an open secret that judges have a good deal of choice in the way in which they apply case law and they are prone to distinguish even the most closely similar precedent if they feel strongly that it tends towards an undesirable result."

5.11
PRECEDENT AND REASONING

The system of precedent is the foundation of legal reasoning in the common law: a proposition of law is established; a similarity is identified in a following case, and the proposition is then applied to the degree or level of generality which may embrace the facts in question in the preceding decision. The judge is therefore reasoning by example, a mechanism by which his finding of fact is applied to a specific legal consequence. Since this application may or may not be appropriate in the different factual situation of a later case, a different result may be yielded. It is the level of generality or particularity of the proposition combined with the facts of the case that determines whether the legal rule contained in the precedent applies.

The judicial process is engaged in selecting the appropriate law and applying it to the facts as found. On the facts and arguments before him the judge arrives at certain conclusions. These he develops into a judgment by building up, piece by piece, a structure of logic in which he may use any material that he considers appropriate, is supportive of his conclusion and, if necessary (but *only* if necessary), moves the law in the direction of the remedy he intends to provide. He has a plethora of authority to select: these days inventive counsel will cite statutes and delegated legislation, both domestic and European, the most recent comprehensive range of cases from all jurisdictions, ancient and modern texts, Hansard, Law Commission reports, parliamentary papers, learned articles and the thinking of eminent foreign jurists.

Fortunately the judge follows certain well-established rules in selecting materials of different relative values. His whole training, drawn from practice as well as the bench, instructs him that the most conclusive logic is the analogy of antecedent cases, especially if courts of a higher jurisdiction than his own have decided them. Since these bind him, the direction in which he must travel is laid out before him. But, as has been said,[30] he is only bound intellectually by the established logic which it his profession to exercise, not in any automatic or mechanical manner. In reality he can flout precedent. No principle in the textbooks can make him a machine. It is he himself who must

[30] *Ibid* p. 333.

decide whether the precedent is authoritative or not. The most Olympian decision of the House of Lords will not bind a county court judge unless he thinks he ought to be bound by it – unless he thinks it presents a clear and relevant analogy to the case before him – and on that point opinions may greatly differ. Allen[31] puts it this way:

> "The binding force of precedents has, through constant and often unthinking repetition, become a kind of sacramental phrase which contains a large element of fiction. If a court is quite clear about the rule of law which should be applied to the case before it, it will seldom allow itself to be embarrassed by an inconvenient decision. There are many ways of 'distinguishing,' and a bad case which runs counter to the *communis opinion doctorum* is soon distinguished out of existence. When, in 1923, the House of Lords definitely overruled *Miller* v *Hancock* [1893] 2 QB 177 in *Fairman* v *Perpetual Investment Co* [1923] AC 74 it merely gave the earlier decision its *coup de grace*; it had been on the point of death for twenty years, because single judges, as well as the Court of Appeal, had repeatedly 'distinguished' it in ways which were more ingenious than ingenuous. What judge, save a pedant, would consider himself bound by *Gibbons* v *Proctor* (1892) 64 LT 594? It is simply pronounced 'bad law' and if all else fails, the blame for its badness can be laid at the door of the reporter."

And Lord Hobhouse said in *R* v *Governor of Brockhill Prison, Ex p. Evans (No 2)*:[32]

> "any legal decision is no more than evidence of the law. In the *Lincoln City Council* case [1999] 2 AC 349, 377, Lord Goff of Chieveley quoted from *Hale's Common Law of England*, 6th ed (1820), p 90 and *Blackstone's Commentaries*, 6th ed (1774), pp 88–89:
>
> > "the decisions of the courts do not constitute the law properly so called, but are evidence of the law and as such 'have a great weight and authority in expounding, declaring, and publishing what the law of this Kingdom is'."
>
> They are a source of law but not a conclusive source. Judicial decisions are only conclusive as between the parties to them and their privies. The doctrine of precedent may give certain decisions a more authoritative status but this is relative as the present case shows: the Divisional Court was at liberty not to follow its own previous decision. A decision or judgment may on examination be shown to be inconsistent with other decisions. The value,

[31] *Ibid* p. 334.
[32] [2001] 2 AC 19 HL @ 45.

> force and effect of any decision is a matter to be considered and assessed. They are not statutes which (subject to European Union law) have an absolute and incontrovertible status.

Modern examples of the processes described by Allen abound: either the gradual chipping away of an accepted approach because it no longer reflects contemporary social attitudes, or a subsequent *mores* thinks that it was wrongly decided;[33] or the higher courts require a change in the ebb and flow of a wider principle of law over the course of time either for practical purposes or reasons of policy.[34]

This is not to suggest that precedent is anything other than of the highest importance to our system. It is the most powerful instrument in the logical process; but it is only one, if the chief among many. What judges look for is not some kind of 'revealed' authority that will miraculously settle the problem before them, but a convincing statement or application of a principle of law appropriate to the case in hand.[35] Clearly you will come across what appears to be a number of difficulties regularly thrown up by any rigid system of authority: first, there is the dilemma between two conflicting decisions of courts of superior jurisdiction which may appear to be completely irreconcilable until the issue is decided from above.[36] Second, and perhaps more often, a judge is sometimes bound by precedent to give a decision contrary to his own conviction, very often hoping it will be reversed on appeal. He often hints as much in a first instance judgment, or else distinguishes on the basis that the prior court felt bound by a decision subsequently overruled.[37] When this happens it is unsatisfactory to both the parties and the judge. Third, by the time it reaches the ultimate tribunal, judicial opinion on a point may be almost equally divided, counting all the judges in all the courts concerned.[38] This surely dilutes the value of the decision.

Any common lawyer will be familiar with a multitude of rules for which particular precedents can be cited as authority, particularly where the rule itself derives from the name of the case by which it was established e.g. *Rylands* v *Fletcher*[39] or *Foakes* v *Beer*.[40] In most scenarios there will be little doubt about its meaning and operation, particularly where the judge beginning or developing the precedent has spelt out with care the rule and it may have been

[33] See for example *R.* v *R.* (*op.cit.*).
[34] See for example *Arthur J. Hall* v *Simons* (*op.cit.*).
[35] *Precedent and Logic* C.K.Allen *op.cit.* p. 334.
[36] See for example *Di Palma* v *Victoria Square Property Co Ltd* [1986] Ch 150 CA overruling *Jones* v *Barnett* [1984] Ch 500.
[37] See *Haste* v *Sandell Perkins Ltd* [1984] QB 735 per Hirst J @ 738.
[38] See for example *Arthur J. Hall* v *Simons* (op.cit.).
[39] [1868] LR 3 HL 330.
[40] (1884) 9 App. Cas. 605, itself a case where the House of Lords reaffirmed a rule which it did not like solely out of respect for precedent.

accepted authoritatively in subsequent cases. There really need to be unusual features that are sufficient to enable the present case to fall outside the ambit of such an existing rule, otherwise a judge has no choice but to apply it. The decision itself then becomes another precedent for the rule and entrenches it further. Frequent judicial endorsement of a rule supported by precedent does give it a special status.

On the other hand judges that afterwards distinguish the precedent will later qualify the original proposition or may even rationalize it on an altogether different basis. In the end nothing may be left of the legal rule which the judge envisaged but a proposition which embodies only all the factual elements of the case which he decided. Judges almost invite a reappraisal of their judgment when formulating a proposed *ratio decidendi* in very general terms, i.e. which may bring within its focus a wide range of disparate cases. A rule of thumb is the more superior the court, the wider can be the ratio. This represents that part of the function of the higher courts which is to give practical guidance to judges at first instance. Good examples may be found historically in the law of privity of contract,[41] and much more recently on causation,[42] and proximity[43] in the recoverability of damage.

[41] *Dunlop Pneumatic Tyre Co* v *Selfridge* [1915] AC 847 HL.
[42] *South Australian Asset Management Co. Ltd.* v *York Montague* (op.cit.).
[43] *Sutradhar* v *National Environmental Research Council* [2004] EWCA Civ 175; [2004] PNLR 30.

5.12

AT THE COAL FACE: TRIAL JUDGES

Judges working at a lower level are concerned principally with the facts before them, and to engage in the adjudicative process as efficiently and, perhaps, conveniently as possible. By and large first instance judges do not like to make new law. They tend to work intuitively, within general legal concepts and look for precedent only where the facts of a relevant authority and facts of the case before the court are either indistinguishable or substantially the same. Judges at first instance are most happy when the finding of facts alone determines the outcome of a case, and will avoid becoming enmeshed in legal argument unnecessarily if they can. If a trial judge has to consider legal issues he usually first finds the facts, then looks at the relevance of a previous case and decides whether the legal reasoning in the previous case be compared and applied to facts before him. He will not wish to make new law, far less give vent to any policy considerations. Even the higher courts tend to shy away from making policy indications on questions lacking general importance, and to the surprise of many advocates appearing before it, the House of Lords is as equally concerned with the factual matrix of a case as the puisne judge.

Judges, like any other professionals, require both confidence and experience to arrive at firm conclusions. Even the most experienced judge may be troubled by an oddity or perhaps the general peculiarity of a situation with which he is faced. He may be dissatisfied with submissions by the advocates appearing on both sides. He may be troubled by a recent authority that appears to be out of step with his own thinking or a common sense approach to solving the problem. Or he may face real uncertainty as to what to do.

While there is no formal mentoring process, judges, and particularly deputies and Recorders, are encouraged to seek advice when they need it, and if necessary, to adjourn cases briefly in order to do so. It may be that they can seek the advice of senior colleagues in the mess over lunch, if a large court centre, or to call upon a judge with more specialist knowledge.

Judges in the lower courts also tend to be conscious of the disapproval in the profession of intellectual dishonesty. "Distinguishing" is sometimes an ingenious intellectual contrivance to avoid having to follow an inconvenient previous decision which would otherwise bind the court. There are many examples worthy of study.[44]

As a member of the community the judge is bound to share more or less its common thinking and accepted wisdom, and indeed judges often express sympathy with such notions when they find themselves reluctantly constrained by an earlier precedent to decide a case in conflict with what must seem reasonable to the layman. It may be that a case such as *Howard* v *Walker*[45] where Lord Goddard CJ was obliged to say:[46]

> "It may be that the law is not entirely satisfactory on this point. No doubt, it is difficult for a layman to understand why, if he is walking along a road and slips into an excavation at the side of it, he should be entitled to recover, whereas if he slips into the excavation as he is endeavouring to get on to the road, he is not, but I must take the law as I find it."

would today be decided differently for precisely the reason that a layman would otherwise find the law unintelligible or lacking in common sense.

The development of the common law is essentially a sophisticated process of refinement in which a later and usually superior court examines previous authority to decide whether the *ratio* of the present case falls within or outside its scope. It evolves by identifying material differences, great or small, and determining whether the rule or proposition in question applies to these, and if so why and to what effect. The application affects not only the decision in hand but also the prior case, since the process of the superior court is to affirm, apply, approve, consider, distinguish, overrule, or reverse the previous decision.

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[44] *Taylor* v *Webb* [1937] 2 KB 283; *Rothwell* v *Caverswall Stone* [1944] 2 All ER 350; *Fisher* v *Ruislip-Northwood UDC* [1945] KB 584; *Brown* v *Davies* [1958] 1 QB 117; *D* v *East Berkshire CH NHS Trust* [2003] 4 All ER 796.

[45] [1947] 2 All ER 197.

[46] @ p.199.

5.13

DISTINGUISHING YOUR JUDGMENT

It becomes essential in your analysis to have a scheme or checklist of items that will assist you in assessing whether the judge can properly distinguish authority which would otherwise bind him.

- Identify whether the issue is really a proposition of law or a question of fact (called by an older generation a proposition of good sense). In *Qualcast (Wolverhampton) Ltd* v *Haynes* [1959] AC 743 HL both Lord Somervell and Lord Denning drew attention to the distinction:

> "A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as "law" and citable, the precedent system will die from a surfeit of authorities. In *Woods* v *Durable Suites Ltd.* [1953] 1 W.L.R. 857; [1953] 2 All E.R. 391. counsel for the plaintiff was seeking to rely on a previous decision in a negligence action. Singleton L.J. said this [1953] 1 W.L.R. 857, 860.: "That was a case of the same nature as that which is now under appeal. It is of the greatest importance that it should be borne in mind that though the nature of the illness and the nature of the work are the same, the facts were quite different. Mr. Doughty claims that the decision of this court in *Clifford* v *Charles H. Challen & Son Ltd.* [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72. lays down a standard to be adopted in a case of this nature. In other words, he seeks to treat that decision as deciding a question of law rather than as being a decision on the facts of that particular case."
>
> In the present case, and I am not criticising him, the learned county court judge felt himself bound by certain observations in different cases which were not, I think, probably intended by the learned judges to enunciate any new principles or gloss on the familiar standard of reasonable care. It must be a question on the evidence in each case whether, assuming a duty to provide some safety equipment, there is a duty to advise everyone, whether experienced or inexperienced, as to its use."[47]
>
> 'My Lords, in 1944 du Parcq L.J. gave a warning which is worth repeating today: "There is danger, particularly in these days when few cases are tried with juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense"; see *Easson* v *London & North Eastern Railway Co.*
>
> In the present case the only proposition of law that was relevant was the well-known proposition – with its threefold sub-division – that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact be it judge or jury – can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law.'[48]

- Be aware that a court is more likely to follow precedent than depart from it, since public policy requires consistency: "The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so." per Lord Slynn in *Lewis* v *Attorney General of Jamaica*.[49]
- Bear in mind that the law is tidal, in the sense that it has an ebb and flow, and particular cases follow a pattern. This is best illustrated where a superior court considers two conflicting lines of authority, for example *Henderson* v *Merrett Syndicates Ltd*.[50] Does the judge's action amount to a radical departure from an established principle?

[47] Per Lord Somervell @ 758.
[48] Per Lord Denning @ 759.
[49] [2001] AC 50.
[50] [1995] 2 AC 145.

- Conversely, is the judge building a logical extension from an established principle? There is a positive desire to do justice in the case in hand, and therefore to set a new precedent if that is what the court believes justice requires: see *White* v *Jones*.[51]

- The Court will rarely overturn a long-established legal concept, although it does happen: see *R* v *R* [52]

- Is the present case on all fours with the precedent: what is the extent of similarity or dissimilarity of the material facts?

- Do both cases illustrate the same principle?

- Is the authority distinguishable because one or more material facts contained in the authority are missing from the present case?

- Is the authority distinguishable because one or more material facts in the present case were not present in the earlier case?

- Is the authority distinguishable because the law has moved on? This is of importance in comparing cases before and after the introduction of the Civil Procedure Rules 1998, particularly in procedural matters,[53] and before and after the coming into force of the Human Rights Act 1998 in remedies.

- Is the authority distinguishable as being no longer 'good law' because society has moved on? The argument is founded on a contention that the relevant social and legal environment prevailing at the time of the precedent has changed: see, for example *D. & C. Builders* v *Rees* [1966] 2 QB 617 per Dankwerts LJ @ 626:

> "the giving of a cheque of the debtor for a smaller amount than the sum due is very different from "the gift of a horse, hawk, or robe, etc." mentioned in *Pinnel's Case*. I accept that the cheque of some other person than the debtor, in appropriate circumstances, may be the basis of an accord and satisfaction, but I cannot see how in the year 1965 the debtor's own cheque for a smaller sum can be better than payment of the whole amount of the debt in cash. The cheque is only conditional payment, it may be difficult to cash, or it may be returned by the bank with the letters "R.D." upon it, unpaid. I think that *Goddard v. O'Brien*, either was wrongly decided or should not be followed in the circumstances of today."

[51] [1995] 2 AC 207 per Sir Donald Nicholls V-C @ 223H (CA) and per Lord Goff @ 259G. (HL)
[52] [1992] 1 AC 599 @ 614 per Lord Keith *op.cit.*
[53] See *Biguzzi* v *Rank Leisure* [1999] 1 WLR 1926.

> A precedent will not be regarded as wrong, but nevertheless may not be followed, where it can be distinguished because societal factual circumstances have changed since it was originally decided: see per Lord Hoffmann in *Lewis* v *Attorney General of Jamaica*.[54] Similarly a precedent, though correctly decided, may not be followed where related legal principles have changed since the precedent was determined.

- Can the authority be said properly to have been decided *per incuriam* for failing itself to take into account prior relevant cases? A precedent may not be followed if it is found to be *per incuriam*, that is where relevant statutory provisions or binding case law authority have been overlooked or misinterpreted in arriving at the holding in the precedent: see Lord Hoffman in *Lewis*.[55]

- Can the authority be conveniently avoided as being 'persuasive' only, and having no true binding force?

- Can the authority be said to have been simply wrongly decided? In *R* v *Kansal (No.2)*[56] a majority of the members of the Appellate Committee held that a precedent may be held to be wrong and justify overruling where it is found from a practical point of view to be unworkable. Lord Hoffmann in *Lewis*[57] went so far as to say that a case could be not followed as it was 'merely wrong' i.e. wrongly reasoned or came to a wrong conclusion.

- Can the authority be said to have placed too great an emphasis on fact 'a' when the present case requires an emphasis on facts 'b' and 'c'?

- Can the authority be shown to have an inconclusive *ratio* or *rationes*? This concerns the type of judicial spree for which Lord Denning became famous, the presentation of independent lines of reasoning not touched upon by arguments, the hallmark of impatient judges trying to set the law to right. Such an approach was the subject of explicit disapproval in *Rahimtoola* v *Nizam of Hyderabad*[58] where Lord Denning was criticized by Vicount Simonds.[59] Lord Reid[60] and Viscount Somervell.[61]

> "My Lords, I must add that, since writing this opinion, I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver. It is right that I should say that I must not be taken as assenting to his views upon a

[54] *op.cit.* @ p. 90.
[55] *Ibid.*
[56] [2001] UKHL 62; [2001] 3 WLR 1562.
[57] *Op.cit.* @ p.89.
[58] [1958] AC 379 HL.
[59] *Ibid* @ 398.
[60] *Ibid* @ 404.
[61] *Ibid* @ 410.

> number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below."

- Is the authority based on an absence of argument? It is well settled that a proposition of law which passes *sub silentio*, i.e. neither supported nor contested in argument by counsel but assumed to be correct without mention by the court, is not binding on future cases, even if the proposition constitutes a *sine qua non* of the actual decision: see *Slack* v *Leeds* [1923] 1 Ch 431 per Lord Sterndale @ 451 (*op.cit.*) and *Nixon* v *Attorney General* [1931] AC 184 HL per Viscount Dunedin @ 190 (*op.cit.*).
- If the authority has multiple *rationes*, is it distinguishable on the basis that the wrong ratio has been applied in the circumstances? A good example of fair criticism of an existing line of authority on this basis is to be found in the analysis by Lord Phillips of Worth Matravers MR in *Great Peace Shipping Ltd* v *Tsavliris Salvage Ltd* [2003] QB 679 of Lord Denning MR's approach in *Solle* v *Butcher* [1950] 1 KB 671 CA.

There are elements of the system of precedent which appear to have changed over the last twenty years or so. Most recently this has crystallised in the significant debate over tension between *stare decisis* and the freedom of final courts of appeal to depart from and overrule previous decisions of their own which they subsequently consider to have been wrong or no longer authoritative where the needs of society have changed in the meantime.[62] The Judicial Committee of the Privy Council in *Lewis* v *Attorney General of Jamaica*[63] and the House of Lords in *R* v *Kansal (No.2)*[64] raised for debate principles which should guide a court of final appeal in contemplation of replacing its own wrongly decided precedents. The Appellate Committee has considerations which do not apply to lesser tribunals – the policy decisions that provide certainty to both the legal and wider community, especially in commerce, property rights, and the provision of remedies for changing social attitudes and needs.

The operation of precedent is not constant: despite extensive electronic data retrieval and other support it remains impossible to guarantee that judges can know every reported case. They still depend very largely on counsel for citation of all relevant authority, and quite rightly so in view of the pressure upon their time. Counsel are not infallible, particularly with the enormous growth in the law itself, not merely law reporting. Sometimes this may result in a judge arriving at a conclusion which might have been quite different if a

[62] See *Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle* Prof. B V Harris (2002) 118 LQR 408.
[63] [2001] AC 50.
[64] [2001] 3 WLR 1562.

particular authority had been before him. That decision stands, and may be followed in other cases until, perhaps years later, the point comes before a higher court where the neglected authority is discovered and the clock must be put back.

The full impact on the common law of Convention rights and the Human Rights Act 1998 has yet to be seen, however, these are certain to have some impact on how judgments are decided, since potentially all common law rules and precedents are open to challenge. Lord Hope raised this spectre in *Kansal (No.2)*:[65]

> "As Lord Wilberforce observed in *Fitzleet Estates Ltd* v *Cherry* [1977] 1 WLR 1345, 1349D-E, the best way to resolve a question as to which there are two eminently possible views is by the considered majority opinion of the ultimate tribunal, and much more than mere doubts as to the correctness of that opinion are needed to justify departing from it. But the development of our jurisprudence on the Human Rights Act 1998 has only just begun. New problems are being revealed every week, if not every day. I believe that the interests of human rights law would not be well served if the House was to regard itself as bound by views expressed by the majority in a previous case about the meaning of provisions in that Act, if to adhere to those reasons would produce serious anomalies or other results which are plainly unsatisfactory: see *R* v *National Insurance Comr, Ex p Hudson* [1972] AC 944, 966, 993 per Lord Reid and Viscount Dilhorne."

If that is the way ahead the more pragmatic, perhaps idiosyncratic, decisions may have to be reigned in, with judges persuaded to start by contemplating the parties' rights. Although European Civil Law has no system of precedent or *stare decisis*, previous decisions interpreting the same legislation are used to show a consistent pattern of thought, even if not regarded as binding legal rules.

[65] *Op.cit.* @ 1578.

5.14
RATIO AND OBITER

It is of immense importance for both practitioner and judge to be precise about the *ratio* both in respect of the case being decided and any authority relied upon, since the hierarchy of precedent and the conclusiveness of a judgment both impact subsequently on substantive law. In its origin and essence a judgment is merely declaratory of rights, not creative of them. An action is a dispute as to the rights of the parties; a judgment is the decision of an arbitrator on the point at issue. However, by virtue of its conclusiveness a judgment comes to be regarded as creative of rights instead of declaratory of them: it is the substantive form of the rule of procedure that two actions cannot be brought for the same cause; the rule of procedure becomes transmuted into the rule of substantive law that the right created by the judgment merges and destroys the right on which the judgment is founded.[66]

How to find the *ratio decidendi*, the application of legal criteria to the facts so giving rise to the legal reason for the decision, is a matter of first principle and not for discussion here. There are many cases where lawyers have accepted too general a formulation of the ratio – but reading a case is an exercise in interpretation; an exercise in exploring the range of possibilities. It is a matter of opinion. There is nothing wrong with you reading a case and thinking this is not really authority for the proposition stated in the textbook or even by the judge: all you have to do is prove that you are right. It is surprising how many times the cases cited in footnotes as authority for legal propositions turn out to be nothing of the sort.

It is unwise to presume that there is one and only one possible *ratio* to a case. In *Esso* v *C & E*[67] the House of Lords decided that where a decision is based upon two grounds, each forms part of the *ratio decidendi* of the case, so that a subsequent court is not entitled to single out one of the two and say it was *ratio* while the other was *obiter*: in *Jacobs* v *LCC* [1950] AC 361 HL Viscount Simonds[68] put it thus:

[66] See *The Superiority of Written Evidence* Salmond (1890) 6 LQR XXI 75 @ 84.
[67] [1976] 1 WLR 1.
[68] @ 369,370.

"It is not, I think, always easy to determine how far, when several issues are raised in a case and a determination of any one of them is decisive in favour of one or other of the parties, the observations upon other issues are to be regarded as obiter. That is the inevitable result of our system. For while it is the primary duty of a court of justice to dispense justice to litigants, it is its traditional role to do so by means of an exposition of the relevant law. Clearly such a system must be somewhat flexible, with the result that in some cases judges may be criticized for diverging into expositions which could by no means be regarded as relevant to the dispute between the parties; in others other critics may regret that an opportunity has been missed for making an oracular pronouncement upon some legal problem which has long vexed the profession. But, however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in *London, Jewellers Ld.* v *Attenborough* [1934] 2 K.B. 206. In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in *Folkes* v *King* [1923] 1 K. B. 282. In the latter case the court had given two grounds for its decision, the second of which was that "where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick." In the former case it was contended that, since there was another reason given for the decision, the second reason was obiter. But Greer L.J., from whose judgment I have taken the passage above cited, said in reference to the argument of counsel: "I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift j., and which commended itself to me in *Folkes* v *King* but that view is not open to us in view of the decision of the Court of Appeal in *Folkes* v *King*. In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first: we must take both as forming the ground of the judgment."

So also in *Cheater* v *Cater* Pickford L.J., after citing a passage from the judgment of Mellish L.J., in *Erskine* v *Adeane* said: "That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum.

> The principle, which can be thus simply stated, is not always easy of application, particularly where the judgments of an appellate court consisting of more than one judge have to be considered."

Although strictly speaking, the *ratio decidendi* is limited to the point necessary for the decision, a lower court will be strongly inclined to follow the considered views of a higher court even though technically these can be described as *dicta*[69]. Judicial *dicta* may be irrelevant for deciding the case but may be relevant to some collateral matter which forms no part of the *ratio*. This is particularly true of opinions expressed in the speeches of the House of Lords which may intentionally be framed in wider terms than are necessary to decide the actual case so that they may serve as a guide to the future. If such expressions of opinion are noteworthy you should be conscious of the fact that *obiter dicta* are of different kinds and weight. There is a sharp distinction between carefully considered opinion on a point which has been argued by counsel, even though not necessary for the purpose of the judgment, and a mere casual or incautious expression made by the judge on a matter which has not been argued and therefore not been seriously considered by the Court: see per Lord Sterndale in *Slack* v *Leeds* [1923] 1 Ch 431 HL @ 451;

> "Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some dicta however are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open no doubt to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class. The dicta in *Dreyfus* v *Peruvian Guano Co.* are of the latter class. As I have shown the point was clearly brought before the Court and argued, and necessarily so, upon the view taken by Bowen L.J. There was ample opportunity for consideration of it, for though the judgment was not a reserved judgment the case had lasted over several days, being heard, according to the report, on November 21, 22, 23, 24, and December 2 and 3, and therefore there was ample time for consideration. Moreover it is quite plain from the judgment of Bowen L.J. that he had in fact given very careful consideration to the matter, and it is clear from his words that he had consulted."

[69] See *Learning Legal Rules Op.cit.* p.155.

and per Viscount Dunedin in *Nixon* v *Attorney General* [1931] AC 184 HL @ 190:

> "When we come to authority, it seems to me that this case is most amply covered by authority. I agree that it is not covered by authority in this sense, that there is no actual judgment which binds this House, in which the precise point was the necessary and only point in the case. But the amount of learned opinion is quite overwhelming. In the first place, I do not think one must altogether forget the two old cases where the question was actually raised in absolute terms. No doubt they are not binding on this House, because they were decisions only of judges of first instance, but they were very learned judges, and their judgments have stood for many years without there being a single note of question against them in any case. Then, when one comes to more modern times, and to pronouncements in this House, there is the considered judgment of Lord Buckmaster, where, although the question may be said to be obiter to the case, it certainly was not obiter to the view that Lord Buckmaster took of the case, and accordingly he considered very carefully the series of statutes, and made that pronouncement which I have already quoted. Lord Loreburn gave an opinion to the same effect, although it was not so necessary in his view to consider that matter, but he went out of his way to say so. We have also the opinion of Lord Cave in the Privy Council and of Lord Reading in the Privy Council. That is really a very great array of authority, against which it would not be easy to go, unless there was some cogent reason for thinking that all those learned persons were wrong, and all that can be put against it is a casual expression, or, rather, I think, an incautious expression, made by the Master of the Rolls and Fletcher Moulton L.J. in *Lupton's* case [1912] 1 K. B. 107 where it was not necessary for them to consider the matter, and the matter was not argued, and I am afraid they slipped into that expression without exactly knowing what the result of it would be."

Since the late 17th century the courts have been offering definitions of what constitutes *obiter*. Lord Vaughan CJ described it as: "an opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or no contrary opinion, had been broached is no judicial opinion, no more than a *gratis dictum*."[70]

A test for *obiter*, which you might find useful, was developed in the 1890s:

i frame carefully the supposed proposition of law;
ii insert into the proposition a word reversing its meaning;

[70] *Bole* v *Horton* Vaugh. 360 @ 382.

iii consider whether, if the court had accepted this proposition as good, the decision would have been the same;

iv if the answer is affirmative, however excellent the original proposition may be, the case is not a precedent for that proposition.[71]

[71] Wambaugh's *Study of Cases* (1894) (2nd edn) 17.

PART 6
ANALYSING JUDGMENTS: TECHNIQUES FOR CRITICISM

6.1
CRITICISING A JUDGMENT FAIRLY

Successful appellate advocacy requires clear thinking, intellectual application and effective argument. In order to persuade an appellate tribunal that the judge below was wrong you must understand yourself why he was wrong, be able to demonstrate that fact with clarity, and withstand a rigorous testing of your contention. You must be prepared for reality testing by analogy and hypothesis, by reduction or expansion of your argument, and by purposive analysis; and you must be able to show the appellate tribunal that your criticism of the judge is fair, and that it is right or just that the appeal should succeed. You should be conscious not only of the judge's error, but also the merits of your client's own position. If you do not keep the merits firmly in mind, the court will. However great the error into which the first instance tribunal has fallen, whatever the departure from canon, if the merits are not with you, then your case will be found to be, on the facts, an aberration or an exception to the guiding principle, and whether intellectually sound or by sleight of hand, you will lose. You may win the argument, but you will lose the appeal.

Criticising a judgment fairly is the last stage of analytical reading. It involves giving an exacting consideration to the text and calls for a five stage process:

1 Reading actively

2 Developing a close understanding

3 Making a critical judgment

4 Understanding why you disagree

5 Forming a structured reply.

Active reading entails not blandly accepting what is being said. It requires an alertness in which the reader is prepared to challenge the writer to persuade him of the correctness of his position. It is unlike a passive operation in which information is absorbed without applying any critical faculty. You should remember that while grammatical and logical skill in writing clearly and intelligibly has merit in itself, the aim of a judgment is also to convince or

persuade. The judge may use rhetorical or literary techniques, or the plainest of common language. Whatever the devices, they are intended to justify his findings. Your task is to react critically to the attempt to persuade.

The writer seeks to achieve intelligibility in his work and to convey understanding to his reader. The lawyer must achieve understanding before he can properly criticise. It may be that on occasion your judge is so prolix or diffuse that you have to strip away verbiage in order to search for understanding, but understand you must. As Adler suggests[1] you must be able to say with reasonable certainty "I understand" before you can say "I agree", "I disagree" or "I suspend judgment". These three remarks exhaust all the critical positions you can take. However please bear in mind that criticism does not mean merely to disagree. To agree is just as much an exercise of critical judgment as disagreement. Suspending judgment is also an act of criticism: it is taking a position that something has not been shown or proven, which is highly pertinent to forensic analysis.

You must understand why you disagree, because your disagreement must be purposive if it is to enable you to appeal successfully. What is at stake is persuading an appellate tribunal that the basis of the disagreement – or the criticism of the judge's judgment – is sufficiently causative or relevant or important first that the appeal should be permitted to be heard, and second, to succeed. An appeal is a futile agitation unless undertaken with the hope that it may either succeed before the court or at least lead to the resolution of an issue between the parties. Disagreement for its own sake is not enough: the costs regime is designed to deter criticism of judicial performance unless it not only has merit but will also be of practical significance.

Forming a structured reply will enable you to marshal your thought processes at the earliest stage, perhaps well before you are called upon to advise or settle a notice of appeal and skeleton argument in support. Once you have identified the basis for your criticism you need to formulate an argument that enables the appellate tribunal to understand not only why the judge's finding is wrong, but also why your client's desired outcome is to be preferred.

[1] *Op. cit.* p. 142.

6.2

ANALYSING YOUR DISAGREEMENT OBJECTIVELY

You have concluded that the judgment may properly and fairly be criticised. Next try and consider the position objectively as an outsider, in this case as the appellate tribunal, would. This is no doubt difficult in view of the two subjective opening positions. You believe that the judge was wrong. However, the appellate tribunal will instinctively start from a defensive point of view, wishing to protect the reputation and dignity of the court under attack, unless by some oversight or procedural defect it is fairly obvious that no reasonable tribunal could have come to the conclusion being appealed against. Taking a step back and making sure that you believe your criticism of the judge is reasonable, and that you are not just acting disputatiously or contentiously, may overcome this difficulty.

Consider whether the substance of your criticism concerns genuine knowledge, and not mere personal opinion. If the latter, then for the most part such disagreements may be more apparent than real. If the criticism has real substance it must concern genuine issues of fact and reason.

6.3

DISTINGUISHING BETWEEN KNOWLEDGE AND OPINION

If the judge does not provide reasoning or support for his propositions they can properly be treated as personal opinions only on his part. While it is facile to say that all judgments are only the personal opinion of the judge, for appellate purposes it is vitally important to distinguish between the reasoned statement of knowledge and the flat expression of personal opinion. Critical obligations should be taken seriously: the practitioner must do more than make judgments of agreement and disagreement. He must have adequate reasons for doing so which can be justified in fact or law.

In this respect you must realise and accept that most knowledge is not absolute. Knowledge consist of opinions which can be defended, opinions for which there is evidence of one kind or another. Knowledge in this sense is something we can convince others of what we know. Mere opinion, on the other hand, is unsupported judgment. What is required is evidence or reason for a statement over and above personal feeling or prejudice: objective evidence that other reasonable men are likely to accept.[2] In dealing with an appellate tribunal you will be engaged in intelligent controversy and challenged not only to carry your own argument but also to deal with the arguments of the tribunal itself.

[2] See Adler *op. cit.* pp.149, 150.

6.4

THE FOCUS OF YOUR CRITICISM

The judge is making judgments about the world in which we live in the context of the facts of the case. His findings as to the facts in dispute give us knowledge or tell us what things exist, the way they behave and what should be done. He can be either right or wrong. His position is justified only to the extent that he says what is probable in the light of the evidence; were that not so it may be contended that his conclusion is unfounded.

Once again, much turns on your understanding with precision the judge's meaning, otherwise your disagreement may be irrelevant: an error of understanding in what he is saying may render the opposite argument without merit. If your criticism is founded upon a misapprehension, the appellate process will be an expensive failure. Issues about matters of fact or policy – the way things are or should be – are real only when they are based upon a common understanding of what is being said. Agreement about the use of words is an indispensable condition for genuine agreement or disagreement about the facts under discussion.[3] You must therefore ensure, as objectively as possible, that there is a real and significant issue at stake which can be readily identified, and is irresolvable with the mechanism of an appeal.

[3] *Ibid* p. 153.

6.5

THE MECHANICS OF FAIR CRITICISM

There are principally four ways in which a judgment can be adversely but fairly criticised: that the judge was uninformed; that he was misinformed; that his approach was illogical in the sense that his reasoning was not cogent; or that his analysis of either the facts or the law was not complete. These four categories are not exhaustive, but they cover most points that are likely to arise. Nor are the defects they describe mutually exclusive.

You cannot mount a sound challenge without being definite and precise about the respect in which the judgment is uninformed or misinformed or illogical, since it is most unlikely that judges of the calibre engaged in our courts and tribunals will be uninformed and misinformed about everything, or else totally illogical.

UNINFORMED:

The judge lacks some piece of knowledge that is relevant to the problem he is trying to solve. You must yourself be able to state a piece of knowledge or information missing, show its relevance, and show how the conclusion would be different. This is often reflected in such criticism by the Court of Appeal as that given by Scott Baker J in *In re Rhondda Waste Disposal Ltd.*:[4]

> "In my judgment the judge was in error in the exercise of his discretion. He should not have regarded the interests of the creditors of the company as trumping all other considerations. He failed to take into account and give due weight to the evidence of Mr Weare. Furthermore, in the event of conviction, there is a statutory obligation on the court fixing the amount of any fine to take account of all the circumstances including the financial circumstances of the company: see section 18(3) of the Criminal Justice Act 1991.

[4] [2001] Ch 57 CA per @ 71[42].

> **43** I consider there were compelling reasons why leave should have been given in this case. The purpose of licensing is to ensure that the disposal of controlled waste does not give rise to: (i) pollution of the environment; (ii) harm to human health and; (iii) serious detriment to the amenities of the locality."

Equally the trial judge's analysis of law may be called into question, as did Lord Denning MR here in *Heywood* v *Wellers*:[5]

> 'Now I think the judge was in error in thinking that the solicitors were entitled to recover any costs at all. There are two reasons. In the first place, the contract of the solicitors was an entire contract which they were bound to carry on to the end; and, not having done so, they were not entitled to any costs: see *Underwood, Son & Piper* v *Lewis* [1894] 2 Q.B. 306. The law as to *entire* contract was put vividly by Sir George Jessel M.R., in *In re Hall & Barker* (1878) 9 Ch.D. 538, 545:
>
> > "If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe and ask you to pay one half the price."
>
> In the second place, the work which they did do was useless. It did nothing to forward the object which the client had in view. It did nothing to protect her from molestation. It being thus useless, they can recover nothing for it: see *Hill* v *Featherstonhaugh* (1831) 7 Bing. 569, when Tudai C.J. said, at pp. 571–572:
>
> > "... if an attorney, through inadvertence or inexperience, – for I impute no improper motive to the plaintiff – incurs trouble which is useless to his client, he cannot make it a subject of remuneration... could a bricklayer, who had placed a wall in such a position as to be liable to fall, charge his employer for such an erection?"
>
> Clearly not. So the solicitors were entitled to nothing for costs: and Mrs. Heywood could recover the £175 as money paid on a consideration which had wholly failed. She was, therefore, entitled to recover it as of right."

[5] [1976] QB 446 @ 458

MISINFORMED

Here he asserts that which is not the case, i.e. the judge makes findings or assertions contrary to fact. The judgment proposes as true or more probable that which is in fact false or less probable; it is based on a claim to have knowledge he does not possess. This was the focus of criticism by Lord Justice Stocker in the Court of Appeal of the trial judge in one of the actions arising out the Hillsborough disaster:

> "To summarise, in my view, the law is that, save in exceptional circumstances, only those within the parent/spouse relationship can recover damages for psychiatric shock sustained by a plaintiff not himself involved as a victim. This defines the category. The exceptions considered on a case to case basis are limited to relatives who meet the criteria of that relationship and who are present at the scene or its immediate aftermath. What has to be foreseeable is that someone may be present at the scene or its immediate aftermath who possesses that love and affection which a parent/spouse is assumed to possess, even if in fact that relative is less closely related to the victim than a parent or spouse. It does not seem to me that such a formulation causes any particular difficulty – it is a slight reformulation of the test of foreseeability to meet the cases referred to by Lord Wilberforce, not any change or addition to what has to be foreseeable in the case of a parent/spouse who suffers psychiatric injury by shock. The judge found that in the case before him brother and sister were entitled to recover. He did so, if I correctly interpret his judgment, by reference to the circumstances of the Hillsborough disaster and by the relationship which might be expected in most cases between brother and sister. He did not carry out any close scrutiny by reference to the love and affection in fact to be attributed to them, having regard in particular to any care (in the sense of custody or maintenance) which they had performed. It may be that had such a scrutiny been carried out, the facts might have entitled them to recover damages and the extension in their favour be justified under the principles enunciated by Lord Wilberforce. I therefore consider that the judge was in error in holding that in the circumstances of the case before him he could regard the brothers and sisters as within the relationship which would entitle them to claim damages."[6]

This kind of defect is only relevant if it is causative in the sense that it affects the judge's conclusions and ultimate position; see, for example, the child abduction case *B.* v *B.*[7]:

[6] *Alcock* v *Chief Constable of South Yorkshire* [1992] 1 AC 310 CA @ 379.
[7] [1993] Fam 32 per Sir Stephen Brown P @ 38.

> "In support of the judge's finding that the removal was not unlawful, Mr. Warnock for the mother submits that the court should apply a strict and restricted interpretation of the term "rights of custody." Since the court had ordered interim custody in favour of the mother (subject to access by the father pending the substantive hearing) there could be no right of custody in any person or body other than the mother. Therefore, he says, she was not in breach of any right vested in the husband, or, indeed, in the court when she removed the child on 3 July 1991.
>
> I find that submission unacceptable. In my view this was the plainest example of an unlawful removal. The mother herself appears to have thought so, for she later stated that she regretted having taken that step at that time. It is suggested that she did not appreciate the legal position, although she was in receipt of legal advice at the time. It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence. I should say that there has never been any issue as to the fact that the child's habitual residence was at all material time in Ontario. Accordingly, I am of the view that the judge was in error when he decided that the removal of the child was not unlawful."

You must be able to argue the truth or greater probability of a position contrary to that of the judge. It should follow as a matter of logic that whenever he is misinformed in one respect, he will also be uninformed in the same respect.

ILLOGICAL

The judge has committed a fallacy in reasoning. This problem generally stems from two sources. Either the judge has fallen into the trap of *non sequitor*, where what is drawn as a conclusion simply does not follow from the reasons offered, or that of inconsistency, where two things he has tried to say are incompatible. To make either criticism you must be able to show the precise respect in which the judge's argument lacks cogency. The judge may have fail to draw the conclusions that the evidence or principles imply: the criticism derives not from poor evidence but from reasoning poorly from good grounds, and in that sense the judgment can also be impeached as being uninformed.

In *The Miraflores and The Abadesa*,[8] a shipping case involving a collision, Winn LJ in the Court of Appeal found that he could not support the trial judge's approach which he considered illogical:

[8] [1966] P 18 @ 35 *et seq.*

> "In the incident which gave rise to this action there were two events, separate in space and time, though not widely separate in either of those elements. The collision between the *Abadesa* and the *Miraflores* was one of those events; the other, partially but not inevitably consequential upon it, was the grounding of the *George Livanos*. Each event was the subject of a separate action: Folio 218 in respect of the grounding, and Folio 228 in respect of the collision. Those actions were heard together. Of the two events, the earlier in point of time, the collision, was far and away the more serious, and it was in every respect natural that Hewson J. should have applied his mind first to determining the respective proportions of fault for that collision to be attributed to the two ships involved in it. He made such a determination, and assessed the *Abadesa* as two-thirds to blame and the *Miraflores* as one-third to blame. That was an assessment of fault in respect of the collision.
>
> He then turned to a consideration of the causes or faults which produced the grounding of the *George Livanos*. He held that the *George Livanos* had herself been 50 per cent. to blame for going aground, and had to that extent been the author of her own misfortune and damage. He expressed that determination thus: "In action Folio 218 I propose to treat the negligence leading to the collision ... as one unit, and the negligence of the *George Livanos* as another." It seems to me that, in so determining, Hewson J. was adopting a mental process of quasi-personification of the collision itself, and that what he was saying when he declared the *George Livanos* to be 50 per cent. responsible for having gone aground was that half the cause of the grounding had been the collision and half the fault or faults of the *George Livanos* in respect of her navigation preceding the grounding. He said: "In action Folio 218 I find it impossible to distinguish between the degrees of fault between the two units." Save in so far as one of those units comprised two ships and the other only one, he did not anywhere in his judgment distinguish, in respect specifically of the grounding, the respective faults of the three individual ships involved.
>
> With the utmost respect to Hewson J. which I sincerely entertain for any view of his, I cannot help thinking that in this respect he fell into a logical fallacy. Since the collision was part of the causation of the grounding, the whole of the responsibility for that consequence of the collision, as well as for the collision, has to be attributed to the respective vessels by whose fault the collision and that consequence of it were caused. As I see it, Hewson J. did not apportion at all one-half of the responsibility for producing the grounding. It having already been determined that the responsibility for producing the

> collision rested as to $66^2/_3$ per cent. upon the *Abadesa*, and to $33^1/_3$ per cent. upon the *Miraflores*, the reasoning might properly proceed on one or other of two parallel lines: either (1) the 50 per cent. residue over and above the fault of the *George Livanos* for the occurrence of the grounding, that is, 50 per cent. of the responsibility for that event, should be distributed equally upon each of the other two vessels so as to add 25 per cent. of responsibility for the grounding and the damage caused thereby to the respective shares of responsibility for the collision; or (2) the share of the same 50 per cent. responsibility for the grounding might be attributed to the *Abadesa* and the *Miraflores* in the same proportions precisely as those fixed in respect of the collision, so as to produce an assessment of $66^2/_3$ per cent. of 50 per cent., that is, $33^1/_3$ per cent. in respect of the grounding damage against the *Abadesa*, and, by parity of reasoning, $16^2/_3$ per cent. (that is, $33^1/_3$ per cent. of 50 per cent.) in respect of the grounding damage against the *Miraflores*.
>
> Responsibility for an event does not terminate when the event occurs, but comprises liability for consequences flowing from the event. By such a method as I have suggested, it seems to me that there is achieved what is not achieved by Hewson J.'s approach: an assessment in respect of each ship of the overall responsibility for the occurrence of the double event of the collision and the partially consequential grounding. For the collision, of course, the *George Livanos* bore no responsibility. I venture to think that Hewson J. was led by the approach which he adopted to lay too much stress upon causation or causative potency and too little upon elements of blame to which due regard must be had; cf. *The British Aviator* et passim."

Once again, you are concerned with the respective defect only to the extent that major conclusions are affected by it, or perhaps by the cumulative effect of such defects. For our purposes a judgment may safely lack cogency in irrelevant respects. This class of criticism requires penetrative reading because the defects are usually well concealed.

INCOMPLETENESS

The basis of this critique is to say the judge

- has not solved all the problems he started with; or
- he has not made use of all the available material; or
- he did not see all the ramifications and implications; or
- he has failed to make all the distinctions relevant to his task.

This might derive from his erroneous acceptance of facts which should be challenged, or it might be an incomplete analysis of thinking because it makes assumptions or fails to make assumptions: an example is to be found in the criticism of an arbitration award in *Drake Insurance Plc* v *Provident Insurance Plc*[9] (CA):

> "In my judgment, the judge was in error in concluding that there was no evidence to suggest that the no fault status of the prior accident would have emerged. Until 7 February 1997 Provident had said nothing to suggest that the disclosure of the fault accident had anything to do with its claim to avoid the policy. When, however, the connection with the status of that accident was first made in Mr Shaw's letter of that date, Dr Singh's next communication with Provident, his letter to the chief executive dated 5 March 1997, straightway pointed out that the accident had been a no fault one. It was the point he made in his first numbered paragraph, after the words: "Mr Shaw did not mention in our telephone conversation any of the other points raised in his letter dated 6 February 1997, if he had I certainly would have corrected his misunderstandings..."
>
> **61** Dr Singh kept that point well in view, for instance in his letter in reply to the arbitrator. It was a great pity that in his award the arbitrator paid no attention whatsoever to this factor."

[9] [2003] EWCA Civ 1834; [2004] QB 601 per Rix LJ @ 621.

6.6
THE STRUCTURED CRITIQUE

In preparing your structured reply undertake the following process:

- Make a list outlining all the problems which the judge is trying to solve. The last step of interpretation is to know which of these problems the judge solved and which he did not.
- Assess in respect of those problems he failed to solve, whether these impact on your client's position as a whole.
- If so, identify the basis of the omission in respect of each relevant fact or consequence omitted.
- If not (or in addition), consider in respect of the problems which the judge did solve, how satisfactory the solutions are.
- Identify those solutions which are to be the subject of complaint, classifying them as uninformed, misinformed or illogical.

RECOMMENDED TOOLS FOR EVALUATING APPELLATE JUDGES

QUALITY JUDGES INITIATIVE

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INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis	Executive Director
Malia Reddick	Director, *Quality Judges Initiative*
Natalie Anne Knowlton	Manager, *Quality Judges Initiative*

The *Quality Judges Initiative* is dedicated to advancing empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Quality Judges Initiative* empowers, encourages, and enables continuous improvement in processes for choosing, evaluating, and retaining judges.

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RECOMMENDED TOOLS FOR EVALUATING APPELLATE JUDGES

Introduction

Judicial performance evaluation (JPE) is a tool for assessing judges' job performance using objective benchmarks that focus on process rather than outcomes. In several states with retention elections, JPE programs provide broad-based, apolitical information to voters about judges standing for retention. But, JPE is not confined to states with judicial retention elections; it serves a similar purpose in some states in which the legislature or a commission makes the retention decision. And in a handful of states where judges are chosen in contested elections or have life tenure, JPE programs are used to encourage and inform judicial self-improvement.

In addition to these primary purposes that JPE serves, such programs have the additional benefit of enhancing public trust and confidence in the judiciary by demonstrating that individual judges and the judiciary as a whole are accountable for their performance. Preserving public trust and confidence is as important for appellate courts as for trial courts. Appellate courts decide cases involving some of the most controversial legal, political, and social issues of the day and establish precedents to be applied in future cases. But having "no influence over either the sword or the purse," appellate courts cannot enforce their own decisions. Instead, the extent to which the public trusts appellate court rulings depends upon the legitimacy of the courts themselves. A well-structured, objective, and transparent performance evaluation program can enhance judicial legitimacy.

These considerations have never been more relevant than in today's political climate, with attacks on judges motivated by unpopular rulings becoming more and more commonplace. State supreme court justices, in particular, have increasingly come under fire for decisions in a single case or on a specific issue, whether it is same-sex marriage, abortion rights, tort reform, capital punishment, or taxation. These attacks tend to dominate the discussion during the election cycle. Some special interest groups offer their own judicial evaluation processes—processes based solely on how the judge has ruled in cases relating to each group's interests. It may be that voters will make their choice on the basis of a single case, but it also may be that voters want information about the judge's performance across all of the cases she has decided. In the context of an election, whether contested or retention, it is essential that voters have an alternative or additional source of information about the job performance of judges on the ballot that does not turn on political or outcome considerations. We offer recommended components of such an evaluation process here.

To a large extent, JPE programs for appellate judges have been patterned after programs for trial judges. But there are fundamental differences in the work of trial judges and appellate judges—differences that must be taken into account in designing programs for evaluating their performance. The most obvious difference is that appellate judges engage in collegial decision making, deciding

cases in three-judge panels or as an entire court, while in a trial court the judge is the sole "decider." Appellate judges also have far less interaction with the parties in their cases than do trial judges, only coming face to face with attorneys during an oral argument (if held) that is likely to last no longer than an hour. Perhaps the most significant difference between appellate and trial judges is their work product. While trial judges hold conferences and make rulings throughout the course of a trial, an appellate judge's primary output is the written opinion, and, even then, individual judges do not write an opinion in every case. All of these factors affect the "who, what, and how" of a judicial performance evaluation program.

Recognizing that performance evaluation programs can and should be more closely tailored to the role and responsibilities of appellate judges, IAALS undertook a two-year effort to develop recommended tools for evaluating appellate judges. Without any preconceptions about what these tools would entail, we revisited the key questions that shape a JPE process—for what criteria appellate judges should be held accountable, who is in the best position to assess appellate judges' job performance, and how the evaluation process should be structured.

The tools we offer here include guidelines and templates for a written opinion review process, surveys for attorneys, trial judges, and court staff, and a self-evaluation survey. As we discuss in more detail in the **Implementation** section, these tools are designed to be flexible and adaptable. They may be used individually or as part of a comprehensive evaluation program. They also may be used in programs that are designed to provide information to voters and others responsible for reselecting judges, programs that serve to enhance public trust in the judiciary, or programs that simply encourage judicial self-improvement. Finally, these tools may be utilized by an official performance evaluation commission, a bar association, or a citizens group.

Developing Our Recommendations

Our effort to develop recommended tools for evaluating the performance of appellate judges began in August 2011 with our *National Conference on Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability*. We brought together more than 70 appellate judges, attorneys, scholars, and JPE program coordinators, with 18 states represented. The conference featured panels that discussed the role and responsibilities of appellate judges, appropriate indicators and tools for evaluating their performance, challenges to establishing and implementing an appellate JPE program, strategies for improving existing programs, and using appellate JPE to defuse political and special interest attacks in judicial elections.

To provide a foundation for these discussions, we conducted a pre-conference survey of appellate judges in nine states who are subject to JPE. Of the 64 judges who responded, 71 percent described JPE results as having "some influence" on voters' decisions in retention elections, with 17 percent

saying they have "a lot of influence." The appellate judges we surveyed were somewhat less positive about the impact of JPE on their professional development, with 53 percent finding it "somewhat beneficial" and 10 percent viewing it as "significantly beneficial," while one in three respondents believed it had no effect on their professional development. A total of 62 percent of respondents reported being "very satisfied" (29 percent) or "somewhat satisfied" (33 percent) with the JPE process in their state, while 14 percent were "somewhat" or "very" dissatisfied. So while appellate JPE programs appear to succeed in providing apolitical, useful information to voters and are somewhat effective in promoting professional development, there is clearly an opportunity for improvement.

When we asked appellate judges subject to evaluation about the specific aspects of their state's JPE process that could be improved upon, respondents overwhelmingly indicated that the evaluation process should incorporate review of their written opinions. Conference panelists and attendees engaged in a broad discussion of the criteria to be used in an opinion evaluation and the types of individuals best suited to conducting the review, and we formed a post-conference task force to consider these questions in greater detail and depth. The task force included two appellate judges, two representatives of state JPE commissions, and a law professor. *An Opinion on Opinions: Report of the IAALS Task Force on State Appellate Court Opinion Review* was the outgrowth of that effort and offers recommendations and guidelines regarding how to identify the opinions to be reviewed, who should perform the review, and the criteria on which the review should be based.

To assist us in ensuring that our recommended tools for evaluating appellate judges were inclusive, fair, and workable, we contracted with the Butler Institute for Families at the University of Denver to conduct focus groups of Colorado appellate judges and appellate attorneys in September and October 2012. These focus groups considered 1) the responsibilities of appellate judges that should be included in a performance evaluation process and 2) the characteristics of a high-quality appellate opinion. The feedback we received during these focus group discussions was invaluable in helping us define the parameters of our recommendations and further refine our guidelines for opinion review. The *Focus Group Report* provides more information about the process and outcomes of the focus groups.

The final step in developing our recommendations for evaluating appellate judges was assuring that one of our primary evaluative tools—the survey—was comprehensive and clear. Based on input from our focus groups, we developed surveys to be completed by three types of respondents who come into professional contact with appellate judges: appellate attorneys, trial judges, and court staff. Working again with the Butler Institute, we conducted cognitive interviews with representatives of each respondent group to "field test" our surveys. We also conducted cognitive interviews with appellate judges themselves regarding a self-evaluation tool.

Our Recommendations

With the benefit of this outreach to stakeholders and input from experts, we developed recommended components of a comprehensive program for evaluating the performance of appellate judges, including guidelines for implementing an opinion review process, surveys for attorneys, trial judges, and court staff, and a self-evaluation tool.

Opinion Review

Recognizing that an appellate judge's primary output is the written opinion, we offer a recommended process for reviewing these opinions, including guidelines regarding the makeup of the evaluation teams that should carry out the review, the identification of opinions for review, the review criteria and process, and training for opinion reviewers. We also offer opinion review templates for attorney and non-attorney evaluators to be used in conjunction with these recommendations.

Surveys

We offer model surveys for three types of respondents: attorneys, trial judges, and court staff. For attorney respondents, the survey poses questions for three categories of attorneys that are based on the nature of their professional contact with the judge: 1) attorneys who use appellate decisions extensively in their legal practice, 2) attorneys who have appeared before the evaluated judge in oral arguments, and 3) attorneys in whose case the judge has written an opinion. In all three instances, attorneys have an important perspective on the judge's performance, but it may be appropriate to give differing weight to attorney assessments based on the type and extent of their professional interaction.

The other two types of respondents are trial judges whose decisions are reviewed by appellate judges and who apply appellate decisions in their own rulings, and court staff, including staff attorneys, law clerks, and administrative assistants.

Surveys for each respondent type include questions relating to such criteria as legal ability, impartiality and fairness, temperament and demeanor, communication skills, and administrative performance.

In order to give evaluated judges a sense of the extent to which the attorneys who respond to the survey are representative of the attorneys with whom they have had professional contact, the attorney surveys begin with demographic questions about the nature of the attorney's practice. Responses to these questions should be reported in the aggregate and not associated with responses to questions regarding the judge's performance.

The model surveys include an optional section for structured free recall. This exercise is designed to address the potential for implicit biases on the part of survey respondents to affect their assessments of individual performance. Research has shown that people make better and more accurate performance evaluations when they take a few minutes to think about specific aspects of the individual's performance rather than simply relying on their general impressions of the individual.

Self-Evaluation

Recognizing that self-improvement is one of the primary purposes of JPE, we also offer a self-evaluation survey. The self-evaluation survey consists of questions similar, if not identical, in content and form to the questions asked of attorneys, trial judges, and court staff. This allows judges to gauge how their own assessments of their performance compare to those of others, with a common framework for such comparison. The self-evaluation tool also includes open-ended questions that require the judge to provide a more detailed explanation of how she assesses various aspects of her own performance. These open-ended questions are well suited for inclusion in a commission interview of the judge, if conducted as part of the evaluation process.

Implementation

In developing recommended tools for evaluating the performance of appellate judges, one of our priorities has been to develop tools that are flexible and adaptable to a variety of evaluation programs—in terms of the purpose(s) for conducting the evaluation, the identity of the evaluating entity, and the available budget.

A performance evaluation commission administers most of the appellate JPE programs currently in place as part of an official program, and more information about official programs—including the selection and composition of such commissions—is provided later in these materials. However, state bar associations are also well positioned to implement the attorney survey component of such a process. Several bar associations in states with retention elections already conduct advisory polls of their members to provide voter information, but it is also appropriate for bar associations to conduct such polls regarding incumbent judges standing for reelection. Our attorney survey is well suited in form and content to being used for these polls. At the same time, appellate judges should be particularly supportive of the use of surveys that have been developed with input from judges themselves and in accordance with social science principles of survey design.

A comprehensive judicial performance evaluation program can require a significant budget allocation—including survey dissemination and processing costs, commission expenses, staff salaries, and publicity costs—but there are steps that may be taken to minimize these costs. Surveys for all respondent types—attorneys, trial judges, and court staff—may be conducted electronically, saving printing, mailing, and follow-up costs. Rather than hiring a survey consultant, a performance evaluation commission, state bar association, or other evaluating entity may utilize online survey software that will distribute the survey and tabulate the results. Staff will simply need to provide the email addresses of potential respondents, including state bar association members, state trial judges, and court staff to judges subject to evaluation—all of which are readily available. Based on court records, staff may also target those attorneys who have recently had cases with evaluated judges.

Conclusion

This report describes tools that have been developed with the input and expertise of social scientists, judges, and attorneys to be used in evaluating the job performance of appellate judges. How and by whom the tools are used and in what combinations will be a function of the needs and resources of individual jurisdictions.

One important message that all of these tools embody is that appellate judges are different from trial judges—their decision making process, their interaction with parties to their cases, and, in particular, their work product is not the same as that of trial judges. Their primary work product is the written opinion, which is read and used not just by the parties or the trial judge in the case but also by the bar at large. How the opinion is written and how it defines and resolves the issues is critical in the development of the law. These are aspects of the opinion that can—and should—be evaluated, and these tools will aid in that effort.

Perhaps of greatest importance, these tools convey the message that the quality of a judge's performance does not turn on the outcome in a particular case or even a group of cases. Rather, we as lawyers, court users, and voters must hold judges accountable for providing a *process* that is fair, impartial, and transparent. Measuring how well judges meet this obligation is important, and these tools can be instrumental in gauging the effectiveness of our judges and keeping our courts strong.

EVALUATION TOOLS

Recommendations for Review of Written Opinions

Opinion review is a component of an appellate JPE program that is best suited to being administered by an official performance evaluation commission. These recommendations apply to such an opinion review process.

Opinion review teams

The opinion review should be undertaken by two- or three-person teams (depending on the size of the evaluation commission and the number of judges to be evaluated), in order to ensure a manageable workload for commission members and allow a more careful and tailored review. Each team should be composed of one attorney and one non-attorney, with an additional attorney or non-attorney as needed for a three-person team. Where the membership of the evaluation commission includes former or retired judges, these individuals should not be assigned to an evaluation team, but rather should be available to all teams to consult on matters that would benefit from a judicial perspective.

Selection of opinions

Each justice/judge subject to evaluation should select five opinions for the evaluation team to review. One of these opinions should be a dissenting or concurring opinion, and for intermediate appellate judges, one should be an unpublished opinion. The opinions should be chosen from throughout the judge's entire term (or term since the last evaluation) and should represent a variety of case types and complexity of issues.

Criteria for review

The criteria used in reviewing the written opinions must focus on the quality and clarity of the opinion rather than the particular outcome reached in the case. These criteria should include legal analysis and reasoning, fairness, and clarity. Criteria should be discussed with evaluators prior to the evaluation cycle, to ensure consistency across the evaluation teams in their understanding and application of the criteria. Opinion review templates for attorney and non-attorney reviewers are provided here.

Review process

The opinion review should take place in two stages. In the first stage, each member of the evaluation team should read and assess the submitted opinions individually. In the second stage, the team should meet and discuss the individual assessments of each opinion—and the justice's/judge's opinions as a whole—and prepare a report to the commission summarizing their assessment. The report should highlight particular strengths and/or weaknesses, as applicable, and make specific reference to any areas of disagreement between the attorney and non-attorney evaluators. Each evaluation team should then share its assessment with the full commission and answer any questions that commission members may have.

Opinion review training

Staff for the performance evaluation commission should develop and conduct a training program for commission members on direct opinion review. Training should emphasize the broad purposes of appellate judicial performance evaluation, focusing on the importance of process-based and objective assessments as opposed to assessments of the outcomes of specific cases. During the training, commission members should review the criteria referenced in the opinion review templates, discussing what each criterion means and does not mean. Special consideration should be given to each type of evaluator (non-attorney, attorney, retired judge, etc.). For non-attorney evaluators, the commission should provide an overview of the role and functions of appellate courts and the opinion writing process. The commission might also consider providing a glossary of legal terms that are used in the opinion review templates, as well as terms the non-attorney evaluators may commonly encounter in appellate opinions. Attorney evaluators (including former or retired judges) should be reminded to focus on the criteria employed in the evaluation process, rather than the substantive issues raised by the opinion or the outcome.

Opinion Review Template:
Attorney Reviewer

Reviewer's Name: _____
Justice's/Judge's Name: _____
Case Name: _____

I. Legal Analysis and Reasoning *(skip for a concurring or dissenting opinion)*

a. The opinion adequately explains the basis of the court's decision.
Agree *Partly Agree/Partly Disagree* *Disagree*

b. The opinion follows an applicable standard of review for the case.
Agree *Partly Agree/Partly Disagree* *Disagree*

c. The opinion clearly sets forth rules of law, if any, to be used in future cases.
Agree *Partly Agree/Partly Disagree* *Disagree*

d. The opinion provides clear direction to the trial court.
Agree *Partly Agree/Partly Disagree* *Disagree*

e. The opinion decides only those issues that need to be decided in the case before the court.
Agree *Partly Agree/Partly Disagree* *Disagree*

Additional comments on **Legal Analysis and Reasoning**:

_____
_____
_____
_____
_____

II. Fairness

a. The opinion addresses the issues raised by both parties fairly.
Agree *Partly Agree/Partly Disagree* *Disagree*

b. *(For a concurring or dissenting opinion)* The opinion is appropriate in tone and substance.
Agree *Partly Agree/Partly Disagree* *Disagree*

Additional comments on **Fairness**:

_____
_____
_____
_____
_____

III. Clarity

a. The opinion is clear.
Agree *Partly Agree/Partly Disagree* *Disagree*

b. The opinion is concise.
Agree *Partly Agree/Partly Disagree* *Disagree*

c. The opinion adequately summarizes the relevant facts in the case.
Agree *Partly Agree/Partly Disagree* *Disagree*

d. The opinion's legal reasoning is easy to follow.
Agree *Partly Agree/Partly Disagree* *Disagree*

Additional comments on **Clarity**:

_____
_____
_____
_____
_____

Opinion Review Template:
Non-Attorney Reviewer

Reviewer's Name: _____
Justice's/Judge's Name: _____
Case Name: _____

I. Fairness

a. The opinion addresses the issues raised by both parties fairly.
Agree *Partly Agree/Partly Disagree* *Disagree*

b. *(For a concurring or dissenting opinion)* The opinion is appropriate in tone and substance.
Agree *Partly Agree/Partly Disagree* *Disagree*

Additional comments on **Fairness**:

_____
_____
_____
_____
_____

II. Clarity

a. The opinion is clear.
Agree *Partly Agree/Partly Disagree* *Disagree*

b. The opinion is concise.
Agree *Partly Agree/Partly Disagree* *Disagree*

c. The opinion adequately summarizes the relevant facts in the case.
Agree *Partly Agree/Partly Disagree* *Disagree*

d. The opinion's legal reasoning is easy to follow.
Agree *Partly Agree/Partly Disagree* *Disagree*

Additional comments on **Clarity**:

_____
_____
_____
_____
_____

Survey:
Attorney Respondent

SECTION I: Introduction

Please check the following statements that apply to you (may check more than one):

- ☐ I use appellate opinions extensively in my practice.
- ☐ I have appeared before this judge in oral argument.
- ☐ This judge has written an opinion in one of my cases.

[If at least one of these options is selected]

Please answer the following demographic questions. Your responses to the demographic questions will NOT be associated with your answers to the evaluative questions. Rather, aggregate demographic information about attorney respondents will be provided to the evaluated judge.

1. Which of the following best describes your legal practice?
   a. Private, solo
   b. Private, 2-5 attorneys
   c. Private, 6+ attorneys
   d. Private, corporate employee
   e. Government
   f. Public service agency or organization (not government)
   g. Other

2. How long have you practiced law in this state?
   a. 5 years or fewer
   b. 6 to 10 years
   c. 11 to 15 years
   d. 16 to 20 years
   e. 21 years or more

3. In what county is your practice based? _____

4. What types of cases do you primarily handle?
   a. Mainly criminal
   b. Mainly civil
   c. Mixed criminal & civil
   d. Other

5. In the most recent case in which you appeared before this judge, did you represent the winning party or the losing party?
   a. Winning party
   b. Losing party
   c. Mixed outcome
   d. Case not yet decided

SECTION II: Structured Free Recall

Research has shown that people make better and more accurate performance evaluations when they take a few minutes to think about specific aspects of the person's performance rather than simply relying on their general impressions of the person.

*To help you make a better performance evaluation, please take a few moments to recall some **positive** aspects of the evaluated judge's performance. In your experience with the judge, what did s/he do well? If it is helpful in organizing your thoughts, you may list these positive aspects here. Anything you record here will be discarded once you submit your survey; it will not be shared with the evaluated judge [or the evaluation commission].*

1.	
2.	
3.	

*Now, please take a few moments to recall some **negative** aspects of the evaluated judge's performance. In your experience with the judge, what did s/he do poorly? If it is helpful in organizing your thoughts, you may list these negative aspects here. Anything you record here will be discarded once you submit your survey; it will not be shared with the evaluated judge [or the evaluation commission].*

1.	
2.	
3.	

SECTION III: Survey

*Rate the evaluated judge's performance as described in the statements below, using the rating scale provided. Please use **N/A** if you have not had the opportunity to experience the behavior described.*

	1 *Strongly Disagree*	**2** *Disagree*	**3** *Neither Agree nor Disagree*	**4** *Agree*	**5** *Strongly Agree*	**N/A** *Not Applicable*
Legal Ability						
1. Writes opinions that adequately explain the basis of the court's decision.						
2. Writes opinions that follow an applicable standard of review for the case.						
3. Writes opinions that clearly set forth any rules of law to be used in future cases.						
4. Writes opinions that decide only those issues that need to be decided in the case before the court.						
Impartiality/Fairness						
5. Writes opinions that address the issues raised by both parties fairly.						
Temperament/Demeanor						
6. Writes separate opinions that are appropriate in tone and substance.						
Communication Skills						
7. Writes opinions that are clear.						
8. Writes opinions that are concise.						
9. Writes opinions that adequately summarize the relevant facts in the case.						
10. Writes opinions in which the legal reasoning is easy to follow.						
If the attorney has appeared before the judge in oral argument:						
Impartiality/Fairness						
11. Is attentive to the arguments of all parties during oral argument.						
Temperament/Demeanor						
12. Is punctual for proceedings.						
13. Is attentive to the differing opinions of colleagues during oral argument.						
If the judge has written an opinion for the court in one of the attorney's cases:						
Legal Ability						
14. Writes opinions that accurately reflect the evidence in the record.						

SECTION IV: Narrative Comments

Please provide any additional comments you have about the evaluated judge's performance. These comments will be shared with the judge, with any identifying information removed.

Survey:
Trial Judge Respondent

SECTION I: Structured Free Recall

Research has shown that people make better and more accurate performance evaluations when they take a few minutes to think about specific aspects of the person's performance rather than simply relying on their general impressions of the person.

*To help you make a better performance evaluation, please take a few moments to recall some **positive** aspects of the evaluated judge's performance. In your experience with the judge, what did s/he do well? If it is helpful in organizing your thoughts, you may list these positive aspects here. Anything you record here will be discarded once you submit your survey; it will not be shared with the evaluated judge [or the evaluation commission].*

1.	
2.	
3.	

*Now, please take a few moments to recall some **negative** aspects of the evaluated judge's performance. In your experience with the judge, what did s/he do poorly? If it is helpful in organizing your thoughts, you may list these negative aspects here. Anything you record here will be discarded once you submit your survey; it will not be shared with the evaluated judge [or the evaluation commission].*

1.	
2.	
3.	

SECTION II: Survey

*Rate the evaluated judge's performance as described in the statements below, using the rating scale provided. Please use **N/A** if you have not had the opportunity to experience the behavior described.*

	1 *Strongly Disagree*	**2** *Disagree*	**3** *Neither Agree nor Disagree*	**4** *Agree*	**5** *Strongly Agree*	**N/A** *Not Applicable*
Legal Ability						
1. Writes opinions that adequately explain the basis of the court's decision.						
2. Writes opinions that follow an applicable standard of review for the case.						
3. Writes opinions that provide clear direction to the trial court.						
4. Writes opinions that clearly set forth any rules of law to be used in future cases.						
5. Writes opinions that decide only those issues that need to be decided in the case before the court.						
6. Writes opinions that accurately present the facts needed to decide the case.						
7. Writes opinions that accurately summarize the proceedings in the trial court.						
Impartiality/Fairness						
8. Writes opinions that address the issues raised by both parties fairly.						
Temperament/Demeanor						
9. Writes separate opinions that are appropriate in tone and substance.						
Communication Skills						
10. Writes opinions that are clear.						
11. Writes opinions that are concise.						
12. Writes opinions in which the legal reasoning is easy to follow.						

SECTION III: Narrative Comments

Please provide any additional comments you have about the evaluated judge's performance. These comments will be shared with the judge, with any identifying information removed.

Survey:
Court Staff Respondent

SECTION I: Structured Free Recall

Research has shown that people make better and more accurate performance evaluations when they take a few minutes to think about specific aspects of the person's performance rather than simply relying on their general impressions of the person.

*To help you make a better performance evaluation, please take a few moments to recall some **positive** aspects of the evaluated judge's performance. In your experience with the judge, what did s/he do well? If it is helpful in organizing your thoughts, you may list these positive aspects here. Anything you record here will be discarded once you submit your survey; it will not be shared with the evaluated judge [or the evaluation commission].*

1.	
2.	
3.	

*Now, please take a few moments to recall some **negative** aspects of the evaluated judge's performance. In your experience with the judge, what did s/he do poorly? If it is helpful in organizing your thoughts, you may list these negative aspects here. Anything you record here will be discarded once you submit your survey; it will not be shared with the evaluated judge [or the evaluation commission].*

1.	
2.	
3.	

SECTION II: Survey

*Rate the evaluated judge's performance as described in the statements below, using the rating scale provided. Please use **N/A** if you have not had the opportunity to experience the behavior described.*

	1 *Strongly Disagree*	**2** *Disagree*	**3** *Neither Agree nor Disagree*	**4** *Agree*	**5** *Strongly Agree*	**N/A** *Not Applicable*
Impartiality/Fairness						
1. Is attentive to the arguments of all parties during oral argument.						
Temperament/Demeanor						
2. Engages in collegial decision making.						
3. Shows respect to all court employees.						
4. Behaves in a manner that fosters respect for the court system.						
Communication Skills						
5. Provides feedback constructively to court staff.						
6. Encourages constructive feedback from court staff.						
Administrative Performance						
7. Is punctual for proceedings.						
8. Effectively handles workload.						

SECTION III: Narrative Comments

Please provide any additional comments you have about the evaluated judge's performance. These comments will be shared with the judge, with any identifying information removed.

Self-Evaluation

Please evaluate your own performance as described in the statements below, using the rating scale provided.

	1 *Strongly Disagree*	**2** *Disagree*	**3** *Neither Agree nor Disagree*	**4** *Agree*	**5** *Strongly Agree*	**N/A** *Not Applicable*
Legal Ability						
1. Write opinions that adequately explain the basis of the court's decision.						
2. Write opinions that follow an applicable standard of review for the case.						
3. Write opinions that provide clear direction to the trial court.						
4. Write opinions that clearly set forth any rules of law to be used in future cases.						
5. Write opinions that decide only those issues that need to be decided in the case before the court.						
6. Write opinions that accurately present the facts needed to decide the case.						
7. Write opinions that accurately summarize the proceedings in the trial court.						
Impartiality/Fairness						
8. Write opinions that address the issues raised by both parties fairly.						
9. Am attentive to the arguments of all parties during oral argument.						
Temperament/Demeanor						
10. Am attentive to the differing opinions of colleagues during oral argument.						
11. Engage in collegial decision making.						
12. Behave in a manner that fosters respect for the court system.						
13. Show respect to all court employees.						
Communication Skills						
14. Write opinions that are clear.						
15. Write opinions that are concise.						
16. Write opinions that adequately summarize the relevant facts in the case.						

17. Write opinions in which the legal reasoning is easy to follow.						
18. Provide feedback constructively to court staff.						
19. Encourage constructive feedback from court staff.						
Administrative Performance						
20. Am punctual for proceedings.						
21. Effectively handle workload.						

The following questions may be asked during the commission's interview of individual justices or judges. If no interview is conducted, these questions should be included with the self-evaluation survey.

- What do you think makes a clear written opinion?
- Please describe how you prioritize your workload.
- How do you use your law clerks?
- If you could change something about your job, what would it be?
- What has been the greatest challenge during your current term and how did you meet it?

Session 4

Meaning & Scope of "Character Roll"

All India Backward Classes and Minorities Welfare Association v. Union of India[1]

The Petitioner is a member of Delhi Higher Judicial Service, at present working as Additional district Judge. The petitioner was directly recruited to service as a Scheduled Castes candidate. He has approached this Court by means of this petition under Article 32 of the Constitution with a grievance that the High Court of Delhi has acted in an unreasonable manner in refusing to grant selection grade to him on more than one occasion. A number of other allied questions were raised during the course of arguments but ultimately on behalf of the petitioner only the grievance relating to the refusal of selection grade was pressed.

Having heard learned Counsel for the parties at a length and having perused the records and also the annual confidential reports awarded to the petitioner and other papers produced on behalf of the High Court, we find it difficult to hold that the High Court has acted unreasonably in refusing to grant selection grade to the petitioner. Admittedly grant of selection grade was considered on the criteria of merit to the members of Delhi Higher Judicial Service. Whenever a post in the selection grade was available the High Court considered the petitioner along with other officers but on a comparative assessment of merit of eligible officers, it granted selection grade to the officers who were junior to the petitioner and in that process the petitioner stood superseded. Where promotion to higher grade or post is made on the criteria of merit, many a time junior officer is bound to supersede his senior in the process of assessment of comparative merit, which may result in supersession of a senior officer. This cannot be helped since the petitioner's case was considered on merit along with others and as the High Court found officers junior to the petitioner suitable for grant of selection grade the petitioner could not be selected. We find no illegality in the High Court's orders.

However, we would like to refer one aspect which needs consideration. On a perusal of the **confidential character roll entries** and other papers produced before us on behalf of the High Court, we find that since March 1979 to July 1980 the monthly statement of work done by the petitioner as assessed by the High Court on the basis of the report of the District Judge shows that

[1] [1988]3SCR613,AIR1988SC1322. Division Bench of K.N. Singh and H.J. Kania, JJ. Decided on 19.04.1988.

the High Court rated his work and conduct as "good" and for the years 1982-83, 1983-84, 1984-85, 1985-86 and 1986-87 the petitioner has been awarded 'B' grading. No doubt he has not earned 'A' grading but the confidential reports show that he is an honest officer. Integrity of a judicial officer is a great asset to administration of justice, it must be given due weight. The petitioner comes from a weaker section of the society and he has been found to be an honest officer, this fact needs consideration. In our opinion the High Court should consider the petitioner's case sympathetically for the grant of selection grade in the light of our observations at the next selection.

Writ petition is disposed of accordingly, there will be no order as to costs.

Baikuntha Nath Das v. Chief District Medical Officer, Baripada [2]

In this case the Supreme Court addressed the issues relating to consideration of "adverse remarks" in one's character roll and its necessity to be communicated the same under conditions of compulsory retirement. The Supreme Court also opined on the role of natural justice and also underscored that most often, the authority which made the adverse remarks and the authority competent to retire him compulsorily are not the same. There is no reason to presume that the authority competent to retire him will not act bonafide or will not consider the entire record dispassionately.

B.P. Jeevan Reddy, J.

1. These appeals raise the question-whether it is permissible to the government to order compulsory retirement of a government servant on the basis of material which includes uncommunicated adverse remarks. While the appellants (government servants compulsorily retired) rely upon the decisions of this Court in *Brij Mohan Singh Chopra*[3] and *Baidyanath Mahapatra*[4] , in support of their contention that it is not permissible, the respondent- government relies upon the decision in *M.E. Reddy*[5] to contend that it is permissible to the government to take into consideration uncommunicated adverse remarks also while taking a decision to retire a government servant compulsorily.

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[2] [1992]1SCR836, AIR1992SC1029, (1992)2SCC299; Full Bench of L.M. Sharma, V. Ramaswami and B.P. Jeevan Reddy, JJ. Decided on 19.02.1992.
[3] [1987] 2 S.C.C. 1988
[4] [1989]3SCR803
[5] (1980)ILLJ7SC

2. The appellants in both the appeals have been compulsorily retired by the government of Orissa in exercise of the power conferred upon it by the first proviso to Rule 71 (a) of the Orissa Service Code. Since the relevant facts in both the appeals are similar, it would be sufficient if we set out the facts in Civil Appeal No. 869 of 1987.

3. The appellant, Sri Baikuntha Nath Das was appointed as a Pharmacist (then designated as Compounder) by the Civil Surgeon, Mayurbhanj on 15.3.1951. By an order dated 13.2.1976 the government of Orissa retired him compulsorily under the first proviso to Sub-rule of Rule 71 of the Orissa Service Code. The order reads as follows:

> In exercise of the powers conferred under the first proviso to Sub-rule (a) of Rule 71 of Orissa Service Code, the Government of Orissa is pleased to order the retirement of Sri Baikunthanath Das, Pharmacist now working under the Chief District Medical Officer, Mayurbhanj on the expiry of three months from the date of service of this order on him.

By order of the Governor.

4. The petitioner challenged the same in the High Court of Orissa by way of a writ petition, being O.J.C. No. 412 of 1976. His case was that the order was based on no material and that it was the result of ill-will and malice the Chief District Medical Officer bore towards him. The petitioner was transferred by the said officer from place to place and was also placed under suspension at one stage. He submitted that his entire service has been spot-less and that at no time were any adverse entries in his confidential character rolls communicated to him. In the counter-affidavit filed on behalf of the government, it was submitted that the decision to retire the petitioner compulsorily was taken by the Review Committee and not by the Chief Medical Officer. It was submitted that besides the remarks made in the confidential character rolls, other material was also taken into consideration by the Review Committee and that it arrived at its decision bonafide and in public interest which decision was accepted and approved by the government. The allegation of malafides was denied.

5. The High Court looked into the proceedings of the Review Committee and the confidential character rolls of the petitioner and dismissed the writ petition on the following reasoning: An order of compulsory retirement after putting in the prescribed qualifying period of service does not amount to punishment as has been repeatedly held by this Court. The order in question was

passed by the State Government and not by the Chief Medical Officer. It is true that the confidential character roll of the petitioner contained several remarks adverse to him which were, no doubt, not communicated to him, but the decision of this Court in *Union of India v. M.E. Reddy*[6], holds that uncommunicated adverse remarks can also be relied upon while passing an order of compulsory retirement. The said adverse remarks have been made by successive Civil Surgeons and not by the particular Chief District Medical Officer against whom the petitioner has alleged malafides. It is unlikely that all the Chief District Medical Officers were prejudiced against the petitioner. In particular, the court observed, "the materials placed before us do not justify a conclusion that the remarks in the confidential character rolls had not duly and properly been recorded." The decision to retire has been taken by the Review Committee on proper material and there are no grounds to interfere with its decision, it opined.

6. The adverse remarks made against the petitioner - in the words of the High Court - are to the following effect:

....most insincere, irregular in habits and negligent and besides being a person of doubtful integrity, he had been quarrelsome with his colleagues and superior officers and had been creating problems for the administration.

7. Rule 71 (a) alongwith the first proviso appended thereto - which alone is relevant for our purpose - reads thus:

> 71. (a) Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, except a ministerial servant who was in Government service on the 31st March, 1939 and Class IV Government servant, is the date on which he or she attains the age of 58 years subject to the condition that a review shall be conducted in respect of the Government servant in the 55th year of age in order to determine whether he/she should be allowed to remain in service upto the date of the completion of the age of 58 years or retired on completing the age of 55 years in public interest:
>
> Provided that a Government servant may retire from service any time after completing thirty years qualifying service or on attaining the age of fifty years, by giving a notice in writing to the appropriate authority at least three months before the date on which he wishes to retire or by giving the said notice to the said authority before such shorter period as Government may allow in any case. It shall be open to the appropriate authority to withhold permission to a Government servant who seeks to retire under this rule, if he is under suspension or if enquiries against him are in progress. The appropriate authority may also

[6] (1980)ILLJ7SC.

> require any officer to retire in public interest any time after he has completed thirty years qualifying service or attained the age of fifty years, by giving a notice in writing to the Government servant at least three months before the date on which he is required to retire or by giving three months pay and allowances in lieu of such notice, xx xx xx

8. It is evident that the latter half of the proviso which empowers the government to retire a government servant in public interest after he completes 30 years of qualifying service or after attaining the age of 50 years is in pari materia with the Fundamental Rule 56 (j).

9. The Government of Orissa had issued certain instructions in this behalf. According to these instructions, the Review Committee, if it is of the opinion that a particular government servant should be retired compulsorily, must make a proposal recording its lull reasons therefor. The administrative department controlling the services to which the particular government servant belongs, will then process the proposal and put it up to the government for final orders.

10. In *Shyam Lai v. Slate of Uttar Pradesh*[7], a Constitution Bench of this Court held that an order of compulsory retirement is not a punishment nor is there any stigma attached to it. It said:

> There is no such element of charge or imputation in the case of compulsory retirement. The two requirements for compulsory retirement are that the officer has completed twenty five years' service and that it is in the public interest to dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence of Note 1 to Article 465-A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity.

11. In *Shivacharana v. State of Mysore*[8] , another Constitution Bench reaffirmed the said principle and held that "Whether or not the petitioner's retirement was in the public interest, is a matter for the State Government to consider and as to the plea that the order is arbitrary and illegal, it is impossible to hold on the material placed by the petitioner before us that the said order suffers from the vice of malafides."

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[7] (1954)IILLJ139SC
[8] (1967)IILLJ246SC

12. As far back as 1970, a Division Bench of this Court comprising J.C. Shah and K.S. Hegde, JJ. held in *Union of India v. J.N. Sinha*[9], that an order of compulsory retirement made under F.R. 56 (j) does not involve any civil consequences, that the employee retired thereunder does not lose any of the rights acquired by him before retirement and that the said rule is not intended for taking any penal action against the government servant. It was pointed out that the said rule embodies one of the facets of the pleasure doctrine embodied in Article 310 of the Constitution and that the rule holds the balance between the rights of the individual Government servant and the interest of the public. The rule is intended it was explained, to enable the Government to energies its machinery and to make it efficient by compulsory retiring those who in its opinion should not be there in public interest. It was also held that rules of natural justice are not attracted in such a case. If the appropriate authority forms the requisite opinion bonafide, it was held, its opinion cannot be challenged before the courts though it is open to an aggrieved party to contend that the requisite opinion has not been formed or that it is based on collateral grounds or that it is an arbitrary decision. It is significant to notice that this decision was rendered after the decisions of this Court in *State of Orissa v. Dr. Binapani Devi*[10] and *A.K. Kraipak v. Union of India*[11]. Indeed, the said decisions were relied upon to contend that even in such a case the principles of natural justice required an opportunity to be given to the government servant to show cause against the proposed action. The contention, was not accepted as stated above. The principles enunciated in the decision have been accepted and followed in many a later decision. There has never been a dissent - not until 1987.

13. In *R.L. Butial v. Union of India*, relied upon by the appellant's counsel, the Constitution Bench considered a case where the government servant was denied the promotion and later retired compulsorily under F.R. 56(j) on the basis of adverse entries in his confidential records. The appellant, an electrical engineer, entered the service of Simla Electricity Board in 1934. Fn 1940, he was transferred to Central Electricity Commission - later designated as Central Water and Power Commission (Power Wing). In 1955 he was promoted to the post of Director wherein he was confirmed in the year 1960. In his confidential reports relating to the years 1964 and 1965, certain adverse remarks were made. They were communicated to him. He made a representation

[9] (1970)IILLJ284SC
[10] (1967)IILLJ266SC.
[11] [1970]1SCR457

asking for specific instances on the basis of which the said adverse remarks were made. These representations were rejected. Meanwhile, a vacancy arose in the higher post. The appellant was overlooked both in the year 1964 as well as in 1965 by the Departmental Promotion Committee and the U.P.S.C. On August 15, 1967, on his completing 55 years of age, he was compulsorily retired under F.R. 56(j). Thereupon he filed three writ petitions in the High Court challenging the said adverse entries as also the order of compulsory retirement. The writ petitions were dismissed whereupon the matters were brought to this Court on the basis of a certificate. The Constitution Bench enunciated the following propositions:

> 1. The rules framed by the Central Water and Power Commission on the subject of maintenance of confidential reports show that a confidential report is intended to be a general assessment of work performed by the government servant and that the said reports are maintained to serve as a data of operative merit when question of promotion, confirmation etc. arose. Ordinarily, they are not to contain specific instances except where a specific instance has led to a censure or a warning. In such situation alone, a reasonable opportunity has to be afforded to the government servant to present his case. No opportunity need be given before the entries are made. Making of an adverse entry does not amount to inflicting a penalty.
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> 2. When the petitioner was overlooked for promotion his representations against the adverse remarks were still pending. But inasmuch as the said representations were rejected later there was no occasion for reviewing the decision not to promote the appellant. Withholding a promotion is not a penalty under the Central Service Rules. Hence, no enquiry was required to be held before deciding not to promote the appellant-more so, when the promotion was on the basis of selection and not on the basis of seniority alone.
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> 3. So far as the order of compulsory retirement was concerned, it was based upon a consideration of his entire service record including his confidential reports. The adverse remarks in such reports, were communicated from time to time and the representations made by the appellant were rejected. It is only thereafter that the decision to retire him compulsorily was taken and, therefore, there was no ground to interfere with the said order.

14. It is evident that in this case, the question arising for our consideration viz., whether uncommunicated adverse remarks can be taken into consideration alongwith other material for compulsorily retiring a government servant did not arise for consideration. That question arose directly in *Union of India v. M.E. Reddy*.

15. The respondent, *M.E. Reddy* belonged to Indian Police Services. He was retired compulsorily under Rule 16 (3) of AH India Service (Death-cum-Retirement Rules) 1958 - corresponding to

F.R. 56 (j). The contention of the respondent was that the order was passed on non-existing material inasmuch as at no time were any adverse remarks communicated to him. His contention was that had there been any adverse entries they ought to have been communicated to him under the rules. The said contention was dealt with in the following words:

> .... This argument, in our opinion, appears to be based on a serious misconception. In the first place, under the various rules on the subject it is not every adverse entry or remarks that has to be communicated to the officer concerned. The superior officer may make certain remarks while assessing the work and conduct of the subordinate officer based on his personal supervision or contact. Some of these remarks may be purely innocuous, or may be connected with general reputation of honesty or integrity that a particular officer enjoys. It will indeed be difficult if not impossible to prove by positive evidence that a particular officer is dishonest but those who have had the opportunity to watch the performance of the said officer from close quarters are in a position to know the nature and character not only of his performance but also of the reputation that he enjoy.

16. The Learned Judges referred to the decisions in *R.L. Butail, J.N. Sinha* and several other decisions of this Court and held that the confidential reports, even though not communicated to the officer concerned, can certainly be considered by the appointing authority while passing the order of compulsory retirement. In this connection, they relied upon the principle in J.N. Sinha that principles of natural justices are not attracted in the case of compulsory retirement since it is neither a punishment nor does it involve any civil consequences.

17. The principle of the above decision was followed in *Dr. N.V. Puttabhatta v. State of Mysore*[12], a decision rendered by A.N. Grover and G.K. Mitter, JJ. Indeed, the contention of the appellant in this case was that since an order of compulsory retirement has adverse effects upon the career and prospects of the government servant, the order must be passed in accordance with principles of natural justice. It was contended that before passing the order, a notice to show cause against the order proposed must be given to the government servant. Reliance was placed upon the decisions in *Binapani Devi* and *Kraipak*. This contention was negatived following the decision in *J.N. Sinha*. It was also pointed out, applying the principles of *Shivacharana* that an order of compulsory retirement is not a punishment nor does it involve any stigma or implication or misbehaviour. Another contention urged in this case was that the order of compulsory retirement was based upon uncommunicated adverse remarks and that the appellant was also not afforded an opportunity to

[12] (1972)IILLJ191SC.

make a representation against the same. At the relevant lime, no appeal lay against the orders passed upon the representation. Dealing with the said contention, the court observed:

> as the confidential reports rules stood at the relevant time, the appellant could not have appealed against the adverse remarks and if the opinion of the government to retire him compulsorily was based primarily on the said report, he could only challenge the order if he was in a position to show that the remarks were arbitrary and malafide.

18. Yet another contention which is relevant to the present case is this: the retirement of the appellant therein was ordered under Rule 235 of Mysore Civil Service Rules. The language of the said rule corresponded to F.R. 56(j) hut it did not contain the word "absolute" as is found in F.R. 56 (j). An argument was sought to he built up on the said difference in language but the same was rejected holding that even in the absence of the word "absolute", the position remains the same. We are referring to the said aspect inasmuch as the proviso to Rule 71 (a) of the Orissa Service Code, concerned in the appeals before us, also does not contain the word "absolute".

19. In *Gian Singh Mann v. Punjab and Haryana High Court*[13], a Bench consisting of Krishna Iyer and Pathak, JJ. reiterated the principle that an order of compulsory retirement does not amount to punishment and that no stigma or implication of misbehaviour is intended or attached to such an order.

20. In *O.N.G.C. v. Iskandar Ali*. a probationer was terminated on the basis of adverse remarks made in his assessment roll. A Bench comprising three learned Judges (Fazal Ali, A.C. Gupta and Kailasam, JJ.) held that the order of termination in that case was an order of termination simpliciter without involving any stigma or any civil consequences. Since the respondent was a probationer, he had no right to the post. The remarks in his assessment roll disclosed that the respondent was not found suitable for being retained in service and even though some sort of enquiry was commenced, it was not proceeded with. The appointing authority considered it expedient to terminate the service of the respondent in the circumstances and such an order was beyond challenge on the ground of violation of Article 311.

21. this Court has taken the view in certain cases that while taking a decision to retire a government servant under Rule 56 (j), more importance should he attached to the confidential records of the

[13] (1981)ILLJ153SC).

later years and that much importance should not be attached to the record relating to earlier years or to the early years of service. In *Brij Bihari Lai Agarwal v. High Court of Madhya Pradesh*[14], upon which strong reliance is placed by the appellant's counsel - a Bench comprising Pathak and Chinappa Reddy, JJ. observed thus:

> .... What we would like to add is that when considering the question of compulsory retirement, while it is no doubt desirable to make an overall assessment of the Government servant's record, more than ordinary value should be attached to the confidential reports pertaining to the years immediately preceding such consideration. It is possible that a Government servant may possess a somewhat erratic record in the early years of service, but with the passage of time he may have so greatly improved that it would be of advantage to continue him in service up to the statutory age of superannuation. Whatever value the confidential reports of earlier years may possess, those pertaining to the later years are not only of direct relevance but also of utmost importance.

22. We may mention that the order of compulsory retirement in the above case is dated 28th September, 1979. The High Court took into account the confidential reports relating to the period prior to 1966 which were also not communicated to the concerned officer. However, the decision is based not upon the non-communication of adverse remarks but on the ground that they were too far hi the past. It was observed that reliance on such record has the effect of denying an opportunity of improvement to the officer concerned The decision in *Baldev Raj Chaddha v. Union of India*[15] , is to the same effect. In *J.D. Srivastava v. State of Madhya Pradesh*[16], it was held by a Bench of three learned Judges that adverse reports prior to the promotion of the officer cannot reasonably form a basis for forming an opinion to retire him. The reports relied upon for retiring the appellant were more than 20 years old and there was no other material upon which the said decision could be based. It was held that reliance on such stale entries cannot be placed for retiring a person compulsorily, particularly when the officer concerned was promoted subsequent to such entries.

23. We now come to the decision in *Brij Mohan Singh Chopra v. State of Punjab*, relied upon by the learned counsel for the petitioner. In this case, there were no adverse entries in the confidential records of the appellant for a period of five years prior to the impugned order. Within five years, there were two adverse entries. In neither of them, however, was his integrity doubted. These adverse remarks were not communicated to him. The Bench consisting of E.S. Venkataramiah and K.N. Singh JJ. quashed it on two grounds viz.,

> 1. It would not be reasonable and just to consider adverse entries of remote past and to ignore good entries of recent past. If entries for a period of more than 10 years past are

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[14] [1981] 2 S.C.R 29.
[15] (1980)IILLJ459SC.
[16] (1984)ILLJ344SC.

taken into account it would be an act of digging out past to get some material to make an order against the employee.

2. In *Gurdyal Singh Fiji v. State of Punjab*[17] *and Amarkant Chaudhary v. State of Bihar*[18] , it was held that unless an adverse report is communicated and representation, if any, made by the employee is considered, it may not be acted upon to deny the promotion. The same consideration applies where the adverse entries are taken into account in retiring an employee pre-maturely from service. K.N. Singh, J. speaking for the Bench observed: "it would be unjust and unfair and contrary to principles of natural justice to retire pre-maturely a government employee on the basis of adverse entries which are either not communicated to him or if communicated, representations made against those entries are not considered and disposed of.

This is the first case in which the principles of natural justice were imported in the case of compulsory retirement even though it was held expressly in *J.N. Sinha* that the said principles are not attracted. This view was reiterated by K.N. Singh, J. again in *Baidyanath Mahapatra v. State of Orissa*[19], (Bench comprising of K.N. Singh and M.H. Kania , JJ.). In this case, the Review Committee took into account the entire service record of the employee including the adverse remarks relating to the year 1969 to 1982 (barring certain intervening years for which no adverse remarks were made). The employee had joined the Orissa Government service as an Assistant Engineer in 1955. In 1961 he was promoted to the post of Executive Engineer and in 1976 to the post of Superintending Engineer. In 1979 he was allowed to cross the efficiency bar with effect from 1.1.1979. He was compulsorily retired by an order dated 10.11.1983. The Bench held in the first instance that the adverse entries for the period prior to his promotion as Superintending Engineer cannot be taken into account. It was held that if the officer was promoted to a higher post, and that too a selection post, notwithstanding such adverse entries, it must be presumed that the said entries lost their singificance and cannot be revived to retire the officer compulsorily. Regarding the adverse entries for the subsequent years and in particular relating to the years 1981-82 and 1982-83 it was found that though the said adverse remarks were communicated, the period prescribed for making a representation had not expired. The Bench observed:

.... These facts make it amply clear that the appellant's representation against the aforesaid adverse remarks for the years 1981-82 and 1982-83 was pending and the same had not been considered or disposed of on the date of impugned order was issued. It is settled view that

[17] [1979]3SCR518.
[18] [1984]2SCR299.
[19] [1989]3SCR803

it is not permissible to prematurely retire a government servant on the basis of adverse entries, representations against which are not considered and disposed of. See *Brij Mohan Singh Chopra v. State of Punjab.*

24. On the above basis, it was held that the Review Committee ought to have waited till the expiry of the period prescribed for making representation against the said remarks and if any representation was made it should have been considered and disposed of before they could be taken into consideration for forming the requisite opinion. In other words, it was held that it was not open to the Review Committee and the government to rely upon the said adverse entries relating to the years 1981-82 and 1982-83, in the circumstances. Unfortunately, the decision in *J.N. Sinha* was not brought to the notice of the learned Judges when deciding the above two cases.

25. The basis of the decisions in *Brij Mohan Singh Chopra and Baidyanath Mahapatra,* it appears, is that while passing an order of compulsory retirement, the authority must act consistent with the principles of natural justice. It is said so expressly in *Brij Mohan Singh Chopra*. This premise, if carried to its logical end, would also mean affording an opportunity to the concerned government servant to show cause against the action proposed and all that it involves. It is true that these decisions do not go to that extent but limit their holding to only one facet of the rule viz., 'acting upon undisclosed material to the prejudice of a man is a violation of the principle of natural justice.' This holding is in direct conflict with the decision in *J.N. Sinha* which excludes application of principles of natural justice. As pointed out above, *J.N. Sinha* was decided after, and expressly refers to the decisions in, *Binapani Devi and Kraipak* and yet holds that principles of natural justice are not attracted in a case of compulsory retirement. The question is which of the two views is the correct one. While answering this question, it is necessary to keep the following factors in mind: (a) Compulsory retirement provided by F.R. 56 (j) or other corresponding rules, is not a punishment. It does not involve any stigma nor any implication of misbehaviour or incapacity. Three Constitution Benches have said so vide *Shyam Lai Shivacharana and R.L. Butail*. (b) F.R. 56(j) as also the first proviso to Rule 71(a) of the Orissa Service Code, empower the government to order compulsory retirement of a government servant if in their "opinion", it is in the public interest so to do. This means that the action has to be taken on the subjective satisfaction of the government. In *R.L. Butail*, the Constitution Bench observed:

> .... In Union of India v. Col J.N. Sinha this Court stated that F.R. 56 (j) in express terms confers on the appropriate authority an absolute right to retire a Government servant on his attaining the age of 55 years if such authority is of the opinion that it is in public interest so to do. The decision further states:
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> If that authority, bona fide forms that opinion, the correctness of that opinion cannot be challenged before courts. It is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision.

26. The law on the subjective satisfaction has been dealt with elaborately in *Barium Chemicals v. Company Law Board*[20]. At page 323, Shelat, J., after referring to several decisions dealing with action taken on subjective satisfaction, observed thus:

> Bearing in mind these principles the provisions of Section 237 (b) may now be examined. The clause empowers the Central Government and by reason of delegation of its powers the Board to appoint inspectors to investigate the affairs of the company, if "in the opinion of the Central Government" (now the Board) there are circumstances "suggesting" what is stated in the three Sub-clauses. The power is executive and the opinion requisite before an order can be made is of the Central Government or the Board as the case may be and not of a Court. Therefore, the Court cannot substitute its own opinion for the opinion of the authority. But the question is, whether the entire action under the section is subjective?

27. The learned Judges then referred to certain other decisions including the decision in *Vallukunnel v. Reserve Bank of India* [21] and concluded as follows:

> Therefore, the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rule 'of natural justice where the function is administrative.

28. The blurring of the dividing line between a quasi- judicial order and an administrative order, pointed out in *Kraipak* has no effect upon the above position, more so when compulsory retirement is not a punishment nor does it imply any stigma. *Kraipak*- or for that matter, *Maneka Gandhi* - cannot be understood as doing away with the concept of subjective satisfaction.

29. On the above premises, it follows, in our respectful opinion that the view taken in *J.N. Sinha* is the correct one viz., principles of natural justice are not attracted in a case of compulsory

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[20] [1967]1SCR898
[21] AIR1962SC1371

retirement under F.R. 56 (j) or a rule corresponding to it. In this context, we may point out a practical difficulty arising from the simultaneous operation of two rules enunciated in *Brij Mohan Singh Chopra*. On one hand, it is stated that only the entries of last ten years should be seen and on the other hand, it is stated that if there are any adverse remarks therein, they must not only be communicated but the representations made against them should be considered and disposed of before they can be taken into consideration. Where do we draw the line in the matter of disposal of representation. Does it mean, disposal by the appropriate authority alone or does it include appeal as well. Even if the appeal is dismissed, the government servant may file a revision or make a representation to a still higher authority. He may also approach a court or Tribunal for expunging those remarks. Should the government wait until all these stages are over. All that would naturally take a long time by which time, these reports would also have become stale. A government servant so minded can adopt one or the other proceeding to keep the matter alive. This is an additional reason for holding that the principle of *M.E. Reddy* should be preferred over *Brij Mohan Singh Chopra and Baidyanath Mahapatra*, on the question of taking into consideration uncommunicated adverse remarks.

30. Another factor to be borne in mind is this: most often, the authority which made the adverse remarks and the authority competent to retire him compulsorily are not the same. There is no reason to presume that the authority competent to retire him will not act bonafide or will not consider the entire record dispassionately. As the decided cases show, very often, a Review Committee consisting of more than one responsible official is constituted to examine the cases and make their recommendation to the government. The Review Committee, or the government, would not naturally be swayed by one or two remarks, favourable or adverse. They would form an opinion on a totality of consideration of the entire record - including representations, if any, made by the government servant against the above remarks - of course attaching more importance to later period of his service. Another circumstance to be borne in mind is the unlikelihood of succession of officers making unfounded remarks against a government servant.

31. We may not be understood as saying either that adverse remarks need not be communicated or that the representations, if any, submitted by the government servant (against such remarks) need not be considered or disposed of. The adverse remarks ought to be communicated in the normal course, as required by the Rules/orders in that behalf. Any representations made against them

would and should also be dealt with in the normal course, with reasonable promptitude. All that we are saying is that the action under F.R. 56 (j) (or the Rule corresponding to it) need not await the disposal or final disposal of such representation or representations, as the case may be. In some cases, it may happen that some adverse remarks of the recent years are not communicated or if communicated, the representation received in that behalf are pending consideration. On this account alone, the action under F.R. 56 (j) need not be held back. There is no reason to presume that the Review Committee or the government, if it chooses to take into consideration such uncommunicated remarks, would not be conscious or cognizant of the fact that they are not communicated to the government servant and that he was not given an opportunity to explain or rebut the same. Similarly, if any representation made by the government servant is there, it shall also be taken into consideration. We may reiterate that not only the Review Committee is generally composed of high and responsible officers, the power is vested in government alone and not in a minor official. It is unlikely that adverse remarks over a number of years remain uncommunicated and yet they are made the primary basis of action. Such an unlikely situation if indeed present, may be indicative of malice in law. We may mention in this connection that the remedy provided by Article 226 of the Constitution is no less an important safeguard. Even with its well-known constraints, the remedy is an effective check against mala fide, perverse or arbitrary action.

At this stage, we think it appropriate to append a note of clarification. What is normally required to be communicated is adverse remarks - not every remark, comment or observation made in the confidential rolls. There may be any number of remarks, observations and comments, which do not constitute adverse remarks, but are yet relevant for the purpose of F.R. 56 (j) or a Rule corresponding to it. The object and purposes for which this power is to be exercised are well-stated in J.N. Sinha and other decisions referred supra.

32. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 29 to 31 above.

33. Before parting with the case, we must refer to an argument urged by Sri R.K. Garg. He stressed what is called, the new concept of Article 14 as adumbrated in *Maneka Gandhi*[22] and submitted on that basis that any and every arbitrary action is open to judicial scrutiny. The general principle evolved in the said decision is not in issue here. We are concerned mainly with the question whether a facet of principle of natural justice - *audi alteram partem* - is attracted in the case of compulsory retirement. In other words, the question is whether acting upon undisclosed material is a ground for quashing the order of compulsory retirement. Since we have held that the nature of the function is not quasi-judicial in nature and because the action has to be taken on the subjective satisfaction of the Government, there is no room for importing the said facet of natural justice in such a case, more particularly when an order of compulsory retirement is not a punishment nor does it involve any stigma.

34. So far as the appeals before us are concerned, the High Court which has looked into the relevant record and confidential records has opined that the order of compulsory retirement was based not merely upon the said adverse remarks but other material as well. Secondly, it has also found that the material placed before them does not justify the conclusion that the said remarks were not

[22] A.I.R. 1978 S.C. 579

recorded duly or properly. In the circumstances, it cannot be said that the order of compulsory retirement suffers from mala fides or that it is based on no evidence or that it is arbitrary.

35. For the above reason, both the appeals are dismissed but in circumstances of the case, we make no order as to costs.

Madan Mohan Choudhary v. The State of Bihar[23]

The question relating to uncommunicated adverse entries has been the subject matter of several decisions of this Court. In *Union of India v. M.E. Reddy*[24] , it was laid down that uncommunicated adverse remarks can be relied upon while passing an order of compulsory retirement. But in two subsequent decisions, namely, *Brij Mohan Singh Chopra v. State of Punjab*[25] and *Baidyanath Mahapatra v. State of Orissa*[26], it was laid down that uncommunicated adverse entries could not be legally relied upon while making an order of compulsory retirement. It was also laid down in *Baidyanath's case* (supra) that if a representation was pending against the adverse remarks, the adverse entries against which the representation is made could not be taken into consideration unless the representation itself was considered and disposed of.

Both these decisions were considered by a Three-Judge Bench ***in Baikuntha Nath Das's***[27] case (supra) and **were over-ruled** and the following five principles were laid down:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be

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[23] [1999]1SCR596, AIR1999SC1018, (1999)3SCC396. Division Bench of Saiyed Saghir Ahmad and M. Jagannadha Rao, JJ.Decided on 12.02.1999.
[24] (1980)ILLJ7SC.
[25] (1987)ILLJ522SC.
[26] [1989]3SCR803.
[27] *Baikuntha Nath Das v. Chief Distt. Medical Officer Baripada*,(1992)ILLJ784SC

so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

This decision has since been followed in *Posts & Telegraphs Board v. C.S.N. Murthy*[28]; *Secretary to the Government Harijan & Tribal Welfare Department Bhubaneswar v. Nityananda Pati*[29]and *Union of India v. V.P. Seth*[30] and considered by this Court in *M.S. Bindra v. Union of India and Ors.*,[31]and again in *The State of Gujarat and Anr. v. Suryakant Chunilal Shah*[32].

The fifth principle in *Baikuntha Nath Das's* case (supra), which has already been extracted above, itself contemplates that the mere circumstance that uncommunicated adverse remarks were taken into consideration would not constitute a basis for interference with an order of compulsory retirement. In para 32 of the Judgment, the learned Judges observed as under:

"32. We may not be understood as saying either that adverse remarks need not be communicated or that the representations, if any, submitted by the government servant (against such remarks) need not be considered or disposed of. *The adverse remarks ought to be communicated in the normal course, as required by the rules/ orders in that behalf. Any representation made against them would and should also be dealt with in the normal course, with reasonable promptitude. All that we are saying is that the action under F.R.56(j) (or the rule corresponding to it) need not await the disposal or final disposal of such representation or representations, as the case may be. In some cases, it may happen that* some adverse remarks of the recent years are not communicated or if communicated, the representation received in that behalf are pending consideration. On this account alone, the action under F.R. 56(j) need not be held back. There is no reason to presume that the Review Committee or the government, if it chooses to take into consideration such uncommunicated remarks, would not be conscious or cognizant of the fact that they are not communicated to the government servant and that he was not given an opportunity to explain or rebut the same. *Similarly, if any representation made by the government servant is there, it shall also be taken into consideration. We may reiterate that not only the Review Committee is generally composed of high and responsible officers, the power is vested in government alone and not in a minor official It is unlikely that adverse remarks over a number of years remain uncommunicated and yet they are made the primary basis of*

[28] (1993)IILLJ866SC.
[29] AIR1993SC383.
[30] (1994)IILLJ411SC.
[31] (1999)ILLJ923SC.
[32] (1999)ILLJ265SC.

action. Such an unlikely situation, if indeed present, may be indicative of malice in law. We may mention in this connection that the remedy provided by Article 226 of the Constitution is no less an important safeguard. Even with its well known constraints, the remedy is an effective check against *mala fide*, perverse or arbitrary action."

(Emphasis supplied)

These observations indicate that the adverse remarks if recorded in an employee's character roll in the "normal course", ought to be communicated to him and if any representation is made against those remarks, the said representation should be disposed of in the "normal course" but with promptitude. It was further emphasised that the pendency of representation against the adverse remarks or non-disposal of that representation would, however, not prevent the action being taken for compulsory retirement of the employee even on the basis of that entry either under F.R.56(j) or any provision equivalent thereto.

All India Judges' Association v. Union of India[33]

Speaking about the relevance of "Character Roll" the Supreme Court observed as under:

There is, however, one aspect we should emphasise here. To that extent the direction contained in the main judgment under review shall stand modified. The benefit of the increase of the retirement age to 60 years, shall not be available automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system. The benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justices of the High Courts and the evaluation shall be made on the basis of the judicial officers' past record of service, character rolls, quality of judgments and other relevant matters.

[33] [1993]Supp1SCR749, AIR1993SC2493, (1993)4SCC288. Full Bench of M.N. Venkatachaliah, C.J.I., A.M. Ahmadi and P.B. Sawant, JJ.Decided on 24.08.1993.

K. Kandaswamy v. Union of India[34]

The officer would live by reputation built around him. In an appropriate case, there may not be sufficient evidence to take punitive disciplinary action of removal from service. But his conduct and reputation is such that his continuance in service would be a menace to public service and injurious to public interest. The entire service record or character rolls or confidential reports maintained would furnish the backdrop material for consideration by the Government or the Review Committee or the appropriate authority. On consideration of the totality of the facts and circumstances alone; the Government should form the opinion that the Government officer needs to be compulsorily retired from service. Therefore, the entire record more particularly, the latest, would form the foundation for the opinion and furnish the base to exercise the power under the relevant rule to compulsorily retire a Government officer.

Higher the ladder the officer scales in the echelons of service, greater should be the transparency of integrity, honesty, character and dedication to duty. Work culture and self- discipline augment his experience. Security of service gives fillip to accelerate assiduity to stay in line and measure up to the expected standards of efficiency by the Government employee. Thereby, they ultimately aid to achieve excellence in public service.

I.K. Mishra v. Union of India[35]

In this case the Supreme Court clarified the status and effect of an adverse remark in the "character roll" of a judicial officer, once he was not elevated in a departmental promotion. The Court relying on principle No. 4 as noted in the case of ***Baikuntha Nath Das Case*** *held as under:*

It was … contended that the appellant having passed the S.A.S. Part II Civil Examination in the year 1972-73 after complying with the eligibility criteria laid down in the Regulations 199 and 207, the adverse entries in the character roll of the appellant lost their sting and for that reason there was no material on record on the basis of which the appointing authority could form an

[34] [1995]Supp3SCR258, AIR1996SC277, (1995)6SCC162. Division Bench of K. Ramaswamy and B.L. Hansaria, JJ. Decided On: 01.09.1995.

[35] [1997]Supp2SCR260, AIR1997SC3740, (1997)6SCC228.Division Bench of S.V. Manohar and V.N. Khare, JJ..Decided on 11.07.1997.

opinion to compulsorily retire the appellant from service. No doubt the appellant was sent by the respondents to appear in S.A.S. examination in the year 1972-73 after having been found that the appellant complied with the conditions for appearing in the said examination and further the appellant passed the S.A.S. Part II examination but merely the facts that the appellant was sent to appear in the examination and was declared successful in the said examination are not the end of the matter. In fact passing of the S.A.S. examination entitles an auditor to be considered for promotion to the higher post by the Departmental Promotion Committee. In the present case after the appellant was declared successful in the S.A.S. examination, the Departmental Promotion Committee after considering the service record of the appellant did not recommend his case for further promotion. Applying the principle No. 4 as noted in the case of *Baikuntha Nath Das*[36] the appellant having not been promoted to the higher post the adverse remarks in his character roll remained intact. Since the appellant was not promoted to the higher post by the Departmental Promotion Committee it is not correct to contend that the adverse materials in the annual confidential report of the appellant lost their sting and those materials could not form the basis of order compulsorily retiring the appellant from service.

Bishwanath Prasad Singh v. State of Bihar[37]

The Apex Court, while highlighting the importance of confidential records and their entries, emphasized the critical role of the High Courts in shaping the careers of the judges of the subordinate judiciary. In a relevant portion of the judgement the Court held that:

A number of decisions dealing with the object and purpose of writing confidential reports and care and caution to be adopted while making entries in the confidential records of Government officers have been referred to in the cases of *Sarnam Singh* (supra, vide para 31, 32) as also in the case of *Ishwar Chand Jain* (supra). We need not repeat the same. Suffice it to observe that the well-recognized and accepted practice of making annual entries in the confidential records of subordinate official by superiors has a public policy and purposive requirement. It is one of the recognised and time-tested modes of exercising administrative and disciplinary control by a

[36] (1992)ILLJ784SC
[37] [2000]Supp5SCR718, (2001)2SCC305; Full Bench of Dr. A.S. Anand, CJI., R.C. Lahoti and Shivaraj V. Patil, JJ. Decided on 15.12.2000.

superior authority over its subordinates. The very power to make such entries as have potential for shaping the future career of a subordinate officer casts an obligation on the High Courts to keep a watch and vigil over the performance of the members of subordinate judiciary. An assessment of quality and quantity of performance and progress of the judicial officers should be an ongoing process continued round the year and then to make a record in an objective manner of the impressions formulated by such assessment. An annual entry is not an instrument to be wielded like a teacher's cane or to be cracked like a whip. **The High Court has to act and guide the subordinate officers like a guardian or elder in the judicial family**. The entry in the confidential rolls should not be a reflection of personal whims, fancies or prejudices, likes or dislikes of a superior. The entry must reflect the result of an objective assessment coupled with and effort at guiding the judicial officers to secure an improvement in his performance where need be; to admonish him with the object of removing for future, the shortcoming found; and expressing and appreciation with an idea of toning up and maintaining the imitable qualities by affectionately patting on the back of meritorious and deserving. An entry consisting of a few words, or a sentence or two, is supposed to reflect the sum total of the impressions formulated by the inspecting Judge who had the opportunity of forming those impressions in his mind by having an opportunity of watching the judicial officer round the period under review. In the very nature of things, the process is complex and the formulation of impressions is a result of multiple factors simultaneously playing in the mind. The perceptions may differ. In the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in confidential rolls to judicial review**. Entries either way have serious implications on the service career. Hence the need for fairness, justness and objectivity in performing the inspections and making the entries in the confidential rolls.**

Session 5

Evaluating the Utility of ACR: How Effective Grading System Is?

JUDICIAL OFFICERS' WORK DISPOSAL (GRADINGS) RULES, 2015

These Rules are in supersession of all previous Rules, Orders, Guidelines or Notifications on the subject.

The procedure and guidelines for recording A.C.R.s of the Judicial Officers is as follows:

- The period for recording of the Annual Confidential Reports (A.C.Rs.) shall be one year between 1st April to 31st March. This new procedure shall come in to force with immediate effect and hence would be applicable for the period from 1st April 2015 to 31st March 2016 and onwards.

- The Officers of the Superior Judicial Service shall fill up the Part - I and Part - II of the A.C.R. Format A of the Schedule to these Rules and the Officers of the Jharkhand Judicial Service shall fill up the Part - I and Part - II of the A.C.R. Format B of the Schedule to these Rules.

- The Zonal Judge shall be the Initiating Officer with respect to the Judicial Officers of the Rank of **Principal District Judge and District and Additional Sessions Judge** serving in His Zone. He shall complete the recording and initiation of A.C.Rs. in respect of these officers latest by 30th June every year. He may append with the A.C.R. of any individual officer, his Inspection Notes, if he considers it desirable or warranted.

- The **Principal District Judge** shall be the initiating officer with respect to the recording of A.C.Rs. of **Civil Judge (Jr.Div.) and Civil Judge (Sr.Div.)** of his District. For this purpose, he may inspect, monitor and oversee the work and conduct of these officers. Along with any A.C.Rs. He may also append his Inspection Notes, if he considers it desirable. The **Principal District Judge** shall ensure that as initiating officer, he completes the entire process relating to initiation of A.C.Rs. of **Civil Judge (Jr.Div.) and Civil Judge (Sr.Div.)** in his district latest by 30th April of every year.

- The A.C.Rs. thus, recorded and initiated by the **Pr. District Judge**, along with the Inspection notes, if any, shall be sent to the Registrar (Vigilance) of the Court, who shall place them before the concerned Zonal Judge who shall be the Reviewing Officer with respect to the A.C.Rs of **Civil Judge (Jr.Div.) and Civil Judge (Sr.Div.)**. The Zonal Judge shall complete the reviewing of such A.C.Rs. and ensure that the work of recording of Such A.C.Rs. in all respects is completed latest by 30th June every year.

- The Registrar (Vigilance) shall be the custodian of all the A.C.Rs. relating to all the Judicial officers. It shall be his duty to ensure that A.C.Rs. of all the Judicial officers of the State are collected and deposited with him latest by 31st July every year. If the Registrar (Vigilance) in execution of these directions faces any difficulty at any time, he may bring this to the notice of the Hon'ble the Chief Justice for such direction as are deemed fit and appropriate. The Chief Justice accordingly, may issue direction, as he considers appropriate for ensuring that all the A.C.Rs. are collected and deposited with the Registrar (Vigilance) latest by 31st July every year.

- It shall be the duty of Registrar (Vigilance) to ensure that any adverse entry/ entries recorded in any A.C.R. of any officer is communicated to him latest by 30th September of the succeeding year for which the entries has been recorded. Any such officers may prefer/ file representation within two months from the date of such communication addressed to the Registrar (Vigilance) for expunction of such adverse entry or entries.

- All such representations received by the Registrar (Vigilance) shall be placed before Zonal Judge concerned for consideration. Standing committee shall be the authority competent to pass the order for expunction of adverse entries in the A.C.Rs. of any Judicial officers of the State, if so warranted in any case.

- Apart from the adverse entries, the A.C.Rs. may contain entries which, though not adverse in character, tend to point out some short – comings or weaknesses of the officer concerned calling for 'counseling' to improve himself in future. Such remarks shall be called " Performance Counseling" remarks and these shall not be considered adverse in character. If any "Performance Counseling" remarks are entered in the A.C.Rs. of any officer, the Registrar (Vigilance) shall, **communicate it to the officer concerned in the same manner as is applicable to the communication of adverse entries; however no representation is required to be filed on behalf of the officer for expunction of these " Performance Counseling" remarks. The Director, Judicial Academy Jharkhand shall be communicated with regard to suggestions/ recommendation entered in column B4/5 of Part-III of the A.C.Rs. for organizing the training programmes for further improvement/ specialization in the suggested field/subject.**

- If the A.C.Rs. Forms, have any part relating to self-assessment, the **Pr. District Judge** shall ensure that the **Civil Judge (Jr.Div.) and Civil Judge (Sr.Div.)** send this part of the A.C.Rs. duly completed in all respect latest by 15th April every year. With respect to **Pr. District Judge and District and Addl. Sessions Judge,** the Registrar (Vigilance) shall ensure that they send this part to the High Court latest by 30th April every year so that it is placed before the Zonal Judge well in time to complete the initiation/ recording of the A.C.Rs. latest by 30th June.

- The Hon'ble Chief Justice may consider opening/ constituting an A.C.Rs. Section in the High Court Registry Under Registrar (Vigilance) for effective implementation of the direction contained herein.

- The Registrar (Vigilance) shall ensure that the all A.C.Rs., complete in all respects, are digitized. The work of digitization of all A.C.Rs. with respect to all Judicial officers shall be completed by 31st December of each year.

- If any adverse entries in any A.C.Rs. are expunged, It shall be the duty of Registrar (Vigilance) to ensure that appropriate correction in the A.C.R. is made within two weeks from the date of expunction order and in the digitized entry also appropriate correction is carried out. The Registrar General, Registrar (Administration) and Joint Registrar (Establishment) shall also be simultaneously informed of such expunction and the revised (after expunction) A.C.Rs. copies shall be distributed to them.

- The format of the A.C.Rs. comprising Part – I to V in respect of Officers belonging to Jharkhand Superior Judicial service and Officers belonging to the Jharkhand Judicial service shall be used from the assessment year beginning from 1st April 2015.

In the A.C.Rs. of Judicial Officers, there are columns/ entries with respect to their gradings based on their outturn, in other words, the disposal of cases. The evaluation of Judicial Officers for the purpose of such gradings will be made as prescribed here-in-below;

The evaluation shall be in the form of categorized gradings as follows:-

		For all Judicial Officers	**For Secretary, D.L.S.A. & Judge-in-charge**
(a)	**Outstanding -**	**80 and above points**	**50 and above points**
(b)	**Very Good -**	**60 to 80 points**	**40 to 50 points**
(c)	**Good -**	**50 to 60 points**	**30 to 40 points**
(d)	**Average -**	**40 to 50 points**	**20 to 30 points**
(e)	**Poor -**	**Below 40 points**	**Below 20 points**

(1) For Principal District & Sessions Judges (including District & Addl. Sessions Judges, Judges of Special Courts etc.)

(i) For each contested Sessions Trial -	6 points	(10 points in case of disposal of cases more than 10 years old 8 points in cases of disposal of case more than 5 years old)
(ii) For each uncontested Sessions Trial –	3 points	
(iii) For each Civil Appeal -	6 points	(10 points in case of disposal of cases more than 10 years old 8 points in cases of disposal of case more than 5 years old)
(iv) For each Uncontested/Compromised Civil Appeal -	3 points	
(v) For each disposal through A.D.R. -	3 points	
(vi) For each Criminal Appeal -	3 points	(**5** points in case of disposal of cases more than 5 years old)
(vii) For each Criminal Revision -	2 points	(**3** points in case of disposal of cases more than 5 years old)
(viii) For each Special Act Case -	6 points.	
(ix) For each Contested Probate case/ Civil Suit/Succession Case/ Suits under Trade Merchandise Act/ Copy Rights Act Cases -	6 points.	
(x) For each Uncontested Probate case/ Civil Suit/Succession Case/ Suits under Trade Merchandise Act/ Copy Rights Act Cases -	3 points.	
(xi) For each Misc. Appeal -	3 points	
(xii) For each B.P./ A.B.P. -	1/4 points	
(xiii) For each Misc. petitions in Special Act Cases -	2 points.	
(xiv) For each Injunction/ Misc. Case -	2 points.	
(xv) For each Amendment petition -	1 point.	

(2) **For Family Court Judges :-**

(i) For each contested Matrimonial Suits	-	6 points.
(ii) For each disposal based on conciliation	-	4 points.
(iii) For each contested Matrimonial application, such as u/s 125 Cr.P.C.	-	4 points.
(iv) For each uncontested disposal	-	2 points.
(v) For each disposal through A.D.R.	-	3 points.

(3) **For Civil Judges (Sr.Div.) and Civil Judges (Jr.Div.) :-**

(i) For each contested Title Suits	-	10 points. (15 points for Suits above 10 years old)
(ii) For each uncontested Title Suits (including compromised)	-	4 points.
(iii) For each Injunction/ Misc. Case	-	2 points.
(iv) For each Amendment petition	-	1 point.
(v) For each disposal through A.D.R.	-	3 points.

(4) **For C.J.Ms., A.C.J.Ms. as Assistant Sessions Judges :-**

(i) For each contested Sessions Trial	-	4 points.
(ii) For each uncontested Sessions Case	-	3 points.
(iii) For each case under other Spl. Acts.	-	4 points.
(iv) For each disposal through A.D.R.	-	3 points

(5) **For Civil Judges (Jr. Div.) [Judicial Magistrate and S.D.J.M.] :-**

(i) For each contested disposal	-	3 points.	(5 points for cases more than 5 years old)
(ii) For each uncontested disposal	-	2 points.	
(iii) For recording statement u/s 164 Cr.P.C.	-	1 point.	
(iv) For attending T.I.P./ recording Dying Declaration	-	2 points.	
(v) For Matters disposed of on Plea Bargaining	-	2 points.	
(v) For each disposal through A.D.R.	-	3 points.	

(6) **For Motor Vechiles Claim Tribunals and other Tribunals Presided by Principal District Judge and District & Additional Sessions Judges including L.A. cases:-**

(i) For each contested disposal u/s 166/163A M.V.Act, 1988	-	5 points.
(ii) For each disposal of applications u/s 140 M.V.Act, 1988	-	2 points.
(iii) For each Uncontested disposal	-	2 points.

NOTE :-

(i) For Disposal of Departmental Enquiry by any Officer	-	4 points.
(ii) For organizing Lok Adalats to P.D.J.	-	10 points per Lok Adalat subject to maximum 20 points in a month.

(iii) For other Judicial Officers for sitting in Bench of Lok Adalat - 5 points per Lok Adalat subject to maximum 10 points in a month.

(iv) If minimum one case per month is not disposed of from the old cases either more than 10 years old case or a case more than 5 years old (in case of pendency of such cases in his/her court), the final assessment of the officer shall be lowered to one grade below.

(v) Judicial Officers exercising both Criminal and Civil Jurisdictions must obtain at least 18 points in a month in Civil side failing which their final assessment shall be lowered to one grade below.

(vi) 50 % points must be obtained by disposal of contested cases excluding B.A./A.B.A., Amendment Petitions failing which the final assessment of the officer shall be lowered to one grade below.

SPECIAL ASSIGNMENTS

There may be the cases of Judicial Officers who are posted/ deputed on Special Assignments, where except undertaking the Specially Assigned tasks, normal judicial work is not done by these Officers, nor is it expected to be done and hence the outturn of these Officers of these Special Assignments may be '0' or negligible and, therefore, based on the aforesaid yardsticks/parameters, these Officers would not earn the 'points'. Because for no fault of these Officers, if they do not earn the points on the aforesaid basis, they should not suffer. The aforesaid yardstick/parameters shall, therefore, not apply in cases of these Officers. Instead, the aforesaid Officers shall on quarterly basis, submit to their respective Zonal Judges (if they are of the rank of District & Additional Sessions Judge and above) and through the Principal District Judges (in other ranks) their self-appraisal/ assessment, or performance reports and on receipt of the same and upon objective assessment, the respective Zonal Judges shall grade them either "normal" or "below normal", as the case may be. Only if the outturn in course of time, during a particular year picks up, the Zonal Judge may award to such an Officer the grading of 'outstanding', 'very good' , 'good', 'average' or 'poor'.

It is made clear that in all such, cases the grading of 'normal' given to the aforesaid Officers shall be equivalent to 'outstanding' as given to other Officers, except in such cases where, for brief reasons to be recorded, the Zonal Judge treats the 'normal' grading other than 'outstanding', such as 'very good', or 'good' Such treatment in respect of grading (which should be other than' outstanding' in the opinion of Zonal Judge) is expected to be based on some cogent material and not otherwise.

At any Station, if for some peculiar local conditions or reasons beyond their control, the disposal is poor, the matter will be placed before the Zonal Judge, who on consideration of all relevant aspects, may treat the case of such an Officer on category and accordingly grade such an Officer 'Normal' or 'below normal' with all other consequences applicable in his case.

Special Note:-

Such of the Officers, irrespective of their rank, who have not been provided with the facility of Stenographer may, be awarded extra 5% of the total points earned in a quarter to compensate them for the lack of this facility.

Quarterly Self Assessment Chart

Each officer posted in District & Subordinate Courts/ Family Court/ Labour Courts has to submit Quarterly Self Assessment Chart in Format C of the Schedule to these Rules. Such Self Assessment Chart must be submitted within 15 days of the end of the Quarter. The Officers of the rank of Principal District Judge will send the Self Assessment Chart to the Registrar (Administration) and rest of the Officers submit the same to the Principal District Judge concerned who in turn will forward the same to Registrar (Administration). The Registrar (Administration) will place the same before the concerned Hon'ble Zonal Judge for consideration.

SCHEDULE

FORMAT- A

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Superior Judicial Service** for the year ending 31st March 20…..

PART – I

PERSONAL DATA

(To be filled by the Officer)

1. Name in Block letters :

_____

2. Date of Joining in Service :

_____

3. Date and place of birth (dd/ mm/ yyyy) | | | | | | | | | Place: _____

4. Present place of posting, post held and date of appointment/ joining

   Place: _____ Post: _____ Date of Joining: _____

5. Date of promotion, if any, within service : -

   Senior Civil Judge :_____ District Judge Cadre:_____

6. Whether, confirmed in the cadre? : -

   If confirmed, date of confirmation in cadre of…

   Civil Judge:-_____ Senior Civil Judge:_____ District Judge:_____

7. Whether Selection Grade/ Super Time granted to the officer: -

   If, yes, Date of conferring: -

   Selection Grade: _____ Super-time: _____

8. Period of absence from duty

   a. On Earned Leave, from

   b. Training, from

   Specify the Training Course: -

(Signature of Officer)

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Superior Judicial Service** for the year ending 31st March 20....

Part – II
(To be filled in by the officer)

Name Of The Officer :-
Place Of Posting With Present Designation :-

1. **a)** Name of spouse, if married : -
   b) Any addition or variation to the family strength: :-
   c) Any immovable property acquired or disposed of by the officer himself/ spouse/ parent/ children in the current year :-
   d) Any movable property valued at more than 10,000/- shares, debenture, units or such like items,: - acquired, purchased, transferred or disposed of, by the officer, spouse, parent or children in the current year
   e) Any appreciation/ commendation communicated to the officer during the current year : -
   f) Any stricture, adverse comments communicated or any penalty imposed in current year? : -
   g) Any other appointment held in the current Assessment Year: - (Specify period of stay of different station during Assessment Year)
   h) Any other additional source of income : -

2. Nature of the work assigned [Please Tick (✓)]

   (a) Civil ☐ **(b)** Administrative Works (D.J./ C.J.M./Registrar/Judge In- Charge) ☐

   (c) Criminal ☐ **(d)** Assignment of work under Legal Services Authority & other modes of A.D.R. ☐

   (e) Any other nature of work: ☐ Please Specify:-

3. Total number of cases disposed of : -
   (a) Civil _____ Criminal _____ _____Misc. (including Bail), Transfer Petition & No. of cases disposed through A.D.R._____

Number of Cases	**Number of Cases**
(i) Title Appeal	**(i)** Sessions Case
(ii) Matrimonial Suit	**(ii)** Cr. Appeal
(iii) u/s 166/163A (M.V.Act)	**(iii)** Cr. Revision
(iv) u/s 140 M.V.Act	**(iv)** Cases under NDPS Act
(v) Execution & others	**(v)** Others, i.e; S.C./S.T. Act

   (b) Specify the number of cases disposed of:-
   (i) More than 10 years old_____
   (ii) 5 to 10 years old_____
   (iii) Cases disposed of as per direction of Hon'ble Supreme Court/ High Court_____

4. **(a) (i)** The number of cases pending on the date of joining / at the commencement of the year which is more than 10 years ☐ old , 5 to 10 ☐ years old
   (ii) The number of cases pending at the end of year; which is more than 10 years old ☐ , 5 to 10 years ☐ old
   (b) Please specify target set by you for disposal of cases, more particularly old cases and the achievement vis-a-vis the target set.
   (c) Factor of hindrance in achievement, if any:-

5. Total units earned as per the Grading Rules during the Assessment Year:-_____

6. Your achievement, if any_____

Place: -
Date: -

(Signature of Officer)

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Superior Judicial Service** for the year ending 31st March 20.....

Part – III

(To be filled in by the Reporting Authority)

Name of the officer

Place of posting with present Designation

A. Nature and Quality of Work

1. **Do you agree with the information furnished in Part II relating to**

   a) Disposal of Cases **Yes**

   Any comment - _____

   b) Achievement **Yes**

   Any comment - _____

2. **Knowledge of Sphere of work –**

   a) Knowledge of Law & Procedure : -

   b) Level of knowledge, related instruction and their application followed and applied by him/her in working. : -

B. Attitude to work

1. To what extent officer is dedicated/ motivated and willing to learn and to systematize his/ her work?: - _____
2. Are his/ her judgement and order well written and clearly expressed? : - _____
3. Attitude or behaviour with ....
   a) Superiors / colleagues : - _____
   b) Sub-ordinate staffs/ litigants/ witnesses : - _____
   c) Members of the Bar : - _____
4. Please suggest/ recommend the field/ subject, the officer may need more training for further improvement/ specialization through Judicial Academy. : - _____

Place: - _____

_____
(Signature of the Zonal Judge)

Date : - _____

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Superior Judicial Service** for the year ending 31st March 20.....

Part – IV

(To be filled in by the Reporting Authority)

Name of the officer

Place of posting with present Designation

1. **Length of service under the Reporting Authority.** : - _____

2. **Integrity and impartiality** : - _____

3. **General Assessment/ efficiency** : - _____

_____

_____

4. **Any other quality** : - _____

_____

_____

5. **Overall Grading**

Outstanding	: -	**A+**
Very Good	: -	**A**
Good	: -	**B+**
Satisfactory	: -	**B**
Average	: -	**B-**
Below Average: -		**C**

Place: - _____

_____
(Signature of the Zonal Judge)

Date : - _____

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Superior Judicial Service** for the year ending 31st March 20……

Part – V

(To be filled in by the Reviewing/ Accepting Authority)

Name of the Officer :

Designation :

Place of Posting :

A.C.R. of the Year :

1. **The Assessment of the Hon'ble Mr.**
   Justice .... **Yes / No**
   Zonal Judge, ...
   are accepted/ approved.

2. **Any additional comments / remarks by the Standing Committee.**

By order of the Hon'ble Standing Committee

Place:

Date:

Registrar (Vigilance)

FORMAT - B

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Judicial Service** for the year ending 31st March 20.....

PART – I

PERSONAL DATA

(To be filled in by the officer)

1. Name in Block letters _____

2. Date of Joining in Service _____

3. Date of birth (dd/ mm/ yyyy) | | | | | | | | | Place of Birth _____

4. Present place of posting, post held and date of appointment/ joining

   Place _____ Post held _____ Date of Joining _____

5. Date of promotion, if any, within service :-

   Senior Civil Judge _____ District Judge Cadre _____

6. Whether, confirmed in the cadre? : - Yes/No

   If confirmed, date of confirmation in the cadre of…

   Civil Judge _____ Senior Civil Judge _____ District Judge _____

7. Whether, ACP/ Selection Grade/ Super Time granted to the officer: - **Yes / No**

   If, yes, Date of Confirmation: -

   ACP _____ Selection Grade _____ Super-time: - _____

8. Period of absence from duty

   a. On Earned Leave, from _____

   b. Training, from _____

      Specify the Training Course: - _____

(Signature of Officer)

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Judicial Service** for the year ending 31st March 20....

Part – II

(To be filled in by the officer)

Name of the officer :-

Place of posting with present Designation :-

1. **a)** Name of spouse, if married : -
   b) Any addition or variation to the family strength: :-
   c) Any immovable property acquired or disposed of by the officer himself/ spouse/ parent/ children in the current year :-
   d) Any movable property valued at more than 10,000/- shares, debenture, units or such like items,: - acquired, purchased, transferred or disposed of, by the officer, spouse, parent or children in the current year
   e) Any appreciation/ commendation communicated to the officer during the current year : -
   f) Any stricture, adverse comments communicated or any penalty imposed in current year? : -
   g) Any other appointment held in the current Assessment Year: - (Specify period of stay of different station during Assessment Year)
   h) Any other additional source of income : -

2. Nature of the work assigned [Please Tick (✓)]

   (a) Civil ☐ **(b)** Administrative Works (D.J./ C.J.M./Judge In- Charge) ☐

   (c) Criminal ☐ **(d)** Assignment of work under Legal Services Authority & other modes of A.D.R. ☐

   (e) Any other nature of ☐ work: Please Specify:-

3. Total number of cases disposed of : -
   a) Civil _____ Criminal _____ Misc. (including Bail), Transfer Petition & No. of cases disposed through A.D.R_____

Number of cases	**Number of cases**
(i) T.Suit	**(i)** Complaint case
(ii) E.Suit	**(ii)** G.R. Case
(iii) Money Suit	**(iii)** Under N. I. Act
(iv) Execution	**(iv)** Sessions Case

   b) Specify the number of cases disposed of:-
   (i) More than 10 years old_____
   (ii) 5 to 10 years old _____
   (iii) Cases disposed of as per direction of Hon'ble Supreme Court/High Court _____

4. **(a) (i)** The number of cases pending on the date of joining /at the commencement of the year which is more than 10 years old ☐ , 5 to 10 years old ☐
   (ii) The number of cases pending at the end of the year, which is more than 10 years old ☐ , 5 to 10 years old ☐
   (b) Please specify target set by you for disposal of cases, more particularly old cases and the achievement vis-a-vis the target set.
   (c) Factor of hindrance in achievement if any :-

5. Total units earned as per the Grading Rule during the Assessment year :-

6. **(a)** Your achievement, if any _____
   (b) Disputes referred/ resolved, if any, through various modes of ADR mechanism:- Specify the number :- _____

Place: -

Date: -

(Signature of Officer)

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Judicial Service** for the year ending 31st March 20.....

Part – III

(To be filled in by the Controlling/ Reporting Authority)

Name of the officer

Place of posting with present Designation

A. Nature and Quality of Work

1. Do you agree with the information furnished in Part II relating to

a) Disposal of Cases **Yes/ No**

Any comment - _____

b) Achievement **Yes/ No**

Any comment - _____

2. Knowledge of Sphere of work –

a) Knowledge of Law & Procedure :- _____

b) Level of knowledge, related instruction and their application followed and applied by him/her in working. : - _____

B. Attitude to work

1. To what extent officer is dedicated/ motivated and willing to learn and to systematize his/ her work?: - _____
2. Are his/ her judgement and order well written and clearly expressed? : - _____
3. Attitude or behaviour with ....
   a) Superiors / colleagues : - _____
   b) Sub-ordinate staffs/ litigants/ witnesses: - _____
   c) Members of the Bar : - _____
4. Ability of officer to inspire and motivate the parties under ADR Mechanism : - _____
5. Please suggest/ recommend the field/ subject, the officer may need more training for further improvement/ specialization through Judicial Academy. : - _____

Place: -

Date: -

Signature: - _____

Name: - _____

Designation: - _____

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Judicial Service** for the year ending 31st March 20…..

Part – IV

(To be filled in by the Controlling/ Reporting Authority)

Name of the officer

Place of posting with present Designation

1. Length of service under the Reporting Authority. : - _____

2. **Integrity and impartiality** : - _____

3. **General Assessment/ efficiency** : - _____

_____

_____

4. Any other quality : - _____

_____

_____

5. **Overall Grading**

Outstanding	: -	**A+**
Very Good	: -	**A**
Good	: -	**B+**
Satisfactory	: -	**B**
Average	: -	**B-**
Below Average: -		**C**

Place: -

Date: -

Signature: - _____

Name: - _____

Designation: - _____

HIGH COURT OF JHARKHAND AT RANCHI

Confidential Report in respect of the Officers of **Jharkhand Judicial Service** for the year ending 31st March 2015

Part – V

(To be filled in by the Reviewing/ Accepting Authority)

Name of the Officer :

Designation :

Place of Posting :

A.C.R. of the Year :

1. Length of service under the Reviewing/Accepting Authority. : - _____

2. The assessment of the officer given by the Reporting authority are accepted : - **Yes / No**

3. Any additional comments/ Remarks :- _____

Place: - _____

_____
(Signature of the Zonal Judge)

Date : - _____

Justice _____

FORMAT - C

HIGH COURT OF JHARKHAND AT RANCHI

Self Assessment Chart of the Officers of Judicial Service

During.....Quarter 20....

Cadre: District Judge/Civil Judge (Senior Division)/Civil Judge (Junior Division)

Name & designation of P.O.:-
Date & Place of Birth:- Educational Qualification:-
Date of Joining in service:- Date of first promotion (if applicable):-
Date of promotion in District Judge Cadre (if applicable):-
Place of posting (at present) with date of joining in present post:-
Previous place of posting.:- (i) (ii) (iii)
(iv) (v) (vi)
Period of absence from duty :-
Training courses attended:-
1.
2.
3.
4.
Suggestion of specific topic/topics for training as per your need
1.
2.
3.

Statement showing Pendency age wise on .....

Civil Cases			Criminal Cases		
More than 10 years	5 years to 10 years	Less than 5 years	More than 10 years	5 years to 10 years	Less than 5 years

Work done from..... to.....
(Column should be filed as per applicability)
Disposal u/s 299 Cr.P.C and 209 must not be mentioned in chart below

Month	Total days devoted/ working days	No. of Disposal of Civil Cases		No. of Disposal of Criminal Cases		No. of cases disposed of through ADR	No. of Disposal of Bails matters	Total witnesses examined (Civil +Crl)	No. of Inter-locutory orders passed	No. of cases in which charged/ SA was framed/ explained	No. of cases in which issues were framed	No. of accused persons whose statements u/s 313 Cr.P.C were recorded	No of points earned as per Judicial Officers work's disposal (Grading) Rules, 2015
		Contested	Uncontested	Contested	Uncontested/ Plea Bargaining								

Assessment of the Performance

Nature of work		No. of Days Devoted	Points Earned			
			Contested Disposal (a)	Uncontested Disposal (b)	Disposal through A.D.R. (c)	Total (a+b+c)
1	Criminal/Sessions Cases					
2	Special Cases					
3	Civil Matters					
Total =						

Points earned Per Day = $\frac{\text{Total Points}}{\text{Actual Working Days}}$

= .....Points per day .....Remarks admissible

- Final Assessment by the officer for the present quarter.....

  Final assessment by the officer for the last quarter.....

(Signature of the Officer)

Remarks, if any, by the District & Sessions Judge.
(Only for the Officers of Sub-Ordinate Judiciary)

(Signature of District & Sessions Judge)

Remarks by the Zonal Judge

NOTE :-

(i) For organizing Lok Adalats to P.D.J. - 10 points per Lok Adalat subject to maximum 20 points in a month.

(ii) For other Judicial Officers for sitting in Bench of Lok Adalat - 5 points per Lok Adalat subject to maximum 10 points in a month.

(iii) If minimum one case per month is not disposed of from the old cases either more than 10 years old case or a case more than 5 years old (in case of pendency of such cases in his/her court), the final assessment of the officer shall be lowered to one grade below.

(iv) Judicial Officers exercising both Criminal and Civil Jurisdictions must obtain at least 18 points in a month in Civil side failing which their final assessment shall be lowered to one grade below.

(v) 50 % points must be obtained by disposal of contested cases excluding B.A./A.B.A., Amendment Petitions failing which the final assessment of the officer shall be lowered to one grade below.

HIGH COURT OF CHHATTISGARH : BILASPUR

NOTIFICATION

No. 1119 /R.V./ Bilaspur dated 05.02.2015

In exercise of the powers conferred under Articles 227, 233, 234 and 235 of the Constitution of India the High Court of Chhattisgarh hereby makes the following regulations namely:—

1. **Short title, commencement and application**.-(1) These regulations may be called the Chhattisgarh Judicial Officers (Confidential Rolls) Regulations, 2015.

(2) It shall come into force w.e.f. 27.01.2015.

(3) It shall apply to writing and maintenance of the confidential rolls of the Members of the Service. It shall also apply to the Members of the Service who are posted on deputation.

2. **Definitions**.—In these regulations, unless the context otherwise requires:-

(a) **"High Court"** means the High Court of Chhattisgarh.

(b) **"Chief Justice"** means the Chief Justice of the High Court of Chhattisgarh.

(c) **"Judge"** means Judge of the High Court.

(d) **"Portfolio Judge"** means the Judge of High Court nominated by Chief Justice to supervise the affairs of the Civil District and for the supervision of work and conduct of Judicial Officers posted in the Civil Districts whether in regular stream or on deputation in any department of Government, Commission, Tribunal etc..

(e) **"State"** means the State of Chhattisgarh.

(f) **"Member of the Service"** means members of Higher Judicial Service and Lower Judicial Service including Judicial Officers posted on deputation.

(g) **"Confidential Report"** means the confidential report referred to in Clause 4 of these regulations.

(h) **"Reporting authority"** means the authority supervising the performance of the member of judicial service and has supervised the work of judicial officer at least for three months as shown in Schedule-I as reporting authority.

(i) **"Reviewing authority"** means authority or authorities supervising the performance of the reporting authority as shown in Schedule-I as reviewing authority.

(j) **“Accepting authority”** means Chief Justice of High Court of Chhattisgarh.

(k) **"Deputation"** means the Member of Service sent to the Governor House, Departments of Central Government / State Government, Registry of the High Court, State Judicial Academy, Law and Legislative Affairs Department, Legal Services Authority and Tribunals.

(l) **“Registrar General”** means the Registrar General of High Court of Chhattisgarh.

3. **Maintenance and custody of confidential rolls—**A confidential roll shall be maintained in respect of every Member of the Service by the High Court.

4. **Form of the Confidential report-—**The confidential report shall be written by the Reporting Authority, Reviewing Authority and Accepting Authority in Form-A appended to the regulations.

5. **Preparation of Annual Confidential Rolls—**(1) A confidential report assessing the performance, character, conduct and qualities of every Member of the Service shall be written for each financial year by reporting authority.

(2) Part-I and Part-II of the form shall be filled up and submitted by the member of the service himself.

(3) Part-III and Part-IV of the form shall be prepared by the reporting authority after submission of Part-I and Part-II by the member of the service.

(4) Duly filled up Part-I to Part-IV of the form shall be placed before the reviewing authority. Part-V of the form shall be prepared by the reviewing authority.

(5) Duly filled form Part-I to Part-V shall be placed before the accepting authority and remarks of the accepting authority shall be final.

6**. Confidential Reports by Reporting Authority in case of relinquishment of charge:**

(1) In case of relinquishment of charge on the ground of superannuation, Confidential Report shall be prepared by the Reporting Authority before his relinquishment of the charge of office or in case of any inability, ordinarily it shall be prepared within one month from relinquishment of the charge.

(2) In case Confidential Report is not prepared under clause (1) or in case of other contingencies, Confidential Report shall be prepared by the Reporting Authority posted in concerned district/office on the basis of record after obtaining permission from the Registrar General.

7 Preparation of ACR and its time limit:

(1) The prescribed format of ACR (Part I to Part IV) shall be made available to the reporting authority by 15th March every year.

(2) The reporting authority shall obtain self-appraisal format (part I & part II) from his subordinates by 10th April positively every year.

(3) The reporting authority shall as far as possible submit the ACRs of his subordinates by 1st of May every year.

(4) The ACRs submitted by the reporting authority shall be made available to the concerned Reviewing authority by 15th May.

(5) The reviewing authority may record his remark on the said report as early as possible. The Accepting authority may record its remark as early as possible on the confidential roll and may accept it, with such modifications as may be considered necessary and counter-sign the roll.

<u>Note</u>: Every endeavour shall be made by the authorities in early finalization of confidential report so as to enable the authority to communicate the final concluded confidential report to the member of service on or before the 1st of August.

8. Communication of the Confidential Rolls.--The confidential report shall be communicated by the High Court to the concerned Judicial Officer stating entries about the adverse remarks, advisory remarks and grade within fifteen days of the remarks accepted by the accepting authority.

9. Representation against adverse remarks.--A member of the service may represent to the High Court against the remarks communicated to him under Clause 8 within 15 days of the date of its receipt by him.

Provided that the High Court may entertain a representation within one month of the expiry of the said period if it is satisfied that the Member of Service had sufficient cause for not submitting his/her representation in time.

10. Consideration of representation.-(1) The High Court may consider the representation made under Clause 9 made by a Member of Service and pass order as far as possible within two months from the date of submission of the representation.

(2) Order passed under sub-clause (1) shall be communicated to the concerned officer by the Registrar General within 15 days from the date of such order.

11. General

The High Court may issue such instructions not inconsistent with these regulations as it may consider necessary, with regard to the writing of confidential rolls, the maintenance of the confidential rolls and the effect of the confidential rolls.

However, if any of the reporting or reviewing authority (as shown in Schedule I) is not available due to superannuation, leave or absence due to any other reason, the Chief Justice may order any other reporting/reviewing authority to write the confidential roll of the concerned Member of Service.

12.Interpretation.-If any question arises as to interpretation of these regulations, the decision of the High Court shall be final.

13. Amendment: -The High Court may make amendment in these regulations as may be deemed necessary.

14. Power to relax: -Where the High Court is satisfied that the operation of any of these regulations causes undue hardship in any particular case or class, it may for the reasons to be recorded in writing dispense with or relax the particular regulations to such extent and subject to such exception and condition as may be deemed necessary.

15. **Repeal and Saving**: -Any order, resolution, direction, notification, if any, is in force immediately before the commencement of these regulations are hereby repealed or restrained as the case may be in respect of the matters covered by these regulations provided that any order made or action taken under the orders, resolutions, guidelines and notifications so repealed shall be deemed to have been made or taken under the corresponding provisions of these regulations.

(Arvind Singh Chandel)
Registrar (Vigilance) and Registrar
(Inspection & Enquiry) -cum-Secretary,
Rule Making Committee

Schedule-1

S.No.	Officer	Reporting Authority	Reviewing Authority	Accepting Authority
1.	Registrar General, Registrar (Vigilance), Registrar (Inspection and Inquiry) and Registrar (Judicial) of the High Court	Chief Justice/ Administrative Judge/ Senior most High Court Judge	Chief Justice	Chief Justice
2.	Director of State Judicial Academy	Chairman, State Judicial Academy	Chief Justice	Chief Justice
3.	Other Judicial Officers posted in Registry of High Court except Registrar Vigilance, Registrar Inspection and Inquiry and Registrar Judicial	Registrar General	Chief Justice	Chief Justice
4.	Additional Director and other Judicial Officers posted at State Judicial Academy	Director, State Judicial Academy	Chairman of State Judicial Academy	Chief Justice
5.	Judicial Officers posted in State Legal Services Authority	Chairman, State Legal Services Authority	Chief Justice	Chief Justice
6.	District Judges, Judges of Family Courts, Special Judges (Atrocities)	Port-folio Judge of concerned District	Chief Justice	Chief Justice
7.	Judicial Officers sub-ordinate to District Judge of concerned District	District Judge	Portfolio Judge of the concerned District	Chief Justice
8.	Judicial Officers posted at Governor House	Chief Secretary on the basis of report of Secretary to Hon'ble the Governor	Portfolio Judge of Distt. Raipur	Chief Justice
9.	Judicial Officers posted in Lok Aayog	Pramukh Lok Aayukt	Chief Justice	Chief Justice
10.	Principal Secretary of Law and Legislative Department, Govt. of C.G.	Chief Secretary of the State	Portfolio Judge of Distt. Raipur	Chief Justice
11.	Other Judicial Officers posted in Law Department, State of C.G.	Principal Secretary of Law Department	Portfolio Judge of Distt. Raipur	Chief Justice
12.	Judicial Officers posted on deputation in District Consumer Forum	Chairman of State Consumer Disputs redressal Commission	Portfolio Judge of concerned District	Chief Justice
13.	Judicial Officers posted on deputation in State Human Right Commission	Chairman of State Human Rights Commission	Chief Justice	Chief Justice
14.	Judicial Officers posted on deputation in State Arbitration Tribunal	Chairman of C.G. State Arbitration Tribunal	Portfolio Judge of Distt. Raipur	Chief Justice
15.	Judicial Officers posted in State Transport Appellate Tribunal	Principal Secretary of Transport department	Portfolio Judge of Distt. Raipur	Chief Justice
16.	Judicial Officers posted in Wakf Board	Principal Secretary Tribal Department	Portfolio Judge of Distt. Raipur	Chief Justice
17.	Judicial Officers posted on deputation with District Legal Services Authority and Jan Upyogi Lok Adalat	Chairman of District Legal Services Authority/District Judge of concerned District	Executive Chairman of State Legal Services Authority	Chief Justice
18.	Other Judicial Officers not falling within the category of S.No.1 to 16 above	As directed by the Chief Justice	Chief Justice	Chief Justice

Form-A

HIGH COURT OF CHHATTISGARH, BILASPUR

PROFORMA RELATING TO

CONFIDENTIAL REPORT OF JUDICIAL OFFICERS

NAME OF OFFICER.....

DESIGNATION.....

PRESENT PLACE OF POSTING SINCE WHEN.....

REPORT FOR THE YEAR/PERIOD ENDING.....

CONFIDENTIAL REPORT FOR JUDICIAL OFFICERS

Report for the year/period ending_____

Part-1

PERSONAL DATA

(To be filled by the concerned officer)

1. Name of Officer

Cadre and year of allotment

Date of Birth

4. Date of continuous appointment to present grade Date Grade

5. Present post and date of appointment thereto Date Post

6. Period of absence from duty
(On leave, training, etc. during the year. If he has undergone training, please specify)

7. Date of filing annual property returns

PART-II

TO BE FILLED BY THE OFFICERS REPORTED UPON

(Please read carefully the instructions given at the end of the form before filling the entries)

1. Brief description of duties

2. Please specify the quantitative work/disposal done by the Officer during the year

3. Please state briefly your achievements with reference to targets/objectives referred to in column no.2. Please also indicate significantly higher achievements in relation to the targets and your contribution thereto.

4. Please state briefly the shortfalls with reference to the targets/objectives referred to in column no.2. Please specify the constraints, if any, in achieving the targets.

5. Kind of cases assigned to you.

6. If you are Officer Incharge Nazarat/Copying/Record Room/Library, please indicate the performance of the work of respective sections. If it is not satisfactory, what steps you have taken to improve the performance.

7. Performance in implementation of Legal Aid Programme and Lok Adalat

8. Supervision control and maintaining of the record of the Court and updating datas.

PART- III

TO BE FILLED BY THE REPORTING AUTHORITY

(*Please read carefully the instructions given at the end of the form before filling the entries)*

A. NATURE AND QUALITY OF WORK

1. Please comment on part II as filled out by the Officer and specifically state whether you agree with the answer relating to targets and achievements and shortfalls. Also specify constraints, if any, in achieving the targets.

2. Quality of output -

Please comment on the Officers quality of performance having regard to standard of work and constraints, if any.

3. Knowledge of sphere of work -

Please comment specifically on each of these: Level of knowledge of functions, related instructions and their application.

B. ATTRIBUTES

1. Leadership qualities -

Please comment on the capacity of Officer to achieve targets.

2. Management qualities-

Please comment on the officer's willingness to assume responsibility, organizing capacity, ability to motivate, ability to provide timely and proper guidance and regard for training and development of subordinates.

3. Interpersonal relations and team work -

Please comment on the quality of relationship with superiors, colleagues and subordinates on his/her capacity to work as member of a team and promote team spirit and optimise the output of the team.

4. Relations with the Bar and Staff -

Please comment on the Officer's accessibility to the Bar and Staff and responsiveness to their needs.

5. Communication skill(written and oral)-

Please comment on the ability of the officer to communicate and on his/her ability to present arguments.

6. Apprising ability-

Please comment on the officers skill and capacity in evaluating and recording performance of sub-ordinates in an impartial and objective manner

PART-IV

To be filled in by the reporting authority

GENERAL

1. State of health -

2. Integrity -

3. Number and nature of complaint received, pendency of enquiry and departmental enquiry and punishment given to the officer

4. General assessment -

Please give an overall assessment of the Officer with reference to his/her strength and shortcomings and also by drawing attention to the qualities, if any, not covered by the entries above.

5. Grading -

(*Outstanding/Very good/Good/Average/Below Average)*

(An officer should not be graded outstanding unless exceptional qualities and performance have been noticed. Grounds for giving such a grading should be clearly brought out).

Place :

Date :

Signature

(Name in block letters)

Designation
(During the period of report)

PART-V

REMARKS OF THE REVIEWING AUTHORITY

1. Length of service under the Reviewing Authority.

2. Is the Reviewing Authority satisfied that the Reporting Authority has made his/her report with due care and attention and after taking into account all the relevant material?

3. Do you agree with the assessment of the Officer given by the Reporting Authority (in case of disagreement, please specify the reasons, is there anything you with to modify or add?)

4. general remarks with specific comments about the general remarks given by the Reporting Authority and remarks about meritorious work of the Officer including the grading.

5. Has the Officer any special characteristics, and/or any exceptional merits or abilities which would justify his/her selection for special assignment or out of turn promotion? If so, specify.

Place: Signature of the Reviewing Authority

Date: (Name in block letters)

Designation
(*During the period of report)*

PART-VI

REMARKS OF THE ACCEPTING AUTHORITY

Place: Signature of the Accepting Authority

Date: (Name in block letters)

Designation
(*During the period of report*)

By order of Hon'ble the High Court

Sd/-
(Arvind Singh Chandel)
Registrar (Vigilance) and Registrar
(Inspection & Enquiry) -cum-Secretary,
Rule Making Committee

E-mail/Speed Post/Hand

HIGH COURT OF TRIPURA
AGARTALA

No. F.88/HC/93-13/ 17836-38

From: M. Chakrabarti,
Registrar General

To
The District & Sessions Judge,
North Tripura District,
Kailashahar

The District & Sessions Judge,
South Tripura District,
Udaipur

The District & Sessions Judge,
West Tripura District,
Agartala.

Dated, Agartala, the 2nd December 2013

Subject: - Submission of A.C.R. for the year 2013.

Sir,

In enclosing herewith a copy of the ACR Form, I am directed to request you to down load required number of copies of the ACR Form from the official Website of the High Court of Tripura and to distribute the same amongst the Judicial Officers under your judgeship for submission of ACRs for the calendar year 2013 and to transmit the same to this Registry after recording/obtaining remarks of Reporting Authority by **20th February 2014 positively.**

The Officer(s) who is/are holding the charge of another post may be requested to submit one consolidated ACR for the year 2013.

I am to request you kindly to direct all the Officers for furnishing 10(ten) copies of judgments delivered by the respective Judicial Officer during the year 2013 along with their A.C.R.

Yours faithfully,

Enclo:- As stated (one A.C.R form).

Sd/-
(**M. Chakrabarti**)
Registrar General

Copy to:-

The Programmer, High Court of Tripura, Agartala along with a copy of the ACR Form. He is directed to up load the same in the official Website of the High Court of Tripura, Agartala.

02.12.13

REGISTRAR GENERAL

THE HIGH COURT OF TRIPURA

AGARTALA

CONFIDENTIAL REPORT OF JUDICIAL OFFICERS

Name of Officer_____

Report for the year/period ending on _____

For instructions, please see page 15 onwards

CONFIDENTIAL REPORT OF JUDICIAL OFFICERS

Report for the year/period ending on _____

PERSONAL DATA

(To be filled in by the concerned Officer)

1. Name of Officer :

2. Post held with special power, if any :

3. Date of continuous appointment to the present grade :

4. Present post and date of appointment thereto :

5. Period of working in the present station :

   i. On judicial side : ..... days

   ii. On administrative side : ..... days

   iii. On deputation : ..... days

   iv. Period of attachment : ..... days

6. Brief description of the duties performed by the Officer including any extra-curricular activities during the year with special achievements, if any. :

7. Brief description of assistance and guidance received by the Officer from his seniors :

OTHER DATA

1. Mention instances, if any, where you have not delivered judgment within 30 (thirty) days of hearing arguments with reasons for such delay.

2. How many cases are fixed for further hearing after conclusion of argument?

3. Mention any five cases where the Revisional/Appellate Court reversed/upheld your judgment.

4. Mention the adverse remark, if any, passed by the Revisional/Appellate Court on your judgment.

5. Summary of the Work in the Court and the Work turned out by the Officer:

Cases pending at the beginning of the year under report	Institution during the year under report	Total for disposal	Disposal during the year under report	
			Main case	Misc case

[For details: Fill up the attached Form]

Form

STATEMENT FOR

THE COURT OF .....

Sl. No.	Type of cases (as applicable)	Pending at the beginning of the year	Instituted/ Brought on transfer	Cases transferred out	Total for disposal	Disposed of		Pending at the end of the year with institution	Units obtained		
						Con	Uncon		Con	Uncon	Total
1	2	3	4	5	6	7	8	9	10	11	12
1.	Title Suits										
2.	Money Suits										
3.	RCC Cases										
4.	Misc (J) Cases										
5.	Title Execution Cases										
6.	Money Execution Cases										
7.	Title Appeals										
8.	Money Appeals										
9.	RCC Appeals										
10.	RCC Revision Cases										
11.	Misc. Civil Appeals										
12.	Claim cases u/s. 166, MV Act										
13.	Indian Succession Act/Succession/ G & W Act Cases										
14.	Guardianship Cases										
15.	Misc (Probate) Cases										
16.	Title (Probate) Suits										
17.	Title (Matrimonial) Suits										
18.	Appointment of Receiver/Guardian										
19.	Other Family Court matters										
20.	Reference under LA Act										
21.	Reference under ID Act										
22.	Interlocutory matter under ID Act										
23.	*Wakf* matters										
24.	Departmental Enquiry										
25.	Arbitration (Execution) matters										

26.	Other contested Civil Cases not covered above										
27.	Sessions Cases: **Type –I**										
28.	Sessions Cases: **Type –II**										
29.	Criminal Appeals										
30.	Criminal Revisions										
31.	Warrant Procedure IPC Cases										
32.	Warrant Procedure Cases under other Acts not included in this list										
33.	Summons Procedure IPC Cases										
34.	Summons Procedure Cases under other Acts not included in this list										
35.	Summary Trial Cases under IPC										
36.	Summary Trial Cases under other Acts not included in this list										
37.	PFA Act/FS & S Act Cases										
38.	NDPS Act Cases										
39.	Electricity Act Cases										
40.	Essential Commodity Act Cases										
41.	Cases under 125, Cr. PC/Muslim Women (Protection on Divorce) Act										
42.	Domestic Violence Act Cases										
43.	NI Act Cases										
44.	MV Act Cases/Traffic Challan Cases										
45.	Excise Act Cases										
46.	Juvenile Act Cases										
47.	Forest Act Cases										
48.	Wild Life Cases										

49.	Labour Act Cases										
50.	Weights & Measures Act Cases										
51.	Foreigners Act Cases/IM(D)T Act Cases										
52.	Cases under Passport Act & Rules made thereunder										
53.	Cinematography/ Copy Right Act Cases										
54.	Prevention of Cruelty to Animals Act Cases										
55.	Gambling Act Cases										
56.	Tripura Police Act Cases										
57.	Tripura Shops & Establishment Act Cases										
58.	Cases of Atrocities on SC/ST										
59.	Prevention of Corruption (PC) Act Cases										
60.	Consumer Protection (CP) Act Cases										
61.	Arms Act Cases										
62.	Information Technology (IT) Act Cases										
63.	Cases under Special Act tried by Sessions Courts										
64.	Cases investigated by CBI and tried by Special Judicial Magistrates										
65.	Enquiry held as per order of the Hon'ble SC/HC										
66.	Orders on Final Reports										
67.	Confessional Statements u/s. 164 (1), Cr. PC /TI Parade										
68.	Cases disposed of in Lok Adalats/Holiday Courts:										
	a) MAC Cases;										
	b) Matrimonial matters; and										

	c) Other Cases										
69.	Bail Applications (BA/AB)										
70.	Other Misc. Cases not covered above										
71.	Other Crl. Cases not covered above										
TOTAL											

Remarks/Explanation of the Officer, if any, in relation to disposal of cases:

In case the Officer has been tied up with any particular case(s) which has consumed a lot of time he can give details of the same and that shall be taken into consideration while making assessment in regard to disposal of cases while recording the overall assessment in the Annual Confidential Reports.

Date :

Place: Signature _____

_____

(Name in full of the Officer submitting the ACR)

Designation _____

N.B.– Attach separate sheet(s) of paper, if required.

REPORT OF THE REGISTRAR (VIGILANCE)

(A) Registrar (Vigilance) is to check up/verify the disposal statement of the concerned Officer and submit his/her report (see instruction at Sl. No. 7):

Contested disposal	:	no. of cases	Units obtained:
Uncontested disposal	:	no. of cases	Units obtained:
Total	**:**		**Total :**

Percentage:

Grading :

(B) Please mention as to whether any Disciplinary Proceeding is pending against the Officer for the year under report:

(C) Please mention observation, if any, of the High Court relating to the concerned Officer on judicial side:

Registrar (Vigilance)

TO BE FILLED UP BY THE REPORTING OFFICER

Group- A (General)			**Marks allotted**	**Marks awarded**
a)	Punctuality in attending and leaving Court	:	10	
b)	Control over Court proceedings	:	20	
c)	Relationship with other Officers	:	10	
d)	Relationship with the Bar	:	10	
e)	Capacity to motivate, to obtain willing support by own conduct and inspire confidence in the subordinate staff	:	15	
f)	Administrative Control	:	15	
			Total 80	

Group- B (Judgment)			**Marks allotted**	**Marks awarded**
a)	Regularity/Promptness in delivering judgments	:	10	
b)	Brevity	:	10	
c)	Reasoning : Factual aspect	:	20	
	Legal aspect	:	20	
			Total 60	

Group- C	**Marks allotted**	**Marks awarded**
Disposal of cases:	**40**	.....

Group- D		**Marks allotted**	**Marks awarded**
Special Achievement in the fields of Legal Aid/Mediation/Conciliation etc.	:	**20**	.....

Marks of **Group A**: General:	80	.....
Marks of **Group B**: Judgment:	60	.....
Marks of **Group C**: Disposal of cases:	40	.....
Marks of **Group D**: Special achievement in disposal of cases /other fields:	20	.....
Total marks: 200	**Total marks awarded:**	

A. Marks obtained out of total 200 :

B. Grading :

Calculation of grading

Outstanding	170 - 200
Very Good	140 - 169
Good	110 - 139
Average	80-109
Below Average	Below 80

(Outstanding/Very Good/Good/Average/Below Average)

(An Officer should not be graded **outstanding** unless exceptional qualities and performance have been noticed. Grounds for giving such a **grading** should be clearly brought out.)

Grading awarded to be written in own words.

Integrity (tick mark whichever is applicable)

a) Beyond doubt

b) Nothing adverse

c) Doubtful

d) Known case of lack of integrity (mention in brief)

State of Health :

General Assessment :

(Please give an overall assessment of the Officer with reference to any striking qualities not covered by the above entries, sense of responsibility in discharging duties etc.)

Date.....

Place: .....

Signature .....

Name in block letters .....

Post held .....

(Reporting Officer)

N.B.– 1. The Reporting Officer shall examine at least 10 (ten) judgments delivered by the Officer during the relevant period and assess the Officer as per the given rating. The copies of said 10 (ten) judgments shall be forwarded along with the filled up A.C.R. Form to the High Court.

2. The Officer is to furnish photostat copy of the original judgments delivered.

TO BE FILLED UP BY THE REVIEWING AUTHORITY

1. Are you satisfied that the Reporting Authority has made his/her report with due care and attention and after taking into account all the relevant materials?

2. Whether you agree with the assessment of the Officer as given by the Reporting Authority? (Reasons must be specified in case of disagreement)

3. Remarks with specific comments about the **general assessment and grading** given by the Reporting Authority.

Date : ..... Signature .....

Place: ..... Name in block letters .....

Post held .....

(Reviewing Officer)

TO BE FILLED UP BY THE ACCEPTING AUTHORITY

(a) Whether the Accepting Authority agrees with the **assessment and grading** of the Officer made by the Reporting Authority/Reviewing Authority?

(b) If disagrees, the **reason, assessment** and **grading** of the Accepting Authority.

(c) Other observations or directions, if any:

(d) Fitness for promotion to higher Grade:

i. Fit

ii. Not yet fit

iii. Unfit

N.B.– In case the officer is assessed as **Not yet fit** or **Unfit,** specific reasons have to be assigned. **Doubtful/Suspicious** or **Known case of lack of integrity** or **Bad reputation** may be the **reason(s)** for grading the Officer as **Not yet fit** or **Unfit** for promotion.

The Officer got any special characteristic and/or any outstanding ability which would justify his special selection for appointment/promotion out of turn. If yes, please mention the characteristic briefly.

Date :.....

Place: .....

Signature .....

Name in block letters .....

Post held .....

(Accepting Authority)

Annexure

By the Assessed Officer

YEARLY CALENDAR

OFFICER RELATED	FROM	TO	NO. OF DAYS
Earned Leave			
Maternity Leave			
Casual Leave			
Any other leave			

Total =

DUTY RELATED	FROM	TO	NO. OF DAYS
Official duty			
Training			
Attending Seminar/Conference			
Attached for other work			

Total =

COURT WORK PARALYSED DUE TO	FROM	TO	NO. OF DAYS
Strike			
Bandh			
Full suspension of Court work on death etc.			

Total =

GOVT. HOLIDAY	FROM	TO	NO. OF DAYS
Restricted Holiday availed			
Notified Holidays			
Long Vacation			

Total =

WORKING DAYS	FROM	TO	NO. OF DAYS
Working Days (Civil)			
Working Days (Criminal)			

Total =

INSTRUCTIONS

REPORTING AUTHORITY/REVIEWING AUTHORITY/ACCEPTING AUTHORITY

DESIGNATION	REPORTING AUTHORITY	REVIEWING AUTHORITY	ACCEPTING AUTHORITY
Sub-Divisional Judicial Magistrate, Judicial Magistrate, First Class/Second Class, Civil Judge (Jr. Divn) & Registrar of the Court of the District Judge **(Grade III)**	Senior-most Addl. District Judge available in the station. In stations where there is no Addl. District Judge, the District Judge	Hon'ble Portfolio Judge	Hon'ble the Chief Justice
Chief Judicial Magistrate, Addl. Chief Judicial Magistrate & Civil Judge (Sr. Divn)-cum-Asst. Sessions Judge **(Grade II)**	District Judge	Hon'ble Portfolio Judge	Full Court
Principal Counsellor, Family Court **(Grade II)**	Judge, Family Court	Hon'ble Portfolio Judge	Full Court
District & Sessions Judge, Judge, Family Court & Addl. District & Sessions Judge **(Grade I)**	Hon'ble Portfolio Judge	Full Court	Full Court
Member Secretary, State Legal Services Authority **(Grade I)**	Executive Chairman, State Legal Services Authority	Full Court	Full Court
Deputy Secretary, State Legal Services Authority **(Grade II)**	Member Secretary, State Legal Services Authority	Executive Chairman, State Legal Services Authority	Full Court
District Secretary, District Legal Services Authority **(Grade II)**	District Judge	Hon'ble Portfolio Judge	Full Court
LR & Secretary, Law Department & Addl. Law Secretary **(Grade I)**	Chief Secretary of the State	Full Court	Full Court
Deputy Secretary, Law **(Grade II)**	LR & Secretary, Law	Chief Secretary	Full Court
Under Secretary, Law **(Grade III)**	Law Secretary	Chief Secretary	Chief Justice

N.B.– ACRs in respect of the Judicial Officers posted in the Registry will be written by the Hon'ble the Chief Justice.

1. (i) Page Nos. 1-7 & Page No.14 (**Annexure**) shall be filled up the **Officer concerned,** Page Nos. 9-11 shall be filled up the **Reporting Authority,** Page No.12 shall be filled up by the **Reviewing Authority** and Page No.13 shall be filled up by the **Accepting Authority**.

(ii) Page No. 8 shall be filled up by the **Registrar (Vigilance).**

(iii) The Officer concerned shall submit the filled up A.C.R. Form to the Reporting Authority immediately at the end of the reporting year but **not beyond 30th January of the new year,** the Reporting Officer shall submit the same to the Reviewing Authority within the **last day of the month of February of the new year** and the Reviewing Authority shall submit the same before the Accepting Authority **immediately after completion of his assessment.**

2. Officers working in the Law Department of the State Government shall fill in the Form and forward the same to the Registry within the last day of the month of February of the following year with the report of the Reporting Authority or with the report of the Reporting Authority and the Reviewing Authority, as the case may be.

3. Officers working on deputation in any Department of the State Govt. shall fill in the Form and forward the same to the Registry within the last day of the month of February of the following year with the report of the Reporting Authority or with the report of the Reporting Authority and the Reviewing Authority, as the case may be.

4. If an Officer works in different stations/courts for the reporting period, the Reporting Officer will be the Officer under whom he is presently working or under whom he worked for more than 4 (four) months.

5. If an Officer fails to furnish true information, the same will be taken seriously.

6. The District Judge, the Judge, Family Court and the Member Secretary of the State Legal Services Authority should send A.C.R. of the Officers under him to the Registry within **last day of the month of February of the following year.**

7. The grading in respect of disposal of cases will be as follows:

270 units or more (per Quarter)	-	Outstanding
225 units or more (per Quarter)	-	Very Good
180 units or more (per Quarter)	-	Good
135 units or more (per Quarter)	-	Average
Less than 135 units (per Quarter)	-	Poor

A Judicial Officer is required to obtain 70% of the total units by contested disposals and any deficiency on this score shall be deducted from the total units obtained.

The benchmark has been fixed on the basis of average pendency for disposal, which is:

Criminal Courts	:	Minimum 400 cases
Civil Courts	:	Minimum 100 cases
Sessions Court	:	Minimum 60 Sessions cases

Benchmark formula is as follows:

Where the pendency is–	**Units may be increased by–**
(a) less by 20% of the total benchmark	10% of the actual units obtained
(b) less by 40% of the total benchmark	20% of the actual units obtained
(c) less by 60% of the total benchmark	40% of the actual units obtained

****

Session 6

Effective Inspection of Courts: An Assessment

Effective District Administration

TAMIL NADU STATE JUDICIAL ACADEMY
No. 30(95), P.S.K.R. Salai, R.A.Puram, Chennai 600 028.
Ph: 044 – 2495 8595 / 96 / 97 Fax: 044 – 2495 8595
http://www.hcmadras.tn.nic.in/jacademy/indexnew.html
E-mail: tnsja.tn@nic.in

INDEX

INSPECTION OF COURTS – CIVIL & CRIMINAL COURT REGISTERS- ASSESSMENT OF WORKS OF SUBORDINATE OFFICERS

Justice S.TAMILVANAN,
Judge, High Court, Madras

INTRODUCTION :

Inspection in general, denotes an official visit of an office by a superior officer or authority to have a careful examination of the functioning of the office, as per procedure and guidelines issued by the authority.

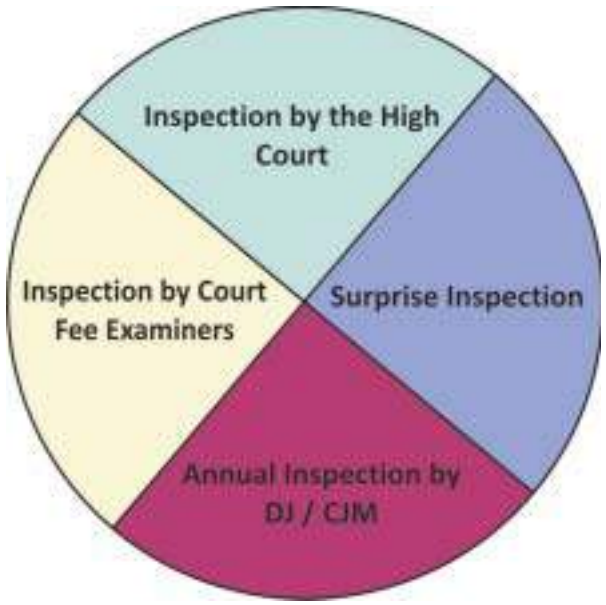
INSPECTION OF COURTS :

The service of judicial officers and judicial ministerial service are not merely an employment like other services. They are part of the system in dispensation of justice. The District level Judges and the Judicial Ministerial staff are highly responsive for the effective functioning of the Courts and the system in dispensation of justice.

The Hon'ble Supreme Court of India has emphasized the need and necessity of inspection of courts to maintain utmost integrity and efficiency in the administration of Justice Delivery System by its decision in **High Court of Judicature at Bombay, through its Registrar vs. Shashikant S.Patil and another**, **2001 (1) LW 1**.

In order to ensure proper discipline and corrective measures, Court inspection gets vital importance. The Courts at the District level have various types of inspections, which are as follows :

1. Periodical Inspection by the High Court;
2. Annual Inspection by the District Judge / Chief Judicial Magistrate;
3. Surprise Inspection by the District Judge / Chief Judicial Magistrate;
4. Inspection by Court-Fee Examiners of the High Court.



INSPECTION BY HIGH COURT :

High Courts in India exercise complete control over subordinate courts, as per Article 235 of the Constitution, which includes District Courts. Inspection of the Subordinate Courts is one of the important functions, which High Court performs, for having effective control over the subordinate courts. The object of such inspection is for the purpose of assessment of the work performed by Subordinate Judge, in respect of his capacity, integrity and competency.

The Hon'ble supreme Court in **High Court of Punjab and Haryana vs. Ishwar Chand Jain**, reported in **(1999) 4 SCC 579**, has given various guidelines regarding inspection of subordinate courts by the High Court, as per Article 235, which reads as follows :

> "Inspection should act as a catalyst in inspiring subordinate judges to give best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the courts while working under great discomfort and hardships. A satisfactory judicial system depends largely on the satisfactory functioning of courts at grass root level."

Periodical inspection of District Court and other Subordinate Courts are done by the concerned Portfolio Judge of the High Court with the assistance of selected staff members of the High Court, who would go to the Courts, to be inspected well in advance and prepare inspection notes, pointing out errors and mistakes, based on the Registers and Records. The High Court exercises complete control over the subordinate courts, including District Court, as per Article 235 of the Constitution, apart from the power of superintendence over all the Courts and Tribunals, subordinate to the High Court under Article 227 of the Constitution.

COURT INSPECTION BY DISTRICT JUDGES :

Judicial Officers and the Judicial Ministerial Staff working in the District Judiciary are the foundation of the system. However, due to various reasons the Court management at the lower level is not in good shape. It cannot be disputed that the judiciary needs more resources to have proper infrastructure and to increase the efficiency of court management. However, it is the duty of the Judges of the District judiciary and the staff working in the said Courts to render dedicated service for the effective functioning of the respective Court at its optimum level, with utmost efficiency in the administration of justice. Hence, inspection is one of the most important functions of the District Judge, to maintain proper administration and control of the Courts in his unit.

Regular inspection by the District Judge is made once in a year, as per procedure. However, surprise inspection can be made as and when required by the District Judge. The Annual court inspection is made at the District level by the District Judge, however, Chief Judicial Magistrate is

also empowered to inspect the Judicial Magistrate Courts in the district unit under his control.

In the State of Tamil Nadu and Union Territory of Puducherry, all the District and Sessions Judges are empowered to inspect the courts in their respective administrative control, including the CJM-courts. If there are more than one District Judge in the District, the Principal District Judge of the District, being the head of the District unit of the judiciary is empowered to inspect the court under his administrative control. However, he cannot inspect any independent court in the District, such as Labour Court etc., as the said court is not under his administrative control. The District Judge has to inspect all the subordinate courts in his unit, which includes, Sub-Courts, District Munsif Courts, CJM's Court, by way of regular inspection, once in a year and submit his report to the High Court.

INSPECTION BY CJM :

The Chief Judicial Magistrate has to inspect all the Judicial Magistrate Courts once in a year, by way of regular inspection. The CJM can also make surprise inspection of any judicial magistrate court in his unit, if need be. The District Judge being the head of the District unit of the judiciary is empowered to make surprise inspection of any Court in the District under his administrative control, including Judicial Magistrate Courts.

INSPECTION BY COURT-FEE EXAMINERS OF THE HIGH COURT :

Inspection by Court-fee Examiners of the High Court is done, in order to verify whether the Court-fee is properly calculated and paid, as per the relevant provision of law, under the Court-Fees Act, by the parties. As payment of Court-fee relates to the revenue of the State, court is duty bound to inspect and verify the correctness of the Court-fee being paid on the plaint, petition etc., based on the valuation of the suit or the claim made by the parties. Only the Court officials, who are experts and having sufficient experience in court fee matters, are being deputed by the High Court to verify the correctness of the Court-fee paid. In case, if there is

deficit payment of court fee, under a wrong provision of law, check-slip could be issued towards collecting the deficit court-fee.

FUNCTIONING OF COURTS OF SESSION :

High Court confers power on the District Judge and Additional District Judges, to function as Sessions Judges in the respective Sessions division, in order to try and dispose cases, exclusively triable by Courts of Session. Similarly, Sub-Judges are conferred with power to try and dispose cases triable by Assistant Sessions Judge. However, they constitute a single unit in the District, while dealing with Sessions cases, as per the Code of Criminal Procedure.

As per the Code, all the cases, which are triable by Courts of Session are committed by the concerned Magistrates to the Sessions Court and the same could be made over to Additional Sessions Court or Assistant Sessions Court by the Sessions Court or Principal Sessions Court, as per procedure known to law.

The Apex Court of India in **High Court of Judicature at Bombay vs. Shrishkumar Rangrao Patil**, reported in **(1996) 6 SCC 339** has observed the importance of self-imposed corrective measures and disciplinary action under the doctrine of control enshrined in Articles 239 and 124 (6) of the Constitution thus :

> *"The lymph nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of the judiciary and the need to stem it out by judicial survey lies on the judiciary itself by its self-imposed or corrective measures or disciplinary action under the doctrine of control enshrined in Articles 235, 124(6) of the Constitution. It would, therefore, be necessary that there should be constant vigil by the High Court concerned on its Subordinate Judiciary and self introspection."*

The court inspection should act as a catalyst and for which it is necessary for pointing out error, in order to correct the error and to avoid the same in future. The object of court inspection is instructive in nature to motivate the judicial officers and the staff to function well, as per procedure. In this regard, the Supreme Court in **High Court of Punjab and Haryana vs. Ishwar Chand Jain and another** reported in **AIR 1999 SC 1667**, observed as follows :

> "33. Time has come that a proper and uniform system of inspection of subordinate courts should be devised by the High Courts. In fact the whole system of inspection need rationalization. There should be some scope of self-assessment by the officer concerned. We are informed that the First National Judicial Pay Commission is also looking into the matter. This subject, however, can be well considered in a Chief Justices' Conference as High Court itself can devise an effective system of inspection of the subordinate courts. Registrar General shall place a copy of this judgment before the Hon'ble Chief Justice of India for him to consider if method of inspection of subordinate courts could be matter of agenda for the Chief Justices' Conference."

PRE-INSPECTION NOTES:

The Inspecting Judge, either the District Judge or Chief Judicial Magistrate is burdened with judicial work, administrative work, inspection of all the Courts in the District and having correspondence with the High Court, in connection with other works. The Unit Head are not personally in a position to systematically assess the situation on the performance of the lower Courts. The staff members who prepare the Pre-Inspection Notes by themselves are not experts in objective assessment as to the performance in the lower Courts. Hence, preparation of Pre-Inspection Notes is to be entrusted to responsible and experienced staff members like Head Clerk of the District Court or Sheristadar of the Sub Court etc. The Ministerial Officers who are entrusted with the preparation of Inspection Notes are to be suitably instructed on the following points :

1. Various registers maintained in the Court, particularly the Suit register and other registers, especially the permanent registers;
2. Proper maintenance of all the registers and in house keeping;
3. Copyist Section;
4. Drafting of decrees etc.

In maintaining the registers, mistakes and omissions are bound to occur. While preparing the Pre-Inspection Notes, the omissions and mistakes are to be pointed out and the innocuous mistakes are to be corrected even during the preparation of Inspection Notes and the same may be noted in the Pre-Inspection Notes as "Since Rectified". Appropriate instructions are to be given to the concerned staff to avoid such mistakes or omissions and not to be faulted with, in future.

IMPORTANT ASPECTS RELATING TO COURT INSPECTION :

In order to have proper assessment of the work, 'Annual Inspection' is to be conducted in the areas like:

1. Filing of the suits – in respect of territorial jurisdiction, pecuniary jurisdiction, subjective jurisdiction, limitation aspect, correctness of the Court Fee paid and such other aspects;
2. Adherence of the Special List system;
3. Number of Part Heard cases;
4. Time taken for hearing the arguments, delivery of judgment etc.;
5. Investment of Court deposits;
6. Proper in house keeping like record room, property room relating to criminal cases, library, indent, replacement of worn out library books, typewriters, furniture, fixtures and fittings, extent of use of Computers etc.

DUTY OF THE INSPECTING JUDGE :

The Inspecting Judge has to go through the Pre-Inspection Notes well in advance – a day or two, prior to the Inspection, so that the Inspecting Judge could carefully go through the same and have clear idea about the performance of the Officer and the Court concerned. Only then the Inspecting Judge could proceed with the clear idea about the functioning

of that particular Court. Such advance preparation for inspection would enable the Inspecting Judge to give appropriate instructions during inspection, that would create an impression upon the minds of the staff and the Officer, which would encourage them for better performance in future.

RELEVANCY OF PERSONAL NOTES :

At the time of inspection, the Inspecting Judge may make personal notes regarding the matters, which are to be attended after the inspection. Suitable correctional instructions are to be given to the officer and the staff so that they may avoid such omissions or lapses in future. The Inspecting Judge, should keep it in mind that after the inspection, the officer and the staff members must have a deep sense of satisfaction for appropriate guidance in future, apart from rectifying the errors.

POST INSPECTION:

This is one of the important area which many a times neglected. Post Inspection stage is important both for the Court inspected and also for the Inspecting Judge. During the post inspection period, the mistakes/ defects pointed out during the inspection regarding the jurisdiction and the Court Fee matters are to be rectified and check-slips are to be issued to comply with the directions during the Annual Inspection. All other correctional directions and instructions are also to be complied with.

INSPECTION REPORT SHALL BE SUBMITTED WITHOUT DELAY :

Subsequent to the inspection, the Inspecting Authority also has a great responsibility. Responsible Court Staff, preferably the same officer, who has prepared the Pre-Inspection Notes, be placed in-charge to see that the instructions are being properly carried out within the stipulated time. All possible steps are to be taken by the Court inspected to comply with all the directions. The Inspecting Authority has to submit the Inspection Report to the High Court within a reasonable time. Elaborate notes on particular register with full details as to the entries need not be submitted to the High Court by the District Judges. As far as possible, the District Judge should summarize in his own words, the notes of Inspection for the

information of the High Court and the result of the scrutiny. Form No.15 given infra deals with the instruction regarding the notes of Inspection of Subordinate Courts. Reading and understanding of Form No.15 would greatly help the Staff Members and the Judicial Officers in improving their efficiency in Court Management.

PURPOSE OF ANNUAL INSPECTION:

The Annual Inspection by the District Judge is to assess the performance of the Staff and the Administrative ability of the Judicial Officer. It does not mean for judging the success or failure and also not for fault finding. The Inspection is mainly correctional; incorrect performance are to be pointed out and directed to be corrected as per procedure known to law. However, if there is any serious lapses, that must be taken cognizance, in order to take appropriate action as per law.

At the end of each inspection, 'Action Review' should be planned and suitable instructions shall be given, so that such lapses / mistakes may not occur. It is a part of the administrative work of the inspecting authority to educate the staff and sensitizing them to do things rightly and to avoid errors and mistakes in future.

The mistakes pointed out in the previous inspection are to be rectified. Watching over the rectification and the compliance of the direction given in the inspection is one of the neglected areas. Often, the Inspecting Authority does not keep track of the inspection report in the compliance of the directions. Rectification and Feed back is very much important. Rectification and Feed back would enable the District Court and High Court that the instructions given are properly carried out.

INSTRUCTION FOR PERIODICAL VERIFICATION OF THE REGISTERS BY THE JUDICIAL OFFICER :

The administrative responsibility of the Judicial Officer plays a vital role in running the administration. In fact the administrative responsibility of the Judicial Officer is no less important than the judicial work. Firstly, the Officer has to issue directions on the basis of going

through the running note file maintained by the Head Ministerial Officer. That apart, the Judicial Officer has to periodically verify all the registers and check, whether they are properly maintained. Such periodical checking has to be at least once in a month or twice in a month. Once the signal is given that the officer is verifying the registers, the staff members would rise up to the occasion towards proper maintenance of the registers. In the periodical meeting convened by the District Judge, Judicial Officers shall give suitable instruction in this regard.

DUTY OF JUDICIAL OFFICER WHILE ASSUMING CHARGES :

Whenever a Judicial Officer assume charges in a particular place, first priority must be given to give instructions to the Head Ministerial Officer / Sheristadar to maintain the running note file. It is also imperative to call for the registers and verify them. Once the registry knows that the Presiding Officer is checking the registers, then and there, the message is sent that they cannot any more remain mediocre and that they should perform well. The Judicial Officer or the Judge of the concerned court may also proceed with the confidence that he has the control of the registers and the registry.

RUNNING NOTE FILE (RNF):

In both the Civil and Criminal Courts, Head Ministerial Officer (HMO) has an immediate control of the other staff members. Head Ministerial Officer is on par with the Manager and must take stock of the situation on ground level. The Head Ministerial Officer must be in command, demanding work and at the same time receptive and also watchful over the work done by the other staff members. Such managerial skill requires knowledge of all the branches and also motivate team work. Head Ministerial Officer must be capable of efficiently organizing his work and also controlling the other staff members.

For exercising effective control over the other branches, Head Ministerial Officer has to maintain the Running Note File – (RNF) regarding all the branches. Head Ministerial Officer has to check the register maintained in all the branches and prepare the Running Note File. The

Running Note File (RNF) has to be placed before the Judicial Officer, who can have cross check in respect of the same and issue prompt directions to rectify the defects.

OBJECT OF RUNNING NOTE FILE (RNF) :

The object of maintaining the Running Note File cannot be underestimated. It serves to achieve accuracy in the maintenance of registers. Maintaining Running Note File has dual purpose -

(i) checking the register, so that the staff can do their best;

(ii) growing the team spirit by enlightening the staff members and correcting their mistakes then and there.

Most often, the need for maintenance of Running Note File by Head Ministerial Officer and the checking up of the records and registers is underestimated. It is important to direct the Head Ministerial Officer to maintain 'Running Note File'. It was noticed that checking of registers and maintaining Running Note File by the Head Ministerial Officer has helped a lot in improving the performance of the staff members and also developing a team spirit amongst them. Maintaining 'RNF' will certainly reduce the work of the Judicial officer in checking the register and for the Head Ministerial Officer, very much easier to check the registers by issuing appropriate directions then and there. The system of maintaining Running Note File (RNF) is helpful to avoid such mistakes pointed out, in the future and improve the performance. Checking up the registers and giving correctional instructions removes all the barriers enabling the staff members to improve their performance.

FILING OF SUITS AND PETITIONS :

Normally, the Head Ministerial Officers are in-charge of checking the Suits, Original Petitions and Appeals etc. relating to jurisdiction, payment of proper Court Fee, Limitation and to find out whether the case filed is in proper form. Everyday number of cases are being filed into the Courts. More the papers are filed, more the time is required to check them up. In order to number the case, thorough checking up of the cases

is very much essential. By and large, it is noticed that when the cases are being returned, all the defects noticed are not stated in the "Grounds of Return" column. It is noticed that the Checking Officer commits the mistake of returning the papers pointing out certain defects. After the case is represented again, the case papers are returned pointing certain other defects and so on. By so returning the case papers number of times, the office has to repeatedly handle the same case papers, which increases the work of the office. Number of returns increases the paper work and also the entries in the registers, resulting in handling the same case papers again and again. At times, this also gives room for complaints.

Equally the delay in assigning the number is also noticed. Either due to pre-occupation with other work or laziness, the numbering of the cases are delayed. Whatever be the reason, the habit of postponing the checking of cases and numbering must be strictly avoided.

TAPALS / LETTER CORRESPONDENCE:

At the commencement of the day, the tapals are to be sorted out. The F.I.Rs, Charge Sheets and other important letters from the High Court and the District Court are to be initialled by the Presiding Officer. The Judicial Officer must necessarily go through the important tapals particularly the tapals of the High Court and the District Court. The Head Ministerial Officer is to sort out the letters and assign to those persons giving proper instructions in attending them. Important tapals are necessarily to be placed before the Judge and shall be acted as per the instructions of the Presiding Officer.

The Head Ministerial Officer and other concerned staff should always have a pocket note book to take down the instructions given by the Officer. The tapals are to be attended then and there, without causing delay.

The staff members are to train up themselves not merely bringing up the tapals and connected problems. They must train up themselves to bring necessary details and facts for discussion and suggestions while they place the letters before the Officer. The High Court correspondences

are to be attended swiftly with utmost care. At times, in a hurry to complete the work, some of the subordinates may have the tendency to put up files and statistics in a hurried manner and at times, the facts and statistics may not be correct. The concerned Judicial Officer should verify the correctness of the details before furnishing the same to the High Court or the District Court. Similarly, the District Court must verify the correctness of the communication, before sending the same to the High Court.

Whenever files are attended, regarding the establishment in respect of acquisition of sites or for allotment of land for formation of new Court buildings, the staff members normally have the tendency of circulating the entire files, which may run to few hundred pages. The staff members are to be suitably trained to develop a sense of involvement in the work of the Institution. They must be taught to go through the file and put up the same with the synopsis of relevant facts and details.

The staff members are to be trained and instructed to properly handle the files and respond to the tapals. The officers must keep themselves informed of everything and be a great motivator and educator of the staff members, in this regard.

REGISTER FOR LIBRARY BOOKS:

Almost in all the Courts, this register is not properly maintained. The books are also not neatly arranged. Library room is yet another area where there is mistaken belief that more efficient staff are not required. Library involves manifold work of receiving the journals and distributing them to the other Courts, arranging the journals and sending them for the binding. In short, only the staff member having skill and knowledge can handle the library.

BINDING OF LIBRARY BOOKS :

In several Courts, binding works of the library books are not done. The binding of the library books are to be sent to the concerned Central Prisons. Sending library books to the Central Prisons has several advantages. It encourages the prisoners to do some manual work. It also aims at trying to reform the prisoners who had been convicted. That apart,

the binding work is done without any payment, since the work is done on book adjustment. However, it must be kept in mind that perfection and neatness in the work is more important.

Care has to be taken in sending the books to Central Prison for biding, by properly arranging them. The prisoners being laymen, would not be in a position to arrange the journals. The journals sent for binding are to be properly arranged in the proper order – Index, Journal Section, Summary of Cases, Cases Reported – Supreme Court and High Court. After sending the books, there shall be periodical correspondence with Prison Authorities to know about the perfection and completion of the work. The Library Books received are to be neatly arranged and maintained. The Library Register has to be periodically checked, especially on the availability of the books.

CUSTODY AND CARE OF LIBRARY BOOKS AND LAW REPORTS:

(i) The books and law reports belonging to the Court should be kept in almyrahs provided with lock and key and shall be placed as much as possible in one room in the custody of the Head Clerk or Sheristadar. The text books should be kept separately from the law reports.

(ii) Two separate registers of the books and law reports should be maintained in each court, one to be kept by the Head Clerk or Sheristadar and the other in the Library.

All new books and reports added from time to time will be entered in the register by the Head Clerk or Sheristadar and missing books should be properly accounted for. The registers should be kept up to date deleting such of the books, which are ordered to be disposed of on adding new ones.

(iii) No book should be removed from the library without the permission of Head Clerk or Sheristadar. When a book is removed, a receipt must invariably be furnished by the person using the book and the receipt should be returned to him or cancelled when the book is returned.

Books should not be handed over to the members of the Bar except under the directions of the Bench Clerk in charge of the Court who will be solely responsible for such books.

The Bench Clerk has to check the books in the Court library, periodically in every week and should also check every morning and at the end of the day the books placed on the Judge's table.

Books and law reports required for reference of the Presiding Officer of the Court at his residence should be promptly restored to the Court premises, in order to avoid missing of books.

(iv) When a new Head Clerk or Sheristadar takes charge of the Library, he shall within a month of his taking charge, report to the Presiding Officer if any book shown in the register of books is either lost or missing.

Every Presiding Officer on assuming charge of office should satisfy himself that the library is in good condition, and if he finds that the books are out of order or that any book or volume is missing, he should take immediate steps to have the defects rectified and the books restored.

THE IMPORTANT POINTS PERTAINING TO INSPECTION OF MAGISTRATE'S COURT :

So far as inspection of Criminal courts are concerned, various guidelines have been issued by the High Court, by way of circular orders.

I. **Pendency of Cases**:

The primary duty of the Court is towards the disposal of cases expeditiously, as per procedure known to law, to meet the ends of justice. However, the courts should also follow the circular orders and standing instructions issued by the High Court, then and there. In this regard the points to be noted are :

(1) The maximum duration of a criminal case should not exceed two months;

(2) Priority has to be given to trial of cases where persons are in custody;

(3) Where from the beginning it is found that the accused are not easily available, prompt and effective steps should be taken. Issues processes under Section 82 and 83 of Criminal Procedure Code, to see that the cases are transferred to the long pending case register and;

(4) Where an accused is present, but witnesses are not secured within a reasonable time, the proceedings are brought to a termination by applying judiciously Section 258 Cr.P.C., in Summons Cases. The pendency should be checked with reference to the above along with other points that may suggest themselves to the Inspecting Officer.

II. **Expeditious trial of cases**:

The attention of the Inspecting Officer is drawn to rules 3, 5, 7 and 10 of the Manual of Instructions for the guidance of Magistrates, in this regard. The Inspection should be designed to find out if the trial of cases has proceeded in the light of those instructions, in addition to the provisions of the Criminal Procedure Code and the Criminal Rules of Practice.

III. **Disposal of property**:

The case properties, both valuable and non-valuable should be kept in proper custody of the Court. The disposal of the property by Judicial Magistrate is also an important aspect. In case of valuable properties, such as gold jewels, there must be proper description of the property, with the correct weight in the register, with appraiser's certificate. The concerned Magistrate / Judge should take proper care in dealing with the property, while keeping in his custody and in case of disposal, by following the mandatory procedure. The crucial points to be borne in mind under this heading are:

(a) the foot note in Criminal Register No.15 is often held to imply that the Magistrate need personally check only on the valuables, once in three months and send a report of such verification once in three months. However, the Magistrate has to check non-valuables also periodically or at least have a verification made by the Head Ministerial Officer once a quarter;

(b) the accumulation of non-valuable properties in the property room should be avoided by a judicious use of (i) Section 452(2), Criminal Procedure Code, which permits properties to be returned on bond at any stage, (ii) Section 42(4), Criminal Procedure Code which permits properties subject to speedy and natural decay to be disposed of at once; and (iii) Section 457(2) Cr.P.C, which requires the issue of a proclamation only in cases where the owner is not known, but not where there is an order directing the property to be returned to a specific person.

IV. Witness batta and process fee:

The duty of the Court is to collect batta in private complaints where such batta has to be collected under the rules, keep proper accounts for its disbursal and refund. In cases prosecuted by the State, batta is to be paid from contingencies, but the batta, payable has to be calculated correctly and disbursed. This task is left to a Ministerial Subordinate, but is essential that the Magistrate keeps a careful day to day check over this item of work.

V. Collection and Remittance of fines:

Prompt collection of fine is an important part of the work of any Magistrate, as that of the trial of cases. The Magistrate should also see that fine, amounts, which became unrealizable are written off at the earliest moment, when it is permissible to do so. For this, proper and systematic attention should be bestowed on (a) the execution of distress warrants and (b) the completion of default sentences. The fine statements, which enable the superior Courts to watch this aspect of the work, should be correctly prepared and sent promptly on the due dates. The proper maintenance of the working sheet for fine recovery in Form 36 is an essential part of this work. It should also be borne in mind that very often the bulk of the arrears shown as pending, relates to taxation cases and it is also in this type of cases that the fines are easily capable of realisation, provided prompt coercive processes are taken.

PRESCRIBED FORMS SHOULD BE ISSUED :

Either inspection of civil courts or criminal courts, printed form prescribed should be used and proper inspection report should be submitted by the concerned District Judge / CJM to be sent to the High Court and there should be follow up action to rectify the errors.

SUPERVISION OF SUBORDINATE CRIMINAL COURTS

SUPERVISION BY SESSIONS JUDGES & CHIEF JUDICIAL MAGISTRATES :

The Code declares that every Chief Judicial Magistrate and Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge and every other Judicial Magistrate subject to the general control of the Sessions Judge be Subordinate to the Chief Judicial Magistrate and every Metropolitan Magistrate shall subject to the general control of the Sessions Judge, be Subordinate to the Chief Metropolitan Magistrate and that the Chief Metropolitan Magistrate is responsible for the supervision of the Magisterial work and Administrative work of all Metropolitan Magistrates and similarly, the Chief Judicial Magistrates must supervise the Administrative and Judicial work of all the Magistrates within the district.

POINTS TO BE NOTICED IN EXERCISING SUPERVISION :

Some of the points to which the attention of the Sessions Judge, Chief Judicial Magistrates is particularly directed in the exercise of their power of supervision, which are noted below:-

(a) Rash issue of process to the accused; judicious and discriminating use of the provisions of Sections 203 and 245 of the Code.

(b) Dealing with disputed claims of civil right under colour of criminal charge.

(c) Indiscreet imposition of fines beyond the means of offenders.

(d) The imposition of heavy fines in addition to imprisonment with a view, in default of payment, to extend the term of imprisonment beyond the powers of the Magistrate to inflict.

(e) Indiscriminate extensions of the grant of time for the payment of the fine without regard to principles laid down in Section 424 of the Code.

(f) Excessive sentence of imprisonment out of all reasonable proportion to the offence of which the accused has been convicted.

(g) Failure to make proper and judicious use of the provisions of Section 360 of the Code, the Tamil Nadu Children Act, the Tamil Nadu Borstal Schools Act and the Tamil Nadu Probation of Offenders Act.

(h) Light punishment for offences requiring severe sentences with special reference to cases, which should have been submitted by the Judicial Magistrates to the Superior Courts for higher punishment.

(i) Exaction of excessive bail or excessive security for keeping peace or for good behaviour.

(j) Avoidable delay at any stage of the trial of the cases.

(k) Needless adverse remarks in judgments against public servants.

(l) If a sentence of imprisonment for a term of less than three months is awarded for the types of offences mentioned in Section 354(4) the reasons recorded by the Magistrate should be noticed.

SECURITY FROM MINISTERIAL SERVANTS AND TESTING OF THE SAME AS TO ITS SUFFICIENCY :

Under the instructions issued in Paragraph 8 of Memorandum No.16, Public (Separation) Department, dated 4th February, 1950, the incumbents of the posts of Head Clerks in the Courts of Chief Judicial Magistrate and Judicial Magistrate, should furnish security for a sum of Rs.500/-. The senior of the Junior Assistant where there is more than one Junior Assistant in the Court of the Judicial Magistrate should furnish a similar security as they too have been entrusted with the custody of cash and valuables. In Courts where there is only one Junior Assistant, the said Junior Assistant should furnish the security aforesaid. The Magistrates concerned shall however, be responsible for the custody of cash and valuables. (G.O. Ms. No.3015 Public (Separation) Department, dated 29th December 1952).

The Chief Judicial Magistrate, should strictly insist on the security prescribed in Paragraph (1) above, being furnished by the incumbents concerned within a reasonable time after their appointment to the post. All the Junior Assistant who do not furnish such security within the time allowed by the Chief Judicial Magistrate should be replaced peremptorily following rule 26(f) of the Tamil Nadu Judicial Ministerial Service Rules. If necessary, Service Commission should be immediately addressed for allotment of sufficient number of candidates for these security posts. The Chief Judicial Magistrate should also take steps, if need be, to appoint willing person from the civil side to these posts as they are also included in Category 5 of class IV of the Tamil Nadu Judicial Ministerial Service (High Court's Roc. No.149/54-C-1, dated 15th March 1955)

The rules contained in Chapter XII of the Tamil Nadu Financial Code, Volume I, will mutatis mutandis apply to the security bonds furnished under this rule, provided that the form of the security bond shall be executed either in Form No.11 or Form No.12 (as the case may be) at Page 343 of the Civil Rules of Practice and Circular Orders, Volume II and that notwithstanding the instructions contained in Article 284 of the Tamil Nadu Financial Code, Volume I, all security bonds in Form No.11 or Form No.12 should be registered under the Registration Act, 1908.

FURNISHING SECURITY BONDS AND FIDELITY BONDS :

The security bonds and the fidelity bonds furnished under these rules shall be kept in the personal custody of the Head Clerk in the Court of the Chief Judicial Magistrate after testing of the personal security and the security in the form of immovable property and the periodical verification referred to in Article 288 of the Tamil Nadu Financial Code, Volume I, may be carried out through the District Munsif having jurisdiction over the area within which the property is situated. The Chief Judicial Magistrates shall report to the High Court in their annual reports that such securities have been duly examined and are found to be satisfactory.

During their annual inspection of the Courts of Chief Judicial Magistrates, the Sessions Judges should see whether these rules have been followed and record their observations in their inspection notes.

INSPECTION OF COURTS BY CHIEF JUDICIAL MAGISTRATES :

(1) Chief Judicial Magistrates shall inspect every year, all the Courts of Judicial Magistrates in their districts, to have proper administrative control over courts. It is open to the Chief Judicial Magistrates to have surprise inspection of any Judicial Magistrate's Court in the District, if need be.

(2) Copies of the reports of the inspection of the Courts of Judicial Magistrates should be submitted to the High Court by the Chief Judicial Magistrate with the lease practicable delay.

INSPECTON OF COURTS OF SPECIAL JUDICIAL MAGISTRATES :

The Courts of Special Judicial Magistrates in the Districts shall be inspected in the manner prescribed below:-

Judicial Magistrates, shall inspect the registers relating to property, fines and cash in the Courts of Special Judicial Magistrates within their jurisdiction once a quarter.

Note:- The Inspection referred to above shall be conducted in the second fortnight of the month following each quarter.

(2) The reports of inspection should be submitted to the Chief Judicial Magistrate concerned; Tabular form to be annexed to the judgment.

The judgments in original decisions shall conform to the provisions of Section 354 of the Code and shall contain the particulars specified therein, with the statement in tabular form, giving in addition the following particulars, viz.

For judgments in Trials only two copies in manuscript of this statement are required, one copy for record and one for transmission to the High Court. The one for record may conveniently be written up in a list to be bound up by way of index with the printed judgments for each year.

However, in cases under the Tamil Nadu Traffic Rules, 1938 and the Prevention of Cruelty to Animals Act, 1960, the copy for record need not be prepared.

Note:- Attention of all Magistrates is drawn to pages 52 to 55 of the manual of instructions for guidance of the Magistrates in the Tamil Nadu State in the matter of writing judgments.

LIST OF WITNESSES ETC., TO BE APPENDED TO JUDGMENT :

There shall be appended to every judgment a list of the witnesses examined by the Prosecution and for the defence and by the Court as also a list of exhibits and material objects.

JUDGMENT OF SPECIFIC OFFENCE IN WHICH SENTENCE IS PASSED :

When an offender is convicted of two or more offences and it is competent to the Court to award more than one sentence, the Court shall in its judgment declare in respect of which offence or offences any sentence awarded is imposed.

PURPOSE OF SURPRISE INSPECTION :

It is also relevant to note the purpose of surprise inspection. Only by way of surprise inspection, the District Judge or Chief Judicial Magistrate can verify the actual functioning of the court, in respect of maintaining the registers and records and also making relevant entries thereon, keeping the Court and the premises neat and clean and verify the absence of staff members, who have signed in the attendance Register of the concerned court. Surprise inspection will make the judicial officers and the staff members alert in the District unit in keeping everything, up to date, expecting surprise inspection at any time. Certainly the surprise inspection will be a message for proper administration of the functioning of the courts under the unit of the District Judge / CJM.

In order to conduct proper inspection by District Judge / Chief Judicial Magistrate, the inspecting Judge should know various registers being maintained by the Courts, the purpose of making such registers and the entries made thereon.

When there is surprise inspection, the Inspecting Judge, should first seize the attendance register and verify the physical presence of the staff members, who signed in the attendance register. In case, any staff member is “on duty”, that could have been noted in the Running Note maintained by the ministerial head.

CONCLUSION :

In respect of Court inspection, three important aspects, so vital are **procedure, practice and techniques**.

PROCEDURE RELATING TO INSPECTION :

It cannot be disputed that Court should scrupulously follow the procedures in maintaining registers and records and making appropriate entries thereon, then and there. The procedure contemplated under the code of Civil Procedure, Civil Rules of Practice, various circular orders issued by the High Court and other standing instructions are to be followed by the Civil Court for proper and effective functioning of the court. Similarly, the criminal courts should follow the code of criminal procedure, Criminal Rules of Practice, High Court circular orders and various notifications for proper administration of the court, including maintenance of Registers and records, for proper and effective functioning of criminal courts. The adherence of the aforesaid procedures have to be verified with reference to the registers and records, by way of court inspection.

PRACTICE RELATING TO INSPECTION :

In respect of court inspection, the Inspecting Judge, prior to the inspection, selects staff members, who are experts, having sufficient experience and maintaining proper integrity, to verify the registers and records of the Court being inspected and to prepare pre-inspection notes. So far as the inspection done by court-fee examiners is concerned, it relates to mainly on payment of court fee, as per Court-Fees Act, hence, staff members, having sufficient knowledge and experience in the said branch shall be deputed, for the inspection. Maintaining Running Note File should be insisted for proper administration of the Court. Similarly, the Sheristadar, Head-Clerk and other staff members entrusted with specific work, shall be directed to keep a small note-book and note down the instructions given by the Presiding Judge, than and there and also to carryout the same promptly.

The Judicial Officer and the Head Ministerial officer are expected to provide instructions, then and there to the concerned staff members in

following the mandatory procedures and also towards maintaining the registers and records properly. Such practice would improve the standard of court management and if it is followed in its letter and spirit, there will be proper and effective court administration.

TECHNIQUES RELATING TO INSPECTION :

Inspection techniques play a vital role, for which the concerned Inspecting Judge should have thorough knowledge, in respect of all the registers, especially about the important registers, maintained by the Courts. The Inspecting Judge, should also have proper legal acumen in following Civil Rules of Practice, Criminal Rules of Practice and up to date circular orders issued by the High Court, then and there and also apply his presence of mind, on the facts and circumstances, to meet the contingency and to give proper instructions, without any deviation to the judicial officer and judicial ministerial staff, entrusted with the specific assignment of the Court and that may be the techniques to be followed by the Inspecting Judge. The inspecting Judge should also verify the follow up action to comply with the directions given in the inspection, for effective court management and to have proper administrative control over all the courts.

QUESTIONNAIRE FOR ANNUAL INSPECTION BY HON'BLE ADMINISTRATIVE JUDGE OF CIVIL, CRIMINAL AND SPECIAL COURTS AND TRIBUNALS.

PART - I INSPECTIONS AND AUDIT

1. What was the last date of inspection made by the Hon'ble Judge of High Court and what are objections and discrepancies still outstanding?

2. A- On what dates the District and Sessions Judge has inspected the subordinate courts and offices during the current year? Give list.

2. B - On what date the District Judge inspected jail along with District Magistrate and the Superintendent of Police in compliance of the order of the Hon'ble the Chief Justice?

3. Whether the inspection notes of the District and Sessions Judge indicate that they are thorough, effective and constrictive in approach?

4. A - Whether the C.J.M. / C.M.M. has inspected the Courts of Magistrates, Jail, the Police Malkhana and the allied offices etc.? If yes, Give details and if No , specify the reasons.

B - Whether the C.J.M./C.M.M. has inspected Nari Niketan? Give details and whether any shortcoming noted is pending for compliance?

C - Whether the C.J.M./C.M.M. has inspected Bal Sudhar Grih? Give details and whether any shortcoming noted is pending for compliance?

5. Whether the District and Sessions Judge has examined inspection notes of the C.J.M./C.M.M. and has given any useful guidance to the Magistrates and C.J.M./C.M.M.?

6. Whether all the other judicial officers have regularly and effectively inspected their offices and submitted their inspection notes to the District and Sessions Judge?

7. Whether compliance of any inspection note still pending at any level? Give reasons, if any.

8. What was the last date of inspection by the Inspector of Stamp and Registration and whether any objection raised therein is still pending for compliance and if so, give reasons.

9. Whether the Inspector of Government Offices has also inspected the offices of the Courts? Give details.

10. Whether any objection raised in such report is still pending for compliance? If so, give reasons.

11. Whether the Officer-in-charge of various departments and central offices have regularly inspected and submitted their inspection report to the District and Sessions Judge? Give details.

12. Whether any objection raised or discrepancy pointed out in such inspection notes is pending for compliance? If so, give reasons.

13. What are the last date of audit of the accounts by the Audit Party of the Accountant General?

14. What are the objections raised in the report of the last Audit Party and whether the replies to the objection have been sent to and accepted by the Accountant General? Is there any objection outstanding?

15. Whether any special audit of the accounts has ever been ordered by the High Court and the Government? If so, whether any discrepancy was found and still existing? If not, whether any special audit is called for at present?

PART - II BUILDINGS AND COMPOUNDS

1. Whether the Court building is government building or on lease?

2. If on lease, is there any lease deed properly executed and registered and when it is going to expire?

3. Whether the building is sufficient, spacious or congested?

4. Whether there is any building under construction or sanctioned or proposed? What is the present position?

5. Whether the compound has got boundary wall, proper gate, inside roads, lawns and trees etc.? Whether the Lavatories for officers, staff and ladies and the general public are separate?

6. Whether the facilities for witness– shed, canteen, drinking water, vehicle parking etc. are actually available and properly maintained?

7. Whether there are commercial shops? Are they auctioned every year or after a specified period and whether the rent is revised periodically on renewal?

8. A - Whether there are proper and adequate arrangements for the protection of the building, offices, courts and records from the fire?

8. B - Is there any intestate property in the possession of the Nazir and has it been kept in double lock after entering in Register Form No.-40.

9. Whether the building is properly electrified, both inside and outside and whether the security lights are available and whether electric fittings are proper and safe?

10. Whether the buildings require any normal or special repairs? If so, what is the position of funds made available and how the funds utilised? If no fund have been provided, steps if any taken there for.

11. Whether there is any alternative arrangement for providing electricity during working hours? Availability of Generators ? Whether all the courts and offices are connected with the Generator or not?

12. Whether the building under construction are being regularly looked after by the District Judge or by such an Additional District Judge as nominated by the District Judge?

13. What are the security arrangements for the building and compound during night and working hours?

14. Whether the Court campus is clean and proper man power is available in the Judgeship to keep the campus neat and clean?

15. Whether electric fans and lighting arrangements have been made in the litigants-sheds and verandas where litigants wait outside the courts?

16. Whether any plan for construction of additional building or shifting to other building etc. has been submitted to the High Court/Government and what is its up-to-date progress?

17. What is the general condition of the maintenance of the building and the compound? Is the campus free from water logging, mud and dust?

18. How many residential flats have been made available to the Judicial Officers and the subordinate staff?

19. How the residential buildings are being maintained and what is the general condition of maintenance of the residential buildings?

20. Is there any building, the possession of which has not yet been given by the construction agency to the District Judge? If so, what are the reasons thereof and what steps have been taken to take the possession?

21. What is the position relating to the need and availability, payment of rentals and maintenance of lawyers chambers existing in the Court compound?

22. Whether there is any encroachment of Government land in the possession of the judicial department either in the Court or in the residential compound? If so, what proceedings have been and are being taken to remove encroachment?

PART - III ESTABLISHMENT MATTERS

1. How many courts are lying vacant since what time?

2. How many courts have been transferred to other districts (the date of transfer be given)?

3. If any demand for creation of court was ever made? If so, what progress has been made in that regard? Whether the matter is pending with the High Court/Government?

4. What is the sanctioned strength of employees under the administrative control of the District Judge (the government order sanctioning the posts either temporary or permanently to be specified) or the Presiding Officer of the Court, Special Court or Tribunal?

5. How many permanent, temporary or adhoc employees are working against sanctioned posts (to be specified individually) and how many daily wagers are working?

6. When last regular recruitment was made for filling up the sanctioned posts?

7. What is the present position of the select list and how many vacant posts continued to exist?

8. How many employees are under suspension and the period thereof ?

9. The pendency of criminal cases against the employees and their involvement in criminal activities? If any.

10. Whether the records relating to selection and appointment of the staff including class III and IV are maintained and preserved in order or not?

11. How many preliminary and disciplinary enquiries are pending and what is the progress? Give details.

12. In how many cases Efficiency Bar of the employees has not been sanctioned? State reasons also.

13. How many representations and appeals are pending against suspension, minor punishment, super-cession, efficiency bar, and withholding/release of annual increments etc.? Give details.

14. (a) In how many cases applications for sanction of leave, encashment of leave and medical leave etc. are pending? Give details and reasons.

(b) Whether leave account of all types of leave of all the employees of the Judgeship have been maintained and has been regularly produced before the officer concerned for perusal/inspection?

(c) Is leave account of Gazetted officers (S.A.O. and Civil Judge (J.D.) of the ordinary scale) being kept correctly and properly?

15. Whether the service books of the employees have been maintained up to date, right from the inception of service of the employee with proper verification by the competent officer? If not, give reasons.

16. (a) Whether the personal file of each official and inferior staff has been opened and regularly maintained?

(b) Whether documents consisting of his application for recruitment or appointment, certificates of age and education, appointment order, permanent address etc. have been kept and arranged in order?

17. (a) Whether the G.P.F. passbooks of the employees are being maintained up-to-date? Whether account slips of G.P.F. have been given to the employees? If not, give reasons.

(b) Whether advances, temporary or permanent, have been entered in the G.P.F. passbooks of the employees and the amount of said advance are being regularly deducted from the salary of the employees and being regularly recorded in the G.P.F. passbooks or relevant records ?

(c) Whether any advance has been sanctioned in violation of guidelines, given for sanction of G.P. F. advance?

18. Whether the character rolls of the employees are being maintained up-to-date and whether the adverse entries have been duly communicated to the concerned official and whether any representation received against adverse remarks is pending on the date of inspection (Specify the cases with proper reasons)? If not, give reasons.

19. (a) Whether the seniority list of the Class III and Class IV employees have been prepared in accordance with the relevant service rules and the directions of the High Court and kept in order properly? If not, give reasons.

(b) Whether the Gradation Lists (seniority list) of class III and IV employees have been circulated amongst the employees inviting objections?

20. Is there any dispute pending amongst the employees about their inter se seniority and, if so, give details and reasons?

21. Whether any appointment by promotion is due to be made and if so, why it has not been made on due date?

22. (i) (a) How many cases for sanction of pension and retirement benefits in respect of retired employees and officers are pending? (b) How many officials are going to retire within next six months? (c) Have they submitted their pension papers? (d) Is there any case of defects pointed out by Accountant General or Directorate of Pension? If so, Why it is not being removed? Give reasons and point out the official responsible?

(ii) How many Class III and Class IV employees of the Judgeship have retired from their services since one year after attaining the age of superannuation and whether the retirement benefits have been paid to them and these informations be shown in the following proforma :-

Statement of employees (Class III & Class IV) who retired since one year from the services of Judgeship of .....

Sl. No.	*Name of employee with date of retirement*	*Pension*		*Gratuity*		*Leave Encashment*		*Group Insurance*		*G.P.F.*		*Reason for delay, if any*
		Date of application and Date of payment		*Date of application and Date of payment*		*Date of application and Date of payment*		*Date of application and Date of payment*		*Date of application and Date of payment*		
1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*

(iii) Since one year, whether the retirement benefits of those Class III and Class IV employees of the Judgeship, who have given compulsorily retirement from their services or who are facing departmental enquiry/criminal case after the retirement, have been paid and these informations be shown in the following proforma :-

Statement of employees (Class III & Class IV), who have been compulsorily retired from the services of Judgeship or facing department enquiry/criminal case .....

Sl. No.	*Name of employee with date of retirement*	*Provisional Pension*		*Provisional Gratuity*		*Leave Encashment*		*Group Insurance*		*G.P.F.*		*Reason for delay, if any*
		Date of application and Date of payment		*Date of application and Date of payment*		*Date of application and Date of payment*		*Date of application and Date of payment*		*Date of application and Date of payment*		
1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*

23. Whether promotion claims, leave applications and complaints etc. have been timely decided? If not, give details and reasons.

24. Whether Screening Committee for compulsory retirement has been constituted and working? Give details.

25. Have annual entries for the last year been given to the entire staff and officers ?

26. (a) Are the Service Books of the officials of the Judgeship countersigned every five years and are the leave accounts and other entries in the Service Books complete?

(b) Have the entries of encashment leave been made in the Service Book of those who have taken encashment leave during the last one year?

27. Is the pay of the officials and Class IV employees being disbursed on the first of every month and if not, why?

PART - IV GOVERNMENT PROPERTIES AND EQUIPMENTS

1. Whether the stock register and register of perishable items have been maintained regularly and whether physical verification of each item has been annually made and the registers have been checked and signed by the Officer-in - Charge, Nazarat besides the certificate of the official making the physical verification?

2. What was the last date of physical verification of each item and whether the compliance of the rules and High Court circular has been properly made?

3. What is the total number of tables, almirahs, chairs, book-shells, racks, stools, benches, photocopier machines, cyclostyle machines, typewriters, desert-coolers, water coolers, ceiling fans, pedestal fans, table fans, telephones, intercom phone etc.?

4. Whether stock balance register of furniture and other items and dead stock register have been maintained?

5. Whether all the articles of furnitures, equipments and machines have been assigned specific number and have been maintained in proper condition?

6. Whether the polishing & painting of the furnitures, equipments and machines have been done? If so, on what date or does it require to be done?

7. How many typewriters, photo copy machine, cyclostate machines, desert coolers, water coolers, ceiling fans and table fans etc. are in working condition and how many require repair and replacement?

8. How many telephones have been sanctioned and how many telephones are in working order and how many telephones have been kept under safe-custody? Give details.

9. Give the names of officers at whose residence the telephones have been installed or shifted? Whether there a register of bills of telephone and broadband facility has been maintained?

10. Give details of the charges of telephone bills and cell phones in respect of each such officer during current financial year (from 1st April to 31st March).

11. Whether the excess amount of the charges of the telephone bills have been paid by and are realised from the officer concerned and whether any such payment is outstanding? Give details.

12. Whether a register has been maintained separately to indicate the furnitures and equipments supplied to the judicial officers at his residence at the time of his posting to the district and receive back or shifted in the name of the successor occupying the same residence under his written acknowledgement?

13. Is there any report of the theft of any government property mentioned above? If so, what proceedings have been and are being taken in this regard?

14. Whether there is any register maintained for the moveables like the curtains, chiks, canvas, pardas, table cloths, tumblers and surahies, jugs, mirrors etc. at the places where they are supplied?

15. Whether the furnitures, curtains, crockeries etc. have been issued/supplied to the officers and offices and entries have been made in the stock inventory registers? Is there any requirement of officers and offices pending? Give reasons for non supply.

16. Whether the moveables aforesaid are being properly maintained, white-washed and replaced in accordance with rules and circular orders of the High Court?

17. Whether there are unserviceable items of furnitures, equipments and stationery (Raddi) or any other dead stock which requires public auction? If so, what steps have been taken and whether the proper certificates declaring the items as unserviceable and if any sanction have been given by the competent authority?

18. Whether any tree in the compound of the Court or residential block requires falling and public auction? If so, give details and steps taken so far?

19. (a) See records relating to Staff Car of D.J. and Pool Cars including its log books, allotment and movement etc.?

(b) Whether the entries of the log books tally with the fuel purchase vouchers and maintenance vouchers etc.?

20. Whether the required deposits are being regularly made in respect of use of official vehicles provided to the D.Js./officers and proper record is maintained thereof?

21. Whether stock register and supply register relating to computers and its accessories have been maintained properly?

22. Whether log books of generators and records relating to purchase and use of its fuel have been maintained properly?

PART - V BUDGET AND FINANCIAL MATTERS

1. What are the allocation of funds under each item of expenditure for the current year?

2. What is the progress of expenditure incurred under each item of expenditure?

3. Whether the monthly statements of expenditure have been regularly sent? If so, give details and if not, give reasons.

4. What are the proposals under head 'New Demands' made for the next year? Give details and reasons.

5. Whether the estimates of budget for the next financial year have been sent on due date or afterwards? Give details and also reasons for delay in the submission of estimates.

6. Whether the estimate of budget have been prepared on realistic basis and all kinds of requirements envisaged for the next financial year have been taken into account and if so, what is the increase in the estimates for the next year over the sanctioned budget of the current year.

7. Whether the estimates including provisions for not only annual repairs but also for special repairs of residential and office buildings and the compounds and for regular repairs of the electrical installation, typewriters, desert coolers, water coolers, photo copy machines, Lifts, motor vehicles and for payments of tames of electricity water and sanitary charges have been made? If not, give reasons and point out the official responsible.

8. Whether the savings and expenditure of the previous financial year were reported to High Court every year? If not, give reasons and point out the official responsible.

9. Why the budget sanctioned for the previous year had not been utilised within time? Give details and reasons.

10. Whether the savings under each item of expenditure were surrendered by the due date? If not, give reasons.

11. Whether the purchase of furniture and other equipment has been made in accordance with the store purchase rules or at government contract rate or from the local market? If not, give reasons.

12. Whether the items purchases have been properly verified with reference to prescribed standards of quality and dimensions by the purchasing authority in this behalf? Whether defective items were replaced or not?

13. Whether the work of annual repairs and special repairs of the buildings and compound has been carried out in accordance with the Government Orders and High Court circulars? If not, give reasons and point out the official responsible.

14. Whether the requisitions for house building advance and for motor car vehicles advance needed by the ministerial staff and officers have been sent in prescribed proformas on due dates to the Finance Department of the Government? If not, give details and reasons.

15. Whether the applications for sanction of house building advance and motor car vehicles advance received from the ministerial staff and officers have been properly registered and arranged in accordance with the Government Orders and High Court circulars?

16. Whether the house building advance and motor car vehicles advance has been sanctioned to the applicants in time? If so give details thereof.

17. Whether the formalities consequent upon the sanction and withdrawal of the house building and motor vehicle advance have been complied with in every case and the executed and registered documents have been safely kept in proper custody? If not, give reasons.

18. Whether the instalments for repayment of house building advance, motor vehicles advance or advance of salary have been regularly deducted?

19. Whether T.A. advance or other kind of advance is outstanding against any employee? If yes, the reasons for non-adjustment of outstanding amount against any employee be given.

20. Is there any loss of fund in government account, appropriate account or in the Civil Courts deposits? If so, was it immediately reported to the Accountant General? If not, give reasons.

21. If there is any case of embezzlement and/or theft of public money? Give details and steps taken.

22. Whether the bills of electricity charges, water charges, sanitary charges, telephone charges, purchase of stationery, furniture and other equipment, books and news papers etc. have been regularly paid on the due date? If not, give details and reasons.

23. Whether the amount of cash in hand of the Central Nazir and balance of permanent advance or the Cashier on the date of inspection is justified under the rules, Government Orders and the circulars of the High Court? If not, give reasons and steps taken. Check some entries from the Day Book and Cash Book from every month.

24. Has any amount in excess of the permanent advance been spent from civil deposits? If so, how much and why?

25. Whether the officials dealing with the cash have submitted their security and whether the securities are proper and sufficient and have been safely kept in the custody of the competent authority?

26. Whether the amount of fines realised by the Criminal Courts has been regularly and daily remitted to the Treasury through State Bank by proper challans?

27. Whether the receipt books of fines in each Criminal Court has been properly maintained?

28. Whether the daily Cash Book has been duly and regularly maintained by the official concerned and daily checked, verified and signed by the Drawing and Disbursing Officer? If not, give reasons and details.

29. Whether the account books and registers in respect of the Government money prescribed by the Government rules and High Court circulars have been maintained regularly by the officials and checked by the superior officers in accordance with the rules and circular orders? If not, give reasons and details.

30. Whether the registers relating to the Civil Court official concerned are duly checked by the Presiding Officers? If not, give details and reasons.

31. What is the position relating to the pendency and disposal of the applications for repayment of Civil Court deposits and applications for refund of Government money from public account and applications for refund of deposits of security?

32. Whether the registration fees of lawyers, clerks, rental of chambers, residences, shops, licence fee of the Government land etc. are properly being realised and accounted for? If not, give reasons and details.

33. Whether plus minus memos are being regularly submitted with proper certificate of verification from the Treasury and to the Accountant General by 15th of next month? If not, give reasons and steps taken.

34. What is the position of refund of lapse deposits? If any, whether lapse deposits have been reported to Accountant General? If no, give reasons.

35. Is there any case of doubt or excess payment, repayment or refund of any amount to any person? If so, what steps have been taken to recover?

36. Whether the salary and arrear bills of the staff and officers are being regularly prepared and amount disbursed on the due date without any delay? If not, give details and reasons.

37. Whether the schedules of Provident Fund, Income Tax, Group Insurance Scheme etc. are being properly prepared and submitted along with bills and whether these deductions of each official have been properly registered? If not, give details and reasons.

38. Whether there is any claim of any official pending in regard to the payment of Group Insurance Scheme? If so, give details.

39. What is the amount of imprest money (Permanent Advance) sanctioned by the Government? Does it require increase of the amount? If so, give reasons.

40 . A- Whether the account of deposition charges realised from parties by the readers has been properly maintained by him and the Nazir and whether the amount of savings is being regularly remitted to the Savings Bank Account of State Bank in the name of the District Judge by the due date? If not, give reasons.

B- Whether the amount of depositions has been properly utilized? Is there any violations of any directions of the Courts? Whether any permission for utilization was ever obtained from the court?

C- Whether registers are maintained in every court about depositions in accordance with the Circular Letters.

41. Whether the bills/vouchers of various expenditures have been properly kept on guard-file and Cash Book has been properly maintained in respect of the amount of fund?

42. Whether the Register No. 35 and 37 have been properly maintained in respect of various deposits and expenditures?

PART - VI MISC. AMINISTRATIVE MATTERS
AMINISTRATIVE OFFICE

1. Whether surprise visits have been frequently made by the District & Sessions Judge or the Presiding Officers of the Court or Special Court or the Tribunal? If so, on what dates?

2. Whether the grievance redressal directions are being followed by the District Judge contained in C.L. no. 38/Xf-21 dated 26.2.1977 and whether any follow up action for the redressal of the complaints received has also been taken?

3. Whether the District Judge and the other Judicial Officers are following the instructions contained in C.L. no. 55/VIIIh -37/Admin. (G) dated 2.11.1988 with a view to improve the working in the subordinate court?

4. Whether the monthly meetings are being regularly held and the minutes thereof have been regularly maintained and the follow up action has been taken?

5. Whether the meetings of the Monitoring Cell are being regularly held and the District Magistrate and the Superintendent of Police are personally attending these meetings and then minutes book of these meetings has been properly maintained and whether follow up action has been taken by the District Magistrate and the Superintendent of Police and the Chief Judicial Magistrate? If not, give reasons.

6. What measures have been taken to prevent chances of corruption and malpractices, if any, and whether the instructions contained in the High Court's circular letters are being strictly followed?

7. Whether the custody of the 2nd key of Currency Chest is being given daily to an Authorised Officer and whether record thereof has been regularly maintained?

8. Whether the register of articles of value deposited in all cases (Form no. 57-A) has been properly maintained up-to-date and kept in the custody of the Nazir?

9. Whether the Register of the opening and closing of the Courts and offices has been properly maintained up-to-date?

10. Whether the Judicial Officers are wearing up proper Court Dress while presiding over the Courts?

11. Whether the commissions are being properly distributed by the Court on the basis of approved list of Commissioner and proper record thereof is being maintained up-to-date?

12. Whether appointment of Amicus Curiae is properly made on the basis of approved list of Amicus Curiae for the year?

13. Whether the Oath Commissioners appointed by the District Judge are functioning properly and charging prescribed fee?

14. Whether there is any complaint by or against the Oath Commissioner? If so, what action has been taken?

15. Whether the District & Sessions Judge has transferred to other courts bail matters and admission matters frequently or rarely? Give reasons in either case.

16. Whether complaints containing allegations of corruption, malpractice, bad behaviour and conduct have been received against any officer? If so, what action has been taken?

17. Whether any question of Parliament and State Legislature are pending? If so, who is responsible for delay?

18. Whether the D.O. Letters received from the High Court and the Government are being properly and separately registered and follow up action is being taken, if any? If not, give reasons.

19. Whether the Register of receipts and the Register of Despatch are being properly and regularly maintained up-to-date?

20. Whether the officials on their appointment, the Amins and the Accounts Clerks are being imparted regular training and refresher courses arranged at the district level or in any Government Institute or Schools? If not, give reasons.

21. Whether proper distribution of work between the Administrative Officer, Sadar Munsarim, Second Clerk, Assistant Clerk, Sessions Clerk, Suit Clerks, Execution Clerk, Miscellaneous Clerk and all other officials has been properly done by written orders?

22. Whether the officials working at a particular post for more than three years have been interchanged or reshuffled? If not, give reasons.

23. What is the date of last inter transfer of the officials?

24. Is the Dak from the Post Office being received in a locked bag and being opened in the presence of the Presiding Officer or the Sadar Munsarim and whether its proper record is being maintained?

25. Whether the statements and returns required to be submitted monthly, quarterly and annually by various courts and offices are being received in time? If not, give list giving the names of courts and offices and the dates of receipt showing reasons for the delay.

26. Whether the statement and returns monthly, quarterly and annually are being submitted to the Hon'ble High Court, Accountant General, U.P. and the Government etc. in time on the required dates and if not, give details of the delayed statements and reasons.

27. Is a Despatch Book in Form no.-66 for local dak being properly maintained? (Rule 445 General Rules (Civil) Part-I)

28. Are letters properly classified and files opened proper heads and letters properly arranged and marked? (Rules 429, 430, 433 and 434 General Rule (Civil) Part-I)

29. Are the closed files kept in bundles and pending files kept in correspondence press? (Rules 437 and 438 General Rule (Civil) Part-I)

30. Has file index been properly maintained about the files entered? (Rule 439 General Rule (Civil) Part-I)

31. (a) Is register for G.L.s and G.O.s maintained in form no.-62 and kept in separate Gaurd files? (Rule 44 of General Rule (Civil) Part-I)

(b) Are copies of important C.L.s, G.O.s being issued to other courts and are all other C.L.s, G.L.s and G.O.s circulated to all the Court?

32. Are separate files being maintained for correspondence originating from High Court circular? Rule 443 General Rule (Civil) Part-I.

33. Is the weeding of the administrative correspondence up-to-date? When was the last weeding done? Rule 449 General Rule (Civil) Part-I.

34. (a) Whether a register in Form no.-24 of all the requisitions received from the Hon'ble High Court is being maintained properly?

(b) How many requisitions received from the Hon'ble High Court have remained uncomplied and for how long? To which courts these were sent and when? Have any reminders been sent?

35. How many cases for reconstruction of records on account of loss of files are pending and with whom and for what period?

36. Is Establishment Order Book maintained? Rule 246 General Rule (Civil) Part-I.

37. Are applications for leave being put up before the District Judge for orders promptly and orders passed communicated to the employees concerned promptly?

38. Whether the Appendix Register under Rule 631 of the General Rule (Civil) is maintained in Form-B as provided in Stationery Civil Courts Ministerial Establishment Rule 1947 and observance of Rules 628 to 632, in this regard is strictly adhered to?

39. Whether the register of date of increment and G.P.F. of the employees is maintained?

40. Whether the ledger and pass-book relating to G.P.F. Account has been maintained up-to-date?

41. Whether the Register regarding the reading of General Rules Civil and Criminal by the Officers on their first appointment, is maintained and certificates from Officers are obtained and compiled in the file as required under Rules 643 and 652 of the General Rules (Civil).

42. Whether register of pending files as required under Rule 444(2) of the General Rules (Civil) is maintained and compliance and direction given under the Rules are strictly adhered to?

43. Whether the list of returns and reports as required under Rule 444(1) of the General Rules (Civil) is posted by the side of the Administrative office and District Judge's Chamber as required under Rule 290 of the General Rules (Civil)?

44. Whether register in form no.-76 for proceedings taken in execution of the orders received from the High Court as required under Rule 400(13) of the General Rules (Civil)?

45. Whether any register of inspection of the work of the Oath Commissioner by some Addl. District Judge nominated by the District Judge is maintained?

46. Whether any register relating to the Family Pension is opened? How many employees during the year under inspection, died in harness?

47. Whether the sons or the daughters of the deceased have given employment? Whether any matter relating to appointment under Dying in Harness Rules is pending? Reasons for delay in disposal of the matter.

48. Whether any vindictive attitude has been resorted to in making frequent transfer of Officer, officials by the District Judge?

49. Whether reports are made promptly of the loss of records as required under Rule 216 of the General Rules (Civil) to District Judge and High Court as well?

50. Whether the lost record has been reconstructed? If not, reasons for delay.

51. Number of enquiries relating to lost of record pending? Reason for delay.

52. Whether the staff is competent and is of good reputation? Whether any of the members of the staff has nexus with the criminals and mafias etc.?

PART - VII LIBRARY

1. Name of the Officer-in-Charge, Library and date from which he is incharge. ?

2. Whether the Officer-in-Charge, Library inspected the Library quarterly and inspection notes have been complied with? (Prepare statement in Proforma-I)

3. Name of the Librarian and since when? Is he trained?

4. Is the Library room in good order with sufficient space and furniture?

5. Are all the books entered in the catalogue as prescribed by rule 450, General Rules (Civil) read with Notification No. 10/VIIIb-272 dated 13.01.1964 and properly classified in accordance with rule 451, General Rules (Civil)?

6. Has the Librarian stamped, put seal of the Court as required and affixed 'Government Property' labels on each book? [Rule 453, General Rules (Civil)].

7. Has a certificate as to condition of books in the Library been sent to the Registrar General, High Court, every year? If so, quote the date [Rule 453 (3) General Rules (Civil)].

8. Has there been any loss of any book from the Library in the current year? If so, has the loss been reported and what action taken? [Rule 453 (4 and 6) and 456, General Rules (Civil)].

8. A. How many books not exceeding Rs. 25/- and reported to be missing have been recovered from the catalogue?

9. Do lawyers including Government Advocates and penal lawyers use the Library? If so, is there sufficient space to accommodate, lawyers to sit there and read law books and journals? [Rule 452 and 454, General Rules (Civil)].

10. Have books been supplied to courts individually? If so, has any entry been made in the register showing books supplied to each Court? [Rule 457, General Rules (Civil)].

11. Whether books issued temporarily to an officer are returned before the close of the day? If not, give instances. [Rule 454, General Rules (Civil)].

12. Have books been issued to lawyers on slip, to be taken out of the Library? [Rule 454, General Rules (Civil)].

13. Has any book remained out side the Library for more than three months? If so, were quarterly lists of such books submitted to the District Judge as required by rule 455, General Rules (Civil)?

13. A. What action has been taken by the District Judge on submission of the quarterly list of books remained out of Library for more than 3 months?

14. Are correction slip received in the Library regularly? If not, why? If no correction slips have been received, what steps have been taken to procure them?

15. (a) Have all corrections and amendments in various Acts from time to time promptly been incorporated in all copies of the relevant Acts and rules etc.? (C.L. No. 120/K-34 dated 08/13.12.1951, G.O. No.-7 dated 05.06.1984 and C.L. No.-13 dated 20.12.1902).

(b) Whether any register for correction slips and amendments received is maintained?

16. Whether all necessary books and enactments have been supplied to all the courts including diglot editions? [Rule 457, General Rules (Civil)].

17. What are immediate requirements of books and enactments etc. for various courts and the Central Library and what amount is required?

18. Whether there are sufficient number of English and Hindi dictionaries approved by the Hindi Department of U.P. Government or Central Government of Bhasha Vibhag and sufficient copies supplied to each Court?

19. Whether register for journals is being maintained and whether all the journals are being received regularly?

20. Whether important Notifications, Acts and Bills are being placed before the District Judge by the Librarian?

21. Whether journals, gazettes and extra-ordinary gazettes are being circulated?

22. Whether the price of the books lost or journals lost has been realised or any inquiry started?

23. Are there unbound books in the Library requiring binding? If so, what steps have been taken to get them bound? (C.L. No.-55-K dated 19.04.1952 and C.L. No.-LB-12 dated August 1976).

23. A. Whether the binding of valuable books is carried after obtaining previous sanction of the High Court?

23. B. How many books during the year of inspection have been bound by engaging local binders in terms of Rule 458 of the General Rules (Civil)?

24. Whether gazettes have been bound and maintained as required by rule 461 General Rules (Civil)? (C.L. No.-77/VIIIb-119 dated 11.09.1956).

25. Has the weeding of books taken place in the Library? If so, when? If not, are there any books in the Library which may require weeding in view of the rule 465, General Rules (Civil), rules 462 to 464, General Rules (Civil) read with C.L. No.-5 dated 13.01.1959).

26. Whether the bills of books purchased and subscribed during the previous year have been paid and grant fully utilized?

27. Whether indents for stationery and non-saleable forms have been received from various courts in time and whether a consolidated indent has been submitted in time? State Form No.- 173. [Rule 512, General Rules (Civil)].

28. Whether all the required stationery and forms have been received? If not, what are the items not received and if any reminder has been issued?

29. Whether the stationery being supplied is sufficient for the judgeship? If not, how much more is required?

30. Is the stock of paper and stationery in accordance with the entries in the Stationery Register on physical checking?

31. Whether guard file of inspection notes is being maintained?

32. Whether any sale of non-official publications and official publications are made in accordance with Rule 465 of General Rules (Civil)?

33. Whether the Registrar General, High Court on 1st January is informed of the condition of books in the Library?

PROFORMA - I

Name of Officer	Quarter ending	Date of Inspection	Date of submission to District Judge after compliance
1	2	3	4

34. Whether the grants issued by the High Court for purchase of books, payment of subscriptions of journals and binding of books has been properly utilized and vouchers/bills have been properly kept on record and the register of grant and its utilization is properly maintained?

35. Whether the journals received in the library are regularly circulated among the Officers?

PART - VIII NAZARAT

1. Whether Cash Book is being maintained in separate sets Court-wise as required under 280 (1) & 92 of G.R.C. or generally a single Cash Book is in use for the whole Judgeship?

2. Whether in the maintenance of Cash Book Rules 314, 317, 318 and 326 of G.R.C. are observed?

3. Whether Administrative Officer grants weekly Certificate in the prescribed form in the Cash Book as required under Rule 326 of G.R.C.?

4. Whether Pass-Book (Form No. 42), Register of Petty Receipts Form and payments (Form No. 43), Register Form No. 35, Register Form No. 37 are maintained court wise as required under Rule 280 of the G.R.C.? Whether in the maintenance of these registers compliance of Rules 288, 289, 294, 295 and 325 of G.R.C. are made?

5. Whether statement of deposits from outlying Courts are received daily at the Head Quarter in Form No. 51 and 52 as required under Rule 315 of G.R.C.?

6. Whether in the maintenance of Day Book (Form No. 58) Rules 355, 359 and 360 of G.R.C. are observed? Is it laid before Presiding Officer every day for examination and initial as required under Rule 362 of G.R.C.?

7. Whether Money Order Register in Form No. 6 as required under Rule 290 of G.R.C. is maintained?

8. Whether Register of Fine, Stamp Duty and penalty realised is maintained in form No. 39?

9. Whether Register of contingent grant in Form No. 13 (State Form) as prescribed by the Financial Hand Book Vol. V Part I has been maintained?

10. Whether the Register of Stationery Form No. 59 to show the expenditure of fixed stationery grant is maintained?

11. Whether the Register of Bicycles is maintained showing amount incurred in its repairs?

12. Whether the grant has been utilised for the same purpose or circumvented and spend for any other thing?

13. Whether work assigned to the contractor is made after getting an agreement executed in prescribed Form on Stamp paper of the value as prescribed under Sub Section 5 of Section 2 of Indian Stamp Act which is chargeable as Stamp duty under Article 15 of Schedule 1-B of Stamp Act?

14. Whether bill of quantity of work to be done got executed by the contractor?

15. Whether payments to the contractor are made in cash or through Bank Draft?

16. Whether compliance of para 307, 308, 310, 311 and 312 of F.H.B. Vol. V Part I are made in execution of work assigned to the contractor?

17. (a) Whether the work distributed between the Nazir and the Assistant Nazirs is sufficient for each of them or any one official working with dates as well as their duties.

(b) Whether proper and sufficient securities have been furnished by each of them and whether the securities have been verified? [Chapter XXIII rules 541 to 548 General Rules (Civil)].

18. (a) Whether the cash in hand of the Nazir at the time of the inspection tallies with the entries in the Cash Book and the Day Book? Whether the Cash Book and the Day Book are posted upto-date?

(b) Whether the cash box is being deposited in the Treasury and received back daily alongwith register in Form No. 57? [Rule 351 General Rules (Civil)].

(c) Whether the cash in hand of the Nazir is more than half the security at the time of the inspection and has the cash in hand during last one year been generally less than half of the security? (Check some entries from the Day Book and Cash Book from every month).

19. (a) Whether account has been maintained for the compensation received in Motor Accident Claim cases?

(b) Whether the account has been opened in the Bank?

(c) Whether the amount has been deposited in the account without delay?

(d) Whether the interest accrued on the amount of compensation received deposited in D.J.'s account is paid to the claimants?

(e) Whether the amount kept deposited in FDRs and proper record is maintained thereof?

(f) Whether any complaints have been received regarding release of amount in forms of claimants?

20. (a) How many vouchers are pending preparing bills for submission to the Treasury and for what amount? (Give the details giving dates of vouchers.)

(b) How many days generally are taken by the Nazir to prepare bills after expenditure?

21. (a) Whether all the saleable forms are available and if not, have the recoupment orders been sent to the Superintendent, Printing & Stationery for the forms sold?

(b) Is the permanent advance of saleable forms sufficient? If not, is there any move for enhancement of the permanent advance?

(c) Since when the Superintendent, Printing & Stationery has not sent recoupment of saleable forms? Have any steps been taken?

22. (a) Whether the excess amount in the hands of the Nazir, when it exceeds half of the security, is being remitted to the Treasury or Bank as a Misc. Deposit? When amount was last sent? [Rule 317, General Rules (Civil)].

(b) Whether the Nazir or the Assistant Nazirs concerned are preparing a list of payable balances of Register Form No. 43 in form no. 47 and affixing the same on the notice board every week? [Last para of rule 294, General Rules (Civil)].

23. (a) How many repayment applications are pending for reports and for how many days? How many of them are pending on account of non-receipt of advice list and general number?

PROCESS SERVING STAFF AND SERVING OF PROCESSES

24. (a) What is the strength of the Process Servers? Is it in excess of the requirement in the light of rule 123, General Rules (Civil)-750 processes per Process Server and one urgent process equal to 3 processes?

(b) How many posts are lying vacant and for what period?

(c) Whether Process Servers remain properly dressed and wear badges, belts and satchels? [Rule 124, General Rules (Civil)]?

25. (a) Whether the Nazir maintains a list of inhabited places and a map of the entire district showing beats therein? [Rule 129, General Rules (Civil)].

(b) Whether the beats have been divided properly leaving a central beat within five miles radius? [Rule 130, General Rules (Civil)].

26. (a) Whether process within five miles radius are issued daily and returned within 24 hours after serving? [Rule 131, General Rules (Civil)].

(b) Whether dates for issue of processes for each beat outside five miles radius limit have been fixed and processes issued on those dates? [Rule 130, General Rules (Civil)].

(c) Whether processes are being issued fairly?

(d) Whether diet money paid to the Process Servers is properly entered in Register No. 105 and 43? (Check some entries comparing with the entries in these registers and diary of the Process Servers).

(e) Whether processes are returned after service in time or are returned beyond time and without seeking extension?

(f) Are all the Process Servers able to give personal service upto 75% ? If not, how many are below the standard and what action has been taken against them? Examine the register of percentage of personal service in light of C.L. No.-95/VIc-4 dated 20.09.1951 and also got monthly statement prepared in the prescribed form as given in this C.L..

27. (a) Have the godowns and dead stock been checked by the Officer-in-charge within one year of the inspection?

(C.L. No.- 107 dated 17.10.1952)

28. Whether proper reports are given on the process served and are duly attested by the Nazir/Deputy Nazir?

29. Whether the process executed have been sent to the courts/offices concerned on the same day? If not, why?

30. Whether the Process Servers sent in beats are sent after fixing a date and time of their returning back in Nazarat?

PART - IX RECORD ROOM

1. Name of Officer-in-charge, Record Room, date from which he is incharge.

2. Has the Officer-in-charge, Record Room, inspected in every quarter and compliance made? (Give details in proforma-I).

3. Whether the inspections made are effective and thorough and short comings, if any?

4. What is the strength of the Record Room staff? Is the staff over-worked? Is the distribution of work among the A.R.K s. even? (Give details in proforma I-A).

5. Whether there are adequate arrangements for extinguishing fire? [Appendix 21, General Rules (Civil), Part-II]. Whether fire-extinguishers are in working order? When those were last tested? Whether the condition of electrical wiring and installations in the Record Room is safe and satisfactory?

6. Whether the staff posted in the Record Room has been given training to use the fire extinguishers?

7. Whether the fire extinguishers are functional and its refills have been renewed? See record.

8. (a) Whether records are kept in separate racks for each Court? [Rule 110 General Rules (Criminal) and Rule 179, General Rules (Civil)].

   (b) Whether different colours for Bastas of different courts have been assigned? If so, give details. [Rule 194 General Rules (Civil) last para].

   (c) How many Bastas require re-colouring, re-labelling or replacement? Whether some record is in the loose conditions and is not kept in the respective Bastas?

   (d) Whether bundles have been properly labelled giving details or records? [Para 2 of Rule 194, General Rules (Civil)].

   (e) Whether records in bundles have been kept in accordance with date of institution in the Court of first instance and serial register no. and according to Rule 192, General Rules (Civil)? [Rules 180 and 194, General Rules (Civil)].

9. (a) Whether dates for consignment of records and registers from various courts to the Record Room have been fixed and whether records are being received within time? (Civil) and 108, General Rules (Criminal).

(aa) Whether the arrangement of the Criminal record is in accordance with Rules 114 and 115 of the General Rules (Criminal)?

(aaa) Whether the records of the Magistrates' Courts are arranged police station-wise and of the Court of Sessions according to the date of decision as required under Rules 115 of General Rules (Criminal)?

(b) Whether registers are also being consigned by various courts according to Rules within the time prescribed? If not, since when the registers have not been received and from which court?

(c) Whether records and registers are accompanied by list and invoice and lists are being properly stitched? Rules 182, 184 and 190 General Rules (Civil) and 109, General Rules (Criminal).

(d) How many Goshwaras are kept unbound? Give number of courts and the years for which Goshwaras have not been bound.

(e) Are sufficient number of decided records and registers being retained by the Court concerned? If so, are reasons given in the accompanying list and requisitions sent? How many of these are retained on account of non-preparation of decrees? (Para 3 of Rule 181, General Rules (Civil). Each A.R.K. to give statement for 3 months preceding the date of inspection in proforma II-A).

(f) Whether certificate of consignment are being submitted by Munsarim of each Court to the District Judge by 28th of every month? Name of the courts from which the certificate have not been received during the last one year [Para 2 of Rule 181 General Rules (Civil)].

10. (a) Whether monthly consignments have been examined and second punching done within one month from the date of receipt and certificate given? [Rules 187, 188, 189 and 191 of General Rules (Civil) and Rule 111, General Rules (Criminal)].

(b) Whether there are any arrears for examination with any A.R.K. or Record Keeper? If so, give details in proforma-III.

(c) How many defective (Badar) files were found during checking? Give details in proforma-IV.

(d) Whether the defective files are being corrected in accordance with Paras 2 and 3 of Rule 188, General Rules (Civil)?

(e) How many defective files are pending for correction in Record Room or various courts and for how much time? Give figure in proforma IV.

(f) Whether examination of records is properly done in light of Rules 142, 150, 153, 157, 159, 181 and 187 and G.Ls. and C.Ls. reproduced on pages 547-553 of the Circulars of the Hon'ble High Court? (Take out a few records from bundles of each A.R.K. and examine them in light of Rules 187, 188 and 191 of General Rules (Civil))

(g) Whether examined records have been restored to the bundles the same day or next day of examination? In case of arrears give details of records received last month in proforma V.

(h) Whether records received back from the Copying Department or Appellate Courts or other Courts are restored as soon as they are received?

(i) Whether the files of miscellaneous cases and papers received, are being restored to the proper records? [Rule 193, General Rules (Civil) and 112, General Rules (Criminal)]

11. (a) Whether all the records and registers required to be weeded upto the date of inspection, have been weeded? If in arrears, give details in proforma VI and VII. Whether the weeding register has been maintained upto date properly?

(b) Whether records have been weeded in accordance with Rules 193 to 201, General Rules (Civil) and Rules 127 to 184 of General Rules (Criminal)?

[Some weeded records and registers should be taken out checked for compliance of Rules 199, 200 and 201 of General Rules (Civil)].

(c) Whether any record has been weeded out before due date?

(d) Whether Rules regarding requisition of bills under Appendix 14 and Rule 209 of General Rules (Civil) are strictly complied with?

(e) Whether register of return of documents (Form 71) is maintained as required under Rule 400 of General Rules (Civil)?

(f) Whether Repayment Application Register is maintained and is placed once in a week before the Officer-in-charge?

(g) Whether the A.R.K., D.R.K. and R.K. maintain Karguzari Register?

(h) Whether the restoration work is upto date or in arrears? If so, the reason therefore?

12. (a) How many ordinary requisitions from courts for records have been complied with more than a week delay during the year under inspection? Give details of such requisitions in proforma VIII for the last three months.

(b) How many urgent requisitions from courts and requisitions from Copying Department have been complied with after more than 24 hours during the year under inspection? (Give details of such requisitions in proforma VIII for the last three months.)

(c) In how many cases records had not been sent at all?

(d) How many requisitions are pending for compliance with each A.R.K. and Record Keeper? (Give dates of the three oldest requisitions.)

(e) Are entries of Register Form No. 24 being properly made in accordance with Rules 211, 212 and 214, General Rules (Civil) for civil records and in Form No. 5 in accordance with Rule 130, General Rules (Criminal) for criminal records? (Check some continuous 25 entries from the registers.)

13. (a) How many records have not been returned from various courts for more than a year and from how many courts? Has any action taken by the Record Keeper and the A.R.K. concerned?

(b) Have the quarterly lists been prepared and sent to the courts concerned and received back after verifications? (Give information in proforma IX).

14. Has monthly statement provided by para 2 of Rule 210 General Rules (Civil) been submitted? If so, on what dates during the last one year?

15. Whether the applications for inspection and search are satisfactory? (Give comparative figures in proforma X).

16. Whether guard file for inspection notes is being maintained?

17. Whether any observations or instructions at the last inspection have remained unattended to? If so, furnish reasons therefor.

18. Whether any matter for reconstruction of lost/destroyed records is pending? Status thereof?

19. Status of reconstruction of weeded records and number of requisitions of higher courts for transmission of records are pending. [Rules 195-201A and chapter VIII of G.R. (Civil)]

20. Whether the repayments and other applications received after disposal relating to decided records are properly placed on the concerned records? Check some.

21. What is the Status of records relating to Criminal Trials, in the matters pending before higher courts or pending execution?

PROFORMAS FOR INSPECTION OF RECORD ROOM

PROFORMA – I

Name of Officer	Quarter ending	Date of inspection	Date of submission to the District Judge
1	2	3	4

PROFORMA – I-A

SI. No.	Designation	Name	Date from which working	Courts and work allotted	Remarks
1	2	3	4	5	6

PROFORMA – II

Name of A.R.K. : .....

Name of Court	Nature of cases	Due date for consignment	Date of actual consignment				Remark
			Jan.	Feb.	March	Etc.	

PROFORMA – II- A

Name of Courts : .....

No. of decided records for consignment	No. of records consigned	No. of records detained		No. of registers not consigned with reasons
		On account of non-preparation of decree	for other reasons	
January				
February				
March				

PROFORMA – III

STATEMENT OF ARREARS OF EXAMINATION

Name of court	Name of month of Basta	Nature of the records	Date of receipt	No. of files received	No. of files examined with time	No. of files remained unexamined	Reasons for arrears of examinations
1	2	3	4	5	6	7	8

PROFORMA – IV

STATEMENT OF BADAR FILES

Name of Court	Name of the cases	No. of files received and examined	No. of defective files	Date on which files sent to the court concerned for removing defects	No. of files received with date of receipt
1	2	3	4	5	6

PROFORMA – V

Name of court	Nature of the cases	No. of files lying unrestored to the bundles	Date of examination	Remarks
1	2	3	4	5

PROFORMA – VI

STATEMENT OF WEEDING

Name of court	Nature of cases	Name of natthis	How far due	How far done	How much in arrears	Remarks
1	2	3	4	5	6	7

PROFORMA – VII

STATEMENT OF BOOKS AND REGISTERS

Name of court	Description of register or book	Period upto which register or registers received in record room	How far due	How far done	How much in arrears	Remarks
1	2	3	4	5	6	7

PROFORMA – VIII

SI. No. of A.R.K. Register	SI. No. of R.K. Register	Date of receipt of requisitions in Record Room	Date by which record required	Date of Compliance	Remarks
1	2	3	4	5	6

PROFORMA – IX

Name of A.R.K.	Date due in first quarter ending March	Date of sending quarterly list with name of Court	Date of return of quarterly list by the Court concerned
1	2	3	4

PROFORMA – X

.... From ..... to ..... From ..... to ..... No. ..... Amount ..... No. ..... Amount .....
Inspection applications **Search applications**

Note : Give figures for Civil and Criminal separately.

PART - X CIVIL COPYING DEPARTMENT

1. Who is the Officer-in-charge of the Copying Department and date from which he is in charge. ?

2. Has the Officer-in-charge inspected the Copying Department every quarter? Give details in Proforma-I and comment.

3. Name of the Head Copyist and since when?

4. Is the staff over-manned or under manned? [Rules 269 and 270, General Rules (Civil)]

5. Check the almirah and the box of the Head Copyist and examine all the prepared copies, rejected applications and folios etc. and comment after getting statements in form no. III, IV, VI prepared.

6. How many Typewriters (Hindi/English) are allotted to the Copying Department and how many are out of order and since when? Are the Typewriters being fully utilised?

7. Whether Register Form No. 31 is properly maintained and entries of urgent and ordinary applications being made in red and blue-black ink? [Rule 265, General Rules (Civil)].

8. Does the Munsarim or the Head Copyist comply with the provisions of Rule 254(a) at the time of presentation of application for copies?

9. Are urgent and ordinary copies being prepared within 24 hours and within a week respectively and if not, what is the average duration for these copies? (Give separate average for the last three months preceding the date of inspection).

10. Give number of pending urgent and ordinary applications in Proforma-II (Discuss reasons of delay in disposal of 12 applications mentioned in the last column).

11. Whether printed forms for preparation of decrees and formal orders are being used for issue of copies? If not, why ? [Last para Rule 257, General Rules (Civil)].

12. (a) Are copies of judgments in appeals, sessions trials and revisions being received from various courts concerned? In how many cases these copies have not been received? Quote the number of cases with name of courts of which copies were not received.

(b). Whether the copies of orders and judgments prepared by Computer are obtained by access to the computer of the court concerned?

13. Whether copies involving more than 1500 words are being prepared without realising the excess fees? If so, in how many cases during the last two months?

14. Are copies of payment being prepared on stamp papers? [Rule 255, General Rules (Civil)].

15. (a) In how many cases free copies have been issued to any other person except prisoner, Government Law Officer and Heads of Departments of the Government of India, any High Court in India or any other authority exercising similar jurisdiction, any court subordinate to the High Court at Allahabad or any particular Court in any foreign country? Check applications for inspection [Rules 248, 251 and 252 G.R. (Civil)].

(b) How many free copies prepared on applications under Rules 248, 251 and 252, General Rules (Civil) read with G.O. No. 113 dated 05.12.1985 and C.L. No. 75/VIII-a-51 dated 03.12.1960 remained undelivered within the prescribed time during one year period preceding the date of inspection?

16. (a) Whether unused stamp in cases of rejected applications are being returned within 30 days after intimation to the applicant or his counsel and if unreturned stamp are being destroyed and necessary entry made in register form no. 31? Give details of such applications in Proforma III in respect of rejected applications during the period of three months one month prior to the date of inspection (Rule 254, paras V to IX).

(b) Examine some rejected applications to see if reports and orders are correct.

17. Whether copies remaining undelivered after 15 days of the notice are being disposed off after obtaining orders of the Judge? Send a statement prepared in Proforma-IV. Examine pending undelivered copies with the Head Copyist on the date of inspection as well as the entries in Register Form No.-31 in respect of undelivered copies at least for three months, one month prior to the date of inspection? [Para 2 of Rule 260, G.R. (Civil)].

18. Whether copies are being prepared legibly, accurately, properly noting the number of words correctly and are being properly certified as true copies duly and legibly signed by the Copyist and Head Copyist? Check some of the copies pending with the Head Copyist undelivered, preferably prepared

before the date of intimation of the inspection and prepared by each Copyist with G.L. No. 29/A dated 1.8.1929, G.L. No. 43 dated 10.8.1934, C.L. No. 59/Ve–65 dated 22.9.1950 and C.L. No. 41/Ve-65 dated 6.5.1957.

19. Whether the consolidated register of Karguzari and distribution of work in Form No. 33-A referred to in Rule 268 is being put up before the Officer-in-charge Copying Department fortnightly (G.L. No. 6/A-17(1) dated 1.11.1935 as amended by G.L. No. 7/A-2(1) dated 27.1.1936).

20. Are records being received in and returned back from the Copying Department within 24 hours of the sending of the application or the preparation of the copy? Get a statement prepared in proforma VI. [Rules 246, 254(a) para 3 and (b) (ii) G.L. No. 3/Ve-81 dated 27.2.1952].

21. Whether strict rule of priority is being maintained by the Head Copyist? (Examine some two days in the Register Form no.-31). In how many cases rule of priority has been deviated? Examine some of the matters.

22. Are provisions of Rules 250 and 253 being followed in the case of applications for copies by strangers or in cases under hearing?

23. (a) Whether copies of maps and registers etc. are being prepared after preparing estimates and whether registers in Form no. 28 and 29 are maintained?

(b) Whether copies of maps and registers etc. are being prepared by the Copyist or by some Special Copyist?

24. Whether fortnightly statements (Progress Report) are being maintained and put up before the District Judge?

25. (a) Whether the Copyists are maintaining a register of Karguzari in Form no.-33 properly?

(b) Whether the Copyists are giving their karguzari according to the prescribed standard? Check work done of some of them and the work shown too have been done?

26. Whether rejected applications are sent to the court concerned or the record room soon after rejection?

27. Whether the Head Copyist maintains a guard file of :
(i) Inspection Notes (ii) for orders of the District Judge (iii) for C.L. and G.L. and (iv) for orders of the Officer-in-charge, Copying Department?

28. Does the Head Copyist work intelligently and in a business like manner?

29. Whether attendance register as required under Rule 8 and 539(10) of the General Rules (Civil) is maintained?

30. Whether register of Casual Leave and application files are maintained? [as required under rule 410 of G.R. (Civil)].

31. Whether Special Casual Leave for more than 4 days were granted against Rule 461 of General Rules (Civil)?

32. Whether copies of General Rules (Civil) and General Rules (Criminal) are supplied and are up-to-date in terms of Rule 643(c) of General Rules (Civil)?

33. Whether applications for leave are attended to in accordance with Rule 640 of General Rules (Civil)?

34. Whether entries made in Col. Nos. 7 and 8 of Register (Form No.-31) are verified by the Record Keeper at the end of every week?

35. Whether any register in break in serials in Form No. 31-B are required under Rule 267(B) of General Rules (Civil) is maintained?

36. Whether any breakage in serial has been made without obtaining orders of Officer-in-charge? Has any irregularity been committed in obtaining orders of breakage of serials?

37. Whether a Distribution Register (Form 31 A) as required under Rule 267-A of General Rules (Civil) is maintained? Whether entries made in col. 8 tally with the words given by the Copyist in his Karguzari Register (Form No. 33)?

38. Whether notice in Form No. 30 is displayed on the notice board as required under Rule 260 of General Rules (Civil)?

39. Whether any Estimate Register is maintained for the supply of copies in Form No. 28 as required under Rule 258 – Para 2 of General Rules (Civil)?

40. Whether copies prepared by the Copyist/Typist are signed by them and true copy by the Head Copyist, mentioning number of words and value of stamps?

41. Whether copies reflects the dates of application etc. in words and figures?

42. Whether Copyists/Typists are charging standard of work according to Rule 267 of the General Rules (Civil)?

43. Whether method of counting of words done by Copyist/Typist is in accordance with procedure laid down in Rule 268 of General Rules (Civil) and G.L. No. 43 dated 10.8.1934.

44. Whether Typists have been allowed to work as Copyists? If so, the reasons therefor.

45. Whether proper record is maintained for preparation of copies by photo copier machine?

46. Whether proper account has been maintained for the amount deposited for issuance of copies by photo copier machine?

47. Whether the copies applied through photo copier machine are issued on the next day? Check some matters.

PROFORMA – I

Name of Officer	Quarter ending	Date of inspection	Date of submission to the District Judge
1	2	3	4

PROFORMA – II

Sl. No.	No. of Urgent Applications pending	No. of Ordinary Applications pending
1	2	3

PROFORMA – III

Particular of Applications	Date of disposal	Cost of Folio	Date of return	Date of destroy
1	2	3	4	

PROFORMA – IV

Sl. No.	No. of Applications	Date of Notice	Date of consignment
1	2	3	4

PROFORMA – VI

Sl. No.	Name of Copyist	Particular of Application	Date of sending application to the concerned court	Date of receiving of record	Date of preparation of copy	Date of returning back of the record
1	2	3	4	5	6	7

PART - XI CRIMINAL COPYING DEPARTMENT

1. Name of the officer in charge and date from which he is incharge. ?

2. Has the Officer-in-charge inspected the Copying Department every quarter? Give details in Proforma-I and comment?

3. Name of the Head Copyist and since when?

4. Is the staff over-manned or under-manned?

5. Check the almirah and the box of the Head Copyist and examine all the prepared copies and the pending case diaries.

6. How many Typewriters (Hindi/English) are allotted to the Copying Department and how many are out of order and since when? Are the Typewriters being fully utilised?

7. How many case diaries are pending for preparation of copies of statements and documents?

8. Whether copies are being prepared legibly, accurately and properly?

9. Whether the Register of Karguzari maintained by Copyist and register of distribution of works maintained by Head Copyist are being properly maintained?

10. Whether fortnightly statement of progress of copying work is being submitted to the Officer-in-charge?

11. Whether the copies of case diary of criminal cases which are exclusively triable by the Court of Sessions and if under trial prisoners are being prepared on priority basis and in chronological order?

12. Whether the copies are being prepared in a systematic manner?

13. Does the Head Copyist works intelligently and in a business like manner?

14. Whether the Copyists are giving sufficient karguzari? Check the work done of some days and the work shown by the Copyists.

15. Whether copies are prepared by photo copier machine and proper record is maintained for the copies so prepared?

PROFORMA – I

Name of Officer	Quarter ending	Date of inspection	Date of submission to the District Judge
1	2	3	4

PART - XII AMINS

1. Name of the Officer-in-charge Amins and date from which he is in charge. ?

2. Has the Officer-in-charge inspected the work of Amins? (Proforma-I).

3. How many posts of Amins in I-Grade and II-Grade are sanctioned for the district and who are the Amins working on these posts and since then? (Proforma-II).

4. Are the Amins qualified and satisfy the condition laid down in Rule 522 General Rules (Civil)?

5. Have the Amins furnished security? If so, of what amount and whether it is sufficient? [Rule 541 G.R. (Civil)].

6. Are there any other officials in the judgeship who have received training of Amins? Give their names and year of training.

7. Have circles of Amins been divided into beats and dates fixed for each beat? Give details [Rule 527, General Rules (Civil)].

8. Have Amins been supplied the necessary instruments for their work? [Rule 523, General Rules (Civil)].

9. (a) Are the Amins substituting their weekly programme to those writs they execute? [Rule 531, General Rules (Civil)].

   (b) Are the Amins planning their tour in accordance with Rule 527(c), General Rules (Civil) and fix sufficient work every day?

10. How many Parwanas are pending with the Amins unexecuted on the date of inspection? (Give details beat-wise three oldest Parwanas of each beat in Proforma II-A with reason).

11. How many Parwanas were received by the Amins for execution during the year under inspection and how many of them were returned unexecuted (Give list of unexecuted Parwanas in Proforma-III).

12. In how many writs, the Amin has made attachments, auction sale, survey commissions successfully?

13. In how many cases the Amin sought extension for execution of the Parwanas during the year under inspection?

14. What is the percentage of parwanas returned unexecuted during the year under inspection? (give comparative figures in Proforma-IV for the current year and the corresponding previous year).

15. Give the number of writs returned unexecuted according to the following classification during the year under inspection:

(i) For shortage of time or late receipt.

(ii) Sudden increase in work.

(iii) Due to absence of the decree holder or his representative or due to unwillingness of the decree holder to get the writ executed.

(iv) Due to nature of work and labour involved.

(v) Due to stay orders from the courts issuing the writ or from the appellate courts.

(vi) For want of Police help.

(vii) Incomplete particulars in the writ.

(viii) For want of self addressed P.C. of D.H.

(ix) For want of requisite material.

(x) On account of unjustified and lame excuses.

16. Whether the Amins have sufficient work to do? If not, are their services being utilized in the office some where else?

17. Are the Amins over-loaded with work and the work is being evenly distributed? Is any additional help required? [Rule 524, General Rules (Civil)].

18. Are the Amins taking proper interest in executing Survey Commissions and execute the same in accordance with the instructions contained in Rule 533, General Rules (Civil)?

19. Are the Amins submitting monthly statements with proper certificate of the work done as required by Rule 535, General Rules (Civil)? Is that statement being submitted to the District Judge after scrutiny by the Officer-in-charge by the 10th of the next month [Rule 536, General Rules (Civil)]?

20. Whether the Amins are maintaining registers in Form No. 107, 108, 109 and 110 properly and make entries in the Cash Register immediately? [Rules 335 and 407, General Rules (Civil)].

A. Check entries made in Form No. 107, 114 from register in Form No. 106 maintained in each court.

B. Whether separate books in each Court relating to T.A. Bills of Amins and their peons are maintained as required under Rule 336 of General Rules (Civil)?

21. How many movable properties are lying attached for more than a year? (Give details in Proforma-V).

22. In how many cases, he released movable properties on the spot during the year under inspection?

23. Whether the Amin is issuing Payment Orders in Form No.-III in case of sale immovable property? [Rule 33, General Rules (Civil)].

24. Whether the Amin is issuing receipt for cash payment received by him ? [Rule 333, General Rules (Civil)].

25. Whether the Amin is paying the cash amounts received by him into the treasury through pass book Form no.-112 the same day or latest the next day and sending the extracts of the pass book to the courts concerned? [Rules 337 and 338, General Rules (Civil)].

26. Whether the Amins are submitting weekly returns in Form no. 113 and 114 to the courts concerned and the same are being checked by the Munsarim of the courts concerned? [Rule 339 and 340, General Rules (Civil)].

27. Whether poundage money is being realised on all the sales conducted by the Amin? [Rule 369, 371 and 373, General Rules (Civil)].

28. Is fee for Amin being realized in accordance with Rules 375, 376, 377 and 378, General Rules (Civil) read with notification no.-99/VIIIb-135 dated 23.3.1959 and correction slip 27 dated 9.6.1992?

29. Has the Amin given priority to some writs over the others received earlier with permission or without permission of the Officer-in-charge? Was there any justification for giving such priority?

30. Dose the Amin exercise his discretion properly in accepting bids in public auctions?

31. Does the Amin take interest and pain in his work? Is he methodical and systematic?

32. What is the opinion of Presiding Officers of various courts about the quality of his work and conduct? (It may be obtained confidentially from various Officers).

33. Whether guard file for inspection notes is being maintained?

34. Whether any observations or instructions at the last inspection have remained unattended? If so, furnish reasons there for.

PROFORMA – I

Name of Officer	Quarter ending	Date of inspection	Date of submission to the District Judge
1	2	3	4

PROFORMA – II

Name of circle	Name of Amin	Grade I or II	Date from which he was posted in the circle	Date from which working as Amin	Date of confirmation	Remarks
1	2	3	4	5	6	7

PROFORMA – II-A

Name of Amin	Name of beat	Number of pending parwanas	Date of 03 oldest of each beat	Reason for delay if first date of return expired
1	2	3	4	5

PROFORMA – III

Sl. No.	Circle beat	Name of court	No. of writ with description	Date of receipt	Date fixed for return	Date fixed for execution	Date of return	Extended date if extension sought	Reasons for returning unexecuted	Remarks
1	2	3	4	5	6	7	8	9	10	11

PROFORMA – IV

Period	Number of Parwanas received	Parwanas executed	Percentage
1	2	3	4
01.01.20... to 01.12.20... (Previous Year) 01.01.20... to 01.12.20... (Current Year)			

PROFORMA – V

Sl. No. of Reg. No.-109	Date of attachment	Name of beat	Suit No. & court	Execution case no.	Name of parties
1	2	3	4	5	6

PART - XIII CIVIL COURTS

1. Give the name(s) of the Presiding Officer who worked since the last inspection with duration.

2. Whether the quarterly inspection by the Presiding Officer has been made and submitted to the District Judge after compliance? Give details in Proforma-I.

3. Whether the staff is adequate or under manned and whether the distribution of work is even and proper? Give the names of the members of the staff with posts and duration.

4. What is the territorial jurisdiction, pecuniary jurisdiction and other jurisdiction being exercised by the Presiding Officer?

5. Is the weekly cause list being posted on each Saturday and are all the cases for a particular day and adjourned cases within the same are entered therein in proper columns? [Rule 16, G.R. (Civil) Part I].

6. (a) What is the number of pendency of all types of cases on the first day of the month of the inspection and the corresponding day last year? Give details in Proforma-II and also give reasons for increase or decrease.

   (b) Give the number and date of institution of ten oldest cases of each type in the remarks column of Proforma-II.

   (c) Give an year wise break-up of pending files of Regular Suits, Appeals, Revisions, Execution Cases as well as Miscellaneous Cases shown in Proforma-II in comparative form for both the dates.

7. (a) How many contested cases have been decided by the Officer during the last one year?

   (b) Give the year wise break-up of all the contested cases decided of all types.

   (c) How many cases were decided ex-parte or in default and what is the percentage of these cases to the contested cases?

   (d) How many cases were decided otherwise?

8. (a) In order to tide over the problem of old cases, every Subordinate Court shall give history sheet of five oldest cases of each category (e.g. Sessions Cases, Appeals, Revisions, Suits, Miscellaneous Cases, Execution Cases, Police Cases, Complaints etc.) in following points and particular attention be given for taking firm steps :-

HISTORY SHEET OF OLDEST CASES

IN THE COURT OF …….
CASE NO. …….

1.Date of institution :

2.Date of admission/registration :

3.Date of appearance of Defendants/Respondents/ accused persons/opposite party :

4.Date of filing written statement/rejoinder/ supply of police paper to accused and commitment :

(state reason of delay, if any,
mention if interlocutory matter intervened)

5.Date of framing issues/charge :
6.First Date of hearing :
7.Period of pendency with progress made before each presiding officer :

(b) Statement of disposal by the Presiding Officers of the Judgeship during the period of inspection in the following proforma :-

Statement of the disposal by the Presiding Officers of the Judgeship from ……. to …….

Sl. No.	Name of Presiding Officer	Actual work done by P.O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total witnesses examined	Remarks
			Contested	Uncontested		Contested	Uncontested		
1	2	3	4	5	6	7	8	9	10
1.									
2.									

(c) Statement of the disposal of the cases monthwise in following proforma:-

STATEMENT OF THE DISPOSAL OF THE COURT OF…….

Month & Year	Actual work done by the P.O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total
		Contested	Uncontested		Contested	Uncontested	
1	2	3	4	7	8	9	10
January ……							
February ……							
TOTAL							

(d) Reason of pendency of cases since more than five years in following proforma:-

REASON OF PENDENCY OF CASE OF THE COURT OF.....

Sl. No.	Case No.	Reason of pendency	Step taken by the present Presiding Officer with date of last order
1	2	3	4

(e) Statement of cases relating to Legal Service Act during one year in the following proforma :-

STATEMENT OF CASES RELATING TO LEGAL SERVICE ACT

W.E.F. ..... TO .....

Sl. No.	No. of cases instituted	No. of cases disposed of	No. of cases pending	Reason for pendency	Remarks
1	2	3	4	5	6

9. (a) Is the Presiding Officer's diary and the Reader's diary properly maintained? Are the dates to which cases are adjourned, the purpose for which fixed and the work done on that day, entered in the diary? [Rules 40 and 18-A, G.R. (Civil)].

(b) Are all the cases entered in the diary of Presiding Officer and the Reader have been carried forward for the next date fixed ?

(c) Are the cases fixed for particular days in the diary of the Presiding Officer in such a manner as to facilitate hearing of all the cases fixed on that day and disposal of old cases?

(d) Are cases taken strictly in accordance with priority rule and are also entered in the diary in that manner?

(e) Does the Presiding Officer fix and does sufficient work on each day?

(f) Are cases taken up day to day or are unnecessarily adjourned?

(g) Are the witnesses present on a particular day examined before adjournment?

(h) Are arguments heard promptly and judgments pronounced with 30 days of the first hearing of arguments?

(i) Are cases adjourned for sufficient reasons by passing detailed order?

(j) Are decree prepared in time and in accordance with Rule 98 G.R. (Civil)?

(k) How many cases are adjourned in a week on the personal ground of the counsel, for no time and on account of no objection by the opposite party?

NOTE: For answers to the above questions, a complete statement of work fixed and done datewise for full one week (Monday to Saturday) two weeks before the notice of inspection should be got prepared in Proforma-III and a statement in Proforma-IV in respect of all the contested decided cases in the month preceding the month in which instruction of inspection has been given.

(l) Whether decree are being prepared in light of instructions contained in C.Ls. reproduced on pages 391, 393 to 395 of circular letters and Orders 20 Rule 21 C.P.C. and Rule 98, G.R. (Civil)?

10. Are the parties and witnesses being examined in suits before framing issues? (Give a statement in Proforma-V for the same week in note above).

11. Whether notices of appointment of guardian are issued to minors also when the age of the minor is more than 12 years?

12. (a) Whether Commissioners submit reports within the time allowed? If not, how much time is taken generally and whether extensions are sought?

(b) How many oldest cases are lying in undisposed on account of non-submission of report by the Commissioner for more than three months and for how long? What action has been taken against Commissioner?

(c) Whether Amins are submitting survey reports within time or are seeking extension?

13. Whether the judicial records are properly maintained by the officials and all the papers have been indexed according to the provisions of Chapter V of G.R. (Civil)?

14. Whether all the registers have been prepared on proper forms and all the cases have been properly entered there in?

15. In how many cases order of ad-interim injunctions, granted, have been confirmed on final disposal of injunction applications?

16. (a) How many suits have been stayed by the Court under section 10 C.P.C.? Give details in the given proforma.

Details of the case	Court under whose order the case is lying stayed	Date of stay order and particulars of the case in which the stay order was passed	Whether any enquiry was made? If so, give date of enquiries made during the last one year
1	2	3	4

(b) Whether full particulars of the connected case with name of the court and copy of pleadings of that case were given by the parties?

(c) Has the fact of stay communicated to the Court in which the connected proceeding is pending?

(d) Has any attempt been made to know the stage and the result of the connected proceeding?

17. How many suits, execution cases and miscellaneous cases have been stayed by the appellate courts and High Court or the records have been sent to them? Give a list in the prescribed Proforma-VI. Has any inquiry been made during the last three months?

18. Whether the proceedings by which trial court matters are stayed or in which records are called for, are disposed of expeditiously to enable the courts to proceed with pending matters?

19. Are the decided records consigned on the dates fixed? If not, what is the arrear?

20 . Whether the number of inspections and search applications is satisfactory? Give comparative statement in prescribed Proforma-VII.

21. How many requisitions from other court including Hon'ble High Court and the Copying Department are pending on the date of inspection and for how many days?

22. Examine some records of each category and examine the files detailed in statements-III and IV from the point of view of compliance of the following provisions of law and rules and other matters mentioned hereinafter :

(i) Order 3 rule 8 C.P.C.

(ii) Compliance of

(a) Order 3 rule 2.
(b) Order 3 rules 3, 4 and 5.
(c) Order X rules 1 to 4
(d) Order XIV rules 1 to 5.

(iii) Service of process by substituted service.

(iv) Rules 2, 3, 4, 6, 10, 11, 14, 15, 16, 17, 18 (for checking efficiency of the Munsarim).

(v) Order 7 rules 3, 7, 14, 15, 16, 17, 19, 20, 23 and order 8 rules 11 and 12.

(vi) Order 13 rules 4, 5, 6, 7 and 8.

(vii) Summoning witnesses under order 16 C.P.C.
(a) Promptness and delay in issue of processes.
(b) Contents of issue of summons to produce documents.
(c) Mode of service.

(viii) Appointment of guardians of minors or lunatics, as plaintiffs or defendants.

(ix) Attachment orders and temporary injunctions or stay order.
(a) Compliance of promptness and delay in putting applications for orders.
(b) Promptness and delay in issuing processes.

23. Checking of compliance of Rules 31, 35, 37, 41, 42, 44, 45, 51, 52, 56 to 61, 142 to 156, 150 and 155 to 159, General Rules (Civil) in the above files or some of them.

24. (a) Whether the conduct of Presiding Officer is judicious and he is intelligent in handling the cases?

(b) Whether he exercises efficient supervision on the day to day working of his officials?

(c) The manner of framing issues.

(d) Whether interests of minors and persons of in-sound mind are properly looked after?

EXECUTION

25. What is the number of execution cases pending over six months?

26. What is the total number of execution cases disposed of and the number of infructuous applications? What is the proportion of infructuous applications to the total of cases disposed of during one year preceding the date of inspection?

27. Are the orders in the Hindi order sheet of the execution cases passed by the Presiding Officer himself? [Rule 163, General Rules (Civil)].

28. Whether proper dates for service of proclamation and sale are fixed?

29. Are the writs of attachment and sale promptly issued to the Amin within three days of the order and property entered in register Form No.-106?

30. Whether the execution cases remained pending due to want of steps for more than a week?

31. Examine some oldest execution cases and some cases more than a year old for :

(a) Checking compliance of orders passed, issue of processes i.e. notices, precepts, seal warrants etc. with particular reference to compliance of rules 166, 167, 169, 172, 173 of General Rules (Civil) and compliance of G.O. No. 3020/10-0-20 dated 4th September, 1920 and G.L. No. 10/VIIIh-19 dated 12.9.1951 as well as compliance of orders of the Hon'ble High Court contained in various C.Ls. and G.Ls. reproduced on pages 273 to 275 of circular letters of the Hon'ble High Court.

(b) Checking of execution and return of parwanas of attachment and sale by Amins extension of time, ground for return of un-executed parwanas and reports of the process servers etc.

32. Whether the execution cases are regularly fixed in the Diary of the Presiding Officer and taken up on regular basis?

33. Whether the writs are issued to Amin without any delay and are being executed actually in execution cases?

PROFORMA FOR INSPECTION OF CIVIL COURTS

PROFORMA – I

Name of Officer	Quarter ending	Date of inspection	Date of submission to District Judge
1	2	3	4

PROFORMA – II

SI. No.	Name of case	Pending on 20.... (Current Year)	Pending on 20.... (Previous Year)	No. and dates of ten oldest case	Remarks
1	2	3	4	5	6

PROFORMA – III

No. of cases	Name of Parties	Nature of cases	Purpose	Work done	Remarks
1	2	3	4	5	6

PROFORMA - IV

No. of cases	Name of Parties	Nature of suit	Date or dates on which evidence was recorded	Date of hearing of arguments	Date fixed for judgement	Actual date of delivery of judgement	Date of preparation of decree	Date of signing of decree by P.O.	Date of certification of decree and judgement to the L.C.	Remark
1	2	3	4	5	6	7	8	9	10	11

PROFORMA – V

No. of Suit	Name of Parties	Nature of cases	Date of framing issue	Date of examination of parties and witnesses
1	2	3	4	5

PROFORMA – VI

Details of the case	Court under whose order the case is lying stayed	Date of stay order and particulars of the case in which the stay order was passed	Whether any enquiry was made? If so, give date of enquiries made during the last one year
1	2	3	4

PROFORMA – VII

Inspection/ Search Applications	From.....to.....		From.....to.....	
	No.	Amount	No.	Amount
1	2	3	4	5
Inspection Applications				
Search Applications				

PART - XIV CRIMINAL COURTS OF MAGISTRATES

1. Give the name(s) of the Presiding Officer who worked since the last inspection with duration.

2. Whether the quarterly inspection by the Presiding Officer has been made and submitted to the District Judge after compliance? Give details in Proforma-I.

3. Whether the staff is adequate or under manned and whether the distribution of work is even and proper? Give the names of the members of the staff, posts and duration.

4. What is the territorial jurisdiction and other jurisdiction being exercised by the Presiding Officer?

5. Whether the Presiding Officer exercises summary powers?

6. (a) What is the number of pendency of all types of cases on the first day of the month of the inspection and the corresponding day last year? Give details in Proforma-II and also give reasons for increase or decrease.

   (b) Give the number and date of institution of ten oldest cases of each type in the remarks column of Proforma-II and also give reasons for increase.

   (c) Give yearwise break-up of pending cases of each type in Proforma-II and comparative form for both the dates.

   (d) Give the total number of Special Act cases, e.g. D.I.R., M.V. Act, Excise Act, Arms Act, Gambling Act etc., in two columns more than 6 months old and more than a year old.

7. (a) How many contested cases have been decided by the Officers during the last one year?

   (b) Give the yearwise break-up of all the contested cases decided of all types.

8. What are the institutions, disposals and pendency of the year under inspection as well as for the previous year?

9. (a) What are the institutions, disposals and pendency of the cases for the one year period covered by the inspection? (Details shown in Proforma-II).

(b) In order to tide over the problem of old cases, every Subordinate Court shall give history sheet of five oldest cases of each category (e.g. Sessions Cases, Appeals, Revisions, Suits, Miscellaneous Cases, Execution Cases, Police Cases, Complaints etc.) in following points and particular attention be given for taking firm steps :-

HISTORY SHEET OF OLDEST CASES

IN THE COURT OF .....
CASE NO. .....

1.Date of institution :

2.Date of admission/registration :

3.Date of appearance of Defendants/Respondents/ accused persons/opposite party :

4.Date of filing written statement/rejoinder/ supply of police paper to accused and commitment :

(state reason of delay, if any, mention if interlocutory matter intervened)

5.Date of framing issues/charge :

6.First Date of hearing :

7.Period of pendency with progress made before each presiding officer :

(c) Statement of disposal by the Presiding Officers of the Judgeship during the period of inspection in the following proforma :-

Statement of the disposal by the Presiding Officers of the Judgeship from ..... to .....

Sl. No.	Name of Presiding Officer	Actual work done by P.O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total witnesses examined	Remarks
			Contested	Uncontested		Contested	Uncontested		
1	2	3	4	5	6	7	8	9	10
1.									
2.									

(d) Consolidated statement of percentage of conviction and acquittal in Criminal Cases by the Magisterial Courts in the following proforma and also the details of the cases in which all the witnesses of the fact stand hostile. It should also be mentioned that what steps were taken including the examination of the hostile witnesses by the Presiding Officer and initiating action against hostile witnesses:-

CONSOLIDATED STATEMENT OF PERCENTAGTE OF CONVICTION & ACQUITTAL IN CRIMINAL CASES BY THE MAGISTERIAL COURTS W.E.F. …….

Sl. No.	Details of the court	Total no. of judgment delivered	Total no. of conviction	Percentage of conviction	Total no. of acquittal	Percentage of acquittal	Remarks
1	2	3	4	5	6	7	8

(e) Statement of the disposal of the cases monthwise in following proforma:-

STATEMENT OF THE DISPOSAL OF THE COURT OF……

Month & Year	Actual work done by the P.O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total
		Contested	Uncontested		Contested	Uncontested	
1	2	3	4	5	6	7	8
January …….							
February ……							
TOTAL							

(f) Reason of pendency of cases since more than five years in following proforma:-

REASON OF PENDENCY OF CASE OF THE COURT OF……

Sl. No.	Case No.	Reason of pendency	Step taken by the present Presiding Officer with date of last order
1	2	3	4

(g) Consolidated statement of under trial prisoners of the Judgeship in the following proforma :-

CONSOLIDATED STATEMENT OF UNDER TRIAL PRISONERS ON ……. OF THE JUDGESHIP OF……

Sl. No.	Details of the Court	Total No. of prisoners on …….	Total No. of U.T. prisoners on …….	Under Trial in Jail								Remarks
				One month	Two months	Three months	Sixth months	One year	Over one year	Over two years	Over three years	
1	2	3	4	5	6	7	8	9	10	11	12	13

(h) Statement of cases relating to Legal Service Act during one year in the following proforma :-

STATEMENT OF CASES RELATING TO LEGAL SERVICE ACT

W.E.F. ..... TO .....

Sl. No.	No. of cases instituted	No. of cases disposed of	No. of cases pending	Reason for pendency	Remarks
1	2	3	4	5	6

10. Are endorsement of admission and denial obtained from the accused or his counsel on the documents filed and relied upon by the prosecution? (Section 294 Cr.P.C.)

11. (a) Are Surrender and Bail Applications disposed off the same day and orders communicated to the Superintendent of Jail immediately? Give details for one week (to be specified) in Proforma-IV.

(b) If bail applications are not being disposed off on the same day? Give reasons, if any.

(c) Reasons for non-disposal of pending bail applications before the Magistrates on the same day as per the directions of Hon'ble Apex Court vide Court's Letter No. 6835/2011/Admin. G-II Section dated 21.04.2011?

(d) Are verification of status of sureties by advocates accepted? If so, upto what amount?

(e) Whether the bail bonds are being accented the very day they are furnished? State three cases within the month of inspection when this was not done and why?

(f) Whether release orders are being dispatched to the Jail authorities the same days? State three cases of the quarter in which this was not done and why?

(g) Whether during the quarter under review bails were granted by the Magistrate in any case exclusively triable by the Court of Sessions? If so, particulars be given.

12. Are the F. I.Rs. received, initialled and dated by the Presiding Officer and entered in the register?

13. (a) Are the statements of the complaints being recorded the same day under section 200 Cr.P.C.? (Submit statement in Proforma-IV A).

(b) Are the statements of complainant under section 200 Cr.P.C. recorded by the Presiding Officer himself?

14. Examine the Fine Register and State : ---

(a) Is register of fine correctly maintained and the amounts entered by the Presiding Officer in his own hand and initialled? [Rule 71, 79 and 82 G.R. (Criminal)].

(b) Are receipts of fine immediately issued and signatures of the person, obtained on the counterfoil? [Rule 79 G.R. (Criminal)].

(c) Is the realization of fine communicated to the Superintendent, Jail immediately? [Rule 77 G.R. (Criminal)].

(d) Are the amounts of fine received sent to the Treasury immediately or to the Nazarat the same day? [Rule 76 G.R. (Criminal)].

(e) What is the total amount of fine pending recovery on the date of inspection and what are 5 oldest items?

(f) What steps have been taken for the recovery of the outstanding fine?

(g) How much fine and how many items have been stayed from the appellate courts? Give a list.

(h) How much amount is fit to be written off being irrecoverable? What efforts have been made for its recovery?

(i) Is the Fly-leaf of check receipt book being completed and the fine receipt book sent to the Treasury for checking every month? [Rule 85 G.R. (Criminal)].

(j) Whether the amount of fine has been verified from the Treasury, up-to-date?

(k) Are refund vouchers prepared promptly? [Rule 81 G.R. (Criminal)].

(l) Is proper certificate being appended at the end of each month after due verification of fine, to the pending items of fine?

(m) Whether any amount of fine, has been written off during the year? If so, on valid reasons.

(n) Whether any amount of fine is liable to be written off and is continued to be shown in the fine register? If yes, why?

15. (a) Is the Presiding Officers' diary properly maintained? Are the dates to which cases are adjourned? The purpose for which fixed, the work done on that day, entered in the diary? [Rule 5-8 G.R. (Criminal)].

(b) Are the cases fixed for particular days in the diary of the Presiding Officer in such a manner as to facilitate hearing of all the cases fixed on that day and disposal of old cases?

(c) Are cases taken strictly in accordance with priority rule and are also entered in the diary in that manner?

(d) Does the Presiding Officer fix and does sufficient work on each day?

(e) Are cases taken up day to day or unnecessarily adjourned?

(f) Are the witnesses present on a particular day examined before adjournment?

(g) How many cases are adjourned in a week on the personal ground of the counsel, for no time and on account of no objection by the opposite party?

(h) Are judgments delivered promptly within 14 days from the close of arguments? Are arguments heard soon after the close of the evidence? (Give statement in Proforma-III for last two months before the inspection).

(i) Whether the judgments are delivered on the date fixed or are being postponed for any valid reason?

(j) Have adjournments been frequently granted? Are they granted on sufficient grounds and reasons for adjournments are noted in the order sheet?

(k) How many witnesses are summoned by the court every day on average? How many of them are examined and discharged and how many are ordered to come again?

(l) Whether cases had to be adjourned for non-receipt of process within time? State three cases in which necessary steps were taken by the Presiding Officer.

(m) Whether cases had to be adjourned for non-attendance of accused? State three cases and the steps taken by the Presiding Officer to ensure attendance.

(n) Whether cases had to be adjourned for non-attendance of prosecution witnesses? State three cases in which this delay took place, its frequency and the steps taken to ensure attendance.

(o) Whether cases were adjourned for want of time or otherwise despite availability of the prosecution witnesses, without examining them? State three cases setting out the reasons for not examining such witnesses.

(p) Whether cases were frequently adjourned on any other ground or grounds, if so, what are the justifications?

NOTE :-

For answers to the above questions a complete statement of work fixed and done datewise for full one week (Monday to Saturday) two weeks before the notice of inspection should be got prepared on Proforma-V. One more statement in Proforma-III be also got prepared for all contested cases of the month previous to the month in which notice of inspection is given.

16. (a) Whether the procedure prescribed under section 206 Cr.P.C. for disposal of petty offences is scrupulously being followed or not?

(b) Whether the registers of petty offences have been properly maintained in Form no. 9 and 45 or not?

(c) How many petty offence cases are pending for want of attendance of accused? Whether the process has been issued in time or not?

17. Is proper use being made of the provisions of sections 203, 239 and 258 of Cr.P.C.? How many cases under these provisions disposed off during the last one year preceding the inspection?

18. How many cases have been compounded during the last one year?

19. (a) In how many cases benefit of sections 3 and 4 of the Probation of Offenders Act has been given during the year under inspection?

(b) Whether the benefit of sections 3 and 4 of the Probation of the Offenders Act has been given to the accused in any case relating to economic offence, accident cases and serious offence cases, where probation is not admissible?

20. Out of the contested cases, how many cases ended in acquittal and how many in conviction and their percentage during the last one year?

21. Whether the Magistrate has summary powers? If so, in how many cases the powers have been exercised?

22. In how many cases accused have been discharged at the stage of charge?

23. Whether the Magistrate has been effectively disposing off the applications concerning disposal of case property under Chapter XXXIV Cr.P.C. and how many applications are pending undisposed off and reasons thereof?

24. Has register of requisition of records in Form No.-5 as amended been maintained? [Rule 130 G.R. (Criminal)].

25. Whether free copies are issued to the accused in cases of convictions immediately? If not, is rule 146 G.R. (Criminal) complied with?

26. In how many cases compensation and costs have been awarded during the last one year and what amounts?

27. (a) How many cases are stayed under orders of the appellate court or the High Court? (Give details in a Proforma Statement-VI). Whether any enquiries were made and when was the last reminder sent?

(b) Whether the skeleton files are prepared and maintained where original files have been requisitioned by the superior Courts and enquiries are regularly been made therein?

28. Whether the number of Inspection and Search applications is satisfactory? Give the comparative figures in Proforma-VII.

29. Whether monthly, quarterly, annual statements have been submitted in time? If not, how much delay? Give a detailed list of those statements submitted late in Proforma-VIII.

30. Examination of Criminal files (2) oldest of each category as given below : -

(I) Police challani cases :

(a) Inquiry cases
(b) Warrant trials
(c) Summon trials
(d) Summary trials

(II) Complaint cases :

(a) Inquiry cases
(b) Warrant trials
(c) Summon trials
(d) Summary trials

NOTE :

These files have to be checked especially on the point of compliance of orders passed by the Court, on the point of issue of summons, notices and warrants to the accused and witnesses, execution of personal bonds, existence of bail with reference to Rules 22, 23, 26, 27, 29 and 61 of General Rules (Criminal).

31. **PERIODICAL RETURNS :**

(a) Whether a list of periodical returns, yearly, six monthly, quarterly and monthly and so on is maintained in the Court and is the same upto-date?

32. When examining records **as in 30**, the following points would also be noted :

(a) Whether remands are being properly given?

(b) With whom the remand papers are kept?

(c) Whether the files are properly maintained and all the papers are indexed according to Chapter IV of G.R. (Criminal)?

(d) Whether appropriate and correct charges are framed?

(f) Whether appropriate sentences are passed?

33. (a) In how many applications under section 156 (3) Cr.P.C., the investigation has been ordered and how many of them have been treated as complaint during the year?

(b) Whether the applications under section 156 (3) Cr.P.C. have been disposed off by proper and speaking orders?

34. Whether the orders under section 203 or 204 Cr.P.C. are properly passed after conducting proper enquiry under sections 200 and 202 Cr.P.C. in complaint cases without any delay? Examine some cases.

35. (a) Whether the amount of bail is fixed by the Magistrates properly and not in arbitrary manner?

(b) Whether the verification of sureties is made in appropriate cases only?

(c) Whether the verification of sureties from Revenue Authorities and Police is obtained without any delay? Examine some cases.

36. (a) Whether final reports are disposed off after giving notice to the complainant/first informant?

(b) How many final reports are pending undisposed off?

(c) Whether final reports are disposed off by reasoned orders without any delay?

37. Number of cases relating to Cyber Laws, hacking of I.T. etc. and their progress?

38. (a) Get a statement of consignment of records during the last three months prepared in Proforma-IX and comment about the arrears.

(b) Whether consignment of records is made on due date and any unconsigned record is pending?

39. Whether the unconsigned records of cases involving petty offences have been weeded out and a proper register for weeding of such records is duly maintained?

PROFORMA – I

Name of Officer	Quarter ending	Date of Inspection	Date of submission to District Judge
1	2	3	4

PROFORMA – II

SI. No.	Nature of Cases	Pending	Pending	Number and dates of 10 old cases
(I)	Police Challani Cases: (a) Inquiry cases (b) Warrant trials (c) Summon trials (d) Summary trials (e) Petty cases			
(II)	(a) Inquiry cases (b) Warrant trials (c) Summon trials (d) Summary trials (e) Petty trials			

PROFORMA – III

No. of cases	Name of parties	Nature of offence of section and Act	Date or dates on which evidence was recorded	Date of hearing of arguments	Date fixed for judgments	Actual date of delivery of judgment	Remarks
1	2	3	4	5	6	7	8

PROFORMA – IV

DETAILS OF DISPOSAL OF BAIL APPLICATION DURING				
Particulars of cases	Section of offences	Date of application	Date of disposal	Date of communication to the Superintendent of Jail
1	2	3	4	5

PROFORMA-IV A

SI. No.	Case No.	Name of Parties	Date of Complaint	Date of recording statement U/s 200 Cr.P.C.
1	2	3	4	5

PROFORMA – V

No. of cases	Name of parties	Section and Act or nature of offence	Purpose	Work done	Remarks
1	2	3	4	5	6

PROFORMA – VI

Details of the case	Court under whose order the case is lying stayed	Date of stay order and particulars of the case in which the stay order was passed	Whether any enquiry was made? If so, give date of enquiries made during the last one year
1	2	3	4

PROFORMA – VII

Inspection/ Search Applications	From.....to.....		From.....to.....	
	No.	Amount	No.	Amount
1	2	3	4	5
Inspection Applications				
Search Applications				

PROFORMA – VIII

Details of Statement	Due date	Date on which submitted
1	2	3

PROFORMA – IX

Month	No. of files decided	No. of files consigned	No. of Badar files received	No. of files returned after removing defects	No. of files not returned after removing defects with reasons
			Date of receipt	Date of return	
1	2	3	4	5	6

PART - XV SESSIONS COURTS

1. Give the list of Courts doing sessions work and the names of their Presiding Officers.

2. What is the number of Sessions Trial pending in each Sessions Court.

3. Give the consolidated statement of the Sessions Trials pending in all the courts in a chronological order. Give the list of oldest 10 Sessions Trials pending in each Court of the Sessions Division.

4. How many Sessions Trials have been stayed under orders of the High Court and the Supreme Court? Give details.

5. Whether the position of stay order is being inquired into after 3 months and a note thereof is being made in the order sheet of the Sessions Trial?

6. Give a list of Sessions Trial in which one or more accused persons are in jail and give reasons as to why Sessions Trials are being held up.

7. (a) Are the witnesses being examined in Session Trials continuously till the examination of a witness is completed?

   (b) Is the hearing of Sessions Trials done on day to day basis?

8. Are the judgments and order in Session Trials are being pronounced promptly and within the prescribed time?

9. How many Criminal Revisions and Criminal Appeals are pending in each Session Court? Give the complete statement of the pending revisions and appeals yearwise.

10. Are the registers relating to Sessions Trials, Criminal Revisions and Criminal Appeals are being maintained properly and up-to-date?

11. (a) Are the records of Sessions Trials requisitioned by the High Court or the Supreme Court being transmitted without reminders?

    (b) Whether the skeleton files are maintained in the cases to hear records of requisitioned by the High Court and Supreme Court and regular enquiries are being made in such matters?

12. (a) In order to tide over the problem of old cases, every Subordinate Court shall give history sheet of five oldest cases of each category (e.g. Sessions Cases, Appeals, Revisions, Suits, Miscellaneous Cases, Execution Cases, Police Cases, Complaints etc.) in following points and particular attention be given for taking firm steps :-

HISTORY SHEET OF OLDEST CASES

IN THE COURT OF …….
CASE NO. …….

1.Date of institution :

2.Date of admission/registration :

3.Date of appearance of Defendants/Respondents/ accused persons/opposite party :

4.Date of filing written statement/rejoinder/ supply of police paper to accused and commitment :

(state reason of delay, if any,
mention if interlocutory matter intervened)
5.Date of framing issues/charge :
6.First Date of hearing :
7.Period of pendency with progress made before each presiding officer :

(b) Statement of disposal by the Presiding Officers of the Judgeship during the period of inspection in the following proforma :-

Statement of the disposal by the Presiding Officers of the Judgeship from ……. to …….

Sl. No.	Name of Presiding Officer	Actual work done by P. O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total witnesses examined	Remarks
			Contested	Uncontested		Contested	Uncontested		
1	2	3	4	5	6	7	8	9	10
1.									
2.									

(c) Consolidated statement of percentage of conviction and acquittal in Sessions Cases by the Sessions Judge of Sessions Division in the following proforma and also the details of the cases in which all the witnesses of the fact stand hostile. It should also be mentioned that what steps were taken including the examination of the hostile witnesses by the Presiding Officer and proceedings initiated against hostile witnesses :-

CONSOLIDATED STATEMENT OF PERCENTAGTE OF CONVICTION & ACQUITTAL IN SESSIONS CASES BY THE SESSIONS JUDGES OF SESSIONS DIVISION W.E.F. …….

Sl. No.	Details of the court	Total No. of judgment	Total No. of conviction	Percentage of conviction	Total No. of acquittal	Percentage of acquittal	Remarks
1	2	3	4	5	6	7	8
1.	District & Sessions Judge						
2.	Additional District & Sessions Judge/ Special Judge						

(d) Statement of the disposal of the cases month-wise in following proforma:-

STATEMENT OF THE DISPOSAL OF THE COURT OF ……

Month & Year	Actual work done by the P.O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total
		Contested	Uncontested		Contested	Uncontested	
1	2	3	4	5	6	7	8
January ……							
February ……							
TOTAL							

(e) Reason of pendency of cases since more than five years in following proforma:-

REASON OF PENDENCY OF CASE OF THE COURT OF.....

Sl. No.	Case No.	Reason of pendency	Step taken by the present Presiding Officer with date of last order
1	2	3	4

(f) Consolidated statement of under trial prisoners of the Judgeship in the following proforma :-

CONSOLIDATED STATEMENT OF UNDER TRIAL PRISONERS ON …… OF THE JUDGESHIP OF.....

Sl. No.	Details of the Court	Total No. of prisoners on …….	Total No. of U.T. prisoners on …….	Under Trial in Jail								Remarks
				One month	Two months	Three months	Sixth months	One year	Over one year	Over two years	Over three years	
1	2	3	4	5	6	7	8	9	10	11	12	13

13. Whether certified copy of judgment and orders are being provided promptly to the accused persons who are convicted and sentenced? If not, give reasons.

14. Whether the Sessions Judge or Additional Sessions Judge have ever inspected the jail? If so, give details.

15. Whether Amicus Curie for the accused are being appointed on the basis of the approved list of the Amicus Curie?

16. Give the list of Sessions Trials decided by the Judge in the year of inspection in which the prosecution witnesses become hostile.

17. Give the list of Sessions Trials decided by the Judge in the year of inspection in which the prosecution witnesses were not declared hostile and the entire evidence of prosecution and defence were recorded showing how many sessions trials resulted in acquittal and how many resulted in conviction?

18. Whether any action has been taken against the complainant and witnesses who have turned hostile?

19. Whether the Presiding Judge is conducting the Sessions Trials efficiently and properly?

20. In how many appeals of revisions the case has been remanded back to the trial court? Whether the remand is proper?

21. Whether the bail and admission work is done by the Sessions Judge himself or is frequently transferred to some Additional District & Sessions Judge?

PART - XVI FAMILY COURTS

1. Give the name of the Presiding Officer who worked since last inspection with duration.

2. Whether the staff is adequate or under manned and whether the distribution of work is even and proper? Give the names of the staff, post and duration?

3. (a) What is the number of pending files of all types of cases on the first day of the month of inspection and the corresponding day last year? Give details in the Proforma and also give reasons for increase or decrease?

Sr. No.	Nature of cases	Pending on	Pending on	No. and date of institution of 10 oldest cases
1	2	3	4	5

(b) Give number and date of institution of 10 oldest cases in the column No. 5 of the Proforma in forgoing question and give reasons for its pendency.

(c) Give year wise break up of pending files of each types of cases shown in the Proforma in forgoing question in comparative form for both the dates.

4. (a) How many contested cases have been decided by the Officer during the last one year?

(b) Give yearwise break up of all the contested cases decided of all types.

(c) How many cases were decided ex-parte or in default or otherwise and what is the percentage of these cases to the contested cases?

5. (a) In order to tide over the problem of old cases, every Subordinate Court shall give history sheet of five oldest cases of each category (e.g. Sessions Cases, Appeals, Revisions, Suits, Miscellaneous Cases, Execution Cases, Police Cases, Complaints etc.) in following points and particular attention be given for taking firm steps :-

HISTORY SHEET OF OLDEST CASES

IN THE COURT OF .....
CASE NO. .....

1.Date of institution :

2.Date of admission/registration :

3.Date of appearance of Defendants/Respondents/ accused persons/opposite party :

4.Date of filing written statement/rejoinder/ supply of police paper to accused and commitment :

(state reason of delay, if any, mention if interlocutory matter intervened)

5.Date of framing issues/charge :

6.First Date of hearing :

7.Period of pendency with progress made before each presiding officer :

(b) Statement of disposal by the Presiding Officers of the Judgeship during the period of inspection in the following proforma :-

Statement of the disposal by the Presiding Officers of the Judgeship from ..... to .....

Sl. No.	Name of Presiding Officer	Actual work done by P. O.	Cases disposed of				Total no. of cases disposed of	Witnesses examined		Total witnesses examined	Remarks
			Civil		Criminal						
			Contested	Uncontested	Contested	Uncontested		Contested	Uncontested		
1	2	3	4		5		6	7	8	9	10
1.											
2.											

(c) Statement of the disposal of the cases Month-wise and Act-wise in following proforma:-

STATEMENT OF THE DISPOSAL OF THE COURT OF .....

Month & Year	Actual work done by the P.O.	Cases disposed of				Total no. of cases disposed of	Witnesses examined		Total
		Civil		Criminal			Contested	Uncontested	
		Contested	Uncontested	Contested	Uncontested				
1	2	3	4	5	6	7	8	9	10
January									
February									
TOTAL									

(d) Reason of pendency of cases since more than five years in following proforma:-

REASON OF PENDENCY OF CASE OF THE COURT OF.....

Sl. No.	Case No.	Reason of pendency	Step taken by the present Presiding Officer with date of last order
1	2	3	4

(e) Statement of cases relating to Legal Service Act during one year in the following proforma :-

STATEMENT OF CASES RELATING TO LEGAL SERVICE ACT

W.E.F. ..... TO .....

Sl. No.	No. of cases instituted	No. of cases disposed of	No. of cases pending	Reason for pendency	Remarks
1	2	3	4	5	6

6. Is the weekly cause list being pasted on each Saturday and all the cases for a particular day and adjourned cases within the same are entered therein proper columns?

7. Are the diaries of Presiding Officer and the reader properly maintained? Are the dates to which the cases are adjourned, the purpose for which fixed and the work done on that day entered in the diary? [Rules 40 and 18A of G.R. (Civil)]

8. Whether the judicial records are properly maintained by the officials and all the papers have been indexed according to the provisions of Chapter V of G.R. (Civil)?

9. Whether all the registers have been prepared on proper forms and all the cases have been properly entered therein?

10. How many suits, execution cases and miscellaneous cases have been stayed by the appellate Courts or the records have been sent to them? Give a list in the prescribed Proforma-I. Have any inquiries been made during the last three months?

11. Whether the service of notice/summons in the cases is effective and no delay is caused due to service of notice? Examine some cases.

12. Are the decided records consigned on the dates fixed? If not, what is the arrear?

13. Whether the number of inspections and search applications is satisfactory? Give comparative statement in prescribed Proforma-II.

14. The status of requisitions from other courts and copying departments and duration of their pendency, if any.

15. Are the judgments/orders passed within 15 days of hearing arguments and the judgments are not adjourned or refixed for arguments in a routine manner?

16. (a) Are the cases for recovery of maintenance allowance are regularly taken up and effective steps are taken to realise the amount of maintenance due?

(b) Whether the amount of maintenance, realised or deposited in court is actually paid to the claimant and proper receipts are kept on record? Examine some cases.

(c) Whether interim maintenance is awarded in maintenance cases and is being paid to the petitioners by the opposite parties?

17. Are decrees in civil family dispute cases being prepared diligently and proper notice is given to the party's counsel without any delay?

18. Whether the Presiding Officer is making genuine efforts himself or through counsellor for reconciliation before beginning of the trial?

PROFORMA – I

Details of the case	**Court under whose order the case is lying stayed**	**Date of stay order and particulars of the case in which the stay order was passed**	**Whether any enquiry was made? If so, give date of enquiries made during the last one year**
1	**2**	**3**	**4**

PROFORMA – II

Inspection/ Search Applications	From.....to.....		From.....to.....	
	No.	Amount	No.	Amount
1	2	3	4	5
Inspection Applications				
Search Applications				

PART -XVII JUVENILE JUSTICE BOARD

1. Give the names of the Presiding Officer and the members of the board, who worked since the last inspection with duration.

2. Whether the staff is adequate or under manned and whether the distribution of work is even and proper? Give the names of the members of the staff, posts and duration.

3. (a) What is the number of pending files of all types of cases on the first day of the month of the inspection and the corresponding day last year? Give in the Proforma and also give reasons for increase or decrease.

Sr. No.	Nature of cases	Pending on	Pending on	No. and date of institution of 10 oldest cases
1	2	3	4	5

(b) Give the number and date of institution of ten oldest cases of each type in the remarks column of Proforma and also give reasons for increase.

(c) Give yearwise break-up of pending files of each type of cases shown in Proforma and comparative form for both the dates.

4. (a) How many contested cases have been decided by the Officers during the last one year?

(b) Give the yearwise break-up of all the contested cases decided of all types.

5. What are the institutions, disposals and pendency of the year under inspection as well as for the previous year?

6. (a) In order to tide over the problem of old cases, every Subordinate Court shall give history sheet of five oldest cases of each category (e.g. Sessions Cases, Appeals, Revisions, Suits, Miscellaneous Cases, Execution Cases, Police Cases, Complaints etc.) in following points and particular attention be given for taking firm steps :-

HISTORY SHEET OF OLDEST CASES

IN THE COURT OF .....
CASE NO. .....

1.Date of institution :
2.Date of admission/registration :

3.Date of appearance of Defendants/Respondents/ accused persons/opposite party :

4.Date of filing written statement/rejoinder/ supply of police paper to accused and commitment :

(state reason of delay, if any, mention if interlocutory matter intervened)

5.Date of framing issues/charge :

6.First Date of hearing :

7.Period of pendency with progress made before each presiding officer :

(b) Statement of disposal by the Presiding Officers of the Judgeship during the period of inspection in the following proforma :-

Statement of the disposal by the Presiding Officers of the Judgeship from ..... to .....

Sl. No.	Name of Presiding Officer	Actual work done by P. O.	Cases disposed of				Total no. of cases disposed of	Witnesses examined		Total witnesses examined	Remarks
			Civil		Criminal						
			Contested	Uncontested	Contested	Uncontested		Contested	Uncontested		
1	2	3	4		5		6	7	8	9	10
1.											
2.											

(c) Consolidated statement of percentage of conviction and acquittal in the cases by the Magistrate in the following proforma and also the details of the cases in which all the witnesses of the fact stand hostile. It should also be mentioned that what steps were taken including the examination of the hostile witnesses by the Magistrate and initiating action against hostile witnesses:-

CONSOLIDATED STATEMENT OF PERCENTAGTE OF CONVICTION & ACQUITTAL IN THE CASES BY THE MAGISTRATE W.E.F. .....

Sl. No.	Details of the court	Total no. of judgment delivered	Total no. of conviction	Percentage of conviction	Total no. of acquittal	Percentage of acquittal	Remarks
1	2	3	4	5	6	7	8

(d) Statement of the disposal of the cases month-wise in following proforma:-

STATEMENT OF THE DISPOSAL OF THE COURT OF .....

Month & Year	Actual work done by the P.O.	Cases disposed of		Total no. of cases disposed of	Witnesses examined		Total
		Contested	Uncontested		Contested	Uncontested	
1	2	3	4	5	6	7	8
January							
February							
TOTAL							

(e) Reason of pendency of cases since more than five years in following proforma:-

REASON OF PENDENCY OF CASE OF THE COURT OF.....

Sl. No.	Case No.	Reason of pendency	Step taken by the present Presiding Officer with date of last order
1	2	3	4

(f) Consolidated statement of under trial Juveniles of the Judgeship in the following proforma :-

CONSOLIDATED STATEMENT OF UNDER TRIAL JUVENILES ON ..... OF THE JUDGESHIP OF.....

Sl. No.	Details of the Court	Total No. of prisoners on	Total No. of U.T. prisoners on	Under Trial in Jail								Remarks
				One month	Two months	Three months	Sixth months	One year	Over one year	Over two years	Over three years	
1	2	3	4	5	6	7	8	9	10	11	12	13

7. Are endorsement of admission and denial obtained from the accused or his counsel on the documents filed and relied upon by the prosecution? (section 294 Cr. P. C.)

8. (a) Are Surrender and Bail Applications disposed off the same day and orders communicated to the Superintendent of Jail/Superintendent, Juvenile Observation Home immediately? Give details for one week (to be specified) in following Proforma :-

PROFORMA

DETAILS OF DISPOSAL OF BAIL APPLICATION DURING				
Particulars of cases	Section of offences	Date of application	Date of disposal	Date of communication to the Superintendent of Jail
1	2	3	4	5

(b) Are the Bail Applications not being disposed off on the same day? Give reasons, if any.

(c) Reasons for non-disposal of pending Bail Applications same day as per directions of Hon'ble Apex Court vide Court's Letter No. 6835/2011/Admin. G-II Section dated 21.04.2011.

(d) Are verification of status of sureties by advocates accepted? If so, upto what amount?

(e) Whether the bail bonds are being accepted the very day they are furnished? State three cases within the month of inspection when this was not done and why?

(f) Whether release orders are being dispatched to the Jail/Juvenile Observation Home the same day. State three cases of the quarter in which this was not done and why?

(g) Whether the bond of guardian/parents of the juvenile is being properly filed for his release on bail?

9. (a) Whether the amount of bail is fixed by the Board properly and not in arbitrary manner?

(b) Whether the verification of sureties is made in appropriate cases only?

(c) Whether the verification of sureties from Revenue Authorities and Police is obtained without any delay? Examine some cases.

10. Whether the procedure prescribed for declaration as juvenile under section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 is being observed by the Board? If not, give reasons.

11. Whether the sitting of the Juvenile Board is made in the premises of Juvenile Board?

12. Whether the condition of juvenile home and facilities of living, education and sports are properly provided to the inmates therein?

13. Examine the Fine Register and State : ---

(a) Is register of fine correctly maintained and the amounts entered by the Presiding Officer in his own hand and initialled? Rule 71, 79 and 82 C.R. (Criminal).

(b) Are receipts of fine immediately issued and signatures of the person, obtained on the counterfoil? [Rule 79 G.R. (Criminal)].

(c) Is the realization of fine communicated to the Superintendent, Jail immediately? [Rule 77 G.R. (Criminal)].

(d) Are the amounts of fine received sent to the Treasury immediately or to the Nazarat the same day? [Rule 76 G.R. (Criminal)].

(e) What is the total amount of fine pending recovery on the date of inspection and what are 5 oldest items?

(f) What steps have been taken for the recovery of the outstanding fine?

(g) How much fine and how many items have been stayed from the appellate courts? Give a list.

(h) How much amount is fit to be written off being irrecoverable? What efforts have been made for its recovery?

(i) Is the Fly-leaf of check receipt book being completed and the fine receipt book sent to the Treasury for checking every month? [Rule 85 G.R. (Criminal)].

(j) Whether the amount of fine has been verified from the Treasury, up-to-date?

(k) Are refund vouchers prepared promptly? [Rule 81 G.R. (Criminal)].

(l) Is proper certificate being appended at the end of each month after due verification of fine, to the pending items of fine?

(m) Whether any amount of fine has been written off during the year? If so, on valid reasons or not?

(n) Whether any amount of fine is liable to be written off and is continued to be shown in the fine register? If yes, why?

14. (a) Is the Presiding Officer's diary properly maintained? Are the dates to which cases are adjourned? The purpose for which fixed, the work done on that day, entered in the diary? [Rule 5-8 G.R. (Criminal)].

(b) Are the cases fixed for particular days in the diary of the Presiding Officer in such a manner as to facilitate hearing of all the cases fixed on that day and disposal of old cases?

(c) Are cases taken strictly in accordance with priority rule and are also entered in the diary in that manner?

(d) Does the Presiding Officer fix and does sufficient work on each day?

(e) Are the witnesses present on a particular day examined before adjournment?

(f) How many cases are adjourned in a week on the personal ground of the counsel, for no time and on account of no objection by the opposite party?

(g) Are judgments delivered promptly within 14 days from the close of arguments? Are arguments heard soon after the close of the evidence? Give statement in following Proforma for last two months before the inspection :-

PROFORMA

No. of cases	Name of parties	Nature of offence of section and Act	Date or dates on which evidence was recorded	Date of hearing of arguments	Date fixed for judgments	Actual date of delivery of judgment	Remarks
1	2	3	4	5	6	7	8

(h) Whether the judgments are delivered on the date fixed or are being postponed on any valid reasons?

(i) Have adjournments been frequently granted? Are they granted on sufficient grounds and reasons for adjournments are noted in the order sheet?

(j) How many witnesses are summoned by the court every day on average? How many of them are examined and discharged and how many are ordered to come again?

(k) Whether cases had to be adjourned for non-receipt of process within time? State three cases in which necessary steps were taken by the Presiding Officer.

(l) Whether cases had to be adjourned for non-attendance of accused? State three cases and the steps taken by the Presiding Officer to ensure attendance.

(m) Whether cases had to be adjourned for non-attendance of prosecution witnesses? State three cases in which this delay took place, its frequency and the steps taken to ensure attendance.

(n) Whether cases were adjourned for want of time or otherwise despite availability of the prosecution witnesses, without examining them? State three cases setting out the reasons for not examining such witnesses.

(o) Whether cases were frequently adjourned on any other ground or grounds, if so, what are the justifications?

NOTE :-

For answers to the above questions a complete statement of work fixed and done datewise for full one week (Monday to Saturday) two weeks before the notice of inspection should be got prepared on following Proforma-A. One more statement in following Proforma-B be also got prepared for all contested cases of the month previous to the month in which notice of inspection is given.

PROFORMA – A

No. of cases	Name of parties	Section and Act or nature of offence	Purpose	Work done	Remarks
1	2	3	4	5	6

PROFORMA - B

No. of cases	Name of parties	Nature of offence of section and Act	Date or dates on which evidence was recorded	Date of hearing of arguments	Date fixed for judgments	Actual date of delivery of judgment	Remarks
1	2	3	4	5	6	7	8

15. In how many cases accused have been discharged at the stage of charge?

16. Whether free copies are issued to the accused in cases of convictions immediately? If not, is rule 146 G.R. (Criminal) complied with?

17. (a) How many cases are stayed under orders of the appellate Court or the High Court? (Give details in a Proforma given below). Whether any enquiries were made and when was the last reminder sent?

PROFORMA

Details of the case	Court under whose order the case is lying stayed	Date of stay order and particulars of the case in which the stay order was passed	Whether any enquiry was made? If so, give date of enquiries made during the last one year
1	2	3	4

(b) Whether the skeleton files are prepared and maintained where original files have been requisitioned by the superior Courts and enquiries are regularly been made therein?

18. Whether the juveniles in conflict with law have been kept in Observation Homes/Special Homes with classification of their age in accordance with the provisions of section 8 and 9 of the Juvenile Justice (Care and Protection of Children) Act, 2000?

19. Whether any juvenile has been detained in the Observation Home without giving information to the parents/guardians in accordance with the provisions of section 13 of the Juvenile Justice (Care and Protection of Children) Act, 2000?

20. Examine the file of cases relating to Inquiry in various cases, pending being oldest in the Board.
Note :-

These files have to be checked especially on the point of compliance of orders passed by the Court, on the point of issue of summons, notices and warrants to the accused and witnesses, execution of personal bonds, existence of bail with reference to Rules 22, 23, 26, 27, 29 and 61 of General Rules (Criminal).

21. (a) Whether the Board has concluded the inquiry under section 14 of the Juvenile Justice (Care and Protection of Children) Act, 2000 within the stipulated time? If not, give reasons.

(b) Whether the C.J.M./C.M.M. has reviewed the pendency of cases in the Board at every six months in accordance with the provisions of section 14 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2000?

22. In how many cases, the Board has obtained social investigation reports on juveniles in conflict with law before passing any orders under section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000?

23. In how many cases, the juveniles have not been found fit to be sent/detained in Special Homes due to seriousness of offence committed by him or due to their conduct and behaviour being not in their interest or in the interest of other juveniles to send a Special Home and what orders have been passed for them [section 16 of the Juvenile Justice (Care and Protection of Children) Act, 2000]?

24. When examining records **as in 18**, the following points would also be noted :

(a) Whether remands are being properly given?
(b) With whom the remand papers are kept?
(c) Whether the files are properly maintained and all the papers are indexed according to Chapter IV of G.R. (Criminal)?
(d) Whether appropriate and correct charges are framed?
(f) Whether appropriate sentences are passed?

25. (a) Get a statement of consignment of records during the last three months prepared in following Proforma and comment about the arrears.

PROFORMA

Month	No. of files decided	No. of files consigned	No. of Badar files received	No. of files returned after removing defects	No. of files not returned after removing defects with reasons
			Date of receipt	Date of return	
1	2	3	4	5	6

(b) Whether consignment of records is made on due date and any unconsigned record is pending?

PART - XVIII MORNING/EVENING COURT

1.Whether the Morning/Evening Court(s) is/are functioning in the Judgeship of ……. and how many?

2.The Name of Presiding Officer(s) and Jurisdiction in the following proforma :-

Sl. No.	Name of Presiding Officer(s)	Designation	Date of posting
1	2	3	4

3.What is the working hours fixed for court(s)?

Answers of the following points be also obtained :-

1. Give the name of the present Presiding Officer and date of his posting in the court.

2. Give the name of the predecessor Presiding Officer and period of his posting.

3. Whether the staff is adequate or under manned and whether the distribution of work is even and proper? Give the names of the members of the staff with posts and duration.

4. What is the jurisdiction being exercised by the Presiding Officer?

5. Is the weekly cause list being posted on each Saturday and are all the cases for a particular day and adjourned cases within the same are entered therein in proper columns? [Rule 16 G.R. (Civil) Part-I].

6. Give the details of the Quarterly Inspection of the court made during the inspection year in the following proforma :-

PROFORMA-I

Name of Officer	Quarter ending	Date of inspection	Date of submission to District Judge
1	2	3	4

7. (a) What is the number of pending files of all types of cases on the first day of the month of the inspection and the corresponding day last year? Give details in Proforma-II and also give reasons for increase or decrease.

(b) Give the number and date of institution of ten oldest cases of each type in the remarks column of proforma-II.

(c) Give an year-wise break-up of pendency of the cases Act-wise as per the jurisdiction prescribed in the Morning/Evening Rules, 2011 shown in Proforma-II in comparative form for both the dates?

PROFORMA-II

Sl. No.	Name of case	Pending on	Pending on	No. and dates of ten oldest cases	Remarks
1	2	3	4	5	6

8. (a) How many contested cases have been decided by the Officer during the last one year?

(b) Give the year-wise break-up of all the contested cases decided of all types.

(c) How many cases were decided ex-parte or in default and what is the percentage of these cases to the contested cases?

(d) How many cases were decided otherwise?

9. (a) Is the Presiding Officer's diary and the Reader's diary properly maintained? Are the dates to which cases are adjourned, the purpose for which fixed and the work done on that day, entered in the diary? [Rules 40 and 18-A of G.R. (Civil)].

(b) Are all the cases entered in the diary of Presiding Officer and the Reader have been carried forward for the next date fixed?

(c) Are the cases fixed for particular days in the diary of the Presiding Officer in such a manner as to facilitate hearing of all the cases fixed on that day and disposal of old cases?

(d) Are cases taken strictly in accordance with priority rule and are also entered in the diary in that manner?

(e) Does the Presiding Officer fix and does sufficient work on each day?

(f) Are cases taken up day to day or are unnecessarily adjourned?

(g) Are the witnesses present on a particular day examined before adjournment?

(h) Are arguments heard promptly and judgments pronounced within prescribed time?

(i) Are cases adjourned for sufficient reasons by passing detailed order?

(j) Are decree prepared in time and in accordance with rule?

(k) How many cases are adjourned in a week on the personal ground of the counsel, for no time and on account of no objection by the opposite party?

NOTE: For answers to the above questions, a complete statement of work fixed and done datewise for full one week (Monday to Saturday) of any 02 weeks, as directed by the Administrative Judge should be got prepared in Proforma-III and a statement in Proforma-IV in respect of all the contested decided cases in the month preceding the month in which instruction of inspection has been given.

PROFORMA – III

No. of cases	Name of Parties	Nature of cases	Purpose	Work done	Remarks
1	2	3	4	5	6

PROFORMA - IV

No. of cases	Name of Parties	Nature of suit	Date or dates on which evidence was recorded	Date of hearing of arguments	Date fixed for judgment	Actual date of delivery of judgment	Date of preparation of decree	Date of signing of decree by P.O.	Date of certification of decree and judgment to the L.C.	Remarks
1	2	3	4	5	6	7	8	9	10	11

(l) Whether decrees are being prepared?

10. Are the parties and witnesses being examined in suits before framing issues? (Give a statement in proforma V).

PROFORMA – V

No. of cases	Name of Parties	Section and Act or nature of offence	Purpose	Work done	Remarks
1	2	3	4	5	6

10 A. How many Suits referred/references, made under Section 89 and sub-rule (1A) of Order X of C.P.C.? The details be provided in the following Proforma-VI :

PROFORMA –VI

Case Number	Name of Parties	Stage of the case	Date of Order passed in the case	Present Status of the case	Remarks
1	2	3	4	5	6

11. Whether the judicial records are properly maintained by the officials and all the papers have been indexed according to the provisions?

12. Whether all the registers have been prepared on proper forms and all the cases have been properly entered therein?

13. Are the decided records consigned on the dates fixed? If not, what is the arrear?

14. Whether the number of inspections and search applications is satisfactory? Give comparative statement in following Proforma :-

Inspection/ Search Applications	From.....to.....		From.....to.....	
	No.	Amount	No.	Amount
1	2	3	4	5
Inspection Applications				
Search Applications				

15. How many requisitions from other court including Hon'ble High Court and the Copying Department are pending on the date of inspection and for how many days?

16. (a) Whether the conduct of Presiding Officer is judicious and he is intelligent in handling the cases?

(b) Whether he exercises efficient supervision on the day to day working of his officials?

(c) Whether the disposal as per norms prescribed in the Morning/Evening Court Rules, 2011 is being given by the Presiding Officer of the court?

17. Whether the honorarium is paid to the Judicial Officer and members of the staff working in the court as per Morning/Evening Court Rules, 2011?

18. Whether the facility of Generator for supply of electricity has been provided to the concerned courts?

PART- XIX GENERAL

1. Give the year-wise comparative statement of the institution, disposal and pendency of all kinds of Civil and Criminal cases for last two years prior to the year of inspection.

2. Give the statement of out-turn of Judicial Officers showing the number of each type of cases disposed off after contest year-wise during the period of the last six months prior to the month of inspection.

3. Give the statement of out- turn of each Judicial Officer according to prescribed standards showing separately the Civil and Criminal work disposed off during previous quarters of the months of inspection. With work details e.g. without trial, with contest/full trial, Ex-parte Admission of Claims/Compromised by arbitration.

4. Give statement of cases in which either copy of judgment of order or records of the case has not been received after the decision of the High Court or whether mere decree has been received without record up to the last month prior to the date of inspection.

5. Give the statement of cases of each kind stayed by the orders of the High Court or Supreme Court and date of stay order.

6. Give the statement of cases wherein orders of remand or the remitting of issues or taking of additional evidence have been passed by the Appellate Court in the sessions division during the last quarter of the year of inspection.

7. Give the statement of total number of revisions Civil and Criminal filed and rejected summarily during the year of inspection.

8. Give the list of transfer applications received in Civil and Criminal cases against the Judicial Officers and nature of orders passed therein during the year of inspection.

9. Give the statement of cases in Civil and Criminal cases, Revisions and Appeals in which judgments were reserved by each court prior to the date of inspection.

10 - A. Statement of injunction application filed, injunction granted ex-parte with dates, injunction refused and confirmed after hearing both parties during the year under inspection generally how much time is taken in disposal of objections filed against ex-parte injunctions orders including date of disposal.

B. Statement of total amount of fine imposed and realised during the year under inspection with full details e.g. outstanding at the beginning of the year, imposed, realised, remitted, stayed by High Court or any superior Court, levy warrants issued for the realisable amount.

C. How many S.T./Crl. Appeals/Civil Appeals/Civil Revisions and Criminal Revisions were decided jointly by one judgment during the year under inspection?

D. How many warrants of proclamation and attachment u/s 82/83 Cr.P.C. were issued simultaneously during the year under inspection?

E. How many second/third bail applications were entertained in the Court with result during the year under inspection?

11. Whether all the Judicial Officers are punctual in attending their Courts and sitting in proper court dress and for full working hours?

12. Whether the amount of fine received/recovered and the fine register is maintained properly in accordance with the provisions of Chapter IX of G.R. (Criminal)?

13. Whether directions contained in Amrawati's case and Lal Kamlendra's case are followed in deciding the bail applications?

14. (a) How many Motor Accident Claim cases are pending? (Yearwise pendency and disposal)

(b) Whether compensation awarded in Motor Accident Claim cases is based on bills, vouchers and proper disability certificates in injury cases and proper evidence of income and dependency in death cases?

15. Whether the Computer Systems have been installed in every court of the Judgeship and whether the concerned officials are working on the Computer Systems?

PART- XX ALTERNATIVE DISPUTE REDRESSAL SYSTEM (A.D.R.) AND LEGAL AID

1. Whether the Alternative Dispute Resolution (A.D.R.) methods, as provided u/s 89 of Code of Civil Procedure (CPC), are being invoked to dispose of the cases ?

LOK ADALAT

2. How many cases have been disposed of with the help of Lok Adalat. Give the details in the following proforma :-

S. No.	Court and name of P.O.	Number of cases referred					No. of cases disposed of					Persons benefited	Amount awarded
		Civil	Criminal	Petty offences	Other cases	Total	Civil	Criminal	Petty offences	Other cases	Total		
1													
2													
3													
4													
5													
6													
TOTAL :													

3. How many Lok Adalats have been held in the Judgeship during financial year, give details with dates.

MEDIATION

4. How many cases have been disposed of with the help of Mediation. Give the details in the following proforma:-

S. No.	Court and name of P.O.	No. of cases referred	No. of cases settled	No. of cases disposed of on the basis of settlement in mediation
1				
2				
3				
4				
5				
6				
TOTAL :				

5. Whether mediation centre is working effectively and properly. Give details of infrastructure, staff, nodal officer etc.

6. Whether mediators have been appointed. Give details of their training, qualification, performance etc. on following proforma:-

S. No.	Name of mediator	Educational qualification	Years of practice as advocate	Training		Whether approved by Court	No. of cases referred to him/her (Both individually and as co-mediator)	No. of cases which resulted in settlement	No. of cases which did not result in settlement
				Trained by	No. of hours of training				

LEGAL AID

7. In how many cases legal aid was provided during the financial year and how many person were benefited?

8. How many visits to Jail have been made during financial year. Give details with dates.

9. How many visits to women protection home were made during the financial year. Give details with dates.

10. Whether District Legal Aid Clinics are functioning effectively? How many legal aid clinics were organized during the financial year and how many people were benefited from it?

11. How many Legal Literacy Camps were organized during the financial year and how many people were benefited from it?

12 How many visits to juvenile home have been made during financial year. Give details with dates.

OTHER MODE OF A.D.R.

13. Give detail of cases disposed of with the help of Arbitration, Conciliation & Judicial Settlement.

PART- XXI COMPUTERIZATION PROGRAMME AND VIDEO CONFERENCING

1. Whether the Computer Centre has been established in District and Outlying Court?

2. Whether the entire Judgeship has been connected with Server Room via LAN (Local Area Network) is properly functioning?

3. Whether WAN (Wide Area Network) connectivity is established and functioning properly?

4. Whether the quarterly inspection of Computer Centre is being made by the Nodal Officer (Computers) and the compliance reports have been submitted timely? Give Details?

Quarter	**Date of inspection**	**Date of submission of Compliance Report**
1st Quarter		
2nd Quarter		
3rd Quarter		
4th Quarter		

5. Whether the annual inspection of Computer Section has been made and whether the Compliance Report has been submitted in time?

6. Whether any Officer (Nodal Officer) has been deputed at the Judgeship to look after the e-Court Project and monitor the development in the Computerization Programme in the District and outlying courts, if any?

7. Whether the Computer Hardware has been provided in each and every court and offices of District Judgeship and are in working condition? Give Details?

Sr. No.	Court Name	Numbers of Hardware provided	Types of Hardware	Hardware Working or not?

8. Whether the earthing is properly installed in the judgeship for the smooth functioning of computer hardware?

9. Whether the feeding of cases (Core and Periphery) is being done in the judgeship? Give Details?

Court Name	Core and Periphery wise	Status of Feeded case

10. Whether preparation of cause lists and other work relating to court are efficiently being done in Computers by the officials concerned?

11. Whether the work in Administrative Office, Accounts Section and other departments of the Judgeship is done on Computers by the officials?

12. Whether Computer Laptops and Broadband facility has been provided to all the Judicial Officers, posted in the District Judgeship? If not, give the details of Judicial Officers who have not been provided Laptops and Broadband facility. Give Details?

Sr. No.	Name of Judicial Officers	Laptop Provided or not?	Broadband Facility Provided or not? (Give reasons)

13. Whether the Generator provided under e-court project is functioning smoothly?

14. Whether the e-mails received in the Judgeship are checked daily by the official concerned and how many times in a day?

15. Whether Video Conferencing facility is available in the Judgeship and is connected with the Jails of the Districts?

16. Whether remands of accused, who are in jail, are extended through Video Conferencing? Give Details?

Sr. No.	Number of accused	Remand extended through VC or not?

17. Whether statements of witnesses are being recorded through Video Conferencing?

18. Whether the Judicial Officer and the Officials have received basic training in Computer ? Give Details?

Sr. No.	**Number of Judicial Officer trained in Computer**	**Number of Officials trained in Computer**

19. Whether the training in new software Ubuntu Version 12.0.4 has been given to the Judicial Officers ? Give Details ?

Sr. No.	**Number of Judicial Officer trained in Ubuntu ver 12.0.4**	**Number of Judicial Officer not training in Ubuntu ver 12.0.4 ? Give reasons?**

20. Whether all Judicial Officers of Judgeship are maintaining their e-mail IDs ?

21. Whether the services, which have to be initiated through CIS, are being initiated in the judgeship?

22. Whether Services are being initiated through computers for the Litigants? Give Details?

Sr. No.	Types of Services	Service Level (Parameter)	Difficulties in Service Initiation (If any) Please mention

23. Whether the monthly, quarterly, half yearly and annual reports of institution, pendency and disposal of cases are being generated through computers?

24. Whether the infrastructure (tables, chairs etc.) for computerization is proper or lacking?

25. Whether there are any obsolete/damages/unworking Computer hardware are lying undisposed off in the judgeship? Give Details?

Sr. No.	**Types of Hardware items**	**No. of the hardware items which are obsolete/damaged/ unworking**

26. Any other information to be provided?

PART- XXII PENDENCY OF THE CASES AT A GLANCE

OF THE JUDGESHIP OF .....

LIST OF ILLUSTRATIVE CASES

Sl. No.	Types of cases	Number of pending cases
1	Session Trial	
2	Warrant Trial	
3	Arms Act	
4	Family related cases	
5	Cases 138 N.I. Act	
6	Summon Trial	
7	L.D.A.	
8	Traffic Challan	
9	A.T.O. Challan	
10	Cases under Municipal Corporation Act	
11	Forest Act	
12	Excise Act	
13	Labour Act	
14	Cases under Entertainment Act	
15	Factory Act	
16	Drug Act	
17	Wild Life Act	
18	Insecticide Act	
19	P.N.D.T. Act	
20	I.T. Act	
21	Prevention of Cruelty to Animal Act	
22	Fire Brigade Act	
23	Mining Act	
24	Others Act	
25	Cases under N.D.P.S. Act	
26	Final Report	
27	**Total Number of Cases**	

Note : The type of cases mentioned above is only illustrative, the category of the cases be added or deleted according to the type of the cases pending in District Judgeship.

PART - XXIII

SHORTCOMINGS AND SUGGESTIONS/ RECOMMENDATIONS

Shortcomings -

Suggestions/Recommendations/Proposals

Signature : .....

Name : .....

Inspecting Judge : .....

Place -

Date -

High Court of Punjab & Haryana v. Ishwar Chand Jain[1]

The Supreme Court laid down guidelines for inspection of subordinate Courts and stressed for devising a proper, rational and uniform system of inspection by the High Courts the matter was directed to be placed before the Chief Justice of India for consideration in Chief Justice's Conference. The Court observed as under:

Inspection of the subordinate courts is one of the most important functions which High Court performs for control over the subordinate courts. Object of such inspection is for the purpose of assessment of the work performed by the subordinate judge, his capability, integrity and competency. Since judges are human beings and also prone to all the human failings inspection provides an opportunity for pointing out mistakes so that they are avoided in future and deficiencies, if any, in the working of the subordinate court, remedied. Inspection should act as a catalyst in inspiring subordinate judges to give best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the courts while working under great discomfort and hardships. A satisfactory judicial system depends largely on the satisfactory functioning of courts at grass root level. Remarks recorded by the inspecting judge are normally endorsed by the Full Court and become part of the Annual Confidential Reports and are foundations on which the career of judicial officer is made or marred. Inspection of subordinate court is thus of vital importance. It has to be both effective and productive. It can be so only if it is well regulated and is workman like**. Inspection of subordinate courts is not a one day or an hour or few minutes affair. It has to go on all the year round by monitoring the work of the Court by the inspecting judge. The casual inspection can hardly be beneficial to a judicial system.** It does more harms than good. As noticed in the case of *R. Rajiah*[2] there could be ill conceived or motivated complaints. Rumour mongering is to be avoided at all costs as it seriously jeopardizes the efficient working of the subordinate courts.

Time has come that a proper and uniform system of inspection of subordinate courts should be devised by the High Courts. In fact the whole system of inspection need rationalization. There

[1] [1999]2SCR834, AIR 1999 SC 1677; (1999) 4 SCC 579. Division Bench of D.P. Wadhwa and N. Santosh Hegde, JJ. Decided on 26.04.1999.
[2] AIR1988SC1388.

should be some scope of self-assessment by the officer concerned. We are informed that the First National Judicial Pay Commission is also looking into the matter. This subject, however, can be well considered in a Chief Justices' Conference as High Court itself can devise an effective system of inspection of the subordinate courts. Registrar General shall place a copy of this judgment before the Hon'ble Chief Justice of India for him to consider if method of inspection of subordinate courts could be matter of agenda for the Chief Justices' Conference.

Session 7

Evaluation of Performance & Increasing Strength of Judges: Time & Accessibility Issues

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SPECIAL SERIES: JUDICIAL INDEPENDENCE: JUDGING JUDGES: SECURING JUDICIAL INDEPENDENCE BY USE OF JUDICIAL PERFORMANCE EVALUATIONS

Penny J. White[*] [*1053]

Conversely, those who would undermine the importance of judicial independence argue for accountability to the citizens or constituents. ... ABA Guidelines for Judicial Performance Evaluations As states experimented with judicial evaluation programs and struggled to identify relevant evaluation criteria, a committee of the Criminal Justice Section of the American Bar Association developed a concept paper suggesting the creation of objective judicial evaluation guidelines. ... Yet, the genuine hope that the Guidelines, as sketchy as they might be, would cause a renewed scrutiny of bar and media polls was indisputable: Without meaning to reflect wholly negatively on all bar polls, or on all media polls, these Guidelines are intended to spark evaluations that are likely to be more reliable, and that should assure objectivity that may not be present in much bar or media polling. ... Those factors include integrity, freedom from impropriety and from the appearance of impropriety, knowledge and understanding of the law, fairness, preparedness and punctuality, diligence, communication skills, managerial skills, and public and professional service. ... By integrating a number of evaluation techniques, surveying a large spectrum of respondents, and allowing disqualification in appropriate circumstances, programs can provide greater assurance that evaluations will not be based on agreement or disagreement with a judge's decisions. ... Not only do the criteria give voters an alternative means of evaluating judges, they also educate and remind the electorate that good judging involves objective, identifiable criteria, not allegiance to a political philosophy or alliance with popular sentiment.

Introduction

The current national debate surrounding judicial independence arguably began in 1996 when both presidential candidates engaged in disingenuous political rhetoric about United States District Judge Harold Baer. [n1] The national discussion about judicial independence [n2] is by no means a new discussion. It dates back to the [*1054] early common law, [n3] the formation of the American democracy, and the constitutionalization of the American judicial system.

When the colonists declared their independence from England, they compiled a list of grievances setting forth justifications for their actions. One of the listed grievances against King George III in the American Declaration of Independence concerned the King's control of the British judiciary. Categorizing the King's control of the British judiciary as an obstruction of

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justice, the patriots declared that "[the King] has made Judges dependent on his Will alone for the Tenure of their Offices, and the Amount and Payment of their salaries." [n4] Control of the judiciary, however, was not a creation of King George III's reign. [n5] It predated his reign by decades, and in fact had been somewhat ameliorated prior to George III's reign when King James II was deposed during the Glorious Revolution of 1688. [n6]

Nonetheless, at the time of the American Revolution the founders of the new country remained concerned about a controlled judiciary. [n7] Although comparatively little time was spent debating [*1055] and structuring the judiciary in the proposed three-branch government, the proposed Constitution provided for permanent tenure for federal judges "during Good Behaviour" and forbid any reduction in federal judicial salaries. [n8] The federal judges were empowered to hear a large variety of cases, although Congress maintained the authority to expand or contract the size as well as the jurisdiction of the courts. [n9] Additionally, the intermingled tripartite system of government with its "great organizing principle, the separation of powers" doctrine, [n10] reiterated the commitment of the founders to a separate and independent judiciary.

The commitment to the formation of a new government with an independent judiciary in no way assured that the doctrine of judicial independence would not be challenged. From the very beginning of the American judiciary [n11] until the Judge Baer fiasco in 1996 [*1056] and after, [n12] the doctrine has been questioned, challenged, and at times, fiercely opposed. [n13]

I. **The Absolute Necessity of Judicial Independence**.

> One who clearly understands judicial independence cannot comprehend how it could be opposed. A judiciary that is not independent of the other branches of government is subject to their control. Judicial decisions would be influenced, if not dictated, by political pressures, threats, and intimidation. A nation whose judiciary was controlled by the legislative or executive branch would offer no stability to its citizens or corporations as to their legal rights or responsibilities.

The effect of a controlled judiciary is often illustrated by reference to intrusion upon personal liberties. The effect of a dependent judiciary on commercial interests, however, would be equally devastating. Consistent enforcement of contract rights, zoning laws, and employment regulations are crucial to business development. The coexistence in America of a stable, independent court system and a thriving national economy is hardly coincidental. Investors and developers cannot risk doing business in an unstable legal environment where their legal rights depend on who is in power. They depend on uniform application of the law by a judiciary that is not swayed by either majority opinion or political power, but is instead guided by precedent and the rule of law.

[*1057] If no free-enterprise capitalist could sensibly oppose judicial independence, why do so many of our national leaders assert positions in direct conflict with it? The cynical answer is that the assertions are pure political rhetoric gauged to be popular with the voters that, although dangerous to freedom and prosperity, are nonetheless successful because of the dearth of understanding of the American judiciary and its role in our society. A less cynical, but even more frightening answer is that the dearth of understanding extends beyond the realm of average citizens and includes national political leaders. [n14]

II. **Defining the Controversy: Judicial Independence and Accountability**

Lawyers and judges, who should understand the significance of judicial

> independence, [n15] cannot attribute all of the blame to ignorance and indifference. The judicial system itself creates some of the confusion.

In the vast majority of states, judges are subject to the vote [n16] either for initial selection or retention. [n17] In most cases, citizens are given the right to vote for judges just as they are for legislators, governors, and presidents. In those few states where citizens neither vote directly for judges nor decide whether to retain them, [*1058] judicial selections generally occur through executive or legislative appointment with sitting judges generally subject to periodic legislative or executive approval. In only three states is the judiciary granted quasi-life tenure after appointment, [n18] without subsequent review or retention. While all federal judges are appointed for life, the congressional confirmation process is certainly not apolitical. [n19]

To the electorate, it must seem that judges who campaign for their positions [n20] are political candidates. It follows that judges who raise funds, advertise, and seek support from voters [n21] must make promises of future conduct and assert their beliefs and opinions in political platforms.

Just as other political candidates are politically accountable to the voters, the citizenry may believe that judges should be accountable. Political accountability requires adherence to one's platform, fulfillment of one's promises, and responsiveness to public sentiment. Failure to display political accountability is a justification for campaigning against, voting against, and replacing an office holder. If a judge is viewed as "just another politician" who is expected to make and keep promises and to respond to public pressure or sentiment, justice is unlikely. The view of a judge as a politician is inconsistent with the constitutional and statutory obligations of American judges required to preserve an independent judiciary. [n22]

If the principle of judicial independence is inconsistent with the typical view of political accountability, does it follow that independence and accountability are concepts in conflict? If so, recent criticisms [*1059] of unaccountable judges and movements to "reign in" an imperialistic judiciary [n23] might have merit. But the obvious answer is that independence and accountability are not conflicting principles. Rather, they stand in juxtaposition to one another. Judges are accountable. Their accountability, however, is not political accountability to individuals, party platforms, majority preferences, or public pressure. A judge's accountability is to the law.

III. Clarifying the Concept of Judicial Independence

> The suggestion that judicial independence is incompatible with judicial accountability is premised on a misunderstanding or misinterpretation of judicial independence. The correct interpretation, provided by its historical beginnings, is that judicial independence is the independence of judges in their judicial capacity from control by inapproriate external forces, pressures, or threats. [n24]

More, and occasionally, less eloquent explanations of judicial independence have been offered. An early Supreme Court decision defined judicial independence as the freedom of a judge in deciding a case to "act upon his own convictions, without apprehension of personal consequences." [n25] Similarly, a federal district judge defines judicial independence as "the freedom of judicial officers to decide particular cases without ... consideration of ... preferment [*1060] or retribution." [n26] The American Judicature Society, long a promoter of judicial independence, describes the principle as one that frees judges "to act in the best interests of justice rather than be beholden to political obligations." [n27] Others suggest that to be independent a judge need only be unbiased.

The common denominator in all accurate descriptions of judicial independence is that judicial independence does not serve to remove a judge from accountability. Rather, it serves to remove a judge from accountability to the wrong sources.

Judicial independence is not the freedom of a judge to decide cases based on personal whim or caprice, nor is it the freedom of a judge to decide cases based on personal viewpoints of what the law ought to require. A judge remains accountable to the fair application of the law regardless of the judge's endorsement of or belief in the law.

IV. Defining Judicial Accountability.

> Accountability at its simplest, means answerability or responsibility. In the context of judicial accountability, the question is to whom or what are judges answerable and responsible.

Those who espouse a commitment to judicial independence often speak in terms of judicial accountability to the "rule of law." [n28] Conversely, those who would undermine the importance of judicial independence argue for accountability to the citizens or constituents. [n29] Accountability to something as esoteric and undefined as the "rule of law," they argue, is no accountability at all. [n30] It is more meaningful to attempt to identify to whom or what in particular a judge should be accountable, than to debate whether the "rule of law" is precise enough to allow accountability to it.

To whom should a judge answer? Posing and probing alternative responses to that question simplifies the answer. Assume that a judge is accountable to his or her "citizens" or "constituents." [*1061] How would those groups be identified? [n31] What would accountability to them entail? Would it require that a judge base his or her decisions on the group's opinion about the issue in the case? If so, would a consensus of opinion be required or would the judge be expected to follow the opinion of the majority of the group? How would either a consensus or majority opinion be determined? How and when, if ever, could a previous consensus or majority opinion be reexamined?

Assume instead that a judge is accountable to the other branches of government. Which branch? Would state judges be accountable only to state legislative and executive officials and federal judges only accountable to the Congress and president? If accountability included responsibility to rule in accord with the selected branch's viewpoint, how and when would the controlling viewpoint be determined? Would accountability to branch or either jurisdiction, state or federal, mean that judicial "precedent" would change each time an administration changed?

When logically explored, the notion that judicial accountability includes adherence to the viewpoints of citizens, government officials, or identified groups is exposed for what it is - a preposterous conflict with the essence of our tripartite system of government. Asserting that judges cannot be required to adhere to the viewpoints of any individual or group is not an assertion that judges should not be accountable for their conduct. It is crucial, however, that a judge's conduct be measured by reference to appropriate sources when evaluating whether the judge has acted accountably.

V. Sources for Evaluating Judicial Accountability.

What are the requirements of accountable judicial conduct? The requirements flow from at least four sources. First, judges at every level are required to obey and

> uphold state and federal constitutions. The traditional oath of office taken by judges requires adherence to those documents. Second, judges are required to follow [*1062] the state and federal law, so long as it does not conflict with constitutional principles. Third, except for those few judges who sit on courts of last resort, judges are required to follow judicial precedent. Finally, judges in all United States jurisdictions are required to follow their jurisdictions' canons of judicial ethics.

The requirement that judges follow the constitutions, laws, and judicial precedents is self-explanatory; adherence to the canons of judicial ethics may be less so. Like lawyers, judges who violate the ethical code for judges are subject to discipline, including removal from office. [n32] Since judges may be subject to official discipline for ethical violations, the specifics of judicial ethics requirements are important components of any judicial accountability system.

Most states have adopted the American Bar Association's Model Code of Judicial Conduct or some variation thereof. [n33] The Code is divided into several canons, usually seven, that set forth either mandatory or suggested rules pertaining to judicial conduct on and off the bench. [n34] Although the order of the canons vary greatly from state to state, they generally address judicial independence, competence, integrity, diligence, impartiality, and impropriety, [*1063] as well as extra-judicial and political activities. The canons require, for example, that judges "uphold the integrity and independence of the judiciary"; [n35] "avoid impropriety and the appearance of impropriety in all activities"; [n36] "perform the duties of judicial office impartially and diligently"; [n37] and "refrain from inappropriate political activity." [n38]

The often-broad language of the Code is, at times, supplemented with very specific directives. Noteworthy are two of Canon 5's requirements pertaining to inappropriate political activity: **(A)(3) A candidate for a judicial office**:

> (d) shall not:
>
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court ... . [n39]

(A)(1) A judge or a candidate for election to judicial office shall not:

> (a) act as a leader or hold an office in a political organization,
>
> (b) publicly endorse or publicly oppose another candidate for public office;
>
> (c) make speeches on behalf of a political organization;
>
> (d) attend political gatherings; or
>
> (e) solicit funds or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions. [n40]

[*1064]

If any doubt about the appropriateness of a nexus between judges and politics is left by the general language of the Canons, that doubt is removed by the specific limitations imposed on judges and candidates for judicial offices by the subdivisions of Canon 5 .

VI. Measuring Judicial Accountability Through Judicial Performance Evaluations

An assertion that judges are accountable to constitutional, statutory, and case law as well as to judicial ethical codes does not complete the accountability inquiry. If it is appropriate for judges to follow the proscribed law and ethics, and if their failure to do so is a legitimate basis for finding them unaccountable, how can those who select or elect judges evaluate a judge's conduct and accountability in office? If we would remove judges from common politics and take away campaigning based on fund-raising, promise-making, and issue-positioning as a basis for electing or selecting judges, what can we offer in replacement? If we oppose efforts to elect and select judges based upon political accountability and suggest the existence of more appropriate accountability sources, how can a judge's compliance with appropriate sources of accountability be determined?

In order for citizens to maintain popular accountability of the judiciary, citizens must be involved in evaluating judicial performance ... . They need to (1) gather information about judicial performance from the citizen's point of view and (2) communicate their opinions to the judiciary. ... The main vehicle of judicial accountability is the [election or retention of judges]. Yet this ... cannot serve its function if citizens do not have the interest to vote or the information necessary to make informed decisions. [n41]

A. Judicial Evaluation by Bar Polls and Media Polls

> Because many have opined that the quality of justice is measured by the quality of judges, judicial evaluation has been a subject of debate since the late 1800s. The first method of evaluation was polling, conducted by state and local bar associations and intended to gauge the bar's preference for one judicial candidate or [*1065] another. [n42] The early polls were mostly straw polls that evolved into performance polls seeking not only the lawyers' preference, but the lawyers' evaluations as well. [n43] Performance polls asked lawyers to evaluate judges based on certain predetermined criteria. [n44] The results of the polls were used to try and affect the performance of sitting judges as well as the vote of the electorate. [n45]

For obvious reasons, judicial performance evaluations by lawyers are problematic. The premise of any valid evaluation system is that those conducting the evaluation are familiar with those being evaluated. While lawyers may generally be qualified to evaluate the criteria essential to "good" judging, are all lawyers equally qualified to evaluate the judges in a given jurisdiction? Should only those lawyers who have litigation practices be allowed to evaluate judges? Should only those lawyers who have appeared before a judge in a sufficient number of matters be allowed to evaluate performance?

Even assuming a sufficient representative sample of knowledgeable lawyers as respondents, bar polls are riddled with difficulties. Despite efforts at maintaining respondent confidentiality, the content of a response may reveal the identity of a respondent. Lawyers may fear this possibility and give guarded responses rather than candid ones. Lawyers may also evaluate judges based on their personal track record, rather than on objective, appropriate criteria. In extreme cases, groups of lawyers may use the bar poll as campaign fodder for a judicial candidate whom they support over an incumbent.

[*1066] On the coattails of the dubious bar polls came media polls - efforts by newspapers to evaluate judges based on surveys developed and administered by the media. [n46] Often these polls were conducted in conjunction with bar associations. [n47] Though possibly well intended, these programs suffer from the same evils that haunt bar polls, including unreliability, insufficiency sampling, and unknowledgeable evaluators.

B. Alternative Judicial Performance Evaluation Methods

To supplement problematic bar polls and evaluations, as early as 1979 states began to explore alternative ways to evaluate judicial performance. Alaska and New Jersey were the pioneers in judicial evaluation systems. The New Jersey Supreme Court responded to a recommendation to adopt a comprehensive judicial evaluation program for the purpose of improving the quality of justice. [n48]Similarly, the Colorado Supreme Court began an initiative aimed at evaluating judges for dual purposes: improvement of the quality of justice and informing the public about the judiciary. [n49]

One of the specific charges of the Colorado Committee on Judicial Performance was to ascertain whether dissemination of judicial performance evaluations to the public would make "retention elections [which were used in Colorado] more meaningful" to the public. [n50] Despite the identification of risks inherent in publishing the results of judicial evaluation, Colorado ultimately decided that the potential benefits, including a more informed and better-educated electorate, outweighed the risks. [n51]

Colorado, Alaska, and New Jersey were not alone in creating more reliable methods of judicial performance evaluation. Arizona, Connecticut, Hawaii, Illinois, Maryland, New Hampshire, [*1067] Utah, and the courts of the Navaho Nation established judicial evaluation programs by 1995, most of which were established to improve judicial skills. [n52] Alaska, however, as well as Arizona, Hawaii, and to a lesser degree, Utah and Tennessee, ultimately developed judicial evaluation programs that would be used in the election or selection process. [n53]

State judicial performance evaluations varied in many ways. Some were authorized by court rule, some dictated by statute, and some produced by administrative orders or bar association recommendations. [n54] The evaluation methods were equally varied. Most programs used survey instruments or questionnaires, but recipients of those instruments were diverse. [n55] Some evaluation programs included courtroom observations, videotaped proceedings, background investigations, and interviews. Others required an in-depth analysis of caseload management data, disciplinary records, and health records. [n56]

C. ABA Guidelines for Judicial Performance Evaluations

As states experimented with judicial evaluation programs and struggled to identify relevant evaluation criteria, a committee of the Criminal Justice Section of the American Bar Association developed a concept paper suggesting the creation of objective judicial evaluation guidelines. [n57] A Special Committee on the Evaluation of Judicial Performance was named in 1983. [n58] Two task forces, one on methodology and one on evaluation criteria, were [*1068] named to assist the Committee in its work. [n59] By mid-1985, the ABA adopted the Guidelines for the Evaluation of Judicial Performance, a document divided into five parts and consisting of black letter principles, endorsed as approved ABA policy, and commentary, offered only for "explanatory purposes." [n60]

The preface to the Guidelines emphasized the limitations of the project: "These are Guidelines, not blueprints; each jurisdiction should find them helpful in formulating its own precisely structured evaluation methods. ... No simple 'recipe book,' no one final precise template, could be produced for all to embrace. ... Each jurisdiction will have to work out its own precise 'recipe.'" [n61] Yet, the genuine hope that the Guidelines, as sketchy as they might be, would cause a renewed scrutiny of bar and media polls was indisputable:

> Without meaning to reflect wholly negatively on all bar polls, or on all media polls, these Guidelines are intended to spark evaluations that are likely to be more reliable, and that should assure objectivity that may not be present in much bar or media polling. As will be seen, polling is not the only means - and not the soundest means if taken alone - of evaluating the performance of judges. [n62]

The Guidelines are described as "suggestions for criteria, uses, and methodology useful for judging the quality and performance of our judges," but are not to be used as "substitutes for nor ... accretions upon the existing Code of Judicial Conduct" nor "principles to be invoked to discipline a particular judge." [n63] As suggested criteria for evaluating judges, the Guidelines provide an excellent list of standards to determine if a judge meets the requirements of his or her office and demonstrates appropriate accountability.

VII. Guideline Standards, Performance Evaluations, and Judicial Accountability

While the Guidelines are careful to differentiate their purpose from that of the Code of Judicial Conduct, they acknowledge the need to draw upon some of the Code's concepts in defining quality [*1069] judicial performance. [n64] The seven performance guidelines applicable to all judges refer to all elements of a judge's performance. [n65] An eighth standard applies only to judges who work with other judges on multi-judge panels or on administrative matters. [n66] The first four guidelines pertain to adjudicative responsibilities and suggest criteria for evaluating conduct by the judge on the bench. [n67] The fifth and sixth guidelines describe a judge's managerial responsibilities. [n68] The last guideline addresses a judge's public service responsibilities. [n69]

A. Standards Related to Adjudicative Responsibilities

The first performance standard, a standard "essential in any ... evaluation of judicial performance" [n70] mirrors Canon 1 of the Code of Judicial Conduct in its requirement that judges exercise integrity and the appearance of integrity. [n71] To monitor integrity and its appearance, the Guidelines suggest an evaluation of four criteria: "avoidance of impropriety and the appearance of impropriety; freedom from personal bias; ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, the popularity of the decision, and without concern for or fear of criticism; and impartiality of actions." [n72] The last criteria, "impartiality of actions," includes an appraisal of a judge's racial, gender, or other biases and evenhandedness. [n73]

The second adjudicative guideline measures a judge's knowledge and understanding of the law. [n74] This standard also includes four factors. The judge should understand the "substantive, procedural, and evidentiary law of the jurisdiction; ... the factual and legal issues before the court; and the proper application of judicial precedent [*1070] and other appropriate sources of authority." [n75] The judge should also be able to issue "legally sound decisions." [n76] In evaluating a judge's legal knowledge and understanding, evaluators are cautioned "to disregard their personal feelings about a judge's decision. This criterion measures knowledge of the law;

it does not measure the extent to which the evaluator and the judge possess the same or harmonious legal philosophies." [n77]

The third standard for judicial evaluation of adjudicative skills relates to a judge's oral, written, and nonverbal communications skills. Under Guideline 3-3, a judge should be evaluated based on communication skills including "clarity of bench rulings and other oral communications; quality of written opinions with specific focus on clarity and logic, and the ability to explain clearly the facts of a case and the legal precedents at issue; and sensitivity to impact of demeanor and other nonverbal communications." [n78]

Lastly, the Guidelines focus on the importance of a positive judicial image. A judge should be evaluated on "preparation, attentiveness, and control over proceedings including ... courtesy to all parties and participants; and willingness to permit every person legally interested in a proceeding to be heard, unless precluded by law or rules of court." [n79] Elaborating on the precise notion of an appropriate judicial image, the commentary identifies the most important element of a positive image as judicial temperament. This judicial temperament includes "patience - but it also includes dignity and understanding. ... [A] dignified judge can do much to earn and encourage [public] respect. Conversely, a judge without good judicial temperament can do great harm to the dignity of the position." [n80]

B. Standards Relating To Managerial Responsibilities

The fifth Guideline relates to a judge's managerial responsibilities. [n81] The commentary for Guideline 5 cautions against "case counting" and other imprecise productivity standards, [n82] but the Guideline itself recommends evaluation of skills including "devoting [*1071] appropriate time to all pending matters; discharging administrative responsibilities diligently; and where responsibility exists for a calendar, knowledge of the number, age, and status of pending cases." [n83]

Promptness and punctuality are the subjects of the sixth Guideline. [n84] It suggests evaluation of "punctuality including: the prompt disposition of pending matters; and meeting commitments on time and according to rules of the court." [n85] The sixth evaluation standard applies to a judge's managerial and adjudicative responsibilities.

C. Standards Relating to Professional and Public Service Responsibilities

Evaluation of a judge's professional and public service centers on judicial education programs and dedication to public needs. Thus, Guideline 3-7 provides for evaluation of services to the profession and the public including "attendance at and participation in judicial and continuing legal education programs; and consistent with the highest principles of the law, ensuring that the court is serving the public to the best of its ability and in such a manner as to instill public confidence in the court system." [n86]

VIII. Guideline Standards, Performance Evaluation, and Judicial Independence

Some opponents of judicial evaluation systems will complain that an evaluation system is simply a dressed-up attack on the independence of the judiciary. [n87] If an evaluation system is properly devised and administered, that complaint is without merit.

The previous sections have outlined factors that are legitimate considerations in determining the quality of a judge's performance on the bench. Those factors include integrity, freedom from impropriety and from the appearance of impropriety, knowledge and understanding of the

law, fairness, preparedness and punctuality, [*1072] diligence, communication skills, managerial skills, and public and professional service. With very few exceptions, these factors are identifiable and, arguably, objective. Even those factors that seem less defined, such as integrity and fairness, can become solid standards for the measurement of judicial performance under a carefully devised evaluation system.

Integrity, for example, is a principle often thought to be basic to judging. [n88] A judge who has integrity is a fair judge, an impartial judge, and a judge who is courageous and dignified in deciding issues brought before the court. In evaluating integrity, a respondent might be asked whether or not the judge engages in ex parte communications, expresses personal or political favor, prejudges issues or cases, rules with decisiveness, or is affected in rulings by ethnic, racial, or sexual bias.

New Jersey inquires as to the "evenhanded treatment of attorneys, fostering [of] a general sense of fairness, absence of bias based on race, gender, ethnicity, religion, or social class, and decisiveness. [n89] Respondents are asked to evaluate the judge on each factor as either "excellent, more than adequate, adequate, less than adequate, poor, or not applicable." [n90] Connecticut asks for an evaluation of the judge's attitude toward all participants in the proceedings, "women, men, minorities, people of a particular region, indigent people, local attorneys, minority attorneys, women attorneys, and particular attorneys." [n91] Alaska evaluates integrity and impartiality based on four factors: "equal treatment of all parties, sense of basic fairness and justice, conduct free from impropriety or appearance of impropriety, and ... decisions [made] without regard to possible public criticism." [n92]

The other factors identified as essential to quality judging are likewise amenable to measurement. Diligence can be assessed by asking for an assessment of a judge's "reasonable promptness in making decisions and willingness to work diligently" in preparation [*1073] for and during trials and hearings. [n93] Legal knowledge and application may be evaluated by inquiring as to the judge's knowledge of relevant substantive, procedural, and evidence law; ability to analyze difficult or complex aspects of a case; soundness, clarity, and completeness of rulings; completeness and accuracy of fact-finding; and clarity of oral or written decision. [n94] The evaluation of managerial skills will completely depend on the nature of the judge's position, but might include an appraisal of the judge's skills in docket management, courtroom control, facilitating settlements or alternative dispute resolution methods, and efficient movement of the proceedings. [n95]

As is true of any attempt to evaluate, whether the subject of the evaluation be job performance, education performance, applications, or grant proposals, the cogency of the evaluation system will be effected by factors that cannot be controlled by the evaluation system. Some lawyers who have lost cases may give a judge a lower score on knowledge of the law than the judge deserves. Some jurors who were angered by having to serve on jury duty may evaluate a judge's promptness unfairly or even untruthfully. But those eventualities occur in any evaluative process. Developers of evaluation instruments have devised methods to reduce any potential prejudice produced by unfair or dishonest evaluators. [n96]

An objective evaluation of the criticisms leveled by those who claim that judicial performance evaluations interfere with judicial independence reveals that the opponents' real concern is with evaluations in general, not judicial performance evaluations in particular. Their criticisms are largely the same as criticisms by those who decry any attempt at objectifying skills and performance in jobs involving judgment, discretion, and intellectual application.

Contrasting the factors upon which a legitimate judicial performance evaluation is based with the factors utilized by those evaluating judges on illegitimate grounds further proves the point. As [*1074] discussed in the beginning of this article, [n97] politicians have, over the course of this nation's history, attempted to evaluate judges based upon the outcome of their decisions. Such evaluation boils down to whether the judge held for or against the criminal defendant or civil plaintiff or found in favor or against capital punishment or punitive damages. No effort is made to analyze the legal issues, the constitutional requirements, applicable judicial precedent, or legislative mandates in any case. Only the outcome is considered, in an extreme vacuum, and with the predetermined judgment that ruling in favor of criminal defendants, civil plaintiffs, or punitive damages, or against capital punishment is inherently wrong and constitutes poor judging sufficient to question whether the judge should continue to serve.

This illegitimate outcome-oriented evaluation has gained more widespread use. For example, members of Congress have encouraged the removal of judges whom they characterize as having ruled for the defense in death-penalty cases or having ruled against the tobacco industry. [n98] Some go so far as to try to quantify the percentage of a judge's decisions that comport with their preferred outcome. [n99] Thus, judges have been criticized for "siding with criminal defendants ... 86% of the time." [n100] Chambers of Commerce, economic teaching institutes, religious organizations, and special interest groups have all joined the trend of espousing judicial evaluations [*1075] based solely on whether the judge held for or against the side favored by the group. [n101]

When contrasted with the inherent dangers of an evaluation system, motivated by political ambition for the purpose of manipulating an uninformed public and based on nothing but the evaluator's assessment of present political correctness, the concerns about the subjectivity of legitimate evaluation factors are infinitesimal. Furthermore, judicial performance evaluations based upon standards relevant to judging, such as integrity, legal knowledge, diligence, and fairness, serve not only as a valid and reliable measurement [n102] of performance, [n103] but as a vehicle for judicial self-improvement as well. [n104] "A growing body of evidence validates the value of the evaluation process for individual judges and for the justice system as a whole." [n105]

It seems obvious that legitimate factor-based performance evaluations do not threaten the independence of the judiciary. The clear criteria used in evaluations and the professional development of reliable and valid methodology [n106] shield the system from the inherent [*1076] dangers of a decision-based evaluation. In addition to these intrinsic safeguards, the program can include guidelines that specifically address any perceived threats to independent decision-making. The American Bar Association Guidelines, for example, provide that the evaluation program "should be structured and implemented so as not to impair the independence of the judiciary." [n107]

Performance evaluation programs may include added assurances that the evaluation process will not usurp judicial independence. Questionnaires and surveys can be prohibited from including questions that might allow responses based on the content of judicial decisions. Judges should be allowed to disqualify certain respondents whose impartiality as an evaluator may reasonably be questioned. Evaluation methods such as video court observations and peer assessment can be given proportionately greater weight than survey and questionnaire responses. By integrating a number of evaluation techniques, surveying a large spectrum of respondents, and allowing disqualification in appropriate circumstances, programs can provide greater assurance that evaluations will not be based on agreement or disagreement with a judge's decisions. [n108]

IX. Forging A Partnership: Securing Judicial Independence By Use of Judicial Performance Evaluation

If the modern-day pastime of judging judges based on whether one agrees with the outcome of a case continues, [n109] then those who value a separate and independent judiciary must act. One method of exposing the illegitimacy and danger of the outcome-based approach is to educate the public about the role of judges in a democracy and the importance of a judiciary free of legislative or executive control. Another appropriate step is to offer the public an alternative means of evaluating those who serve in the judiciary. Undoubtedly, much of the success of those who seek to destroy judicial independence results from the lack of available information upon which to base one's decision in judicial elections.

States that have judicial evaluation programs should reevaluate their programs' goals and ascertain whether the programs, as currently [*1077] operating, can provide helpful information to citizens making decisions in judicial elections. If the program's self-improvement goal has required methodologies that are not conducive to a broader use of the evaluations, considerable thought should be given to revising the program or devising another evaluation program for the purpose of providing voter information.

Those states that do not have judicial evaluation programs in place should create commissions to consider devising such programs for the purpose of informing the electorate about the performance of judges who stand for election or retention. [n110] The American Bar Association, the National Center for State Courts, and the American Judicature Society, as well as several states with judicial performance evaluation programs, offer abundant resources, research, and information for states that are beginning the process of devising a performance evaluation program. A comprehensive judicial performance evaluation bibliography is also available. [n111]

Conclusion

The impetus for the existing state judicial performance evaluation programs was not to provide a response to criticism about an unaccountable judiciary. Neither were evaluation programs devised to identify appropriate criteria for voters to consider when deciding how to vote in judicial elections. Nonetheless, the evaluation criteria used in the programs do just that. Like the Model Code of Judicial Conduct, the existing state judicial evaluation programs identify objective factors that are legitimate considerations in judging judges. Not only do the criteria give voters an alternative means of evaluating judges, they also educate and remind the electorate that good judging involves objective, identifiable criteria, not allegiance to a political philosophy or alliance with popular sentiment.

Legal Topics:

For related research and practice materials, see the following legal topics: Civil ProcedureJudicial OfficersJudgesGeneral OverviewGovernmentsCourtsJudgesLegal EthicsClient RelationsAppearance of Impropriety

FOOTNOTES:

n1. During the 1996 presidential campaign, more than 200 members of Congress wrote President Clinton a letter regarding a suppression ruling made by United States District Judge Harold Baer, Jr., of the Southern District of New York. The letter asked the president to call for the resignation of the judge. On March 23, the Republican presidential candidate Robert Dole was quoted in the New York Times as saying that Judge Baer "ought to be impeached instead of reprimanded." Jon O. Newman, The Judge Baer Controversy, 80 Judicature 156, 158 (1997). The criticism of Judge Baer continued and became the springboard for a general attack on appointments to the federal bench made by Clinton and approved by a Democratic Congress. After Dole

suggested that Judge Baer be impeached based on the ruling, Clinton spokespersons announced that Baer would be asked to resign, and that if he did not, the president would consider calling for his impeachment. Id. Eventually, the Baer debate subsided, perhaps as a result of Judge Baer's subsequent ruling reconsidering the grant of the motion and denying suppression instead. Id.

But the underlying issue did not so easily evaporate. Senator Dole charged that Clinton had appointed judges who were "dismantling those guard rails that protect society from the predatory, the violent, the anti-social elements in our midst." Robert Cohen, Dole Attacks Clinton on Judicial Appointments, Star Ledger, Apr. 20, 1996, at 3. Dole singled out individual judges who he named to the Clinton "Hall of Shame." Id. Dole's campaign staff characterized the speech as an "opening shot for the November 5 election, and said it would be a 'major theme' in the months ahead." Id.

n2. The Baer controversy sparked national debate and comment and even international discussion. In April 1996, at the 52nd United Nations Commission on Human Rights in Geneva, the special rapporteur on the Independence of Judges and Lawyers made the following comment:

Threats to judicial independence appears all pervasive. As seen judicial independence was recently threatened in a developed country like the United Kingdom.

What is of greater concern is the latest outburst in the United States over a decision of a federal judge given some two months ago to exclude certain evidence in a drugs related trial. From information received just two days ago, the President of the United States was reported to have said through his spokesman that if the judge did not change his ruling the President would call for the judge's resignation. Though attempts were made subsequently to distance the President from the words of his spokesman, the damages appear to have been done. It was further reported that Senator Dole had called for the same judge's impeachment.

These political attacks led four judges of the Federal Appeals Court to come in defense of the judge concerned with a public statement which read, inter alia, "These attacks do a grave disservice to the principle of an independent judiciary and most significantly, mislead the public as to the role of judges in a constitutional democracy."

... Obviously the President and the Senator, in the heat of their political campaigns, lost sight of constitutionalism.

Id. at 164.

n3. At common law, the principle of judicial independence was absorbed in the doctrine Nemo Judex In Re Sua: "No man may be a judge in his own cause." Dr. Bonham's Case, 77 Eng. Rep. 646, 8 Coke 114(a) (C.P. 1610). Ironically, Lord Coke, chief justice of the King's Bench, ruled against the Board of Censors of the Royal College of Physicians, an adjudicator of a physician's incompetence and a beneficiary of the resulting fine. Based on this decision, King James I removed Lord Coke from the bench. Stephen D. White, Sir Edward Coke and "the Grievances of the Commonwealth" 1621-28, (1979).

n4. The Declaration of Independence para. 7, 8 (U.S. 1776).

n5. Bernard Schwartz, The Roots of Freedom: A Constitutional History of England 121-23, 150, 190-91 (1965).

n6. 1 W. Holdsworth, History of English Law 195 (7th ed. 1956). After the Glorious Revolution, judges in England were appointed for good behavior, rather than "at the King's pleasure"; their salaries were set by Parliament. Id.

n7. In 1789, in a speech in which then Congressman James Madison proposed the amendments to the United States Constitution that would become the Bill of Rights, he suggested that the safety of the enumerated rights contained in the amendments would rest largely in the federal courts' hands. "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights. ... They will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated in the Constitution by the declaration of rights." Robert Shnayerson, The Illustrated History of the Supreme Court of the United States 54 (Adele Westbrook ed., 1985).

n8. U.S. Const. art. III.

n9. Id. at art. III, 1, 2.

n10. Id. at art. I, II, & III. Robert Shnayerson, The Illustrated History of the Supreme Court of the United States 55 (Adele Westbrook ed., 1985). The intermingled constitutional plan of the United States was described by Louis H. Pollak, former dean of the Yale Law School, as follows:

Congress can make laws; but a President, whose salary is inviolable during his term can veto them; Congress can, in its turn, pass laws over the President's veto, but the ultimate impact of any laws enacted depends, first, upon the vigor with which the President enforces the laws, and, second, on the interpretations put upon them by the judges - appointed by the President, with the Senate's assent, but thereafter holding office for life. On the other hand, the President has to reckon with Congress' power to withhold needed appropriations - and he also has to reckon with Congress' correlative power to inquire into the way in which sums appropriated to the executive department are actually utilized. Similarly, the judges are not unaware of Congress' latent power to

contract their jurisdiction. And both the executive and the judiciary are potential targets of the congressional power of impeachment.

Id. at 55 (quoting from 1 Louis H. Pollak, The Constitution and the Supreme Court 74 (1996).

n11. In the early days of the United States Supreme Court, the Justices sat as circuit justices as well as members of the Supreme Court. This required each Justice to travel a large circuit and hear, as a court of original and appellate jurisdiction, cases that might ultimately reach the "one Supreme Court" created by the United States Constitution. For both reasons - the arduousness of the task as well as the incompatibility of sitting at trial, on appeal, and at the Supreme Court level - the Justices ardently opposed their circuit judges tasks. They expressed their opposition as early as 1790, by writing the president and Congress, but were not totally relieved of their circuit duties until the passage of the Circuit Court of Appeals Act of 1891. At different times between 1790 and 1891, Congress seemed posed to relieve the justices of their circuit riding duties only to decline to do so, often curiously close in time to a disfavored ruling by the Court. Comm'n on the Bicentennial of the U.S. Constitution, The Supreme Court of the United States: Its Beginnings & Its Justices 1790-1991, at 12-19 (1992).

n12. A very recent example of interference with judicial independence can be found in the United States Congress's failure to confirm Missouri Supreme Court Justice Ronnie White as a federal district judge. Justice White was labeled as "soft on the death penalty," despite his varied record on capital cases. See Charles Babington & Joan Biskupic, Senate Rejects Judicial Nominee, Wash. Post, Oct. 6, 1999, at A01. This mislabeling results in a de facto qualification requiring judges to rule in accord with congressional wishes in order to be appointed to the federal bench.

n13. Some historically significant challenges to judicial independence in the United States include the following: the congressional reaction to the Supreme Court decision in Marbury v. Madison, 5 U.S. 137 (1803); the impeachment trial of Justice Samuel Chase; the Progressive Party platform of Theodore Roosevelt, which proposed a congressional veto of Supreme Court decisions; the Franklin D. Roosevelt court-packing plan; the "Impeach Earl Warren" movement; and the modern-day congressional litmus tests for federal court appointments.

n14. Contrast, for example, President Clinton's response to the Dole attack on Judge Baer during the 1996 campaign, with President Mandela's response to the South Africa Constitutional Court's decision striking down legislation aimed at implementing his executive agenda. In re State v. Makwanyane and Mchunu, 1995 (3) SALR 94 (CC), reprinted in 16 Hum. Rts. L.J. 154 (1995). "Mandela immediately made a public announcement that the court had spoken and its decision must be implemented." Stephen B. Bright, Political Attacks on the Judiciary, 80 Judicature 165, 173 (1997).

n15. Unfortunately, examples abound of both lawyers and judges who have either not understood the principle or who have abused it. The president of a bar association announced that people were beginning to understand that it was easier to "buy a judge" than to buy an entire legislative body. See Gerald F. Uelmen, Crocodiles in the Bathtub: Maintaining the Independence of State, 72 Notre Dame L. Rev. 1133, 1133. Judges routinely campaign on platforms designed to curry favor with voters. See, e.g., Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759 (1995).

n16. This article should not be taken as an expression of opinion on any judicial selection or election method. The propriety of judicial elections, partisan and nonpartisan, retention and competitive, is a topic for another day.

n17. See Am. Judicature Soc'y, Judicial Selection in the States: Appellate and General Jurisdiction Courts, Summary of Initial Selection Method (6-11-96 revision) (on file in the author's office and available from the American Judicature Society); Uelmen, supra note 15, at 1133, 1134 n.6 & 7.

n18. Judges are appointed until age seventy in Massachusetts and New Hampshire. In Rhode Island, judges are appointed for life. Am. Judicature Soc'y, supra note 17.

n19. See e.g., Charles E. Schumer, Judging by Ideology, N.Y. Times, June 26, 2001, at A19.

n20. The conflict between judicial independence and judicial campaign fundraising is very significant. For the most part, however, that topic is beyond the scope of this article. See generally Roy A. Schotland, Elective Judges Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?, 2 J.L. & Pol. 57 (1985); Mark Hansen, The High Cost of Judging, A.B.A. J., Sept. 1991, at 44; Sheila Kaplan & Zoe Davidson, The Buying of the Bench, Nation, Jan. 26, 1998 at 11.

n21. It is true that judicial campaigns are subject to restrictions set forth in the Model Code of Judicial Conduct. These restrictions affect fund-raising, advertising, and the content of campaigns. They subject violators to disciplinary action. Nonetheless, judicial campaigns, viewed from the perspective of lay citizens, appear no different from other political campaigns.

n22. Judges in virtually every state and in the federal court system take oaths to "uphold the Constitution and the laws of the United States." Additionally, every state subscribes to some version of the American Bar Association Model Code of Judicial Conduct, which requires judges to uphold the independence of the judiciary. See Model Code of Judicial Conduct Canon 1 (1990). See text accompanying notes 33-40 infra.

n23. Edwin Meese III & Rhett DeHart, Reigning in the Federal Judiciary, 80 Judicature 178 (1997). In former Attorney General Meese's opinion, "The federal judiciary has strayed far beyond its proper functions." Meese lists five strategies that Congress must use "to reign in the active federal judiciary and return it to its rightful place in our democracy." Id. at 178. The strategies listed are (1) using the confirmation authority to block the appointment of "activist judges"; (2) stripping the American Bar Association of its role in the federal judicial selection process; (3) exercising Congress's power to limit federal court jurisdiction; (4) amending the Constitution to allow future constitutional amendments to be ratified by the states without congressional approval; and (5) stopping the federalization of crime and the expansion of litigation in federal courts. Id. at 181-83.

n24. For many years the standard for judicial disqualification of federal judges was the so-called external source doctrine. Under this doctrine, a lawyer moving to recuse a federal judge from participating in a case based on allegations of bias had to establish that the source of the bias was "external" to the courtroom. After the case of Liteky v. United States, 510 U.S. 540 (1994), the external source doctrine was replaced with a new totality of the circumstances standard, but whether the bias was alleged to have come from an external source remains an important factor for consideration.

n25. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 337 (1872) ("For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.").

n26. Judicial Independence Revisited, Judges' J., Winter 1998, at 28, 46 (quoting Judge David F. Levi, United States District Judge for the Eastern District of California).

n27. Promoting Judicial Independence, 80 Judicature 152 (1997).

n28. See, e.g., William C. Whitford, The Rule of Law, 2000 Wis. L. Rev. 723 (discussing generally the meaning and usage of the phrase "rule of law").

n29. See, e.g., J. Harvie Wilkinson III, The Role of Reason in the Rule of Law, 56 U. Chi. L. Rev. 779, 780 (Accountability in our government must run ultimately to the governed.").

n30. See id. ("That unelected judges have been left to interpret the equivocal will of elected representatives must sometimes seem the final measure of our government's fall from grace.").

n31. An attempt to identify a judge's constituents proves the absurdity of the notion that judges are to be held accountable to their so-called constituency. Are only those who voted in a judicial election "constituents?" Does that include those who voted against the judge as well as for the judge? If the judge has limited jurisdiction, are only those with matters within the court's jurisdiction constituents? What happens when a newcomer moves to the area? Does the newcomer become a "constituent" only after voting in the first election in which eligibility attaches, or does the "constituent" status from the newcomer's previous residence carry over to the place of the new residence? And what about minors - do they only become "constituents" when they vote for the first time after reaching the age of majority?

n32. Modern day judicial ethics enforcement tribunals are an outgrowth of discontent over judicial accountability methods. The only method provided in the United States Constitution for the removal of a federal judge from office is by impeachment. U.S. Const. art. III, 1, art. II, 2, art. I, 3. Following that lead, early state constitutions provided for impeachment of state judges as well. In most states, no other device for removal or discipline of state judges existed. The impeachment process was arduous and difficult. In addition to modifying judicial selection methods (as a separate means of accountability), judicial reformers began to create additional methods for disciplining judges when their misconduct did not merit removal, but demanded some sanction. In 1947, New York created the first "Court on the Judiciary," a special court convened to hear cases of judicial misconduct and disability. It was not until 1960, however, that a state created a judicial discipline office that could receive and investigate complaints, convene hearings, and make disciplinary recommendations to the state supreme court. Since 1960, judicial conduct commissions and hearing tribunals have been created by constitutional amendment, statute, or court rule in virtually every jurisdiction. See generally Edward J. Schoenbaum, A Historical Look At Judicial Discipline, 54 Chi.-Kent L. Rev. 1 (1977).

n33. Peter A. Joy, A Professionalism Creed for Judges: Leading By Example, 52 S.C. L. Rev. 667, 692 (2001) ("Forty-nine states and the District of Columbia base their judicial ethics codes to varying degrees on the ABA Model Code of Judicial Conduct. ...").

n34. The ABA Model Code of Judicial Conduct is written in mandatory terms. Model Code of Judicial Conduct (1990). Each canon begins with the words "A judge shall" or "A judge shall not." Id. Some states, however, in addition to modifying specific standards within the Code, have phrased their canons in terms of what judges "should" or "should not" do. A third category of states, by far the smallest, has differentiated between mandatory and preferred canons requiring, in some instances, that judges "shall" or "shall not" and, in other instances, that judges "should" or "should not."

n35. Id. at Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society. A judge should ... observe those standards [of conduct] so that the integrity and independence of the judiciary will be preserved.").

n36. Id. at Canon 2(A), (B) ("A judge shall ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. ... A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment.").
n37. Id. at Canon 3(B)(1). ("A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism."); id. at (E)(1) ("A judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned."
n38. Id. at Canon 5.
n39. Id. at Canon 5(A)(3)(a), (d)(i), & (ii).
n40. Id. at Canon 5(A)(1)(a)-(e).
n41. Anne Rankin Mahoney, Citizen Evaluation of Judicial Performance: The Colorado Experience, 72 Judicature 211, 216 (1989).
n42. See James H. Guterman & Errol E. Meidinger, In the Opinion of the Bar: A National Survey of Bar Polling Practices (1977); S. Flanders, Evaluating the Judges: How Should the Bar Do It?, 61 Judicature 304 (1978).
n43. Richard L. Aynes, Evaluation of Judicial Performance: A Tool for Self-Improvement, 8 Pepp. L. Rev. 255, 266-70 (1981).
n44. See Joel H. Goldstein, Bar Poll Ratings as the Leading Influence on Non-Partisan Judicial Election, 63 Judicature 376, 379 (1980) (explaining that the Louisville Bar Association asked each of its members to rate the candidates on "(1) integrity; (2) judicial temperament; (3) legal ability; (4) impartiality, freedom from bias and prejudice; and (5) industry, diligence and promptness").
n45. Id. at 377. But see Aynes, supra note 43, at 268 ("As a general rule the results of such polls are utilized by third parties, such as voters or public officials, in making choices about retaining or promoting the judges who were the subjects of the poll. In contrast, as used in this article, the proposal to evaluate judicial performance refers to a systematic, multi-faceted attempt to gather data, subjective and objective, which would give judges insight into their performance in such a manner as to reinforce that performance when it is desirable and to spur improvement where improvement could be obtained.").
n46. See ABA Special Comm. on Evaluation of Judicial Performance, Guidelines for the Evaluation of Judicial Performance ii (1985) [hereinafter Guidelines] (discussing judicial evaluations conducted by the media).
n47. Aynes, supra note 43, at 293 (discussing the possibility that the media may work in conjunction with bar associations in conducting judicial evaluations).
n48. Id. at 262 ("In New Jersey, the State Supreme Court established a Special Committee on Judicial Evaluation and Performance, and that committee had submitted its report calling for [a program of judicial evaluation] in early March of 1978.").
n49. Id.
n50. See infra note 51.
n51. The stated goals of the existing Colorado Judicial Performance Evaluation Program are "to provide persons voting on the retention of justices and judges with fair, responsible, and constructive information about judicial performance and to provide justices, judges, and magistrates with useful information concerning their own performances." Col. Rev. Stat. 13-5.5-101 (2001 Cum. Supp.).
n52. See A. John Pelander, Judicial Performance Review In Arizona: Goals, Practical Effects and Concerns, 30 Ariz. St. L.J. 643, 725 n.6 (1998).
n53. Ariz. Const. art. 6; Alaska Stat. 22.07.060, 22.10.150, 22.15.195 (2000); Tenn. Code Ann. 17-4-201 (2001 Supp.); Haw. Sup. Ct. R. 19; Utah CJA, R. 3-110, 3-111.
n54. Kevin M. Esterling, Judicial Accountability the Right Way, 82 Judicature 206, 209 (1999) (explaining that judicial performance evaluation commissions "are official state-sponsored independent agencies with either constitutional or statutory authority, and are funded by legislative appropriation").
n55. The various recipients of surveys or questionnaires included lawyers, litigants, jurors, court personnel, witnesses, judge being evaluated, other judges, appellate judges, staff attorneys, law clerks, social service or probation case workers, and others. See Aynes, supra note 43, at 298-302 (discussing the possible sources for evaluating judges).
n56. For a chart outlining non-survey sources of information used in Alaska, Arizona, Colorado and Utah state judicial evaluation programs, see Esterling, supra note 54, at 210.
n57. ABA Special Comm. on Evaluation of Judicial Performance, Concept Paper (1979) [hereinafter Concept Paper].
n58. Guidelines, supra note 46.
n59. Id. at iii.
n60. Id. at iii.
n61. Id. at iv.
n62. Id. Guideline 1-1.3 provides, however, that the guidelines are not "intended to replace or impair judicial polls conducted by state and local bar associations." Id. at 1-1.3.
n63. Id. at iv (emphasis added).

n64. Id. at 3-0.
n65. Id.
n66. Id. at 3-8. Guideline 3-8 provides for evaluation based on a judge's effectiveness in working with other judges, particularly "when ... exchanging ideas and opinions ... during the decision-making process; soundly criticizing the work of colleagues; and facilitating the performance of administrative responsibilities of other judges." Id. at 3-8.
n67. Id. at 3-1.
n68. Id. at 3-5, 3-6 (guideline 6 pertains to adjudicative and managerial responsibilities).
n69. Id. at 3-7.
n70. Id. at 11 cmt.
n71. Id. at 3-1.
n72. Id. at 3-1.
n73. Id. at 12 cmt.
n74. Id. at 3-2.
n75. Id.
n76. Id. at 3-2.2
n77. Id. at 13 cmt.
n78. Id. at 3-3.
n79. Id. at 3-4.
n80. Id. at 15 cmt.
n81. Id. at 3-5.
n82. Id. at 16 cmt. "In short, the measures for this criterion should look beyond the raw data." Id. at 17 cmt.
n83. Id. at 3-5.
n84. Id. at 3-6.
n85. Id. at 3-6.
n86. Id. at 3-7. The commentary recognizes the significant contributions made by judges in other public arenas, but justifies the exclusion of those from the evaluation criteria in order to avoid "inappropriately penalizing those judges who are legitimately unable to engage in such extracurricular activities." Id. at 19 cmt.
n87. Esterling, supra note 54, at 208 ("One major concern in judicial performance evaluations is ensuring the independence of the courts from the will of the commissioners.").
n88. Guidelines, supra note 46, at 11 cmt. ("It is essential in any program for the evaluation of judicial performance that integrity be included as a criterion.").
n89. N.J. Supreme Court Comm. on Judicial Performance, Second Report on the Judicial Performance Program 81 (Dec. 1995) (on file in the author's office and with the New Jersey Administrative Office of the Courts).
n90. Id.
n91. State of Conn., Judicial Performance Evaluation Program, Annual Report to the Chief Court Administrator, Attorney's Questionnaire (1992) (on file in the author's office and with the Connecticut Judicial Evaluation Administrator).
n92. Alaska Judicial Council, 1994 Judicial Evaluation Material 94 (May 1994) (on file in the author's office and with the Alaska Judicial Council).
n93. Id. Some states have mandatory time limits for disposing of cases. Commentary to Canon 3(A)(5) of the Model Code of Judicial Conduct indicates that diligence is important not only in the disposition of cases but also in a judge's other duties. "At a minimum, ... promptness includes starting the judicial proceedings on time and ending them on time." Model Code of Judicial Conduct Canon 3(A)(5) cmt.
n94. See supra text accompanying notes 74-78; Concept Paper, supra note 57, at 79.
n95. Id.
n96. Some evaluation systems, for example, allow judges to deselect certain respondents based on their perceived bias against the judge. See Judicial Performance Evaluation Methodology for the Tennessee Judicial Performance Evaluation Program (on file in the author's office and with the Administrative Office of the Courts for the State of Tennessee).
n97. See supra Introduction.
n98. These references are to United States Courts of Appeals Judges Rosemary Barkett and H. Lee Sarokin. Judge Barkett's nomination to the Eleventh Circuit Court of Appeals caused great controversy, but she was eventually confirmed by a vote of 61-37 in 1995. Judge Sarokin resigned following a series of political attacks citing the attacks as hampering his ability to render independent decisions. See Judicial Performance Evaluation Methodology for the Tennessee Judicial Performance Evaluation Program (on file in the author's office and with the Administrative Office of the Courts for the State of Tennessee).
n99. This assertion is not intended to indicate that the author believes that those who claim to evaluate in this manner are actually interested in evaluating a judge's performance. See Anthony Lewis, Politicians Play Politics to Intimidate Judges, Nominees, Sun Sentinel, Apr. 1, 1997, at 11A. What is important for this

discussion is not their true motivation, but the impression that their public comments makes on the uninformed electorate.

n100. Clint Bolick, Clinton Judges Hold Pro-Defendant Record, USA Today Apr. 4, 1996, at 13A; Orrin G. Hatch, Rule of Law: Is Clinton Tough on Crime? Just Look at His Judges, Wall St. J., May 1, 1996, at A15. Senator Orrin Hatch, Senate judiciary committee chair, issued statements against judges based upon their having "written or joined opinions seeking to free defendants ... or to stretch the law."

n101. See T. Carter, A Lesson Learned, A.B.A. J., May 1998, at 70. The efficacy of the approach is expressed aptly in the Luntz Research Company's book, The Language of the 21st Century, which asserts that "it's almost impossible to go too far when it comes to demonizing lawyers [and judges]. ... Few classes of Americans are more reviled by the general public ... and you should tap into people's anger and frustration with practitioners of law. ... [It] is admittedly a cheap applause line, ... but it works [so] don't hesitate to resort to ridicule when making your points." The book formed a part of a plan presented by pollster Frank Luntz to congressional leaders in 1998 for election campaign strategies.

n102. See supra text accompanying notes 88-95.

n103. Susan Keilitz & Judith White McBride, Judicial Performance Evaluation Come of Age, State Court J., Winter 1992, at 4. "During 15 years of development, judicial performance programs have demonstrated usefulness as a means of examining the performance of individual judges and the judicial system ... Programs provide meaningful feedback on fundamental aspects of judicial performance that can be used to identify ways of improving individual and institutional judicial performance." Id. at 13.

n104. Judicial self-improvement is identified as the primary use of judicial performance evaluations by the ABA Guidelines. Guidelines, supra note 46, at 1-1.1.

n105. Keilitz & McBride, supra note 103, at 13.

n106. ABA Special Comm. on Evaluation of Judicial Performance, Issues in Research and Development and Data Collection for Judicial Performance Evaluation Programs 14 (Apr. 1986).

Reliability and validity are terms with specialized meanings as used by social scientists. Reliability refers to the accuracy or precision of a measuring instrument (i.e, the less the error, the greater the reliability). ...

Validity, as compared with reliability, pertains more to the nature and meaning of one's variables. Content validity involves examining each item or question to determine its relevance. ...

Id.

n107. Guidelines, supra note 46, at 1-2.

n108. See generally Michael A. Hallett, Fostering Public Stewardship of the Courts: The Tennessee Performance Evalution Study, Tenn. B.J., Jan.-Feb. 1997, at 20.

n109. See, e.g., Joyce Pornick, Metro Matters: Ideology? Well, Who's to Judge? N.Y. Times, July 2, 2001, at B1.

n110. For a chart outlining some of the different models in place, see Keilitz & McBride, supra note 103, at 5-9.

n111. For this bibliography and other information, see http://www.ajs.org.

AMERICAN BAR ASSOCIATION

BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE

FEBRUARY 2005

I. GOALS

Guideline 1-1. Judicial evaluation programs improve the performance of individual judges and the judiciary as a whole. All court systems should develop and implement a formal program for the evaluation of judicial performance.

Guideline 1-2. In jurisdictions where judges are subject to reappointment, retention, or reelection, judicial evaluation programs enable those responsible for continuing judges in office to make informed decisions.

II. USES

Guideline 2-1. Primary uses of judicial performance evaluation include promoting judicial self-improvement, enhancing the quality of the judiciary as a whole, and providing relevant information to those responsible for continuing judges in office.

Guideline 2-2. Additional uses that may be considered include the effective assignment of judges within the judiciary and the improved design of continuing education programs.

Guideline 2-3. The uses of judicial performance evaluation do not include judicial discipline. The information developed in a judicial evaluation program should not be disseminated to authorities charged with disciplinary responsibility, unless required by law or by rules of professional conduct.

III. DISSEMINATION

Guideline 3-1. The dissemination of data and results from a judicial evaluation program should be consistent with and conform to the uses of the program. Except for the authorized uses of the performance evaluation and consistent with the law, the data and results should be confidential.

Guideline 3-2. When judicial evaluations are used only for judicial self-improvement, individual results should be provided only to the judge evaluated and the presiding or supervisory judge responsible for the performance of the court on which the judge serves.

Guideline 3-3. When judicial evaluations are used to improve the quality of the judiciary as a whole, results should not identify or give comparative rankings of individual judges.

Guideline 3-4. When judicial evaluations are used to inform decision makers regarding the continuation of judges in office, results should be made readily available to those responsible for continuation decisions, including voters, governors, legislatures, and commissions.

-4.1. Those responsible for reappointing, reelecting, or retaining judges should be provided with objective summaries of evaluation results for each judge and an explanation of how to interpret the results.

-4.2. If evaluation results are provided to an individual or entity responsible for continuation decisions, and those results include assessments of a judge's overall performance or recommendations as to whether a judge should be continued in office, judges should have an opportunity to review and respond to the evaluation report before it is disseminated.

-4.3. If evaluation results are publicly disseminated, and those results include assessments of a judge's overall performance or recommendations as to whether a judge should continued in office, judges should have an opportunity to review, respond, and meet with members of the evaluation body before the results are made public.

IV. ADMINISTRATION AND SUPPORT

Guideline 4-1. Ultimate authority over the development and implementation of a judicial performance evaluation program should be vested in the highest court or other constitutionally mandated body having ultimate responsibility for judicial administration.

-1.1. In states where performance evaluation programs have not been established by the judiciary or other governmental body, bar associations should develop and administer evaluation programs according to these guidelines.

-1.2. In states where judges are chosen in contested elections, it may be inappropriate for the judicial branch or any other entity using public funds to disseminate performance evaluations of incumbent judges running for reelection. In order to provide voters in these states with relevant information, bar associations should develop and administer judicial performance evaluation programs according to these guidelines.

Guideline 4-2. The day-to-day activities of the judicial evaluation program should operate through an independent, broadly based, and diverse committee.

-2.1. In jurisdictions where judicial evaluations are used solely for self-improvement and for improving the quality of the judiciary as a whole, oversight committees should be composed of members of the bench and the bar.

-2.2. In jurisdictions where evaluations are used to inform decisions regarding the continuation of judges in office, oversight committees should also include members of the public who are familiar with the judicial system.

Guideline 4-3. Staff support and adequate funding should be available to support a judicial evaluation program of high quality.

Guideline 4-4. Judicial evaluation programs should be structured and implemented so as not to impair judicial independence. The evaluation process should be free from political, ideological, and issue-oriented considerations.

Guideline 4-5. Judicial evaluation programs should be developed systematically and may be implemented in progressive stages. Evaluation programs should remain flexible so that they may be modified as needed. The entity having ultimate responsibility for the evaluation program should conduct periodic assessments of the program.

V. CRITERIA

Guideline 5-1. A judge should be evaluated on his or her legal ability, including the following criteria:

-1-1. Legal reasoning ability.

-1.2. Knowledge of substantive law.

-1.3. Knowledge of rules of procedure and evidence.

-1.4. Keeping current on developments in law, procedure, and evidence.

Guideline 5-2. A judge should be evaluated on his or her integrity and impartiality, including the following criteria:

-2.1. Avoidance of impropriety and the appearance of impropriety.

-2.2. Treating all people with dignity and respect.

-2.3. Absence of favor or disfavor toward anyone, including but not limited to favor or disfavor based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

-2.4. Acting fairly by giving people individual consideration.

-2.5. Consideration of both sides of an argument before rendering a decision.

-2.6. Basing decisions on the law and the facts without regard to the identity of the parties or counsel, and with an open mind in considering all issues.

-2.7. Ability to make difficult or unpopular decisions.

Guideline 5-3. A judge should be evaluated on his or her communication skills, including the following criteria:

-3.1. Clear and logical oral communication while in court.

-3.2. Clear and logical written decisions.

Guideline 5-4. A judge should be evaluated on his or her professionalism and temperament, including the following criteria:

-4.1. Acting in a dignified manner.

-4.2. Treating people with courtesy.

-4.3. Acting with patience and self-control.

-4.4. Dealing with pro se litigants and litigation fairly and effectively.

-4.5. Participating and providing leadership to an appropriate degree in professional development activities and in jurisdiction-wide and statewide court improvement and judicial education activities.

-4.6. Promoting public understanding of and confidence in the courts.

Guideline 5-5. A judge should be evaluated on his or her administrative capacity, including the following criteria:

-5.1. Punctuality and preparation for court.

-5.2. Maintaining control over the courtroom.

-5.3. Appropriate enforcement of court rules, orders, and deadlines.

-5.4. Making decisions and rulings in a prompt, timely manner.

-5.5. Managing his or her calendar efficiently.

-5.6. Using settlement conferences and alternative dispute resolution mechanisms as appropriate.

-5.7. Demonstrating appropriate innovation in using technology to improve the administration of justice.

-5.8. Fostering a productive work environment with other judges and court staff.

-5.9. Utilizing recruitment, hiring, and promotion policies and practices to ensure that the pool of qualified applicants for court employment is broad and diverse.

-5.10. Acting to ensure that disabilities and linguistic and cultural differences do not limit access to the justice system.

Guideline 5-6. Additional criteria should be developed reflective of jurisdiction (specialized versus general) and level of court (trial versus appellate).

-6.1. A specialized court judge should be evaluated according to whether he or she demonstrates the knowledge and skills necessary.

-6.2. An appellate court judge should be evaluated on the quality of his or her preparation for and participation in oral argument and on his or her effectiveness in working with other judges of the court.

VI. METHODOLOGY

Guideline 6-1. The judicial evaluation process is comprised of data collection, synthesis and analysis, and its usage.

Guideline 6-2. Expert competence should be used in developing methods for evaluating judges and collecting and analyzing data.

Guideline 6-3. Behavior-based instruments should be used to evaluate judges.

Guideline 6-4. The evaluation process must ensure the anonymity of individual respondents.

Guideline 6-5. Reliable sources of information should be developed for judicial evaluation programs.

-5.1. Multiple sources should be used whenever feasible.

-1.1. Potential sources of information for trial judge evaluations include attorneys, jurors, litigants, and witnesses who have appeared before the judge; non-judicial court staff, social service personnel, and law enforcement officials who have had regular contact with the judge; and appellate judges who have reviewed the judge's decisions.

-1.2. Potential sources of information for appellate judge evaluations include attorneys who have appeared before the judge, non-judicial court staff who have had regular contact with the judge, other appellate judges, and trial court judges whose decisions have been reviewed by the judge.

-5.2. Sources should be limited to those with personal and current knowledge of the judge.

-5.3. Objective sources of information may include public records.

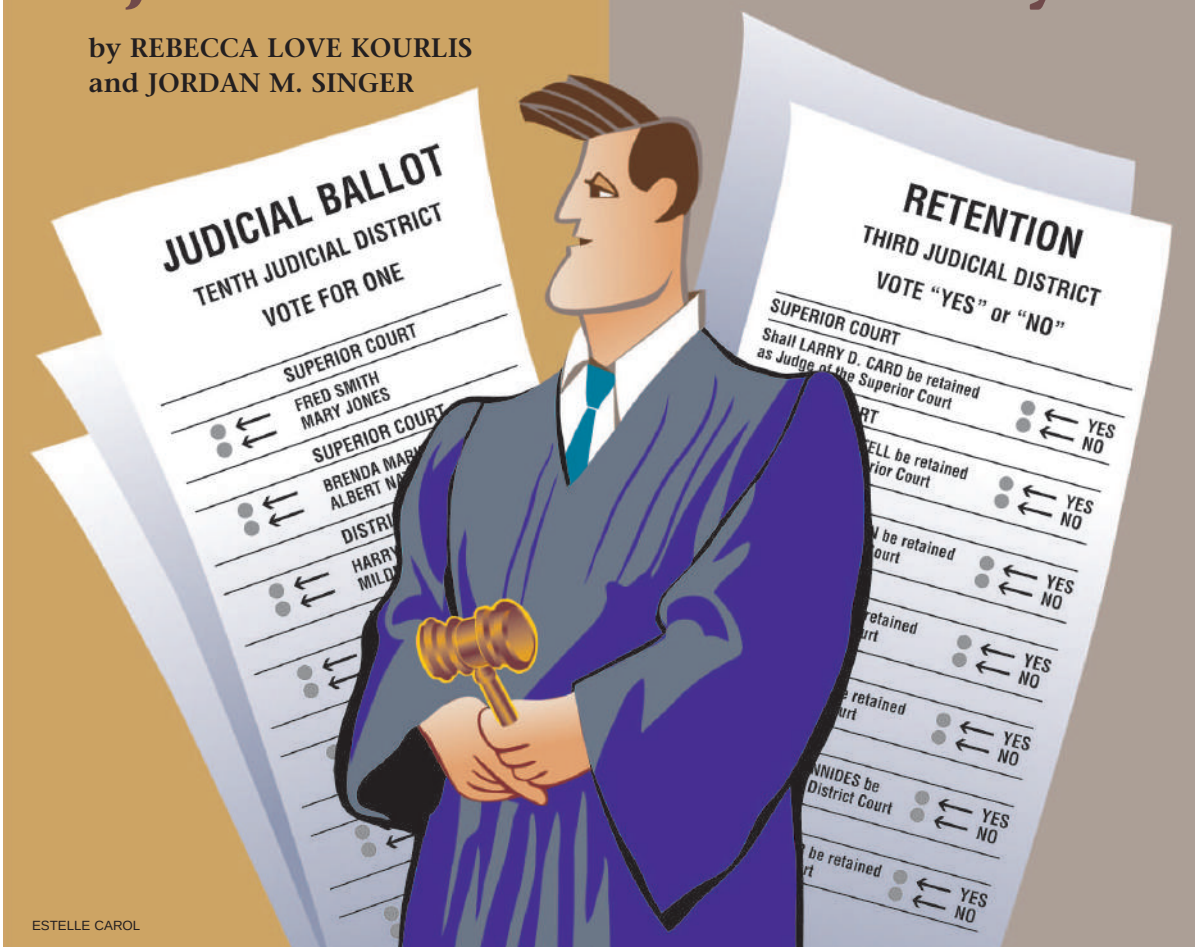
Guideline 6-6. At the outset of the evaluation program, program administrators should establish minimum thresholds for both response rates and number of respondents.

Guideline 6-7. Questionnaire content and wording should be structured with the relevant respondent group, and the nature and extent of that group's interaction with judges, in mind. In most instances, it will be necessary to use a different performance questionnaire for each respondent group.

Guideline 6-8. Judges should be evaluated periodically. The frequency of judicial evaluations should be related to such factors as the length of time the judge has served on the bench and when the judge will be considered for reappointment, retention, or reelection.

Using judicial performance evaluations to promote judicial accountability

by REBECCA LOVE KOURLIS
and JORDAN M. SINGER



In November 2006, voters in several states faced ballot measures that would have crippled the ability of state courts to do the work we expect of them. The "JAIL 4 Judges" referendum would have subjected South Dakota's judges to civil and criminal penalties for deciding cases in ways that offended a small minority of citizens. A proposal in Montana threatened judges with special recall elections if they made unpopular decisions. In Colorado, a ballot initiative sought to penalize judicial experience by imposing retroactive term limits for appellate judges, a measure that would have ousted nearly half the sitting appellate bench. And Oregon voters considered whether to elect their appellate judges by geographic district, apparently intending to tie judicial candidates more closely to the values of a particular region of the state.

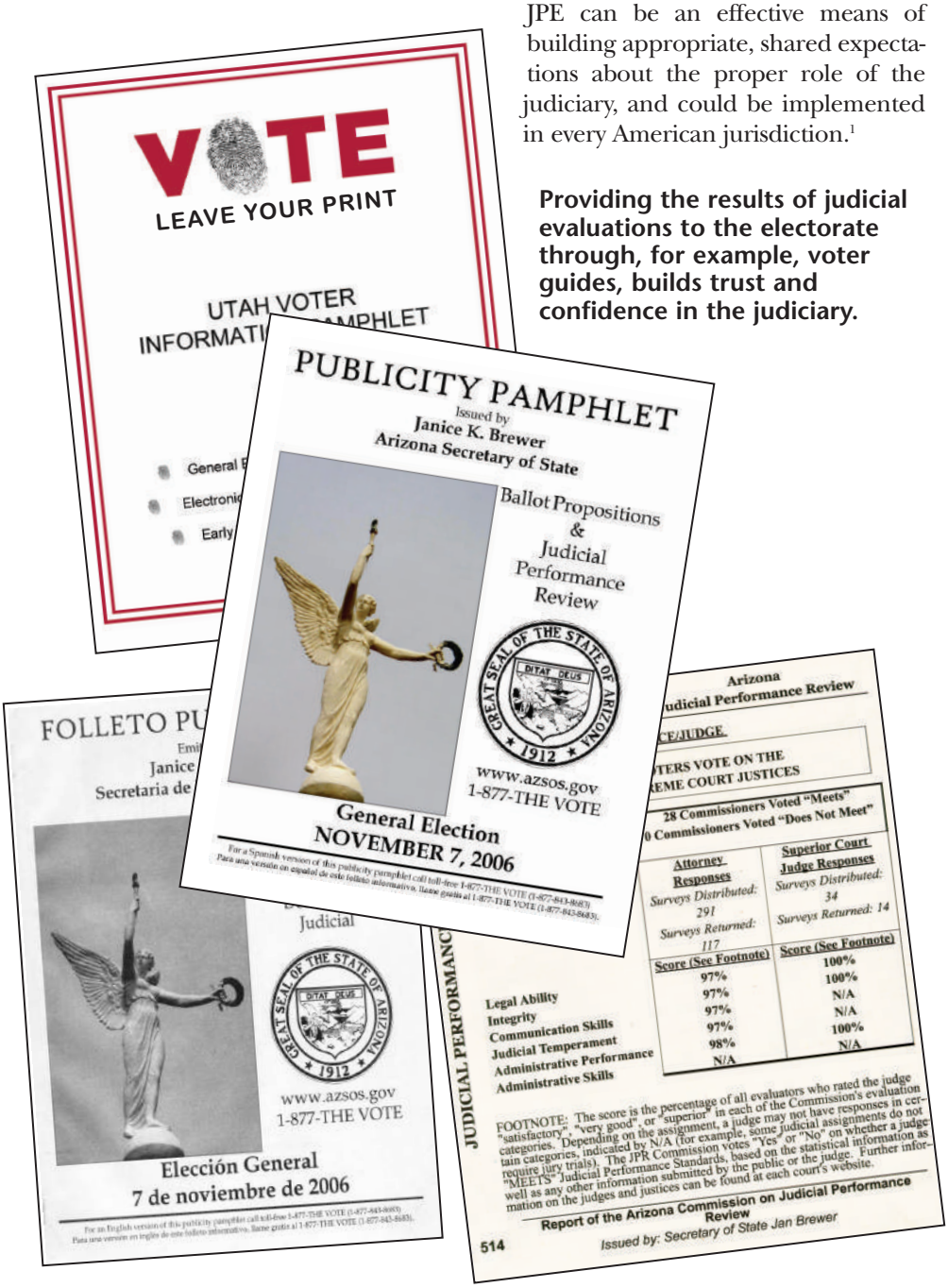
Each of these initiatives was couched as an effort to hold judges more accountable, "accountability" being defined (implicitly or explicitly) by their sponsors as adherence to the will of the majority. The chief architect of the Colorado initiative, for example, argued that term limits would make the judiciary as a whole "more responsive to the sovereign will of the people." Similarly, in Montana, proponents argued that recall of individual judges would "be a powerful tool for judicial accountability and democratic oversight of a branch of government that for too long has been too removed from the will of the people."

Although none of these initiatives was ultimately successful, those who want an effective, impartial judiciary can ill-afford to be complacent about the conditions that fueled their placement on the ballot. The public is increasingly being asked to hold judges accountable for the outcomes of specific cases, rather than the appropriateness of the process used to reach those outcomes. This

The authors would like to thank Institute for the Advancement of the American Legal System board members Russell Wheeler of the Governance Institute and Brookings Institution, and Lynn Mather of the Baldy Center for Law and Social Policy at the University of Buffalo, for their invaluable assistance in preparing this article.

1. The study, entitled *Shared Expectations: Judicial Accountability in Context*, is available through the Institute's website, www.du.edu/legalinstitute.

A recent study concludes that if properly designed and executed, judicial performance evaluations can be an effective means of building appropriate, shared expectations about the proper role of the judiciary, and could be implemented in every jurisdiction.



was not always the case. The time is ripe to return "judicial accountability" to its traditional role: a necessary partner, along with judicial independence, in ensuring an effective judicial branch.

This article summarizes the results of a recent comprehensive study of an existing but underutilized approach to process-oriented judicial accountability: judicial performance evaluation (JPE). The study, undertaken by the Institute for the Advancement of the American Legal System at the University of Denver, concluded that if properly designed and executed, JPE can be an effective means of building appropriate, shared expectations about the proper role of the judiciary, and could be implemented in every American jurisdiction.[1]

Providing the results of judicial evaluations to the electorate through, for example, voter guides, builds trust and confidence in the judiciary.

A primer on JPE

Nineteen states, plus the District of Columbia and Puerto Rico, employ some form of a judicial performance evaluation program (see "Overview of official judicial performance evaluation programs," page 204). These programs vary in their specifics—for example, they may use slightly different criteria for measuring judges' performance, or seek information from somewhat different sources, or share information with the public in different ways—but as a general rule all focus on whether judges are managing cases efficiently, deciding them on the basis of established facts and applicable law, explaining their decisions clearly, and exhibiting proper courtroom demeanor. In addition, regardless of the differences in their formats, JPE programs are uniformly process-oriented, not outcome-oriented: what matters is whether the judge handled a case in a balanced, fair, and efficient manner—not whether the ultimate decision in the case provoked limited or even widespread opposition.

Each judge is typically evaluated by an independent commission consisting both of attorneys and nonattorneys. The commission provides surveys to attorneys, jurors, and others who have interacted with the judge in a professional setting, asking for anonymous responses to questions about the judge's professional skills. In more comprehensive programs, the commission also reviews the judge's case management statistics and written opinions, solicits public comments on the judge's performance, and conducts one or more interviews with the judge. The commission then uses the collected information to measure each judge's performance against predetermined criteria. Because appellate judges typically work more collectively and have different roles in the judicial system, they generally are subject to different criteria than trial judges or magistrates.

JPE programs have been most commonly used in states employing

the "Missouri Plan" or "Nonpartisan Court Plan," so called because it was first adopted by Missouri voters in 1940. Under the Missouri Plan, judges are initially appointed to the bench through a merit selection process and subsequently participate in periodic retention elections. In a retention election, the judge runs uncontested, and the only question on the ballot is "Should Judge X be retained in office?" In most cases, if the sitting judge wins a simple majority of affirmative votes, he or she will continue to hold the office for another term.[2] In Missouri Plan states, JPE commissions generally make the results of each judicial evaluation available to the public well in advance of the judge's retention election. Where judges do not face retention elections, individual evaluations are generally kept confidential.

The need for JPE

Judicial performance evaluations are likely to promote judicial accountability in three ways. First, JPE programs can provide a valuable source of information to voters about their judges and judicial candidates. In many states where judges face elections to hold or remain in office, JPE programs may provide the only substantive, neutral source of information about judges on the ballot. This information is critically important. Without adequate, accurate information, voters generally decline to cast ballots in judicial elections.[3] Furthermore, many of those who do vote choose to elect or retain a judge based not on the judge's performance, but on the judge's ethnicity, gender, name, party affiliation, or length of time on the bench, or even for no articulable reason whatsoever.[4]

Surveys in 2004—one of a national sample, another in New York—suggest that voters would much prefer to make informed choices about their judges. More than two-thirds of respondents in the national survey agreed that "receiving a nonpartisan voter guide containing background information on judicial candidates would make them more likely to vote in judicial elections."[5] A report on the New York survey said that 88 percent of the respondents "believe that voter guides are a useful way to educate the public about judicial elections."[6] The inclusion of performance evaluations in voter guides can help fill the information gap.

The limited empirical research on voters' use of performance evaluation information suggests that the information substantially informs voting choices. In one study of four major metropolitan areas in states using JPE, 66-76 percent of the voters surveyed responded that the official evaluation information either helped their voting decision or served as the basis for that decision.[7] A majority of respondents in each of the four cities who said they were familiar with the evaluation reports also stated that "the information influenced their voting decisions, added confidence to their voting choices, [and] made them more likely to vote in judicial elections."[8]

JPE programs can also build shared expectations about the judiciary by educating the public about the specific qualities that make a good judge. If popular commentary is any indication, the most fundamental threat to judicial independence today is pressure on voters to "hold judges accountable" for politically unpopular outcomes in specific cases, or to vote for judicial candidates based on those candidates' personal opinions on hot-button political issues. That pressure reflects claims that too many judges are merely "legislating from the bench," and that judicial opinions are examples of policymaking rather than application of existing law.

For example, judicial candidates in Iowa's November 2006 election were asked by one coalition to complete a six-page questionnaire indicating their personal positions on (among other things) abortion, gay marriage and civil unions, assisted suicide, homosexual relationships, and the display of the Ten Commandments in public buildings and schools.[9] Widespread use of JPE programs can dilute this threat to judicial independence by shifting public focus away from political positions or particular case outcomes and toward the process of adjudication. JPE programs can measure the characteristics expected from an independent, knowledgeable judge: impartiality, temperance, knowledge of the law, fair application of the law, and efficiency. The voter who thinks of a judge in these terms, rather than as a robed policymaker, is arguably more likely to vote carefully and objectively

2. Two states, Illinois and New Mexico, require a supermajority to secure retention.

3. *See* "Report of the Commission to Promote Public Confidence in Judicial Elections" 38 (2004) (on file with authors), *available at* http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf (hereinafter "Feerick Commission Report") (58% of New York voters said they did not vote in judicial elections because they lacked candidate information); *see also* Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 72 (1983) (finding a high rate of abstentions among voters who had no information on the judges facing retention).

4. *See* Larry Aspin et al., *Thirty Years of Judicial Elections: An Update*, 37 SOC. SCI. J. 1, 3 (2000); *see also* Susannah A. Nesmith, *16 Judge Seats Draw 35 Candidates*, MIAMI HERALD, Sep. 1, 2006, at 6B (noting the electoral advantage of Hispanic and Jewish-sounding surnames in Florida judicial elections); Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 308-09 (1992) (noting voter reliance on low-information cues, including the gender of the candidates, in elections for associate justices of the Ohio Supreme Court in 1986 and 1988); Anthony Champagne & Greg Theilemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 271 (1991); Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1492 (2005) (discussing "'party sweeps' in which popular top-of-the-ticket candidates have swept judges of the opposing party out of office and elected judges of a popular candidate's party for no other reason than that the judges shared the popular candidate's party affiliation"); Griffin & Horan, *supra* n. 3, at 74; Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 6 (1994).

5. *See* Zogby International Survey of 1,204 American voters, commissioned by Justice at Stake and conducted March 17-19, 2004, *cited in* Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, 42-JUN TENN. B.J. 23, 25 & n.16 (2006).

6. Feerick Commission Report, *supra* n. 3, at 39.

7. Kevin M. Esterling and Kathleen M. Sampson, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 39 (Chicago: American Judicature Society, 1998).

8. *Id.* at 40.

9. *See* "Iowans Concerned About Judges, 2006 Judicial Voters' Guide Questionnaire for Judicial Candidates" (on file with authors), *available at* http://www.iowansconcernedaboutjudges.org/doc/Survey.pdf. Similar questionnaires greeted judicial candidates in other states.

in a judicial election.

Finally, judges themselves stand to benefit from the formal feedback of an evaluation. Each evaluated judge receives concrete information about the strengths and weakness of his or her performance, creating individualized opportunities for professional self-improvement. JPE programs can provide judges with feedback that simply could not, or would not, be captured through any other medium. This is particularly true for interpersonal performance issues such as courtroom demeanor, which a judge cannot truly evaluate for him- or herself and which lawyers, jurors, and litigants are unlikely to comment upon except through formal, anonymous evaluations.[10]

Judicial support for JPE

Despite the natural human aversion to being reviewed, sitting judges who have participated in performance evaluation programs have expressed support for them. A 1998 survey of judges in the four states with the most developed JPE programs (Alaska, Arizona, Colorado and Utah) found that:

- A very high percentage of judges in all four states agreed that the evaluations provided useful feedback on their performance;
- A significant majority of judges in each state agreed that appropriate criteria are used to evaluate their performance;
- Nearly all judges in each state felt that evaluation commissioners are fair;
- Large percentages in each state said that commission members understand their role as judges;
- Majorities in each state agreed that commission members understand the importance of judicial independence; and
- Majorities of judges in each state said that the evaluation process makes them appropriately accountable for their job performance.[11]

Similarly, judges who took part in a 2001 pilot study in Washington State had "predominantly positive" comments about the experience, and reported that the information they received was useful, had not been previously available, and could not have been transmitted through a means other than anonymous surveys.[12] Federal judges who participated in a 1991 pilot program also assessed the value of judicial performance evaluation as "overwhelmingly positive."[13] As one federal judge put it, "this project is extremely worthwhile to me. Although I would feel distressed if the responses were critical and unfavorable, I still want to know."[14]

Judges have occasionally opposed JPE programs in the abstract, based on fears that evaluations lie in the hands of unreliable, and potentially partisan, evaluation commissions.[15] But the risk of commission bias can be reduced through appropriate safeguards, such as partisan balance, requiring formal training for commission members, and formal approval of commission members by the legislature or another body. Moreover, in reality judicial elections have been politicized far more frequently when the public is *not* able to rely on performance reviews as a source of information. In the last 20 years, the most notorious examples of campaigns to remove judges from the bench—Rose Bird, Joseph Grodin and Cruz Reynoso in California, David Lanphier in Nebraska, and Penny White in Tennessee—occurred in states where official, formal evaluations of each judge's performance were not available to voters at the time of the election. As a result, one or two controversial issues became the focus of the campaign. It is telling that some of the strongest advocates of JPE are individuals whose time on the bench was cut short or threatened by segments of the public demanding particular outcomes in individual cases.[16]

Variation and innovations

As noted above, JPE programs have varied somewhat in their implementation. Several western states have adopted quite comprehensive JPE programs, which feature predetermined standards for judicial performance, thorough collection of information, and widespread dissemination of results. Other states have been more limited in their data collection, or have debated whether, and the extent to which, evaluation results should be kept confidential. In addition, different jurisdictions have sought information from different sources. These program variations reveal a number of innovations to the evaluation process, which other jurisdictions may want to consider.

The first innovation is broadening the pool of survey participants beyond attorneys. For example, an increasing number of states now survey jurors on the judge's clarity, demeanor, and level of preparedness at trial. New Mexico has broadened the pool even more significantly, providing surveys for appellate court judges to court staff, other appellate judges, trial court judges whose cases have been appealed, the judge's cur-

10. *See, e.g.*, Editorial, *The Judicial Survey*, 155 N.J.L.J. 748 (Feb. 15, 1999) (noting that "[t]he tradition of deference may serve to conceal that information [on courtroom demeanor] from the very person who needs it most, particularly if the judge's problem is a lack of audience-sense or of the ability to put himself in the shoes of another person.").

11. *Supra* n. 7, at xvii.

12. American Judicature Society – Washington Chapter, Committee on Judicial Performance Standards and Evaluation, FINAL REPORT OF THE WASHINGTON STATE JUDICIAL PERFORMANCE EVALUATION PILOT PROJECT 29 (2002).

13. Darlene R. Davis, JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 9 (Federal Judicial Center, 1991). The pilot project evaluated all district court, magistrate, and bankruptcy court judges in one judicial district, the Central District of Illinois. The pilot program limited its information collection to anonymous attorney survey responses in five areas of judicial performance: integrity, judicial temperament, legal ability, decisiveness, and diligence. *Id.* at 5. Although participation was voluntary, every judge in the district chose to participate. *See id.* at 2.

14. *Id.* at 8.

15. *See generally, e.g.*, Jacqueline R. Griffin, *Judging the Judges*, 21 LITIGATION 5 (1995).

16. *See* Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1076 (2002) (advocating for robust performance evaluations and noting that "Undoubtedly, much of the success of those who seek to destroy judicial independence results from the lack of available information upon which to base one's decision in judicial elections."); Leonard Post, *ABA Offers New Way to Judge the Judges*, NAT'L L.J., May 5, 2005, at 4 (noting that Virginia's JPE program was spurred by Justice Barbara Milano Keenan, who faced opposition to her reappointment by the state legislature in 2003 because of a dissent she wrote in a 1995 case involving the custody of a child by a homosexual parent).

Overview of official judicial perfomance evaluation programs

State or jurisdiction	Participating judges/frequency	Public dissemination?
Alaska	All judges/Prior to retention election	Yes — Included in election pamphlet mailed to every voter; detailed evaluations posted on website; evaluations printed in newspapers and aired on radio
Arizona	All appellate judges; Superior Court judges in Pima and Maricopa Counties/Every two years (mid-term and prior to retention election)	Yes — Pre-election reviews are mailed to voters and made available at public centers such as libraries, banks and grocery stores, and are posted on Arizona courts webpage. Mid-term performance reviews are confidential.
Colorado	All judges/Prior to retention election	Yes – Blue Book of Ballot Issues (election information) sent to all voters prior to election; also available on judicial branch website and published in newspapers
Connecticut	New judicial nominees and incumbent judges seeking reappointment/Upon seeking reappointment	Only evaluation criteria and procedural rules are made public. Judge may request that hearings concerning his reappointment be open to the public.
D.C.	Those seeking reappointment or senior status/ Upon seeking reappointment or senior status	No
Florida	Voluntary, informal program; appears to vary from circuit to circuit/No evaluations	No – evaluation forms go directly to judge with committee reviews
Hawaii	All full-time judges/As retention and appointment decisions warrant	Summary reports are disseminated; individual results are kept confidential.
Idaho	District magistrates only/After initial 18-month term of office	No
Illinois	Voluntary/N/A	No – evaluation data is kept strictly confidential
Kansas*	All judges/N/A	Yes and no – for judges in retention elections, evaluations publicly available; for judges running in contested elections, evaluations kept confidential
Massachusetts	All judges/Judges with four years of experience are evaluated every 12-18 months; judges with more than four years of experience are evaluated once every 18-36 months.	Annual summary report available to bar members; no information provided on individual judges
Minnesota	Voluntary/Varies by judicial district	Varies; some districts issue reports or summary information
New Hampshire	All Superior Court and District Court judges (appellate judges are evaluated collectively)/ Every three years, with one-third of judges evaluated each calendar year	Annual summary report for entire judiciary is presented to Governor and other top state officials
New Jersey	All judges/Second and fifth year after appointment	No – strictly confidential.
New Mexico	All sitting judges except those running in a partisan election/Midterm and prior to retention election	Yes – Retention evaluations are posted on commission's website, published in newspapers, and made available at county clerk offices. Midterm evaluations are confidential.
Puerto Rico	N/A/Every 3 years	N/A
Rhode Island	All judges/Every 2 years	No – sent to Chief Justice of Supreme Court and Chief Judge of each district court only.
Tennessee	Appellate judges seeking retention/Every 8 years, prior to retention election daily newspaper	Yes – final report of less than 600 words per judge is published at least 180 days before qualifying deadline in general circulation

Overview of official judicial perfomance evaluation programs

State or jurisdiction	Participating judges/frequency	Public dissemination?
Utah	All judges/Every 2 years	Yes – published in voter information pamphlet and posted on governor's website.
Vermont	Judges seeking retention/Prior to retention elections	Report for each judge seeking retention presented to the General Assembly for consideration
Virginia	All judges/Three times per term	No – first two evaluations of each term are confidential; third sent only to relevant members of state legislature

Note: This chart reflects official judicial performance evaluation programs only. State and/or local bars conduct independent judicial evaluations in Georgia, Illinois, Kentucky, Maine, Missouri, Nebraska, Ohio, Pennsylvania, South Carolina, Texas, Washington, West Virginia, and Wyoming. In Nevada, performance evaluations are conducted by a newspaper, the *Las Vegas Review-Journal.*

*The Kansas program is brand new and has not had the opportunity to conduct any evaluations.

rent and former law clerks, and law professors (who are asked to evaluate the clarity and accuracy of the judge's published opinions). Trial judge surveys in New Mexico are sent to lawyers and jurors, as well as court staff, law enforcement personnel, probation officers, psychologists, citizen review volunteers, social workers, interpreters, and court-appointed special advocates. Courts in Minnesota have also reached out to a non-traditional resource, sending detailed questionnaires to litigants to gauge their perception of how they were treated and their overall satisfaction with the court process.

Another innovation is the use of trained court observers in Alaska and New York. In Alaska, independent court observers receive approximately 40 hours of advance training, and are assigned to sit in on court proceedings at unscheduled intervals. As many as 15 observers review each judge. They observe both criminal and civil matters, and review court proceedings ranging from jury trials to motion hearings and arraignments. Observers give both numerical ratings and written comments in response to straightforward questions about the judge's behavior, such as "Did the judge pay close attention to the testimony?" and "Did you understand the judge's explanations and decisions, or did you leave feeling confused?" All observer data for each judge are compiled into a one-page evaluation that sets out the total number of hours the judge was observed, the types of cases observed, and the average rating the judge received in each category. While New York does not have an official JPE program, an independent organization, the Fund for Modern Courts, sponsors similar regular, public court monitoring (complete with detailed observer reports) throughout the state.

A third innovation is the development of benchmarks for judicial performance. Established benchmarks for (among other things) a judge's case management skills and performance in survey responses provide a clear guide for judges and the public as to expected standards for the judiciary, and give evaluation commissions a framework for assessing each judge's performance. Benchmarks also reduce the opportunity for mischief by an evaluation commission that might be inclined (for whatever reason) to recommend retention of a subpar judge or against retention of an excellent one.

Utah has taken the lead in setting bright-line rules, instructing its evaluation commissions to base their recommendations on the judge's ability to meet six predetermined benchmarks. These include: (1) a favorable rating by at least 70 percent of the respondents on at least 75 percent of the attorney survey questions; (2) for trial judges, a favorable rating by at least 70 percent of the respondents on at least 75 percent of the juror survey questions; (3) compliance with rigid timing requirements for disposition of cases; (4) at least 30 hours of judicial education per year; (5) substantial compliance with the Code of Judicial Conduct; and (6) physical and mental fitness for office.[17]

A fourth development involves mentoring of evaluated judges. Arizona has established three-member "conference teams" for each evaluated judge, consisting of another judge, a member of the state bar, and a member of the public. The conference team meets with the judge to formulate a written self-improvement plan based upon the judge's self-evaluation, public comments, and survey results. Conference teams work separately from evaluation commissions, and are prohibited by rule from "participat[ing] in formulating any finding as to whether a judge or justice meets judicial performance standards."[18] Justices on the New Hampshire Supreme Court also engage in

17. *See, e.g.*, UTAH VOTER INFORMATION PAMPHLET (General Election Nov. 5, 2002) at 60 (on file with authors), *available at* http://elections.utah.gov/GOV_election_pamphleWEB.pdf.

18. R. P. JUD. PERF. REV. ARIZ. 6(f)(2), *quoted in* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 690-93 (1998) (alteration in Pelander).

peer review, completing individual self-evaluations and then collectively discussing them to identify personal strengths and weaknesses.

A fifth innovation is the development of formal processes to appeal the commission's evaluation and recommendation. In Colorado, an evaluated judge is permitted to review the commission's draft profile and recommendation before it is made available to the public; if the judge disagrees with the evaluation, he or she may request an additional interview with the commission or, where retention is not recommended, attach a statement of his or her own position to the profile when it is sent to the public. Similarly, in Arizona the judge is permitted to review the evaluative report and submit comments before the report is disseminated to the public.

A sixth innovation is partnership between the state judiciary and state and local bar associations to develop JPE programs.[19] Bar polls are frequently used to evaluate judicial performance, but alone they cannot account for important measures such as case management statistics and courtroom observation. Furthermore, bar polls have been criticized by some as unscientific or haphazard. By working directly with the judiciary to convert existing bar polls into more comprehensive programs, bar associations can build trust with the judiciary and provide a more useful product for the public.

A final development is the growth of creative efforts to disseminate results, including the increasingly sophisticated use of performance commission websites. One obstacle to comprehensive programs is the cost of disseminating evaluation results, particularly if evaluations are conducted frequently. Costs, however, can be reduced significantly by posting evaluation results online, provided that the public is made aware of the website and the information is easy to access.

Indeed, the value of JPE programs is tied directly to the extent to which the results are shared with the public. Providing the results of individual judicial evaluations to the electorate (both directly and through the news media) in a manner that is easily understood builds trust and confidence in the judiciary by identifying judges with outstanding performance and identifying those who need improvement. The broad public discussion of judicial performance standards and results reinforces the expectation that judicial accountability should be process-oriented rather than outcome-oriented, and increases the profile of the evaluation commission, which encourages greater participation in the JPE process. Lack of transparency, by contrast, tends to promote suspicion about the evaluation process (from both judges and the public), causes the public to become disinterested or apathetic about its judges, and invites the creation of informal judicial rankings and polls to fill the information gap.

JPE has yet to gain widespread application, but the innovations described above are working in states that have adopted them. Whether improving an existing JPE program or starting one from scratch, evaluation commissions would benefit greatly from frequent sharing of ideas with their peers in other jurisdictions.

Nationwide value

Judicial performance evaluation has value regardless of how a state chooses its judges. JPE has been used most frequently, and in its most robust form, in Missouri Plan states. This is not surprising, since voters in retention elections are natural consumers of information on the performance of sitting judges. However, many of the benefits of JPE also translate to jurisdictions where judges are chosen through contested elections. Limited JPE programs in Washington and New York, among other states, strongly suggest that comprehensive performance evaluation and widespread public dissemination of evaluation results would have a positive effect on judicial elections, by informing voters about the performance of their judges and judicial candidates, and reducing the need for voters to rely on expensive and politically charged campaign advertisements.

The most significant obstacle to the broad implementation of JPE programs in contested election states is the concern that a candidate who is not currently on the bench cannot be evaluated in the same way as a sitting judge. This concern is well-taken, but it is not insurmountable. Even candidates who have not previously held judicial office can be evaluated on the skills they would expect to use on the bench. Judicial candidates are almost always attorneys or judges on lower courts, and would be expected to have skills and knowledge that are measurable in much the same way as the skills and knowledge of an incumbent judge. For example, an attorney could be evaluated on his or her disposition, timeliness, responsiveness, fairness in negotiating with opposing counsel, use of facts and appropriate sources of law in briefs, and the like. Sources of information on the attorney candidate's performance might include:

- Surveys of members of the bar, especially attorneys who have worked with and against the candidate in recent cases;
- Surveys of non-attorneys who have interacted with the attorney in courtroom, mediation, or deposition settings, including judges, mediators, arbitrators, court staff, stenographers, and perhaps jurors or witnesses;
- Surveys and/or consultation with sitting judges (allowing for partisan balance among the judges consulted if desired);
- Review of selected submissions to the court, including a variety of motions and briefs; and
- Management of cases for which the candidate was the lead attorney, looking for compliance with court time frames and other rules and the

19. *See, e.g.*, Hawaii State Bar Association, Standing Committee on Judicial Administration, *Report: Regarding a Judicial Evaluation Program*, 3-DEC HAW. B.J. 9, 9 (1999) (describing efforts to work with the state judiciary to implement a JPE program); Press Release, Missouri Bar Association, Judicial Evaluations Available Online to the Public (on file with author), *available at* http://www.showmecourts.org (noting that for the first time, the Missouri bar would be surveying jurors as part of its bar poll for the 2006 election).

number of times the candidate requested extensions or continuances.

This form of evaluation, while not identical to judicial evaluation, would provide a reasonably fair and accurate basis for comparison between the candidates. More importantly, it would frame the comparison in terms of objective, process-directed criteria expected of any judge, helping voters to cast an informed ballot. The evaluation commission obviously should not endorse a particular candidate in a contested election, but it can state whether each candidate has met the predetermined benchmarks to be considered qualified for office.

Even candidates who have not previously held judicial office can be evaluated on the skills they would expect to use on the bench.

JPE programs can also be adapted to jurisdictions where judges are appointed and do not have to face the voters directly. For example, approximately half the federal judiciary serves terms of office, and performance evaluations could assist with reappointment decisions. Even for judges with life tenure and no expectation of changing jobs, performance evaluation serves as an incentive to identify areas for self-improvement, and to confirm strengths on the bench. For the public, regular and frequent dissemination of evaluation results allows citizens to observe growth in judicial performance, enhances public trust and confidence, and reinforces the expectation that the proper criteria for judicial accountability focus on the adjudicative process, not particular case outcomes.

Recommendations

The Institute's report details a significant number of recommendations for implementing a comprehensive, well-functioning JPE program. These detailed recommendations fall within six general categories, and may be summarized as follows:

- *Conduct evaluations regularly.* Each sitting judge should be evaluated on a regular schedule, at least twice during each term of office or, if there is no set term, at least once every three years. Regular evaluations help judges improve more quickly, and help the public accept neutral measures of judicial performance more readily.
- *Choose neutral criteria.* Evaluations should emphasize apolitical metrics of judicial performance, and should be based primarily on performance against predetermined benchmarks. Where judges and the public understand and accept the goals and substance of performance benchmarks, shared expectations about judicial performance are apt to develop more easily.
- *Cast a wide net for collecting information.* An evaluation commission should gather a broad and deep set of information on the judge's performance, seeking information that is timely and based on personal knowledge when applicable. Such information should include survey data, review of case management skills and written opinions, courtroom observation, and information gained from interviews with the judge. The commission should issue a report concerning each judge's performance based on the collected information. Evaluation criteria should be as comprehensive as possible, and any report or recommendation should represent a thorough analysis of the judge's performance.
- *Create trustworthy evaluation commissions.* Each evaluation commission should be independent and more or less balanced between attorneys and non-attorneys and along partisan lines. Depending on the size of the commission, gender and geographic balance may also be appropriate. The less opportunity for bias in the commission, the more likely the public will receive its evaluations positively.
- *Be open.* The evaluation process should be transparent both to the judge being evaluated and to the public. Judges and citizens should know exactly why the commission made the recommendation or evaluation it did. Those who do not understand the process are unlikely to give it proper credence.
- *Share the results.* Evaluation results should be widely disseminated to the public through voter guides, newspapers of general circulation, and the Internet. No matter how comprehensive the evaluation, shared expectations cannot be developed if the public is unaware of, or unable to access, the results.

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Rarely does a process that has been in use for three decades qualify as an important "discovery," but for the majority of state and federal courts, JPE is exactly that. It is an important component to balancing judicial accountability and judicial independence. It identifies the proper criteria by which to review a judge, without invading the province of judicial independence so critical to our democracy. And it serves as a valuable educational tool both for judges and the public they serve. For every court system in the United States, judicial performance evaluation is an idea whose moment has come.

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Session 8

Relying on Opinion of Bar: Credibility Issues

"Judicial Independence: Is It Threatened?"[1]

by
Hon'ble.Mr. Justice J.S.Verma , Former Chief Justice of India.

"The place of justice is a hallowed place, and therefore not only the Bench, but also the foot space and precincts and purpose thereof ought to be preserved without scandal and corruption".

"On Judicature" by Francis Bacon

In the year 1995 I delivered the First P.K.Goswami Memorial Lecture at Guwahati with the title *"The Independence of The Judiciary—Some Latent Dangers"*. In a way it was a sequel to my apprehension over the years expressed judicially in my separate opinion in the K. Veeraswami case, 1991(3) SCC 655 followed by the events leading to the V. Ramaswami cases that I had to hear and decide. Fifteen years later I am anguished that some of my apprehensions threaten to come true! Hence, the choice of this topic for the lecture to pay homage to the memory of a doyen of the Madras Bar, S.Govind Swaminadhan who was a true professional practicing the highest standards of professional conduct and ethics in the Bar, which is the greatest assurance for judicial independence. In my vocabulary, the word 'Bar' denotes the entire legal profession—the practicing lawyers as well as the judges on the Bench.

Another reason for this choice goes back to the time of my entry to the Bar in 1955 when the first book to read and digest given to me by my senior, G.P.Singh (later Chief Justice of the M.P.High Court) was a compilation of lectures delivered by a senior member of the Madras Bar, K.V.Krishnaswami Iyer to the junior members on professional conduct and ethics. The high tradition of professional conduct and ethics of the Madras Bar coupled with my baptism in the Bar with this lesson indicated the obvious choice of the topic for beginning the Lecture series in the memory of S.Govind Swaminadhan at this venue. It is not merely contextual but also of great constitutional significance at a time when prompt measures are needed for protecting judicial independence from lurking dangers.

II

Judicial Independence & Accountability

The independence of the judiciary is a necessary concomitant of the power of judicial review under a democratic Constitution. The foundation for judicial review without a specific provision under the American Constitution was laid by Marshall, C.J. in 1803 in Marbury v. Madison; even though much earlier in 1608 it was Lord Coke whose opinion in Dr. Bonham's case germinated that concept. In the Indian Constitution, judicial review is expressly provided *inter alia* in Articles 13, 32, 136, 141, 142, 226 and 227. It is also recognized as a basic feature forming an indestructible part of the basic structure of the Constitution pursuant to the decision in Keshavananda Bharti, AIR 1973 SC 1461. The directive principle of State policy in Article 50

[1] First S.Govind Swaminadhan Memorial Lecture at the Madras High Court Bar in Chennai on 29 January 2010.

mandates separation of judiciary from the executive to maintain its independence, as essential for its function as the watchdog under the Constitution. However, like every organ of the State and every public functionary in a democracy the judiciary as an institution and every judge as a public functionary is accountable to the political sovereign—the People. The only difference is in the form or nature of the mechanism needed to enforce their accountability. In short, judicial accountability is a facet of the independence of the judiciary; and the mechanism to enforce judicial accountability must also preserve the independence of the judiciary.

The rule of law which is the bedrock of democracy will be adversely affected if the independence of the judiciary is compromised by the erosion of the integrity of the judiciary. Such erosion can be from within as well as from without. Safeguards to protect the judicial independence are in our Constitution in addition to the several international instruments, which can be read into the constitutional guarantees by virtue of the canons of construction evolved in Vishakha, AIR 1997 SC 3011.

In addition to the UDHR and the ICCPR, the UN has set forth a set of standards known as the *'Basic Principles on the Independence of the Judiciary'*. Also *'The Beijing Principles on the Independence of the Judiciary, 1997'* adopted at Manila by the Chief Justices of the Asia Pacific Region; and *'The Bangalore Principles of Judicial Conduct, 2002'* are two such documents needing particular mention. **The essential values stated in the Bangalore Principles are: *judicial independence, both individual and institutional, as a prerequisite to the rule of law; impartiality, not only to the decision itself but also to the process; integrity; propriety, and the appearance of propriety; equality of treatment to all; competence and diligence.* It concludes with the need for effective measures to be adopted to provide mechanisms to implement these principles.**

To protect the judiciary from dangers within, the framers of Indian Constitution considered it sufficient to provide for removal of a judge of a High Court or the Supreme Court in the extreme case of proved misbehaviour or incapacity under Articles 217 and 124 respectively; and to vest the control over the subordinate judiciary in the respective High Court under Article 235. In this manner the Constitution provides for enforcing judicial accountability preserving the independence of the judiciary.

III

Mechanism for Judicial Accountability

A serious debate is now raging about the inadequacy of the existing mechanism for enforcing the judicial accountability of any erring judge in a High Court or in the Supreme Court. There is now a general consensus that some recent incidents involving a few in the higher judiciary has exposed the inadequacy of the existing provisions to deal with the situation; and it calls for an effective mechanism to enforce the judicial accountability of the higher judiciary, in case of need.

There can be no doubt that the public perception in this behalf cannot be ignored. Public confidence in the judiciary is its real strength that has also legitimized *'judicial activism'* through Public Interest Litigation; and converted the judiciary's image from the *'least dangerous branch'* without the *'purse or the sword'* (borrowing from Alexander Hamilton in the 78th Federalist) to a strong arm of the State. The recent clamour for effective judicial accountability justified by a few recent incidents must be properly channelised to ensure that an effective mechanism for accountability of the higher judiciary is developed without eroding the independence of the judiciary. It must be borne in mind that the number of erring superior judges is miniscule which

must not embarrass the vast majority of correct judges. The threat to the independence of the judiciary must be averted by a sensible balancing act.

Once the integrity and accountability of the higher judiciary is assured, the subordinate judiciary can be easily managed by virtue of Articles 50 and 235. High Courts are pivotal in the administration of justice. Once they justify people's confidence, the subordinate courts would not lag behind. The best way to exercise control over the subordinate courts is for the High Courts to lead by example. It is well known that "*An ounce of practice is worth more than a ton of precept"*. All the precept in the form of circulars and guidelines to the subordinate judiciary from the higher judiciary is ineffective unless it is identified with the practice of the preachers. That does not appear to be the current perception in all cases.

IV

Areas of Concern

Focus on some important areas is needed. A few of these were identified in my above 1995 lecture, separate opinion in the K.Veeraswami case, and the majority opinion in the Second Judges case. A brief mention of these in the present context is helpful.

In the 1995 lecture, I pointed out the latent dangers to judicial independence from within and concluded thus:

"The existence of power must be accompanied by accountability…Erosion of credibility in the public mind resulting from any internal danger is the greatest latent threat to the independence of the judiciary. Eternal vigilance to guard against any latent internal danger is necessary, lest we suffer from self-inflicted mortal wounds...The absence of any codified rules or norms to regulate judicial behaviour at the higher levels has been on account of the view that those entrusted with the task of regulating the conduct and behaviour of others do not need to be told of the requirement from them. However, if we fail in living up to that expectation, it should not be surprising if in the near future there is move by an outside agency to step in and provide a solution to the felt need…The need of the hour, therefore, is to realize this clear and present danger as an imminent threat to the independence of the judiciary from within…In my view there is no time to lose and we must act promptly…Observance by us of the norms and guidelines indicated for the members of the judiciary by the ancient texts and the judicial verdicts is a sure way to prevent any threat from the lurking latent dangers from within. It would also satisfy the legitimate expectation of the people of our accountability which must accompany the investment of any public power".

Earlier in the K.Veeraswami case, 1991 (3) SCC 655 my dissent recognized the felt need for suitable legislation, the existing provision being inadequate, to ensure accountability of the higher judiciary protecting the judicial independence.

Therein, I had said:

"If there is now a felt need to provide for such a situation, the remedy lies in suitable legislation for the purpose of preserving the independence of judiciary free from likely executive influence while providing a proper and adequate machinery for investigation into allegations of corruption against such constitutional functionaries and for their trial and punishment …The social sanction of their own community was visualized as sufficient safeguard with impeachment and removal from office under Article 124(4) being the extreme step needed, if at all. It appears that the social

sanction of the community has been waning and inadequate of late. If so, the time for legal sanction being provided may have been reached".

Having been convinced that the majority opinion in the K.Veeraswami case was not workable (as proved by later events), I added a warning in one para at the end of my draft dissent, which I omitted at the time of its pronouncement because of its strong language. The apprehension therein of a later intrusion by the executive to prescribe for us having now come true, it may help to recall that sentiment with the hope that some prestige may be salvaged even now in enactment of the impending legislation to cover the field. **I believe that self regulation is dignified while outside imposition is demeaning.** The omitted draft para from that opinion was:

"With no pretensions of a 'prophet with honour' to borrow the title from Alan Barth's compilation of opinions of some great dissenters, and no desire to be a prophet of doom, I deem it fit to end on a note of caution. My view is not shared by the majority. I hope they are right. But, if it be not so, let not posterity accuse us that the control over the judiciary denied to the executive by the Constitution and the Parliament, and which the executive could not wrest through the Parliament was conferred on it by judicial craftsmanship itself. I do hope that in spite of the present clamour for the majority view, in calmer times, when present pressures, passions and fears subside, and the potential threat of the yet unknown and unexpected power in the executive without the requisite statutory safeguards is fully realized, there will be time enough to effectively check any intrusion into the independence of judiciary by this means. Undoubtedly, there is erosion of values in all spheres but even now the higher judiciary retains comparatively the greatest credibility in public eye, as it did in earlier times. Is it, therefore, correct and wise to vest the executive, which does not enjoy even equal, much less greater credibility, with this extra power not envisaged by the Constitution and the Parliament? The answer at present by the majority is in the affirmative, which would be the law. It is the future, which will unfold the true canvass'.

The need to regulate this area by internal discipline to prevent outside intrusion prompted resolutions to this effect in the Chief Justice's conferences, but the general reluctance from within kept the matter in abeyance till the three resolutions were adopted unanimously by the Supreme Court on May 7, 1997: *Restatement of Values in Judicial Life; Declaration of Assets by the Supreme Court and High Court judges; and 'In-house Procedure' for inquiry into allegations against these judges.* These resolutions were later adopted in the Chief Justice's Conference in 1999. The Bangalore Principles, 2002 also affirmed the Restatement of Values. **These resolutions provided the framework for the needed legislation to cover the field without any scope for executive intrusion in enactment of the legislation.** Before demitting the office of the CJI, I also wrote a letter on December 1, 1997 to the Prime Minister to this effect in a bid to ensure judicial accountability preserving the independence of the judiciary. After my retirement, I have reiterated it in a letter of April 7, 2005 to the present Prime Minister.

V

Self-regulation

It saddens me to find that the judiciary appears to have lost the initiative and the political executive who also controls the Parliament in our constitutional scheme is now to determine the contents of the impending legislation. What troubles me even more is the reported initial assertion of the CJI, K. G. Balakrishnan that the superior judges need not declare their assets unless bound to do so by a law, in spite of the unanimous resolution of the Supreme Court on May 7, 1997 since that has only moral authority; and later the judicial challenge to applicability of the RTI Act

in the High Court and then to itself! I am distressed at the comments made publicly and heard privately about the higher judiciary in this context. However, the subsequent dilution of that stand is welcome news. The *perception* that law alone and not morality binds the judiciary is in conflict with the judicial tradition and is disturbing. It ignores Jeffry Jowell's wise enunciation that *'law is seen as institutionalized morality'*; and David Pannick's conclusion in his book--'Judges': *"The qualities desired of a Judge can be simply stated: that he be a good one and that he be thoughts be so".*

However, the recent response of the Delhi High Court (in L.P.A. No. 501 of 2009 decided on 12 January 2010) led by Chief Justice A.P.Shah in rejecting the tenuous stand of the Chief Justice of India, K.G.Balakrishnan that the office of CJI and the Supreme Court are above the law (RTI Act) applicable to all public functionaries in our republican democracy is to be hailed as a welcome blow for transparency and accountability, which are acknowledged principles of standards in public life. The decision first by a single judge, S.Ravindra Bhat, affirmed on appeal by the full bench of the Delhi High Court is a glaring proof of judicial independence. The observations of A.P.Shah, C.J. speaking for the full bench that *"Judicial independence is not the personal privilege of the individual judge, but a responsibility cast on him",* and *"Democracy expects openness…don't wait for Parliament to compel judges to disclose assets and undermine judicial independence",* provide strong fillip to judicial independence.

Chief Justice A.P.Shah has articulated the true concept of judicial independence reiterating the modern view. He has echoed the words of Lord Woolf, C.J. in an article wherein he said, *"The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public".* It is time the Chief Justice of India, takes the lead in this direction provided admirably by the High Court to bring quietus to the unsavory controversy threatening judicial independence.

Indira Gandhi's case, AIR 1975 SC 2299 enunciated certain propositions: accountability is an integral part of a democratic polity; it implies the people's right to know the manner of working of the government; accountability improves the quality of governance; secrecy, on the other hand, promotes nepotism and arbitrariness; and, therefore, article 19(1)(a), which implies open government, is premised on the 'right to know'. This view has been reiterated in later decisions: S P Gupta, AIR 1982 SC 149; Secretary, Ministry of IB, AIR 1995 SC 1236.

It is reasonable to assume that the Supreme Court will practice what it has preached and made the law of the land. It is useful to recall Lord Acton's summary of the imperative of the people's 'right to know'. He said: *"Every thing secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity".*

Let me hope that the Supreme Court led by the Chief Justice of India will now accept the verdict in good grace and not appeal to itself to re-examine its obvious merit of the Delhi High Court judgment! Conflict of interest in the further appeal to itself is obvious, since the doctrine of necessity is not attracted. Otherwise, we are bound to go down in the public estimation which would rightly conclude that we do not practice what we preach.

VI

Role of the Bar

The Bar has a significant role in such a situation. I wish the Attorney General, G.E.Vahanvati who appears for the Supreme Court draws inspiration from some of his illustrious predecessors to

advise the CJI against a further appeal by the Supreme Court now to itself. Govind Swaminadhan as Advocate General of Tamil Nadu boldly contradicted Chief Justice A.N.Ray at the hearing of the review of Kashavananda Bharti decision when the CJI attempted to justify the review saying it was at the behest of the former. Lal Narayan Sinha as the Solicitor General refused to argue the Union Government's untenable plea in the Habeas Corpus matter during the Emergency (1975--'77). M.C.Setalvad, C.K.Daftary, S.V.Gupte and H.M.Seervai to name a few, were similar leaders of the Bar who did not hesitate to guide correctly the Chief Justices when ever need arose to preserve the dignity, credibility and the independence of the judiciary. M.C.Setalvad and Sir Alladi Krishnaswami Aiyer had no hesitation in giving an opinion to the President of India, Dr. Rajendra Prasad, which was not to his liking. Leaders of the Bar must not abdicate their role to preserve judicial independence with judicial accountability.

VII

Appointments

Another issue relevant in this context is of the appointment of judges in the Supreme Court and the High Courts. Chief Justice of India, K.G.Balakrishnan asserts that the collegium headed by him is strictly following the decision in the Second Judges case by which they are bound. The general perception voiced eloquently by the executive is that the executive has no part in making these appointments for which the judicial collegium alone is responsible and answerable. In this manner the judiciary is held responsible for the aberrations in these appointments in the recent years. It is true that the veto power granted to the executive by the First Judge's case, AIR 1982 SC 149 is taken away by the Second Judge's case, AIR 1994 SC 268; but it is not correct that the executive has been denuded of all power in adjudging the suitability of the candidates for appointment. However, greater responsibility does lie in the judicial collegium because of its role under the existing system. A brief reference to the Second Judge's case is necessary.

The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in K.Veeraswami case. It said:

"A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system…a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof".

In my separate opinion I had also emphasized the need for strict scrutiny at the entry point that will avoid the need for later removal of a bad appointment. I had said:

"The collective wisdom of the constitutional functionaries involved in the process of appointing a superior judge is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful person gains entry…even if sometime a good appointment does not go through. This is not difficult to achieve".

A brief reference to the Second Judge's case, AIR 1994 SC 268 is apposite. The majority opinion held:

"The process of appointment of judges of the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment…There may be a certain area, relating to suitability of the candidate,

such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India…If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment…non-appointment for reasons of doubtful antecedents relating to personal character and conduct, would also be permissible".

The clear language of the decision leaves no room for any doubt that the executive has a participatory role in these appointments; the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc. are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegium, if not unanimous does not bind the executive to make the appointment.

Some reported instances in the recent past of the executive failing to perform its duty by exercise of this power even when the recommendation of the judicial collegium was not unanimous and the then President of India had returned it for reconsideration, are not only inexplicable but also a misapplication of the decision, which the CJI, Balakrishnan rightly says is binding during its validity. Such instances only prove the prophecy of Dr. Rajendra Prasad that the Constitution will be as good as the people who work it. Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability.

The Second Judge's case affirmed by the Third Judge's case in the Presidential Reference, merely formalizes the procedure developed and followed till executive supremacy in the matter of appointments was given by the First Judge's case (1982); and that practiced even later by Chief Justices who did not succumb to executive pressure. A few earlier observations to this effect are significant to prove the point.

Granville Austin in his book—*'Working A Democratic Constitution: The Indian Experience'* (1999), has dealt with the issue of judicial independence. Some portions therein summarise the experience of the first fifty years. He says: *"The CJI during the Nehru period had virtually a veto over appointment decisions, a result of the conventions and practices of the time and the Chief Justice's strength of character"*. He quotes Mahajan, C.J. saying *"Nehru has always acted in accordance with the advice of the CJI"*, except in rare circumstances, despite efforts by State politicians with *'considerable pull'* to influence him. The Law Commission chaired by M.C.Setalvad in its 14th report recommended that appointments to the Supreme Court and the High Courts be made solely on the basis of merit sans any other consideration; and on the recommendation of the Chief Justice of the High Court with *concurrence* of the CJI.

The recent aberrations are in the application of the Second Judge's case in making the appointments, and not because of it. This is what I had pointed out in my letter of 5 December 2005 to CJI, Y.K.Sabharwal with copy to the two senior most judges, who included the present CJI, K.G.Balakrishnan.

VIII

Post-retirement Behaviour

Post-retirement conduct of the superior judges, particularly those of the Supreme Court is also relevant in this context to require mention.

In addition to the system providing for the appointment of persons of proven integrity as guardian of the constitutional values, there is the need for constitutional safeguards to insulate them also from possible executive influence through temptations in subtle ways to preserve judicial independence. One such method to penetrate the resolve of even a few of the best is the temptation of lucrative post-retiral benefits given by the executive to a favoured few. The obverse of the constitutional guarantee of security of tenure and conditions of service is the obligation of such constitutional functionaries to the observance of a code of post-retiral conduct eschewing any such temptation. To the extent possible, the needed constitutional prohibitions should also be enacted, to enable the development of healthy conventions. The environment of eroding ethical values calls for this preventive measure.

Some instances of post-retirement activity of judges of Supreme Court (including the CJI) are attracting public disapproval, even if voiced privately. Chamber practice of giving written opinions by name to be used by litigants/parties before court/tribunal or any authority; arbitrations for high fees; doing arbitrations even while heading Commissions/Tribunals availing the salary, perquisites and benefits of a sitting Judge/CJI are some activities inviting adverse comments and seen as eroding judicial independence.

This too is a threat to judicial independence, which must be averted.

IX

Conclusion

The Constitution needs to provide for systems with checks and balances to eliminate abuse and misuse of public power. The caution administered by Dr. Rajendra Prasad at the concluding session of the Constituent Assembly is worth recalling. He then said:

"Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it… a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them".

This is the crux of the matter.

The expectation from the judiciary is indeed very high in view of the nature of its role in the Constitution. The independence of the judiciary is meant to empower it as the guardian of the rule of law. It is not merely for its honour, but essentially to serve the public interest and to preserve the rule of law. Judicial accountability is a facet of the independence of the judiciary in the republican democracy. There are, therefore, recognized norms of judicial behaviour expected from the judges.

In the words of Addison, *'to be perfectly just is an attribute of the divine nature, to be so to the utmost of our abilities is the glory of man'*. This is an apt description of the nature of judicial function.

How to ensure this result, and to achieve the true purpose of judicial independence? It has been answered in the texts and by the recognized judicial conventions restated generally in the above 1997 resolutions.

The Allahabad High Court Post-Centenary Silver Jubilee Commemoration Volume reminds us with a quote from the ancient texts:

"Let the king appoint, as members of the courts of justice, honourable men of proved integrity, who are able to bear the burden of administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends and foes".

Recently David Pannick in his book—'Judges' concludes:

"The qualities desired of a judge can be simply stated: *'that he be a good judge and that he be thought to be so'*…Such credentials are not easily acquired. The judge needs to have *'the strength to put an end to injustice'* and *'the faculties that are demanded of the historian and the philosopher and the prophet'*…Because the judiciary has a central role in the government of society, we should (in the words of Justice Oliver Wendell Holmes) *'wash…with cynical acid'* this aspect of public life".

The stated principles on the independence of the judiciary are meant to cover these aspects. The appointment process and the mechanism for ensuring judicial independence with judicial accountability at all levels are significant to thwart the impending threats to judicial independence. Sincere commitment and resolve of the entire Bar (including the Bench) towards this end is the need of the hour.

This would be our true homage to the memory of S.Govind Swaminadhan, a doyen of the Madras Bar who practiced these norms and has been a role model for the legal profession!

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High Court of Himachal Pradesh v. Shri Manoj Kumar Bansal[1]

The question as to whether a judicial officer has exercised his powers honestly or not requires deep consideration. It is well nigh true that a decision rendered by a judicial officer may be right or wrong, but it should not be motivated. … Merely, because the order is wrong will not by itself constitute misconduct unless it can be covered within the parameters of *P.C.Joshi's case*[2] …. We may also add that if the order does not meet the exacting standards of a conscientious judicial officer, this may form a part of his Annual Confidential Report which may debar him from further service benefits including promotion etc. But it would not per se be a matter for inquiry. Of course, the situation would be different if the order / judgment has been obtained by corrupt motive/ influence etc. which is a serious matter

Disgruntled advocates at the bar need to be discouraged from making complaints against judicial officers when they find orders passed inconvenient to the cause they plead. If the officer is not capable of holding the judicial assignment requiring specialized degree of skill, if his orders disclose a lack of judicial skill, that is not a matter for disciplinary proceedings, but something for consideration by the Court as to whether some entry requires to be made on his Annual Confidential Report or withholding of service benefits or issuance of a caution for improvement.

Ishwar Chand Jain v. High Court of Punjab and Haryana[3]

In this case the Supreme Court laid down that it is a Constitutional obligation of the "Guardian Judges" who represent the High Court to guide and protect the Judicial Officers from the adversaries. An independent and honest judiciary is a sine qua non for Rule of law. Relying on the opinion of the bar must be put to appropriate test before consideration of trifling allegations on the subordinate judicial officers.

Under the Constitution the High Court has control over the subordinate judiciary. While exercising that control it is under a *Constitutional obligation* to guide and protect judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts. If complaints are entertained on trifling matters relating to judicial orders which may have been upheld by the High Court on the judicial side no judicial officer would feel protected and it

[1] MANU/HP/0116/2009. Division Bench of R.B. Misra and Dev Darshan Sud, JJ. Decided on, 09.01.2009.
[2] *P.C. Joshi v. State of U.P. and Ors.* (2001)IILLJ1249SC.
[3] [1988]Supp1SCR396, AIR1988SC1395, (1988)3SCC370; Division Bench of E.S. Venkataramiah and K.N. Singh, JJ. Decided on 26.05.1988.

would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a *sine qua non* for Rule of law. If judicial officers are under constant threat of complaint and enquiry on trifling matters and if High Court encourages anonymous complaints to hold the field the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is therefore imperative that the High Court should also take steps to protect its honest officers by ignoring ill-conceived or motivated complaints made by the unscrupulous lawyers and litigants.

Union of India v. K.K. Dhawan[4]

In this case the Supreme Court indicated the basis upon which a disciplinary action can be initiated in respect of a judicial or a quasi judicial actions it laid down as follows:

[T]he officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge.… It is important to bear in mind that … we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer…Thus we conclude that the disciplinary action can be taken in the following cases:

(i) where the judicial officer has conducted in a manner as would reflect on his reputation or integrity or good faith or devotion to duty;

(ii) that there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii) that if he has acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(iv) that if he had acted in order to unduly favour a party;

(v) that if he had been actuated by corrupt motive.

Hari Shankar Jain v. Bar Council of India[5]

The High Court has been invested with the power of administrative control over subordinate judiciary. In case of any delinquency of a Judge, a complaint can be made by a litigant to the

[4] [1993]1SCR296, AIR1993SC1478, (1993)2SCC56; Full bench of L.M. Sharma, C.J., S. Mohan and S.P. Bharucha, JJ.Decxided on 27.10.1993.

[5] 2006 4 AWC3893All, MANU/UP/1288/2006; Division Bench of Jagdish Bhalla and Dharam Veer Sharma, JJ. Decided on 06.03.2006.

High Court and the same shall be dealt with in accordance with law. Thus, no lawyers can obstruct the course of justice. Provisions of transfer of the case from one Court to another and from one district to another also exist, which are enough to meet the ends of justice.

In the surrounding situation, we have no hesitation to say that the existing Judicial system provides complete transparency and through which every body is entitled to get Justice and it requires no change. The function of the Judges are divine and it is duty of the judiciary to ensure that public at large does not lose faith in the Judicial system.

We would also like to quote the relevant extract of the Judgment delivered by the Division Bench of this Court in, *Yash Pal Singh v. State of U.P. and Ors*.[6]:

> We are of the considered opinion that the Bench and Bar have strong but delicate relationship with certain responsibilities. This institution can function best when both Bar and Bench respect each others purpose and responsibilities. A Bar functions best when its speech is untrammeled but guided by deep scholarship. A counsel serves the institution best when knows that it is not his job to win cases by all means but to assist the Court with all his mastery of facts and law. A Judge serves the institution best when he does not fear to hear but does not decide out of fear, when he fears with compassion, but does not decide out of favour (e.s.).

Before parting, we would like to observe that Members of Bar should impose self-restraint upon themselves of being party to the scandalous methods adopted by the litigant and advise them properly in the interest of the Institution.

E.S. Reddi v. Chief Secretary, Government of A.P.[7]

Hon'ble Apex Court in this case approved the views of Lord Reid and Lord Denning. The roles the counsels are expected to play in their relations with the Bar & Bench and the clients it was explained as under:

Lord Reid in Roundel v. Worsley (1967) 3 All ER 993 has succinctly set out the conflicting nature of the duties a counsel has to perform in his own inimitable manner as follows:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has

[6] Writ Petition No. 1160 (S/B) of 2002.
[7] [1987]3SCR146, AIR1987SC1550, Division Bench of A.P. Sen and B.C. Ray, JJ. Decided on 01.05.1987.

> an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party by witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

Again as Lord Denning, M.R. in Roundel v. W (1966) 3 All ER 657 would say 'he (the counsel) has time and again to choose between his duty to his client and his duty to the Court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. When a barrister or an advocate puts his first duty to the Court, he has nothing to fear'. In the words of Lord Denning:

> It is a mistake to suppose that he is the mouthpiece of his client to say what he wants :... He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.

Union of India v Duli Chand[8]

In this case on the question of quasi-judicial authority and amenability to disciplinary proceedings, it overruled the decision in Zunjarrao Bhikaji Nagarkar v Union of India [1999] Supp1 S.C.R. 87and upheld the decision in Union of India v. K.K. Dhawan [1993] 1 S.C.R. 296. Whether disciplinary action could be taken against respondent-employee on ground that he had been found to be grossly negligent while discharging quasi-judicial functions? It was held, officer who exercises judicial or quasi-judicial powers acting negligently or recklessly could be proceeded against by way of disciplinary action if he had acted negligently or that he omitted prescribed conditions which are essential for exercise of statutory powers.

The law on the subject was considered in *extenso* in the three-Judge Bench decision of *Union of India v. K.K. Dhawan*[9], wherein it was noted that the view that no disciplinary action could be

[8] (2006) 5 SCC 680. Full Bench of Mrs. Justice Ruma Pal, C.K. Thakker, Markandey Katju. Decided on 21.04.2004.

initiated against an officer in respect of judicial or quasi-judicial functions was wrong. It was further said that the officer who exercises judicial or quasi-judicial powers acting negligently or recklessly could be proceeded against by way of disciplinary action. The Court listed six instances when such action could be taken:

> "(i) where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;
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> (ii) if there is *prima facie* material to show recklessness or misconduct in the discharge of his duty;
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> (iii) if he has acted in a manner which is unbecoming of a government servant;
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> (iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
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> (v) if he had acted in order to unduly favour a party;
>
> (vi) if he had been actuated by corrupt motive, however small the bribe may be because *Lord Coke* said long ago *'though the bribe may be small, yet the fault is great'*."

K.P. Tiwari v. State of Madhya Pradesh[10]

The Supreme Court held that every error, however gross it may look, should not, therefore, be attributed to improper motive. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly.

The higher courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to erred. It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily

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[9] [1993] 1 S.C.R. 296, AIR 1993 SC 1478.

[10] [1993]Supp3SCR497, AIR1994SC1031, 1994Supp(1)SCC540; Division bench of P.B. Sawant and Yogeshwar Dayal, JJ. Decided on 29.10.1993.

wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly upto their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make not of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary than when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill.

Session 9

Persona of a Guardian Judge: Demeanor, Behavior etc.

High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal[1]

[U]nder the Constitutional scheme, Chief Justice is the supreme authority and the other Judges, so far as officers and servants of the High Court are concerned, have no role to play on the administrative side. Some Judges, undoubtedly, will become Chief Justice in their own turn one day, but it is imperative under Constitutional discipline that they work in tranquility. **Judges have been described as "hermits". They have to live and behave like "hermits" who have no desire or aspiration, having shed it through penance. Their mission is to supply light and not heat.** This is necessary so that their latent desire to run the High Court administration may not sprout before time, at least, in some cases.

Kashi Nath Roy v. State of Bihar[2]

It cannot be forgotten that in our system, like elsewhere, appellate and revisional courts have been set up on the pre-supposition that lower courts would in some measure of cases go wrong in decision-making, both on facts as also on law, and they have been knit-up to correct those orders. The human element in justicing being an important element, computer-like functioning cannot be expected of the courts; however hard they may try and keep themselves precedent-trodden in the scope of discretions and in the manner of judging. Whenever any such intolerable error is detected by or pointed out to a superior court, it is functionally required to correct that error and may, here and there, in an appropriate case, and in a manner befitting, maintaining the dignity of the Court and independence of judiciary, convey its message in its judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellow but clear, and result-orienting, but rarely as a rebuke. Sharp reaction of the kind exhibited in the afore-extraction is not in keeping with institutional functioning. The premise that a Judge committed a mistake or an error beyond the limits of tolerance, is no ground to inflict condemnation on the Judge-Subordinate, unless there existed something else and for exceptional grounds.

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[1] [1998]1SCR961,AIR1998SC1079, (1998)3SCC72; Division Bench of Saiyed Saghir Ahmad and G.B. Patnaik, JJ. Decided on 19.02.1998.

[2] [1996]Supp1SCR558, AIR1996SC3240,Division bench of M.M. Punchhi and K.T. Thomas, JJ. Dicided on 18-04-1996.

Braj Kishore Thakur v. Union of India[3]

No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when judges of higher courts publicly express lack of faith in the subordinate judges. It has been said, time and again, that respect for judiciary is not in hands by using intemperate language and by casting aspersions against lower judiciary. It is well to remember that a judicial officer against whom aspersions are made in the judgment could not appear before the higher court to defend his order. Judges of higher courts must, therefore, exercise greater judicial restraint and adopt greater care when they are tempted to employ strong terms against lower judiciary.

State v. Nilkanth Shripad[4]

It is very necessary, in order to maintain the independence of the judiciary, that every Magistrate, however junior, should feel that he can fearlessly give expression to his own opinion in the judgment which he delivers. If our Magistrates feel that they cannot frankly and fearlessly deal with matters that come before them and that the High Court is likely to interfere with their opinions, the independence of the judiciary might be seriously undermined.

Dr. Raghubir Sharan v. The State of Bihar[5]

[E]very judicial officer must be free to express his mind in the matter of the appreciation of evidence before him. The phraseology used by a particular Judge depends upon his inherent reaction to falsehood, his comparative command of the English language and his felicity of expression. There is nothing more deleterious to the discharge of judicial functions than to create in the mind of a Judge that he should conform to a particular pattern which may, or may not be, to the liking of the appellate Court. Sometimes he may overstep the mark. When public interests conflict, the lesser should yield to the larger one. An unmerited and undeserved insult to a witness may have to be tolerated in the general interests of preserving the independence of the judiciary. Even so, a duty is cast upon the judicial officer not to deflect himself from the even course of

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[3] [1997]2SCR420, AIR1997SC1157; Division Bench of M.M. Punchhi and K.T. Thomas, JJ. Dicided on 24-02-1997.
[4] AIR 1954 Bom. 65., ILR1954 Bom 148; Full Bench of M.C. Chagla, C.J., R.S. Bavdekar and Y.V. Dixit, JJ. Decided on 20.06.1953.
[5] [1964]2SCR336, AIR1964SC1; Full bench of J.R. Mudholkar, K. Subba Rao and Raghubar Dayal, JJ. Decided on 14.03.1963.

justice by making disparaging and undeserving remarks on persons that appear before him as witnesses or otherwise. Moderation in expression lends dignity to his office and imparts greater respect for judiciary. But occasions do arise when a particular Judge, without any justification, may cast aspersions on a witness or any other person not before him affecting the character of such witness or person. Such remarks may affect the reputation or even the career of such person. In my experience I find such cases are very rare. But if it happens, I agree with the Full Bench of the Bombay High Court that the appellate Court in a suitable case may judicially correct the observations of the lower Court by pointing out that the observations made by that Court were not justified or were without any foundation were wholly wrong or improper. This can be done under its inherent power preserved under s. 561-A of the Code of Criminal Procedure. But that power must be exercised only in exceptional cases where the interest of the Party concerned would irrevocably suffer.

From the aforesaid discussion the following principles emerge : (1) A judgment of a criminal Court is final; it can be set aside or modified only in the manner prescribed by law. (2) Every Judge, whatever may be his rank in the hierarchy, must have an unrestricted right to express his views in any matter before him without fear or favour. (3) There is a correlative and self-imposed duty in a Judge not to make irrelevant remarks or observations without any foundation, especially in the case of witnesses or parties not before him, affecting their character or reputation. (4) An appellate Court has jurisdiction to judicially correct such remarks, but it will do so only in exceptional cases where such remarks would cause irrevocable harm to a witness or a party not before it.

V.K. Jain v. High Court of Delhi through Registrar General[6]

Lord Denning in his celebrated book "*The Due Process of Law*" has observed the importance of independence for judicial officers in the following words:

> Every judge of the courts of this land - from the highest to the lowest - should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment", it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in

[6] (2008)17SCC538; Division Bench of Dalveer Bhandari and H.S. Bedi, JJ. Decided on 23.09.2008.

> the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it to be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.

…

In the matter of *H. Daly case* AIR 1928 Lah 740 at page 742 Tek Chand, J. observed as under:

> It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by this Court.

…

In the famous case of *L. Banwanri Lal v. Kundan Cloth Mills Ltd*.[7], Skemp, J., more than eight decades ago, observed that reflections on the conduct of the party should also be in sober language. The Court observed as under:

In may be necessary for a Judge or a Magistrate to pass reflections upon the conduct or honesty of a party or the truthfulness of a witness; when this is necessary that should be done in sober and becoming language.

In *Dr. Raghubir Saran v. State of Bihar and Anr*.[8], this Court while approving the judgment in AIR 1954 Bom 65 at p.66 (FB) (supra), the court observed:

> Whatever maybe the degree of impact, the result of expunging remarks from a judgment is that it derogates from its finality. A judgment of a lower Court may be wrong; it may even be perverse. The proper way to attach that judgment is by bringing it under the scrutiny of the superior Court and getting the judgment of the lower Court judicially corrected.
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> The inherent power that the High Court possesses is, in proper cases, even though on appeal or revision maybe preferred to the High Court, to judicially correct the observations of the lower Court by pointing out that the observations made by the Magistrate were not justified or were without any foundation or were wholly wrong or improper. The contrary view

[7] AIR 1937 Lahore 527
[8] AIR 1964 1

> infringes the fundamental principles of jurisprudence that a judgment made by a Court, however inferior it may be in the hierarchy, is final and it can only be modified in the manner prescribed by the law governing such procedure.

In this judgment the court further observed:

> Every judicial officer must be free to express his mind in the matter of the appreciation of evidence before him. The phraseology used by a particular judge depends upon his inherent reaction to falsehood, his comparative command of the English language and his felicity of expression.

In *Anjani K. Verma v. State of Bihar and Anr*.[9], the court observed as under:

> ...at the same time, while passing strictures against a member of the subordinate judiciary utmost care and caution is required to be taken, also having regard to the stress and conditions under which, by and large, the judicial officers have to render justice.

In *A.M. Mathur v. Pramod Kumar Gupta and Ors*[10]. this Court has held as under:

> Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect; that is, respect by the judiciary. Respect to those who come before the Court as well to other co-ordinate branches of the State, the Executive and Legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the Judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.
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> In the said decision, this Court has also observed that Judges have the absolute and unchallengeable control of the Court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. The Court further observed that concededly the Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct.
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> In the said case, this Court while quoting Justice Cardozo and Justice Frankfurter stated that the judges are flesh and blood mortals with individual personalities and with normal human traits. Still judicial restraint and discipline are as necessary to the orderly

[9] (2004) 11 SCC 188
[10] AIR 1990 SC 1737

> administration of justice as they are to the effectiveness of the army. The duty of restraint should be the constant theme of the judges, observed the Court: "This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary."

In yet another case of similar nature, this Court in the case of *Niranjan Patnaik v. Sashibhusan Kar and Anr.*[11] again reminded that the higher the forum and greater the need for restraint and the more mellowed the reproach should be. The court again reiterated the settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before Courts of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct.

In *Samya Sett v. Shambhu Sarkar and Anr*.[12], this Court observed as under:

In Alok Kumar Roy v. Dr. S.N. Sarma[13] the vacation Judge of the High Court of Assam and Nagaland passed an interim order during vacation in a petition entertainable by the Division Bench. After reopening of the Court, the matter was placed before the Division Bench presided over by the Chief Justice in accordance with the High Court Rules. The learned Chief Justice made certain remarks as to "unholy haste and hurry" exhibited by the learned vacation Judge in dealing with the case. When the matter reached this Court, *Wanchoo, C.J*., observed: (SCR pp. 819 F-820 A):

> It is a matter of regret that the learned Chief Justice thought fit to make these remarks in his judgment against a colleague and assumed without any justification or basis that his colleague had acted improperly. Such observations even about Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleague they are even more open to objection. We are glad that Goswami, J. did not associate himself with these remarks of the learned Chief Justice and was fair when he assumed that Dutta, J. acted as he did in his anxiety to do what he thought was required in the interest of justice. We wish the learned Chief Justice had equally made the same assumption and had not made these observations castigating Dutta, J. for they appear to us to be without any basis. It is necessary to emphasise that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible.

In Samya Sett (supra), the court further observed:

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[11] AIR 1986 SC 819
[12] (2005) 6 SCC 767 at 773.
[13] AIR 1968 SC 453

> It is universally accepted and we are conscious of the fact that judges are also human beings. They have their own likes and dislikes; their preferences and prejudices. Dealing with an allegation of bias against a Judge, in Linahan, Re Frank J. stated:
>
> If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices.

Justice John Clarke has once stated:

> I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are 'all the common growth of the
>
> Mother Earth' -- even those of us who wear the long robe.
>
> (emphasis supplied)

Similar was the view of Thomas Reed Powell, who said:

> Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is.

The learned Counsel placed reliance on the judgment of this Court in *Ishwari Prasad Misra v. Mohammad Isa*[14] In this judgment, this Court made some observations regarding approach adopted by the High Court in passing the remarks and comments about a judicial officer:

> Before we part with this appeal, it is necessary that we should make some observations about the approach adopted by the High Court in dealing with the judgment of the court which was in appeal before it. In several places the High Court has passed severe strictures against the trial Court and has, in substance, suggested that the decision of the trial Court was not only perverse but was based on extraneous considerations. It has observed that the mind of the learned Subordinate Judge was already loaded with bias in favour of the plaintiff an that the plaintiff had calculated that such of the evidence as he would produce "long with the pull and weight that would be harnessed from behind would be sufficient to carry him through." Similarly, in criticising the trial Court for accepting the evidence of Jamuna Singh, the High Court has observed that the presumption made by the trial Court

[14] (1963) 3 SCR 722.

that teacher, as a rule, is a respectable person, "is not any legal appreciation of the evidence but a way found to suit the convenience of the court for holding in favour of the plaintiff." It would thus be seen that in reversing the decision of the trial Court, the High Court has suggested that the trial Court, was persuaded by extraneous considerations and that some pull and weight had been, used in favour of the appellant from behind.

This Court observed:

> We are constrained to observe that the High Court was not justified in passing these strictures against the trial Judge in dealing with the present case. Judicial experience shows that in adjudicating upon the rival claims brought before the courts it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of their conflicting contentions and circumstances are similarly pressed into service. In such a case, it is no doubt, the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light probabilities and decide which way the truth lies. The impression formed by the Judge about the character of the evidence will ultimately determine the conclusion which he reached. But it would be unsafe to overlook the fact that all judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge. That explains why in some cases courts of appeal reverse conclusions of facts recorded by the trial Court on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case, acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such cases should always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusions or the adoption of unduly strong intemperate, or extravagant criticism, against the contrary view, which are often founded on a sense of infallibility should always be avoided.

This Court further observed that:

> In the present case, the High Court has used intemperate language and has even gone to the length of suggesting a corrupt motive against the Judge who decided the suit in favour of the appellant. In our opinion, the use of such intemperate language may, in some cases, tend to show either a lack of experience in judicial matters or an absence of Judicial poise and balance. We have carefully considered all the evidence to which our attention was drawn by the learned Counsel on both the sides and we are satisfied that the imputations made by the High Court against the impartiality and the objectivity of the approach adopted by the trial Judge are wholly unjustified. It is very much to be regretted that the High Court should have persuaded itself to use such extravagant language in criticising the trial Court, particularly when our conclusion in the present appeal shows that the trial Court was right and the High Court was wrong. But even if we had not upheld the findings of the trial

> Court, we would not have approved of the unbalanced criticism made by the High Court against the trial Court.

In another case, this Court deprecated the practice of passing stricture against subordinate judicial officer. In *State of M.P. and Ors. v. Nandlal Jaiswal and Ors*.[15], the Chief Justice P.N. Bhagwati (as he then was) observed that Judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice. Chief Justice Bhagwati further observed that sweeping observations attributing mala fides, corruption and underhand dealing to the State Government made by the High Court Judge were unwarranted and not justified on record.

In *K.P. Tiwari v. State of M.P*[16]., this Court while dealing with a similar matter of expunging of remarks observed thus:

> 4. We are, however, impelled to remind the learned Judge of the High Court that however anguished he might have been over the unmerited bail granted to the accused, he should not have allowed himself the latitude of ignoring judicial precaution and propriety even momentarily. The higher Courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right.
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> It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher

[15] (1986) 4 SCC 566
[16] 1994 Supp. (1) SCC 540

court to adopt is to make note of his conduct in the confidential record of his work and to use it on proper occasions.

The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly, no greater damage and be done to the administration of justice and to the confidence of the people in the judiciary can when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill.

It is the obligation and duty of the higher courts to modify or set aside orders which are contrary to law or the facts of the case. This is one of the most important functions of the superior courts. Our legal system acknowledges the fallibility of the judges and provides for appeals and revisions. Judges of the superior courts while discharging their duty ought to be extremely careful before passing imputations, strictures and remarks against subordinate judicial officers.

A three-Judge Bench of this Court again dealt with a similar issue In re: '*K' A Judicial Officer*[17]. In this case, the court passed a comprehensive order which reads thus:

15. In the case at hand we are concerned with the observations made by the High Court against a judicial officer who is a serving member of subordinate judiciary. Under the constitutional scheme control over the district courts and courts subordinate thereto has been vested in the High Courts. The control so vested is administrative, judicial and disciplinary. The role of High Court is also of a friend, philosopher and guide of judiciary subordinate to it. The strength of power is not displayed solely in cracking a whip on errors, mistakes or failures; the power should be so wielded as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly. "Pardon the error but not its repetition". The power to control is not to be exercised solely by wielding a teacher's cane; the members of subordinate judiciary look up to the High Court for the power to control to be exercised with parent-like care and affection.

[17] (2001) 3 SCC 54

This Court further observed that:

> The exercise of statutory jurisdiction, appellate or revisional and the exercise of constitutional power to control and supervise the functioning of the district courts and courts subordinate thereto empowers the High Court to formulate an opinion and place it on record not only on the judicial working but also on the conduct of the judicial officers. The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied, however, the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities. Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard. Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in open and therefore becomes public. The same Judge who found himself persuaded, sitting on judicial side, to make observations guided by the facts of a single case against a Subordinate Judge may, sitting on administrative side and apprised of overall meritorious performance of the Subordinate Judge, may irretrievably regret his having made those observations on judicial side, the harming effect whereof even he himself cannot remove on administrative side. Thirdly, human nature being what it is, such criticism of a judicial officer contained in the judgment of a higher court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is subversive of judicial authority of the deciding Judge. Fourthly, seeking expunging of the observations by a judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court -- a situation not very happy from the point of view of the functioning of the judicial system. May be for the purpose of pleading his cause he has to take the assistance of a legal practitioner and such legal practitioner may be one practising before him. Look at the embarrassment involved. And last but not the least, the possibility of a single or casual aberration of an otherwise honest, upright and righteous Judge being caught unawares in the net of adverse observations cannot be ruled out. Such an incident would have a seriously demoralising effect not only on him but also on his colleagues. If all this is avoidable why should it not be avoided?
>
> The remarks made against a judicial officer are so grave that even if they are expunged would not completely restitute and restore the harmed Judge from the loss of dignity and honour suffered by him. In re: 'K' A Judicial Officer (supra), the court further observed:

> The remarks made in a judicial order of the High Court against a member of subordinate judiciary even if expunged would not completely restitute and restore the harmed Judge

> from the loss of dignity and honour suffered by him. In Judges by David Pannick (Oxford University Press Publication, 1987) a wholesome practise finds a mention suggesting an appropriate course to be followed in such situations:

Lord Hailsham explained that in a number of cases, although I seldom told the complainant that I had done so, I showed the complaint to the Judge concerned. I thought it good for him both to see what was being said about him from the other side of the court, and how perhaps a lapse of manners or a momentary impatience could undermine confidence in his decision.

Chief Justice K.G. Balakrishnan in a three-Judge Bench of this Court in *Ramesh Chander Singh v. High Court of Allahabad and Anr*[18]. observed as under:

> The higher court should convey its message in the judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellowed but clear and result oriented and rarely a rebuke.

Mr. Andhyarujina lastly submitted that the strictures and remarks passed against the appellant be expunged.

Mr. A. Mariarputham, learned advocate appearing for the High Court of Delhi submitted that the appellant is a very good judicial officer in the Delhi High Judicial Service. He enjoys excellent reputation of ability and integrity. Mr. Mariarputham also submitted that he has been consistently getting outstanding (A+) in ACRs.

Mr. Mariarputham could not justify the remarks made against the appellant and submitted that this Court may pass an appropriate order.

We have heard the learned Counsel for the parties at length and have carefully perused the records.

In the light of law which has been followed for several decades, remarks, imputations and strictures passed by the learned Single Judge of the High Court in this case are totally unjustified, unwarranted and unnecessary for the following reasons:

(a) The appellant has passed the order dated 04.3.2002 because respondent No. 3 expressed willingness to deposit the passports of his wife and mother, respondent Nos. 4 and 5 in the court presumably with their consent and concurrence. It may be pertinent to observe that none of them made any grievance about the said order. Respondent Nos.

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[18] (2007) 4 SCC 247

4 and 5 sought modification only when they wanted to travel after five months of passing the order.

(b) The appellant has followed the previous orders passed by different Benches of the High Court. As a Subordinate Judge, he was duty bound to follow the orders of the High Court. There was no justification in passing any imputations, remarks or strictures against the appellant for passing an order in terms of earlier orders of the High court.

(c) Assuming that the order passed by the appellant was wrong or erroneous, even then the High Court ought to have either modified or set aside the order, but the High Court was not justified in passing totally unmerited, derogatory, harsh and castigating remarks against the appellant.

50. When we examine the facts of the instant case in the light of the judicial decisions spreading over a century, the following principles of law can be culled out:

(I) Erosion of credibility of judiciary in the public mind, for whatever reason, is the greatest threat to the independence of judiciary.

(II) Judicial discipline and restraint are imperative for the orderly administration of justice.

(III) Judicial decorum makes it imperative that the courts' judgments and orders must be confined to the facts and the legal position involved in the cases and the courts should not deviate from propriety, moderation and sobriety.

(IV) Majesty of Court is not displayed solely in cracking the whip on mistakes, inadvertent errors or lapses, but by persuasive reasoning so that the similar errors and mistakes are not repeated by the judicial officers.

(V) Majesty of Court would be enhanced by practicing discipline and self-restraint in discharging of all judicial functions. All actions of a judge must be judicious in character.

(VI) The role of superior courts is like a friend, philosopher and guide of the judiciary subordinate to it. The judicial officers have to be treated with parental care and affection.

(VII) The approach of the superior courts ought to be correctional and not to be intended to harm or ruining the judicial career of the officers.

(VIII) The superior courts should always bear in mind that the judicial officer is not before it and should ordinarily refrain from passing strictures, derogatory remarks and scathing criticism. The passing of such order without affording a hearing to the judicial officer is clearly violative of the principles of natural justice.

(IX) The superior courts should always keep in mind that disparaging and derogatory remarks against the judicial officer would cause incalculable harm of a permanent character having the potentiality of spoiling the judicial career of the concerned officer. Even if those remarks are expunged, it would not completely restitute and restore the harmed judge from the loss of dignity and honour suffered by him.

(X) The superior courts should convey its messages to the concerned judicial officers through a process of reasoning highlighting the correct provisions of law, precedents and proper analysis of evidence and material on record, but rarely by passing harsh and derogatory remarks.

(XI) The superior courts must always keep in mind that it is a herculean task for the judicial officer to get the derogatory remarks expunged by the superior court. He is compelled to take assistance from lawyers and such a practitioner may be appearing before him. It is embarrassing, humiliating, time consuming and an expensive exercise.

(XII) The superior courts must always keep in mind that the much cherished judicial independence must not be presented only from outside but from within, by those who form the integral part of the judicial system.

Damage from within has much larger and greater potential for harm than danger from outside. We alone in judicial family can take care of it.

(XIII) The superior courts should not use strong, derogatory, disparaging and carping language while criticizing the judicial officers. They must always keep in mind that, like all other human beings, the judicial officers are also not infallible. Any remarks passed against them may result in incalculable harm resulting in grave injustice.

(XIV) The superior courts judges should not be, like a loose cannon, ready to inflict indiscriminate damages whenever they function in judicial capacity.

(XV) The superior courts should keep in mind that infliction of uncalled for, unmerited and undeserved remarks clearly amount to abuse of the process of court.

(XVI) The superior courts should not allow themselves even momentarily the latitude of ignoring judicial precaution and propriety.

(XVII) It must be remembered that the subordinate judicial officers at times work under charged atmosphere and are constantly under psychological pressure with all the contestants and their lawyers almost breathing down their necks and more correctly upto their nostrils.

(XVIII) Err is human and no one is infallible. A judge who has not committed an error is yet to be born. Judicial decorum has to be maintained at all times and even where criticism is justified. It must be in a language of utmost restraint always keeping in view that the person making the comment is also fallible.

(XIX) Judges of the superior courts have a duty and obligation to ensure judicial discipline and respect for judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticized intemperately and castigated publicly. Our legal system acknowledges the fallibility of the judges and provides for appeals and revisions.

(XX) It is the duty and obligation of the judges of the superior courts to ensure that independence of judiciary is not compromised and every judicial officer should feel that he can freely and fearlessly give expression to his own opinion. This is absolutely imperative in maintaining the independence of judiciary.

(XXI) The superior courts' judges must always bear in mind that no greater damage can be caused to the administration of justice and to the confidence of people when judges at superior courts express lack of faith either in ability or integrity of subordinate judges.

On consideration of the totality of the facts and circumstances, the impugned order passed by the learned Single Judge cannot stand scrutiny of law as far as passing the remarks and strictures against the appellant are concerned and consequently we deem it appropriate to set aside the impugned order to the extent of expunging the remarks made against the appellant in the said order. We order accordingly.

52. The appeal is accordingly allowed and disposed of.

Amar Pal Singh v. State of U.P.[19]

In this case Supreme Court expressed it opinion on - Judicial decorum and propriety - Appellant, a judicial officer, being aggrieved by comments and observations passed by Single Judge of High Court in Criminal Revision had preferred an Appeal - Whether remarks in question and directions had been made in consonance with principles that had been laid down by various pronouncements of this Court and was in accord with judicial decorum and propriety was in question. It was held that, there had to be a process of reasoning while unsettling judgment and such reasoning were to be reasonably stated with clarity and result orientation - A distinction had been lucidly stated between a message and a rebuke - A Judge was required to maintain decorum and sanctity which were inherent in judicial discipline and restraint - A judge functioning at any level had dignity in eyes of public and credibility of entire system was dependent on use of dignified language and sustained restraint, moderation and sobriety - It was not to be forgotten that, independence of judiciary had an insegregable and inseparable link with its credibility - Unwarranted comments on judicial officer created a dent in said credibility and consequently lead to some kind of erosion and affected conception of rule of law - Sanctity of decision making process should not be confused with sitting on a pulpit and delivering sermons which defy decorum because, it was obligatory on part of superior Courts to take recourse to correctional measures - A reformative method could be taken recourse to on administrative side - It should be paramount in mind of a Judge of superior Court that a Judicial officer projected face of judicial system and independence of judiciary at ground reality level and derogatory remarks against a judicial officer would cause immense harm to him individually - A judge of a superior Court was required to maintain sobriety, calmness, dispassionate reasoning and poised restraint - Concept of loco parentis had to take a foremost place in mind to keep at bay any uncalled for any unwarranted remarks - Every judge had to remind himself about aforesaid principles and religiously adhere to them - In present case, comment and eventual direction were wholly unwarranted and uncalled for.

The present appeal frescoes a picture and exposits a canvas how, despite numerous pronouncements of this Court, while dealing with the defensibility of an order passed by a Judge of subordinate court when it is under assail before the superior Court in appeal or revision, the imperative necessity of use of temperate and sober language warranting total restraint regard being had to the fact that a judicial officer is undefended and further, more importantly, such unwarranted observations, instead of enhancing the respect for the judiciary, creates a concavity in the

[19] AIR2012SC1995, (2012)6SCC491; Division Bench of B.S. Chauhan and Dipak Misra, JJ. Decided on 17.05.2012.

hierarchical system and brings the judiciary downhill, has been totally ostracised. Further, the trend seems to be persistent like an incurable cancerous cell which explodes out at the slightest imbalance.

The Appellant, a judicial officer, being aggrieved by the comments and observations passed by the learned Single Judge of High Court of Judicature at Allahabad in Criminal Revision No. 1541 of 2007 vide order dated 31.05.2007, has preferred the present appeal. The brief resume of facts are that one Sunil Solanki had filed an application Under Section 156(3) of the Code of Criminal Procedure (for short 'the Code') before the Chief Judicial Magistrate, Bulandshahar with the allegation that on 11.02.2007 at 09.30 p.m. when he was standing outside the door of his house along with some others, a marriage procession passed through the front door of his house and at that juncture, one Mauzzim Ali accosted him and eventually fired at him from his country made pistol which caused injuries on the abdomen area of Shafeeque, one of his friends. However, as good fortune would have it, said Shafeeque escaped unhurt. Because of the said occurrence, Sunil Solanki endeavoured hard to get the FIR registered at the concerned police station but the entire effort became an exercise in futility as a consequence of which he was compelled to knock at the doors of the learned Chief Judicial Magistrate by filing an application Under Section 156(3) of the Code for issue of a direction to the police to register an FIR and investigate the matter. While dealing with the application, the learned Chief Judicial Magistrate, the Appellant herein, ascribed certain reasons and dismissed the same.

Being dissatisfied, said Sunil Solanki preferred a revision before the High Court and the learned Single Judge, taking note of the allegations-made in the application, found that it was a fit case where the learned Magistrate should have directed the registration of FIR and investigation into the alleged offences. While recording such a conclusion, the learned Judge has made certain observations which are reproduced below:

> This conduct of chief Judicial Magistrate is deplorable and wholly malafide and illegal
>
> Thereafter the learned Judge treated the order to be wholly hypothetical and commented it was:
>
> vexatiously illegal

After so stating the learned Single Judge further stated that Chief Judicial Magistrate has committed a blatant error of law.

Thereafter the passage runs thus:

> ... and has done unpardonable injustice to the injured and the informant. His lack of sensitivity and utter callous attitude has left the accused of murderous assault to go Scotfree to this day.

After making the aforesaid observations, he set aside the order and remitted the matter to the Chief Judicial Magistrate to decide the application afresh in accordance with law as has been spelt out by the High Court of Allahabad in the case of ***Masuman v. State of U.P. and Anr.*** 2007 AU (1) 221. Thereafter, he directed as follows-

> Let a copy of this order be sent to the Administrative Judge, Bulandshahar to take appropriate action against the concerned C.J.M. as he deem fit.

The prayer in the Special Leave Petition is to delete the aforesaid comments, observations and the ultimate direction.

We have heard Mr. Ratnakar Dash, learned senior Counsel for the Appellant and the Learned Counsel for the State.

It is submitted by the learned senior Counsel appearing on behalf of the Appellant that the aforesaid observations and the consequential direction were totally unwarranted and indubitably affect the self-esteem and career of a member of the subordinate judiciary and therefore deserve to be expunged.

The Learned Counsel for the State has fairly stated that a judicial officer enjoys a status in the eyes of the public at large and his reputation stabilises the inherent faith of a litigant in the system and establishes authenticity and hence, the remarks made by the learned Single Judge should not be allowed to stand.

At the very outset, we make it clear that we are neither concerned with the justifiability of the order passed by the Chief Judicial Magistrate nor are we required to dwell upon the legal pregnability of the order passed by the learned Single Judge as far as it pertains to dislodging of the order of the learned Magistrate. We are only obliged to address to the issue whether the aforesaid remarks and the directions have been made in consonance with the principles that have been laid down by the various pronouncements of this Court and is in accord with judicial decorum and propriety.

In ***Ishwari Prasad Mishra v. Mohammad Isa***[20], the High Court, while dealing with the judgment of the trial court in an appeal before it, had passed severe strictures against the trial court at several places and, in substance, had suggested that the decision of the trial court was not only perverse but was also based on extraneous considerations. Dealing with the said kind of delineation and the comments, Gajendragadkar, J (as His Lordship then was) authoring the judgment held that the High Court was not justified in passing the strictures against the trial Judge. The Bench observed that judicial experience shows that in adjudicating upon the rival claims brought before the courts, it is not always easy to decide where the truth lies. Evidence is adduced by the respective parties in support of their conflicting contentions and circumstances are similarly pressed into service. In such a case, it is, no doubt, the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide which way the truth lies. The impression formed by the Judge about the character of the evidence will ultimately determine the conclusion which he reaches. But it would be unsafe to overlook the fact that all judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge. That explains why in some cases courts of appeal reverse conclusions of facts recorded by the trial Court on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such cases would

[20] AIR 1963 SC 1728.

always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusions, or the adoption of unduly strong intemperate, or extravagant criticism against the contrary view, which are often founded on a sense of infallibility should always be avoided. It is worth noting that emphasis was laid on sobriety, judicial poise and balance.

In ***Alok Kumar Roy v. Dr. S.N. Sarma and Anr.***[21] the Constitution Bench was dealing the issue whether a Judge of High Court can pass order in that capacity while he was working as Head of the Commission of enquiry and whether he can entertain writ petition and pass interim order while being at a place which was not seat of High Court. The learned Chief Justice of High Court while dealing with the matter commented on the Judge that he had passed the order in "unholy haste and hurry". That apart certain observations were made. While not appreciating the said remarks in the judgment against a colleague, their Lordships opined that such observations even about the Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. The Constitution Bench further proceeded to state that it is necessary to emphasise that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible. Even when there is jurisdiction for criticism, the language should be dignified and restrained.

In ***Ishwar Chand Jain v. High Court of Punjab and Haryana and Anr***[22]**.**, it has been observed that while exercising control over subordinate judiciary under Article 235 of the Constitution, the High Court is under a Constitutional obligation to guide and protect subordinate judicial officers.

K.P. Tiwari v. State of Madhya Pradesh[23], the High Court while reversing the order passed by the lower Court had made certain remarks about the interestedness and the motive of the lower Court in passing the impugned order. In that context this Court observed that one of the functions of the higher Court is either to modify or set aside erroneous orders passed by the lower Court. It has been further observed that a judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. "It is well said that a judge who has not committed an error is yet to be born", and that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly upto their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make note of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from

[21] AIR 1968 SC 453.
[22] AIR 1988 SC 1395.
[23] AIR 1994 Sc 1031.

all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary than when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them as that is the surest way to take the judiciary downhill.

In ***Kasi Nath Roy v. State of Bihar***[24] it has been ruled that in our hierarchical judicial system the appellate and revisional Courts have been set up with the pre-supposition that the lower Courts in some measure of cases can go wrong in decision making, both on facts as also on law. The superior Courts have been established to correct errors but the said correction has to be done in a befitting manner maintaining the dignity of the Court and independence of the judiciary. It is the obligation of the higher Courts to convey the message in the judgment to the officers concerned through a process of reasoning, essentially, persuasive, reasonable, mellow but clear and result orienting but rarely a rebuke.

In ***Braj Kishore Thakur v. Union of India***[25] this Court disapproved the practice of passing strictures for orders against the subordinate officers. In that context the two-Judge Bench observed thus:

> No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when judges of higher courts publicly express lack of faith in the subordinate judges. It has been said, time and again, that respect for judiciary is not in hands by using intemperate language and by casting aspersions against lower judiciary.

In ***A.M. Mathur v. Pramod Kumar Gupta***[26] though in a different context immense emphasis was laid on judicial restraint and discipline, it is appropriate to reproduce a passage from the said decision:

> Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect; that is, respect by the judiciary. Respect to those who come before the Court as well to other coordinate before the Court as well to other coordinate branches of the State, the Executive and Legislature. There must be mutual respect. When these qualities fail or when litigants and public believe

[24] AIR 1991 SC 3240.
[25] 1997 SCR 420.
[26] AIR 1990 SC 1737.

that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.

In Re; K, a Judicial officer[27]**,** a two-Judge Bench of this Court was dealing about the adverse remarks contained in the judgment of the High Court disposing of a Criminal Misc. Petition Under Section 482 of the Code and the expunction sought by a Metropolitan Magistrate was aggrieved of such remark. After discussing that aggrieved judicial officer could approach this Court for expunging the remarks the Bench opined under what circumstances the exercise of power of making remarks can withstand scrutiny. The Bench reiterated the view expressed in ***State of Uttar Pradesh v. Mohammad Nairn***[28], wherein it was clearly stated that the overall test is that the' criticism or observation must be judicial in nature and should not formally depart from sobriety, moderation and reserve. Thereafter their' Lordships referred to the conception of judicial restraint, the controlling power, the expectations of subordinate judiciary form the High Court, the statutory jurisdiction exercised by the High Court and eventually opined that the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their won mischievous infirmities. Thereafter the Court proceeded to enumerate the infirmities. They read as follows:

> Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard. Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in open and therefore becomes public. The same Judge who found himself persuaded, sitting on judicial side, to make observations guided by the facts of a single case against a subordinate Judge may sitting on administrative side and apprised of overall meritorious performance of the subordinate Judge, may irretrievably regret his having made those observations on judicial side the harming effect whereof even he himself cannot remove on administrative side. Thirdly, human nature being what it is, such criticism of a judicial officer contained in the judgment of a higher Court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is subversive of judicial authority of the deciding Judge. Fourthly, seeking expunging of the observations by judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court - a situation not very happy from the point of view of the functioning of the judicial system.

Thereafter the Bench laid down how the matter should be handled and should be dealt with on the administrative side and ultimately expunged the remarks.

In ***Samya Sett v. Shambu Sarkar and Anr.***[29] the court was dealing with the case where a judicial officer was constrained to approach this Court for expunging the remarks made by Single Judge of the High Court of Calcutta against him. Their Lordships referred to the decisions in ***Mohammad***

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[27] AIR 2001 SC 1972.
[28] AIR 1964 SC 703.
[29] AIR 2005 SC 3309.

Nairn (supra), ***Alok Kumar Roy*** (supra), ***State of M.P. v. Nandlal Jaiswal and Ors.*** MANU/SC/0034/1986 : 1987 1 SCR 1 and certain other authorities and opined that the stricture was totally inappropriate. In that context the court referred to certain passages about the view expressed in other countries. We think it apt to reproduce them.

> It is universally accepted and we are conscious of the fact that judges are also human beings. They have their own likes and dislikes; their preferences and prejudices. Dealing with an allegation of bias against a Judge, in *Linahan, Re*, (1943) 138 F IInd 650, Frank J. stated;
>
> > If, however, 'bias' and 'partiality' be defined to mean that total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices.

Justice John Clarke has once stated;

> 1 have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are 'all the common growth of the Mother Earth' - even those of us who wear the long robe.

In ***State of Bihar v. Nilmani Sahu and Anr.***[30] a sitting judge of the Patna High Court had approached this Court for expunction of the some observations made by this Court in disposing of a special leave petition arising out of a land acquisition proceeding. A Bench of this Court had used the expression "We find that the view taken by the learned Singh Judge, Justice P.K. Dev, with due respect, if we can say so, is most atrocious". The learned Single Judge had treated this to be stigmatic and approached this Court and raised a contention that it was not necessary for the decision. A two-Judge Bench of this Court after hearing the Learned Counsel for the parties and considering the judgment of this Court opined the expression used in the judgment was wholly inappropriate inasmuch as when this Court uses an expression against the judgment of the High Court it must be in keeping with dignity of the person concerned. Eventually the said observations were deleted.

From the aforesaid enunciation of law it is quite clear that for more than four decades this Court has been laying emphasis on the sacrosanct duty of a Judge of a superior Court how to employ the language in judgment so that a message to the officer concerned is conveyed. It has been clearly spelt out that there has to be a process of reasoning while unsettling the judgment and such reasoning are to be reasonably stated with clarity and result orientation. A distinction has been lucidly stated between a message and a rebuke. A Judge is required to maintain decorum and sanctity which are inherent in judicial discipline and restraint. A judge functioning at any level has dignity in the eyes of public and credibility of the entire system is dependent on use of dignified language and sustained restraint, moderation and sobriety. It is not to be forgotten that independence of judiciary has an insegregable and inseparable link with its credibility.

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[30] (1999) 9 SCC 211.

Unwarranted comments on the judicial officer creates a dent in the said credibility and consequently leads to some kind of erosion and affects the conception of rule of law. The sanctity of decision making process should not be confused with sitting on a pulpit and delivering sermons which defy decorum because it is obligatory on the part of the superior Courts to take recourse to correctional measures. A reformative method can be taken recourse to on the administrative side. It is condign to state it should be paramount in the mind of a Judge of superior Court that a Judicial officer projects the face of the judicial system and the independence of judiciary at the ground reality level and derogatory remarks against a judicial officer would cause immense harm to him individually (as the expunction of the remarks later on may not completely resuscitate his reputation) but also affects the credibility of the institution and corrodes the sacrosanctity of its zealously cherished philosophy. A judge of a superior Court however strongly he may feel about the unmerited and fallacious order passed by an officer, but is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of loco parentis has to take a foremost place in the mind to keep at bay any uncalled for any unwarranted remarks.

Every judge has to remind himself about the aforesaid principles and religiously adhere to them. In this regard it would not be out of place to sit in the time machine and dwell upon the sagacious saying of an eminent author who has said that there is a distinction between a man who has command over 'Shastras' and the other who knows it and puts into practice. He who practises them can alone be called a 'vidvan'. Though it was told in a different context yet the said principle can be taken recourse to, for one may know or be aware of that use of intemperate language should be avoided in judgments but while penning the same the control over the language is forgotten and acquired knowledge is not applied to the arena of practice. Or to put it differently the knowledge stands still and not verbalised into action. Therefore, a committed comprehensive endeavour has to be made to put the concept to practice so that it is, concretised and fructified and the litigations of the present nature are avoided.

Coming to the case at hand in our considered opinion the observations, the comment and the eventual direction were wholly unwarranted and uncalled for. The learned Chief Judicial Magistrate had felt that the due to delay and other ancillary factors there was no justification to exercise the power Under Section 156(3) of the Code. The learned Single Judge, as is manifest, had a different perception of the whole scenario. Perceptions of fact and application of law may be erroneous but that never warrants such kind of observations and directions. Regard being had to the aforesaid we unhesitatingly expunge the remarks and the direction which have been reproduced in paragraph three of our judgment. If the said remarks have been entered into the annual confidential roll of the judicial officer the same shall stand expunged. That apart a copy of the order be sent by the Registrar of this Court to the Registrar General of the High Court of Allahabad to be placed on the personal file of the concerned judicial officer.

The appeal is allowed accordingly.

Session 10

Transparency in Performance Assessment

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM
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The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver is a non-partisan legal reform organization devoted to targeting dysfunctional areas of the system and offering innovative, real-world solutions.

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TRANSPARENT COURTHOUSE™

SECTION ONE

Building a Transparent Courthouse

Introduction

The Transparent Courthouse™ is an umbrella concept for the proactive court system of the 21st century – a system that is dedicated to the goals of accountability, accessibility, and action. All three goals are intended to help courts be responsive to the needs of their constituents by demystifying the courts and the legal process.

The materials in this booklet are intended to help you design a program to enhance the first goal – accountability – through judicial performance evaluation (JPE). The public demand for judicial accountability has risen considerably in recent years, and never has it been more important for courts to acknowledge that demand and take ownership of it. Indeed, if courts do not innovate ways to hold themselves accountable, the public will do it for them, often through drastic means such as jurisdiction-stripping.

Judicial performance evaluation programs are a proven approach to promoting accountability without unnecessarily restricting judicial independence. Judges are evaluated on neutral criteria related to the process of judging, rather than the specific case outcomes. JPE programs can be shaped in many different ways, to meet the specific needs of a state's judiciary and citizenry.

These materials will guide you through the process of establishing a new judicial performance evaluation system (or refining an existing one). Using the accompanying checklist, you should consider each of the fifteen questions in the order presented and make the best choice for your jurisdiction. The result should be a coherent, cohesive blueprint for a JPE system.

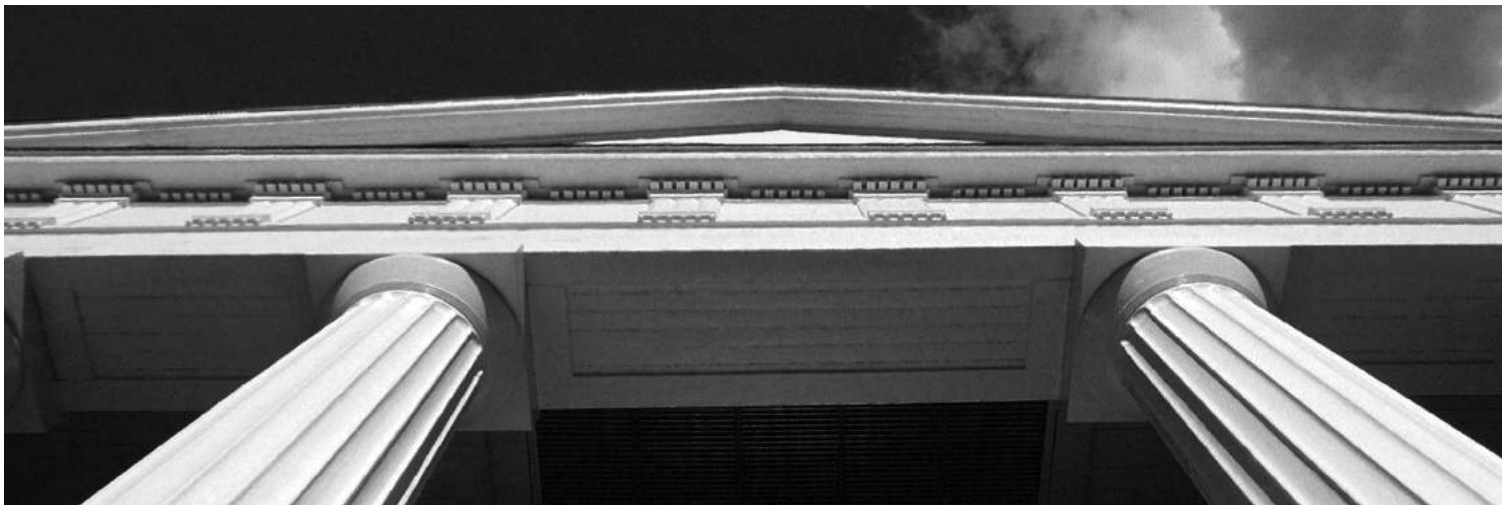
Principles of Judicial Performance Evaluation

A well-constructed judicial performance evaluation program, like a well-constructed courthouse, requires high quality materials. For JPE those materials take the form of four core principles. These principles are:

- ***Transparency*** – The system should be designed so that all involved – the judges, the evaluation commission, survey respondents, and the public – fully understand and trust the evaluation process.
- ***Fairness*** – Evaluations should be fair in design and result.
- ***Thoroughness*** – Evaluations should take into account all relevant information, and be done frequently enough so that the data is meaningful. The data upon which evaluations rely must be as comprehensive as possible.
- ***Shared expectations*** – Evaluations should teach judges about their strengths and weaknesses on the bench, and promote improved performance. At the same time, evaluations should teach the public about the proper way to evaluate a judge, based on process-oriented measures, not individual case outcomes.

As you proceed in designing your own JPE system, remember that each building block should remain true to these principles.

The Building Blocks



There are fifteen building blocks for a judicial performance evaluation program:

1. ***Authorization:*** How should a judicial performance evaluation program be legally authorized?
2. ***Implementation:*** What will the rules governing the program say?
3. ***Placement:*** What branch of government, if any, should oversee the program?
4. ***Reach:*** Should there be local performance commissions for local judges?
5. ***Composition:*** What should the make-up of the performance commission be, and how should its members be chosen?
6. ***Timing:*** How frequently should evaluations be conducted?
7. ***Confidentiality:*** When, if at all, should evaluations be kept confidential?
8. ***Deliberation:*** Should the commission's meetings be open to the public?
9. ***Criteria:*** What are the appropriate bases for evaluating judges?
10. ***Data Collection:*** What information do we want on the judges?
11. ***Benchmarks:*** What threshold standards should be expected of every judge?
12. ***Recommendation:*** Should the commission issue a formal recommendation on retention, if applicable?
13. ***Appeal:*** What process should a judge have to appeal the evaluation results?
14. ***Publication:*** What information should the commission make available to the public?
15. ***Dissemination:*** How should the commission's work be made available to the public?

Assembling the Building Blocks

1

Authorization

Many states with existing JPE programs have chosen to authorize them by statute. Statutory authorization represents a balanced approach, combining a certain degree of permanence with the flexibility to implement changes at the legislature's discretion.

Another option is to mandate judicial performance evaluation in the state constitution. This approach is obviously more rigid than a statutory scheme, but it may be appropriate under some circumstances. For example, if you are considering a constitutional change from election of judges to merit selection, inclusion of a JPE requirement as part of the merit selection scheme may satisfy voters that appointed judges will be held accountable. Similarly, placing the fundamentals of a JPE program in the state constitution may make sense if there is a desire to protect the program from legislative amendment. Currently, only Arizona requires performance review of its judges in its constitution.

In contrast to the rigidity of constitutional authorization, the most flexible approach is to authorize judicial performance evaluation by court rule or some other judicial mechanism. Several states have used this method, but it is less preferable than a statute because it leads to the public perception that no outside source is promoting judicial accountability. In other words, if JPE is authorized solely at the discretion of the judiciary, the public may perceive that it is designed purely to benefit judges, not to provide an accurate and impartial assessment of their performance.

Representative samples of authorizing statutes and court rules are included in Appendix A.

2

Implementation

In addition to an authorizing document, most states have rules governing the judicial performance evaluation process. Such rules can implement the operating procedures of the performance commission as well as the standards the commission should apply. To the extent not spelled out in the authorizing statute, the governing rules should detail the composition of the commission, the information it must collect on each judge, the criteria used to evaluate judges, and the form of the commission's final evaluation or report. The rules should also set forth information on the frequency of evaluations and the extent to which they will be kept confidential.

Arizona and Colorado have developed two of the most comprehensive sets of rules, which are included as models in Appendix B.

3 *Placement*

Several states, including Alaska and Colorado, currently house their performance commissions within the judicial branch – for budgetary as well as staffing purposes. This is a reasonable choice to protect judicial independence and avoid politicization of the evaluation process. However, there must be great care taken to assure that the commission and its staff are themselves independent from the rest of the judiciary and from the state court administrator. This means that the commission should have a separate line-item budget within the judicial branch budget, its own staff and its own autonomy. Otherwise, the commission necessarily falls prey to the criticism that it may be influenced by the very judges it must evaluate.

A better solution may be to create a separate office altogether to conduct judicial performance evaluations. An office with a budget, staffing, and a physical location away from the judiciary or the state court administrator is most likely to be viewed as independent of judicial influence.

Some have suggested placing the performance commission within the legislative or executive branches, ostensibly to assure that it will not be unduly pressured by ties to the judiciary. These approaches, however, pose too great a risk of infecting the commission with partisan politics, which violates the core principle of fairness.

Reach 4

Every state with a current JPE program uses a statewide commission for evaluating judges. Colorado additionally uses 22 local commissions, corresponding to each of the state's judicial districts. The local commissions evaluate trial judges in each of their respective districts, while the statewide commission is charged with evaluating all of the state's appellate judges.

Local commissions are expected to have a greater familiarity with the judges they evaluate, making them better equipped to draw lessons about judicial performance on an individual basis. More local commissions also reduces the workload of a statewide commission, which might otherwise have to review dozens of judges during each evaluation cycle.

Local commissions, however, may not be practical in some jurisdictions, for three reasons. First, additional commissions require more commission members, and some states may find themselves hard-pressed to find enough committed volunteers to serve. Second, there is an added administrative challenge associated with coordinating multiple commissions. Third, multiple commissions may cause incremental cost increases.

The appropriateness of local commissions depends on each state's political landscape and the means by which its judges are chosen. Colorado's use of state and local commissions is successful in part because Colorado uses the same structure in its judicial nominating process. In a state like Kansas, however, where the process of selecting trial court judges is not homogenous (i.e., some judges are appointed and others elected), it may be simpler and more effective to have one statewide body oversee all evaluations.

5

Composition

Performance commissions vary significantly by size and composition. Historical operation suggests that the size of the commission is immaterial to its ability to conduct thorough performance reviews. For example, Alaska's seven-member commission and Arizona's thirty-member commission have both worked well in practice. Commission size can be selected based on the pool of qualified volunteers and the commission's workload.

The composition of the commission does matter. Many states require a rough balance of attorneys and non-attorneys among the commission membership. Both types of members are necessary: attorneys play an important role as relative experts on the legal system, while non-attorneys contribute an important outsiders' perspective. The inclusion of non-attorneys also builds public confidence that judges are not just being evaluated by those in their own profession.

Several states require partisan balance on the commission, so that judges and the public are comfortable that evaluations are not driven by the party affiliation of the judges or that of the governor who appointed them. Here perception is as important as reality; even thorough and neutral evaluations will be discounted if the commission is seen as partisan. Accordingly, it is recommended that the evaluation commission be balanced along partisan lines.

States should be cautious, however, about setting too many requirements for balancing commission membership. Although some have argued for requiring commissions to have geographic, gender, ethnic or racial balance as well, in practice it may be difficult to fill a commission with competent, dedicated volunteers if there are too many factors to balance. Ultimately, the most important characteristics of any successful commission member are dedication, care and an open mind.

There are many different models for appointing members to the commission, including appointments by various state officials, local officials, and/or the state bar association. It is recommended that states adopt an appointment system similar to that used in Colorado, which divides appointment authority more or less equally between the three branches of state government. Under that scheme, the governor and the chief justice of the supreme court each appoint one attorney and two non-attorneys to the commission, and the speaker of the house and president of the senate each appoint one attorney and one non-attorney. The involvement of all three branches of government assures that the judicial branch is simultaneously accountable and protected.

Commissioners' terms of office should be set either in the authorizing statute or the governing rules. It is recommended that terms of office be staggered to preserve institutional memory between evaluation periods.

6 *Timing*

Evaluations become more valuable when they occur more often. Frequent, regular evaluations assist judges by identifying areas of weakness early and allowing them to work toward professional self-improvement. Frequent evaluations also provide the commission with a larger amount of data with which to work, lowering the chance that an evaluation will be seen as an aberration.

Costs and commission fatigue must be taken into account when increasing the frequency of evaluations. For example, instituting mid-term evaluations with a review and publication process identical to term-end evaluations would double the time spent by the commission, and would also double the cost of evaluation. It is possible to reduce costs and volunteer time, however, by modifying the process or the distribution of mid-term evaluations. For instance, mid-term evaluations may be conducted according to the full review process, but the results not disseminated until the next election cycle.

---

7 *Confidentiality*

Transparency is the fundamental goal of judicial evaluations, both with respect to the process used to evaluate each judge and the results of each evaluation. Several states have satisfied this principle, by transmitting comprehensive information about each judge's evaluation to the public. Some jurisdictions, however, have chosen to keep evaluations entirely confidential, or have disseminated only general, court-wide results to the public, without providing any information on individual judges.

Under no circumstances should evaluation results always be kept confidential. Failure to provide evaluation results to the public is a missed opportunity to educate voters about the proper criteria for evaluating judges, as well as a failed occasion to praise excellent judges and hold less-than-excellent judges accountable. Furthermore, in the absence of official performance evaluations, the public is apt to rely on less comprehensive substitutes such as bar polls or judge rankings.

Evaluations should always be made public when the judge being evaluated is facing an election. When done properly, JPE provides the public with impartial, comprehensive information about judges on the ballot – the only such information voters are likely to receive. Indeed, in the absence of evaluation results, voters are left to rely on information entirely unrelated to the judge's job performance in determining whether to retain the judge in office, such as name recognition, ethnicity, or gender.

On the other hand, confidentiality may be appropriate where the judge is not scheduled to face voters immediately. For example, if an appellate judge with an eight-year term is evaluated every two years, keeping the mid-term evaluations confidential allows the judge to identify – and acknowledge – areas of professional strength and weakness without the accompanying pressure of an election. Confidential mid-term evaluations would also be somewhat less expensive than public evaluations, because there would be no related cost of disseminating the information.

If full transparency is not practical, the Institute recommends an amalgamated approach, in which mid-term evaluations are initially shared only with the judge, but during election years all previous mid-term reports and the election year report are publicly disseminated. This approach allows a judge to work toward professional self-improvement out of the public eye, but holds the judge accountable to the voters for whether that improvement was actually achieved.

In states where judges are appointed and do not face retention elections, evaluations should be made public at regular intervals.

8 *Deliberation*

Public meetings enhance public trust and confidence. Like every other part of the evaluation process, the more the public understands the commission's role and thinking, the more likely it is to accept the commission's conclusions. Open meetings also enhance judicial trust. If the commission's deliberations are open to the public, judges can feel comfortable that the commission's final evaluation was the result of a good faith discussion, not a closed-door effort to damage specific judges' reputations.

Open meetings, however, are not without risks. There may be a chilling effect on commission members who are afraid to speak candidly about a judge in public, especially if they are likely to appear before that judge again. On the other hand, should a commission member be prone to grandstanding, a public forum invites it all the more. There is also some risk that public attendees themselves will attempt to disrupt the proceedings. In practice, however, there have been no reports of open meetings being any less efficient or productive than closed meetings. Also as a practical matter, meetings are likely to pull relatively few public attendees, meaning they can serve the public interest without the risk of commotion.

9 *Criteria*

The right criteria for evaluation are a critical part of the decision process. The criteria for trial judges must differ from the criteria for appellate judges. For example, a trial judge should be evaluated generally on the basis of case management skills, fairness and demeanor, and teamwork. Appellate judges should be evaluated on the basis of clarity of opinions, adherence to the facts and law of the case and workload management. A proposed set of evaluation criteria is set out in the accompanying checklist. In addition, model surveys are attached as Appendices C through H.

10 *Data Collection*

Data collection is a matter of best practices. As detailed in the accompanying checklist, the commission should generally collect anonymous, reliable survey data from a variety of sources (including attorneys, jurors, litigants, witnesses, court staff, and others who have interacted with the judge in a professional setting); information gleaned from courtroom observation; sample opinions and orders from each judge; case management statistics; and public comments. The Institute recommends that the data be somewhat different for trial judges than for appellate judges. Alaska's use of court observers for trial judges is recommended, as is New Mexico's broad surveys related to appellate judges.

Surveys should be sent to a wide range of sources in part because the volume of raw data is important. Many survey recipients will not complete and return the surveys when they receive them. Accordingly, reminders and follow-ups may be appropriate. In the interest of collecting more raw data, states may also want to explore making public questionnaires or comment cards available at the courthouse and online. While such data would be anecdotal and not as reliable as scientific surveys, it still could be made available to the evaluation commission as additional information on public perception of the judge's performance. The Institute cautions that it is not aware that any state or jurisdiction has used public questionnaires or comment cards to date.

One of the most significant challenges in data collection is protecting the confidentiality of survey participants. If survey recipients fear that the judge will identify them by their comments, they may limit their comments to positive traits or decline to comment altogether. Accordingly, written comments on surveys should be carefully scrutinized for identifying information (such as names, case numbers, or unique facts about the case) before they are submitted to the judge, and survey participants should be assured that their identities will not be revealed. Identity can be further masked by having survey data compiled by an third party unaffiliated with the judicial branch.

11

Benchmarks

It is important that the commission set benchmarks for judicial performance prior to beginning the evaluation process. Such benchmarks serve as guideposts for both the commission and the judges, and reduce the risk that the commission will reach a conclusion about a judge that is inconsistent with the totality of the information collected. Closely tying the commission's evaluation to predetermined benchmarks also adds credibility to the evaluation.

The Institute proposes the following set of sample benchmarks for evaluation of judges:

1. At minimum, an average performance on at least 80% of all survey questions ("average performance" meaning, for example, a score of 3.0 on a 1-5 scale, or at least 75% of respondents answering "yes" to a yes/no question);
2. For trial judges, no cases with issues under advisement more than 90 days, unless the judge's particular docket assignment justifies exceptions;
3. For appellate judges, the authorship of a proportionate number of opinions authored by that court on average in a given calendar year, taking into account both particularly complex cases and concurring or dissenting opinions authored during the same period;
4. All or nearly all written opinions clearly and accurately describe the relevant facts and applicable law, and clearly state the court's order; and
5. No findings by a body charged with judicial discipline that the judge has violated the applicable code of judicial conduct.

Recommendation

12

The majority of states that conduct evaluations ask the performance commission to offer a recommendation on whether the evaluated judge should be retained in office. Alaska and Colorado also publicly announce the results of the commission's vote, so that voters can determine whether the commission reached its recommendation unanimously. In most cases, the recommendation is simply to retain or not retain the judge. Colorado also has a rarely used category of recommendations designated "No Opinion," meaning that the commission could not reach a recommendation based on the information available to it.

Studies suggest that voters tend to follow the commission's recommendations. Anecdotal evidence also suggests that most voters will use the recommendations as a shortcut on how to vote, and may ignore the underlying details or rationale. In other words, voters treat the commission's work as a proxy for their own investigation into judicial performance, and vote accordingly. This underscores the importance of the commission reaching its recommendation based on carefully defined procedures and rules.

Perhaps because voters attach overwhelming weight to formal recommendations, commissions in two states simply issue statements as to whether each judge has met pre-approved benchmarks. In Arizona, the commission members vote on whether each judge "meets" or "does not meet" judicial performance standards, and the vote total is made public. In Utah, the commission also issues a determination as to whether the judge has exceeded the standard for acceptable performance, based on rigid performance standards. It does not make a recommendation, and there is no publication of vote totals.

It is of course inappropriate for a commission to issue a formal recommendation on a candidate for a contested judicial election; however, the commission may certainly state whether the candidate meets the threshold standards for acceptable performance.

13

Appeal

A number of states provide for an appeal process by which the judge can challenge the commission's conclusions. That is clearly the preferred alternative in order to protect the fairness of the process.

Appeals can work in slightly different ways, but whatever method is adopted should allow the judge to review the evaluation before the public does, and challenge conclusions that he deems inaccurate. In Arizona, for example, the judge may review a draft of the commission's report before it is disseminated to the public, and he may submit oral or written comments to the commission if he disagrees with the evaluation. New Mexico embraces the same concept, but requires that comments from the judge be written. Colorado similarly allows a judge who is concerned with the commission's report and retention recommendation to request an additional interview. If the commission still recommends that the judge should not be retained, the judge may include with the commission's published recommendation a written statement setting out his own position.

You may also wish to permit the judge (or a commission member) to appeal the decision to an outside body if he is concerned that the commission's governing rules were not followed properly. This option is currently available in Colorado.

Publication

14

Historically, one of the biggest challenges for performance commissions has been determining the amount of information that it should provide to the public. Providing too little information prevents the public from making informed judgments about the judiciary, and undercuts a central purpose of performance evaluation. Providing too much information, however, tends to overwhelm the public, and they simply disregard it.

The Institute recommends a multi-tiered approach to disseminating evaluation results. The lowest tier is appropriate for "quick reads" such as voter guides and newspapers, and should include basic biographical information on the judge, a summary of his strengths and weaknesses, and the recommendation of the commission (if any). A second tier might include a slightly more detailed analysis, with summaries of survey data and case management statistics. Finally, at the highest tier, the entire evaluation (including all data at the commission's disposal) should be made available to public upon demand.

Different members of the public will require different levels of information about their judges. Rather than guessing at who would like what information, the commission should be sure that higher-tier, more detailed information is available and easy to access. Posting such information on a commission website is one easy and cost-effective solution.

While survey data should be made available, the commission should think carefully about publishing written comments about the judge received from survey participants or the public. Written comments should be shared with the judge and taken into account by the commission, of course, but past experience has shown that many such comments are mean-spirited, or otherwise inappropriate, and would not benefit the public.

For every tier of information, the commission should publish a clear, concise explanation of the evaluation process, including an exposition on the criteria used to evaluate each judge, the data collected, and the procedure by which the commission's recommendation (if any) was reached. A model explanation is attached at Appendix I.

15 *Dissemination*

To serve the purpose of educating and informing the electorate, the commission's conclusions must be widely disseminated. A commitment to public judicial performance evaluation involves a concomitant commitment to assuring that the results are widely known: by the use of websites, press coverage and even advertisements.

To this end, the commission should strive to place evaluation information in the hands of voters in as many ways as possible. In election cycles, evaluation reports should be included in voter guides and available on a specific commission website. The commission may also want to explore newspaper ads, as well as making reports available in hard copy in courthouses and selected public buildings.

The commission may also want to promote a voter education campaign in connection with the release of evaluation results. Such a campaign might include working with the local media to inform voters about the evaluation process, and/or with public interest groups that provide voter education services. The Alaska Judicial Council has even run radio advertisements to inform voters that judicial evaluations have been conducted, and where voters can get more information. Regardless of the approach used, at the end of the evaluation process, the public should know three things: (1) that information on the performance of their judges is available; (2) where the information is available; and (3) what information they can expect to find.

For further information on the purpose and fundamentals of judicial performance evaluation, you may download a free report entitled "Shared Expectations: Judicial Accountability in Context" from the Institute's website, www.du.edu/legalinstitute.

SECTION TWO

Building Blocks

for Judicial Performance Evaluation

A Checklist for Creating or Improving a JPE Program

1. How will the judicial performance program be legally authorized?

- ☐ Statute (recommended)
- ☐ Constitutional provision
- ☐ Court opinion or court rule
- ☐ Other (_____)

2. What will the rules governing the program say?

It is recommended that any subject matter listed below be addressed in the governing rules if it is not included in the JPE program's authorizing document.

Check all that apply:

- ☐ Commission membership
  - ☐ Appointment of commission members
  - ☐ Qualifications for membership
  - ☐ Term of office
    - ☐ Length of term
    - ☐ Staggered or concurrent terms?
  - ☐ Requirements of overall commission composition (if applicable)
  - ☐ Process for choosing a chair or co-chairs
- ☐ Frequency of judicial evaluations
- ☐ Criteria for evaluations
- ☐ Data to be collected for evaluations
- ☐ Judge's right of appeal (if applicable)
- ☐ Frequency and form of published evaluation results
- ☐ Other (_____)

3. What branch of government, if any, should oversee the program?

- ☐ Program administered, funded and staffed by the judicial branch
- ☐ Program included in judicial budget, but with independent staff
- ☐ Separate governmental office with staff and line-item budget independent of the judiciary
- ☐ Wholly independent from state government
- ☐ Other (_____)

4. Should there be local commissions for local judges?

- ☐ One statewide commission for all judges
- ☐ Statewide commission for appellate judges and local commissions for trial judges
- ☐ Other (_____)

5. What should the makeup of the commission be, and how should its members be chosen?

Will any of following be required with respect to the composition of the commission?

- ☐ Partisan balance (recommended)
- ☐ Geographic balance
- ☐ Gender balance
- ☐ Racial or ethnic balance
- ☐ Other (_____)

Complete the chart, indicating the number of commission members in each category on the left to be appointed by each branch of government on the top.

	Chief Justice	*Governor*	*Legislature*	*Other*
Attorneys				
Judges				
Public				
Other				

6. How frequently should evaluations be conducted?

- ☐ Only prior to a retention election or a contested judicial election
- ☐ In election years and at least one other time during the judge's term (recommended)
  - ☐ Full-scale evaluation (as in election years)
  - ☐ Modified or limited evaluation (Explain: _____)
- ☐ Annually
  - ☐ Full-scale evaluation (as in election years)
  - ☐ Modified or limited evaluation (Explain: _____)
- ☐ Other (_____)

7. When, if at all, should evaluations be kept confidential?

- ☐ Never, all results made public
- ☐ Results made public only in election years
- ☐ Other (_____)

8. Should the commission's meetings be open to the public?

- ☐ All meetings open to the public
- ☐ Selected meetings open to public (indicate which: _____)
- ☐ No meetings open to the public

9. What are the appropriate criteria for evaluating judges?

For trial judges, check all that apply:

- ☐ **Legal knowledge**
  - ☐ Demonstrated understanding of substantive law and relevant rules of procedure and evidence
  - ☐ Awareness and attentiveness to the factual and legal issues before the court
  - ☐ Proper application of statutes, judicial precedents, and other appropriate sources of legal authority

- ☐ **Integrity**
  - ☐ Avoids impropriety or the appearance of impropriety
  - ☐ Displays fairness and impartiality toward all parties
  - ☐ Avoids ex parte communications
- ☐ **Communications skills**
  - ☐ Clearly explains all oral decisions
  - ☐ Issues clear written orders and opinions
  - ☐ Clearly explains relevant information to the jury
- ☐ **Judicial temperament**
  - ☐ Shows courtesy toward attorneys, court staff, and others in the courtroom
  - ☐ Maintains and requires order and decorum in the courtroom
  - ☐ Shows and expects professionalism from everyone in the courtroom
  - ☐ Demonstrates appropriate demeanor on the bench
- ☐ **Administrative performance**
  - ☐ Appears prepared for all hearings and trials
  - ☐ Uses court time efficiently
  - ☐ Issues opinions and orders without unnecessary delay
  - ☐ Effectively manages cases
  - ☐ Offers help to fellow judges where appropriate
  - ☐ Shares burden of court workload
- ☐ **Public outreach**
  - ☐ Participates in programs designed to educate the public about the judicial system
  - ☐ Participates in activities designed to improve the legal system
- ☐ Other (_____)

For appellate judges, check all that apply:

- ☐ **Legal knowledge**
  - ☐ Opinions demonstrate understanding of substantive law and relevant rules of procedure and evidence
  - ☐ Opinions demonstrate attentiveness to factual and legal issues before court
  - ☐ Opinions adhere to precedent or clearly explain legal basis for departure from precedent
- ☐ **Integrity**
  - ☐ Avoids impropriety or the appearance of impropriety both in court and out of court
  - ☐ Displays fairness and impartiality toward all parties
  - ☐ Avoids ex parte communications
- ☐ **Communication skills**
  - ☐ Opinions are clearly written and understandable
- ☐ **Judicial temperament**
  - ☐ Demonstrates courtesy toward attorneys, court staff, and others in the courtroom
  - ☐ Maintains and requires decorum in the courtroom
  - ☐ Demonstrates preparedness for oral argument
- ☐ **Administrative performance**
  - ☐ Effective workload management
  - ☐ Offers help to fellow judges where appropriate
  - ☐ Shares burden of court workload
- ☐ **Public outreach**
  - ☐ Participates in programs designed to educate the public about the judicial system
  - ☐ Participates in activities designed to improve the legal system
- ☐ Other (_____)

10. What information do we want on judges?

Check all that apply:

- ☐ Data from anonymous surveys
  - ☐ Attorneys
  - ☐ Jurors (trial judges only)
  - ☐ Litigants
  - ☐ Court staff
  - ☐ Law clerks
  - ☐ Peer judges with the same bench assignment
  - ☐ Police and probation officers (trial judges only)
  - ☐ Social workers (trial judges only)
  - ☐ Court-appointed special advocates (trial judges only)
  - ☐ Guardians ad litem (trial judges only)
  - ☐ Courtroom interpreters (trial judges only)
  - ☐ Lay and expert witnesses (trial judges only)
  - ☐ Law professors (appellate judges only)
  - ☐ Trial judges (appellate judges only)
  - ☐ Other (_____)
- ☐ Individual case management data
- ☐ Representative opinions and orders
- ☐ Detailed interviews or questionnaires to selected attorneys
- ☐ Written comments from the public
- ☐ Public hearings
- ☐ Courtroom observation
  - ☐ By the performance commission
  - ☐ By independent observers
  - ☐ By videotape

- ☐ Judicial self-evaluation
- ☐ Interview(s) with the judge
- ☐ Other statistical data (_____)
- ☐ Information from unsolicited public questionnaires
- ☐ Other (_____)

11. What threshold standards should be expected of every judge?

Check all that apply:

- ☐ Survey ratings indicating at least average performance on at least 80% of survey questions
- ☐ No cases with issues under advisement more than 90 days, unless the judge's particular docket justifies exceptions (trial judges only)
- ☐ Authorship of a proportionate number of opinions authored by the court as a whole in a given calendar year, taking into account both particularly complex cases and concurring and dissenting opinions authored during the same period (appellate judges only)
- ☐ All or nearly all written opinions clearly and accurately describe the relevant facts and applicable law, and clearly state the court's order
- ☐ No findings by a body charged with judicial discipline that the judge has violated the applicable code of judicial conduct
- ☐ Other (_____)

12. Should the commission issue a formal recommendation on retention, if applicable?

- ☐ Formal recommendation indicating commission's vote count
- ☐ Formal recommendation without vote count
- ☐ Statement as to whether judge meets benchmarks, with vote count
- ☐ Statement as to whether judge meets benchmarks, without vote count
- ☐ No statement issued by commission
- ☐ Not applicable (judges not subject to retention elections)

13. What process should be available to judges have to appeal the recommendation?

Check all that apply:

- ☐ Request for additional interview with commission
- ☐ Opportunity to submit written comments to commission
- ☐ Opportunity to submit statement for inclusion in voter guide
- ☐ Formal appeal to outside body

14. What information should the commission make available to the public?

Check all that apply:

- ☐ Recommendation on retention or statement of qualification (see #12)
- ☐ Judge's biographical data
- ☐ Summary of strengths and weaknesses
- ☐ Summaries of survey data
- ☐ Complete survey data

15. How should the commission's work be made available to the public?

Check all that apply:

- ☐ Voter guides (when applicable)
- ☐ Newspapers
- ☐ Commission website or other website
- ☐ Distribution at public places (courthouses, grocery stores, libraries, etc.)
- ☐ Direct mail
- ☐ Television or radio
- ☐ Educational collaboration with other organizations
- ☐ Other (_____)

APPENDIX C

APPENDIX C: *Model Attorney Survey For Appellate Judge Evaluations*

This questionnaire seeks your input on the quality of Judge X's performance on the appellate bench. Your responses will remain anonymous. Please fill out and return this survey if you have appealed a case and Judge X participated in the decision. If you have not had experience with Judge X, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

☐ **Judge X has not heard the appeal of any of my cases for the survey period.**

1. Which of the following types of cases have you appealed in which Judge X participated in the decision? Select all that apply.

a. Civil
b. Criminal
c. Domestic
d. Juvenile
e. Other

2. Please evaluate Judge X's job performance on the issues below, using the following scale:

1 Inadequate
2 Less than Adequate
3 Adequate
4 More than Adequate
5 Excellent
NA Cannot Evaluate

If you do not feel you have adequate ***first hand knowledge*** to evaluate Judge X on a specific question, select NA ("Cannot Evaluate").

a.	Behaves in a manner that is free from impropriety or the appearance of impropriety	1	2	3	4	5	NA
b.	Treats people equally regardless of race, gender, ethnicity, economic status, or any other factor	1	2	3	4	5	NA
c.	Displays fairness and impartiality toward each side of the case	1	2	3	4	5	NA
d.	Avoids ex parte communications	1	2	3	4	5	NA
e.	Allows parties to present their arguments and answer questions	1	2	3	4	5	NA
f.	Maintains the quality of questions and comments during oral argument	1	2	3	4	5	NA

g.	Is courteous toward attorneys	1	2	3	4	5	NA
h.	Is courteous toward court staff	1	2	3	4	5	NA
i.	Demonstrates appropriate demeanor on the bench	1	2	3	4	5	NA

3. Did Judge X author or co-author one or more opinions in your case(s)?

4. If you answered Question 3 in the affirmative, please evaluate the judge on the topics below, using the same 1-5 scale as in Question 2:

a.	Opinions are clearly written	1	2	3	4	5	NA
b.	Opinions are issued without unnecessary delay	1	2	3	4	5	NA
c.	Opinions clearly explain the basis of the Court's decision	1	2	3	4	5	NA
d.	Opinions demonstrate scholarly legal analysis	1	2	3	4	5	NA
e.	Opinions demonstrate knowledge of the substantive law	1	2	3	4	5	NA
f.	Opinions reflect sufficient familiarity with relevant facts of the case	1	2	3	4	5	NA
g.	Opinions demonstrate knowledge of the rules of evidence and procedure	1	2	3	4	5	NA
h.	Opinions are rendered without regard for possible public criticism	1	2	3	4	5	NA
i.	Opinions refrain from reaching issues that need not be decided	1	2	3	4	5	NA

5. Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.

6. Your years in practice: 0-5 6-10 11 or more

APPENDIX D

APPENDIX D: *Model Attorney Survey For Trial Judge Evaluations*

This questionnaire seeks your input on the quality of Judge X's performance on the bench. Your responses will remain anonymous. Please fill out and return this survey if you have had courtroom interaction of any sort with Judge X during the survey period, including but not limited to jury trials, bench trials, and motion hearings. If you have not had experience with Judge X during the survey period, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

☐ **Judge X has not presided over any of my cases for the survey period.**

1. Which of the following types of cases have you had before Judge X? Select all that apply.

a. Civil
b. Criminal
c. Domestic
d. Juvenile
e. Other

2. Please evaluate Judge X's job performance on the issues below, using the following scale:

1 Inadequate
2 Less Than Adequate
3 Adequate
4 More than Adequate
5 Excellent
NA Cannot Evaluate

If you do not feel you have adequate ***first hand knowledge*** to evaluate Judge X on a specific question, select NA ("Cannot Evaluate").

a.	Behaves in a manner that is free from impropriety or the appearance of impropriety	1	2	3	4	5	NA
b.	Treats people equally regardless of race, gender, ethnicity, economic status, or any other factor	1	2	3	4	5	NA
c.	Displays fairness and impartiality toward each side of the case	1	2	3	4	5	NA
d.	Avoids ex parte communications	1	2	3	4	5	NA
e.	Is prepared for hearings and trials	1	2	3	4	5	NA

f.	Allows parties latitude to present their arguments	1	2	3	4	5	NA
g.	Allows parties sufficient time to present case	1	2	3	4	5	NA
h.	Is courteous toward attorneys	1	2	3	4	5	NA
i.	Is courteous toward court staff	1	2	3	4	5	NA
j.	Maintains and requires proper order and decorum in the courtroom	1	2	3	4	5	NA
k.	Shows and expects professionalism from everyone in the courtroom	1	2	3	4	5	NA
l.	Demonstrates appropriate demeanor on the bench	1	2	3	4	5	NA
m.	Understands substantive law	1	2	3	4	5	NA
n.	Understands rules of procedure and evidence	1	2	3	4	5	NA
o.	Weighs all evidence fairly and impartially before rendering a decision	1	2	3	4	5	NA
p.	Clearly explains all oral decisions	1	2	3	4	5	NA
q.	Written opinions and orders are clear	1	2	3	4	5	NA
r.	Issues opinions and orders without unnecessary delay	1	2	3	4	5	NA
s.	Starts court on time	1	2	3	4	5	NA
t.	Uses court time efficiently	1	2	3	4	5	NA
u.	Effective as an administrator	1	2	3	4	5	NA
v.	Effectively uses pretrial procedures to narrow and define the issues	1	2	3	4	5	NA
w.	Overall performance	1	2	3	4	5	NA

3. **Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.**

4. **Your years in practice:** 0-5 6-10 11 or more

APPENDIX E

APPENDIX E: *Model Attorney Survey for Trial Judge Candidate Evaluations in Contested Elections*

Candidate X has declared his intent to run for judicial office. This questionnaire seeks your input on the quality of Candidate X's performance as an attorney related to skills he will be expected to use on the bench. Your responses will remain anonymous. Please fill out and return this survey if you have had professional interaction in a litigation setting with Candidate X during the survey period, including but not limited to trials, court hearings, depositions, discovery conferences, settlement conferences, or alternative dispute resolution. If you have not had experience with Candidate X during the last ten years, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

☐ **I have not interacted professionally with Candidate X on any litigation matters in the last ten years.**

1. In which of the following types of cases have you interacted with Candidate X? Select all that apply.

a. Civil
b. Criminal
c. Domestic
d. Juvenile
e. Other

2. In which types of settings you have interacted with Candidate X? Select all that apply.

a. Jury trial
b. Bench trial
c. Motion hearing
d. Evidentiary hearing
e. Other hearing
f. Deposition
g. Discovery conference
h. Settlement conference
i. Mediation
j. Arbitration
k. Contact by telephone only
l. Contact my letter or e-mail only
m. Other contact

3. Did you work on the same litigation team (i.e., representing the same client or clients) as Candidate X in any of the litigation matters listed above? If so, identify which matters:

4. Please evaluate Candidate X on the issues below, using the following scale:

1 Inadequate
2 Less Than Adequate
3 Adequate
4 More than Adequate
5 Excellent

If you do not feel you have adequate ***first hand knowledge*** to evaluate Candidate X on a specific question, select NA ("Cannot Evaluate").

a.	Behaves in a manner that is free from impropriety or the appearance of impropriety	1	2	3	4	5	NA
b.	Treats people equally regardless of race, gender, ethnicity, economic status, or any other factor	1	2	3	4	5	NA
c.	Avoids ex parte communications	1	2	3	4	5	NA
d.	Is prepared for hearings, trials, and the like	1	2	3	4	5	NA
e.	Is courteous toward other attorneys	1	2	3	4	5	NA
f.	Is courteous toward court staff	1	2	3	4	5	NA
g.	Maintains proper decorum in the courtroom	1	2	3	4	5	NA
h.	Shows professionalism in the courtroom	1	2	3	4	5	NA
i.	Demonstrates appropriate demeanor	1	2	3	4	5	NA
j.	Understands substantive law	1	2	3	4	5	NA
k.	Understands rules of procedure and evidence	1	2	3	4	5	NA
l.	Acknowledges weaknesses in argument where appropriate	1	2	3	4	5	NA
m.	Briefs and motions are clearly written	1	2	3	4	5	NA
n.	Meets court and discovery deadlines without unnecessary delay	1	2	3	4	5	NA
o.	Ready for court and depositions on time	1	2	3	4	5	NA
p.	Uses court time efficiently	1	2	3	4	5	NA
q.	Effectively uses pretrial procedures to narrow and define the issues	1	2	3	4	5	NA
r.	Overall performance	1	2	3	4	5	NA

5. **Please add any comments about Candidate X relating to any of your responses above. Please use additional pages as necessary.**

6. **Your years in practice:** 0-5 6-10 11 or more

APPENDIX F

APPENDIX F: *Model Juror Survey for Trial Judge Evaluations*

As a juror, you have been in a position to observe the functions of the court system. Your opinion of the system is important to us. Please take a few minutes to complete this survey regarding your observations of Judge X. Your responses will be kept anonymous, and will help maintain a system than runs efficiently and effectively. Thank you for your service.

Please answer the following questions:

1.	Did the judge treat people equally regardless of race, gender, ethnicity, economic status, or any other factor?	Yes	No
2.	Did the judge's behavior appear to be free from bias or prejudice?	Yes	No
3.	Did the judge conduct proceedings in a fair and impartial manner?	Yes	No
4.	Did the judge act in a dignified manner?	Yes	No
5.	Did the judge treat people with courtesy?	Yes	No
6.	Did the judge act with patience and self-control?	Yes	No
7.	Did the judge act with humility and avoid arrogance?	Yes	No
8.	Did the judge pay attention to the proceedings throughout?	Yes	No
9.	Did the judge build your confidence in the judicial system?	Yes	No
10.	Did the judge clearly explain court procedure?	Yes	No
11.	Did the judge clearly explain the responsibility of the jury?	Yes	No
12.	Did the judge clearly explain reasons for any delay?	Yes	No
13.	Did the judge start court on time?	Yes	No
14.	Did the judge maintain control over the courtroom?	Yes	No
15.	Would you be comfortable having your case tried before this judge if you ever had a case in court?	Yes	No

APPENDIX G

APPENDIX G: *Model Litigant Survey for Trial Judge Evaluations (Civil Cases)*

We are interested in learning about your recent experience with our court system. Please take a few minutes to complete this survey regarding your perceptions of Judge X and the court's handling of your case. Your responses will be kept anonymous, and will help us maintain a system that it efficient, effective, and fair.

Please answer the following questions about your case:

1.	Were you the plaintiff or defendant in your case?	Plaintiff	Defendant	
2.	If a trial was held, how long did it last?	_____		
3.	Do you win or lose the case, or did it settle out of court?	Won	Lost	Settled

Please answer the following questions about the judge:

1.	Did the judge appear well-prepared for your case?	Yes	No
2.	Did the judge deal with your case promptly?	Yes	No
3.	Was the judge respectful to you?	Yes	No
4.	Was the judge respectful to the other parties?	Yes	No
5.	If there was a trial, did the judge manage it efficiently?	Yes	No
6.	Did the judge manage the entire case efficiently?	Yes	No
7.	Do you feel that the judge listened to your side of the case?	Yes	No
8.	Were the judge's rulings clear?	Yes	No
9.	Do you understand why the judge ruled the way he/she did?	Yes	No

Please add any other comments you would like to make about the judge or the way your case was handled in court:

APPENDIX H

APPENDIX H: *Model Court Staff Survey for Trial Judge Evaluations*

This questionnaire seeks your input on the quality of Judge X's performance. Your responses will remain anonymous. Please fill out and return this survey. If you have not had experience with Judge X, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

1. Please evaluate Judge X's job performance on the issues below, using the following scale:

1 Inadequate
2 Less Than Adequate
3 Adequate
4 More than Adequate
5 Excellent
NA Cannot Evaluate

If you do not feel you have adequate ***first hand knowledge*** to evaluate Judge X on a specific question, select NA ("Cannot Evaluate").

a.	Behaves in a manner that encourages respect for the courts and is free from impropriety or the appearance of impropriety	1	2	3	4	5	NA
b.	Displays fairness and impartiality toward each side of the case	1	2	3	4	5	NA
c.	Avoids ex parte communications	1	2	3	4	5	NA
d.	Allows parties to present their arguments and answers questions	1	2	3	4	5	NA
e.	Demonstrates appropriate demeanor on the bench	1	2	3	4	5	NA
f.	Is prepared for each day's docket	1	2	3	4	5	NA
g.	Is courteous toward attorneys	1	2	3	4	5	NA
h.	Offers to assist other judges and is generally a team player	1	2	3	4	5	NA
i.	Is courteous toward court staff	1	2	3	4	5	NA
j.	Writes rulings/opinions clearly	1	2	3	4	5	NA
k.	Issues rulings/opinions promptly	1	2	3	4	5	NA

2. Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.

3. Your years with the court: 0-5 6-10 11 or more

4. Is the judge your supervisor?

PERFORMANCE APPRAISAL

Prof. Karam Pal Narwal[*]

Learning Objective: *The main objective of this chapter is to make the students learn about the fundamental concepts and methods of performance appraisal.*

Chapter Contents: Introduction to Performance Appraisal and Counseling; Significance of Performance Appraisal; The Appraisal Process; Methods of Performance Appraisal; Grey Areas in Performance Appraisal; Suggestions for Improvement; Summary; and Self Assessment Questions

I. INTRODUCTION TO PERFORMANCE APPRAISAL

Performance appraisal is one of the important sub-functions of staffing in management. Human behaviour is a complex phenomenon because no one can anticipate accurately what exactly a man is going to do. The individual joins an organization to satisfy his objectives. But the organization also has its own goals, which need not to be in conformity with the individual goals. If the goals of the individual and organization are extremely contradictory, a conflict will arise which either result into suppression of human personality or a complete will set back to his work. It is not desirable that individual's personality be suppressed but at the same time organization goals should also be achieved. For monitoring this process of achieving organizational goals, the performance of an individual needs to be assessed after a regular interval so that the desired behaviour could be maintained. This will also help the organization to satisfy the needs and the aspiration of the individual by providing him more facilities, improved working condition and carrier advancement.

According to *Heyel*, "the performance appraisal is the process of evaluating the performance and competencies of an employee in term of the requirements of the job for which he is employed, for the purpose of administration including placement, selection for promotions, providing financial rewards and other actions which require differential treatment

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among the members of a group as distinguished from action affecting all members equally".

Performance appraisal may also be defined as a process that involves: -

(i) Setting work standard;
(ii) Assessing the employees actual performance relative to these standards; and
(iii) Providing feedback to employee with the aim of motivating that person to eliminate performance deficiencies or to continue to perform above par.

How Performance Appraisal differs from Counseling: Counseling follows performance appraisal. It covers two aspects i.e. 'tell and sell' where the boss tells his subordinates where they stand. He adopts the method of criticism and persuasion. These two are the fundamental tools for counseling. In counseling, the boss discusses the future development by encouraging his subordinates to appraise themselves. Here, the give and take problem-solving approach may be used throughout the counseling meeting. The aim of the counseling is not just to tell the subordinates what they have done wrong. Instead, the boss reveals the root cause of the problem and secures constructive solution. The boss generally avoids criticizing his subordinates and he tries to emphasize the organizational development.

In fact, the performance appraisal process if understood in its comprehension includes the counseling and coaching. Counseling and appraisal differ slightly because the counseling is done on day-to-day basis whereas the appraisal is done after a regular interval. Therefore, it can be said that the performance appraisal would yield dividend only when the proper counseling takes place in an organization.

II. SIGNIFICANCE OF PERFORMANCE APPRAISAL

(i) Career planning and development: Performance feedback guides career decisions about specific career paths one should investigate.

(ii) Compensation adjustments: Performance evaluations help the decision makers to determine who should receive pay raises. Many firms grant part or all of their pay increases and bonuses on the basis of merit, which is determined mostly through performance appraisal.

(iii) **Equal employment opportunity:** Accurate performance appraisals that actually measure job-related performance ensure that internal placement decisions are not discriminatory.

(iv) **External challenges:** Sometimes performance is influenced by factors outside the work environment, such as family, financial, health, or other personal matters. If these factors are uncovered through appraisals, the human resource department may be able to provide assistance.

(v) **Feedback to human resources:** Good or bad performance throughout the organization indicates how well the human resource are performing.

(vi) **Informational inaccuracies:** Poor performance may indicate errors in job analysis information, human resource plans, or other parts of the personnel management information system. Reliance on inaccurate information may lead to inappropriate hiring, training, or counseling decisions.

(vii) **Job-design errors:** Poor performance may be a symptom of ill-conceived job designs. Appraisal help diagnose these errors.

(viii) **Performance improvement:** Performance feedback allows the employee, the manager and personnel specialists to intervene with appropriate actions to improve performance.

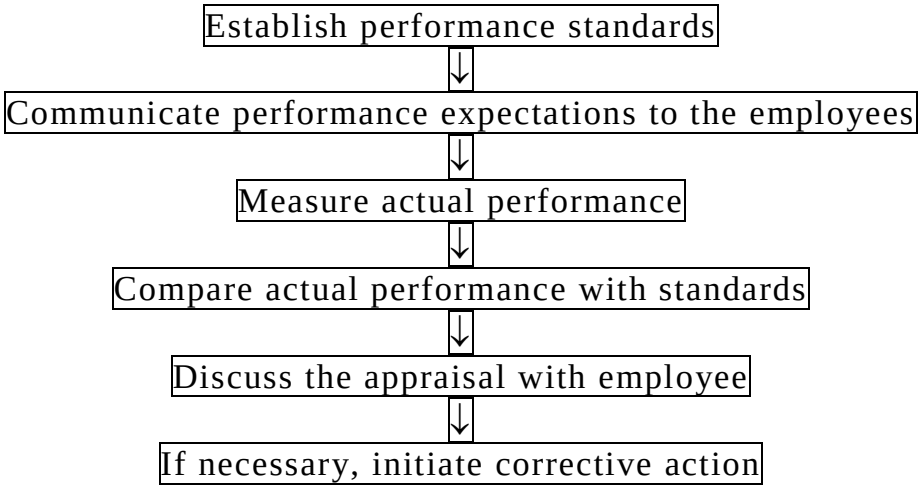
(ix) **Placement decisions:** Promotions, transfers, and demotions are usually based on past or anticipated performance. Often promotions are a reward for past performance.

(x) **Staffing process deficiencies:** Good or bad performance implies strengths or weaknesses in the personnel department's staffing procedures.

(xi) **Training and development needs:** Poor performance may indicate a need for retraining. Likewise, good performance may indicate untapped potential that should be developed.

III. THE APPRAISAL PROCESS

The performance appraisal process generally involves the following steps:



The appraisal process begins with the establishment of performance standards. At the time of designing a job and formulating a job description, performance standard are usually developed for the positions. These standards should be clear and not vague and objective enough to be understood and measured.

Once performance standards are established, it is necessary to communicate these expectations. It should not be the part of the employees' job to guess that what is expected of them. Unfortunately, too many jobs have vague standards. The problem is compounded when these standards are not communicated to the employees. It is important to note that communication is a two-way street. Mere transference of information from manager to the subordinate regarding expectations is not communication. Communication only takes place when the transference of information has taken place and has been received and understood by the subordinate. Therefore, feedback is necessary from the subordinate to the manager. Satisfactory feedback ensures that the information communicated by manager has been received and understood in the way it was desired.

The third step in the appraisal process is the measurement of performance. To determine what actual performance is, it is necessary to acquire information about it. We should be concerned with how we measure and what we measure. To measure actual performance frequently, managers use

four common source of information: personal observations, statistical reports, oral reports and written reports. Each has its own strength and weaknesses. However, a combination of them increases both the number of input sources and possibility of receiving reliable information.

The fourth step in the appraisal process is the comparison of actual performance with standards. The attempt in this step is to note deviations between standard performance and actual performance so that we can proceed to the next phase of the appraisal process—the discussion of the appraisal with the employee.

One of the most challenging tasks facing managers is to present an accurate appraisal to the subordinate and then have the subordinate accept the appraisal in the right spirit. Appraising performance touches on one of the most emotionally charged activities - the assessment of another individual's contribution and ability. The impression that subordinates receive about their assessment has a strong impact on their self-esteem and very important, on their subsequent performance. Of course conveying good news is considerably less difficult for both the manager and the subordinates than conveying the bad news that performance has been below expectations. In this context, the discussion of the appraisal can have negative as well as positive motivational consequences. This is reinforced, for example, when we recognize that statistically speaking, half of all employees are below average.

The final step in the appraisal is the initiation of corrective action when necessary. Corrective action can be of two types. One is immediate and deals predominately with symptoms. The other is basic and deals with causes. Immediate correction action is often described as "putting out fires", whereas basic corrective action gets to the source of deviation and seek to adjust the difference permanently. Coaching and counseling may be done or person may be deputed for formal training courses and decision making responsibilities and authority may be delegated to the subordinates. Attempt may also be needed to recommend for salary increased or promotions, if these decisions become plausible in light of the appraisal.

IV. METHODS OF PERFORMANCE APPRAISAL

Here, we will look at how management can actually establish performance standard and devise instruments that can be used to measure and appraise an employee's performance. There are various methods to appraise the employees. No single method is always best. Each has its strengths and

weaknesses. Following are the some of the standard methods used by the organizations to measure the performance of their employees:

1. Graphic Rating Scale

The graphic rating scale is the simplest and most popular technique for appraising the performance. It consists of typical rating scale. It lists traits (such as quality and reliability) and arrange of performance values (from unsatisfactory to outstanding) for each trait. The supervisor rates each subordinate by circling or checking the score that best describes his or her performance for each trait. The assigned value for the traits is then aggregated.

The rating method is easy to understand and easy to use. It permits the statistical tabulations of scores in terms of measures of central tendency, skewness and dispersion.

It permits a ready comparison of scores among employees. The scores presumably reveal the merit or value of every individual. However, this method has certain drawbacks also. There is a disadvantage that a high score on one factor can compensate for a low score on another. If a man scores low for quantity of work, this may be counter-balanced by high scores for attendance, attitude, cooperativeness etc. In practice, rating tends to cluster on the high side with this system.

2. Ranking Method

One of the simplest methods of performance appraisal is ranking method. The supervisor evaluates all the subordinates under him on an overall basis and then rank orders them from exceptional to poor. Each rank indicates the position of an employee in relation to others under the same supervisor. In case these employees have worked under several supervisors each one of these supervisors ranks them according to his own assessment. Finally, all the ranks are grouped to see which one of the employees is rated low. An illustration of this is presented in Figure given below, where five subordinates working under three supervisors are ranked.

Subordinates	**Supervisors**			***Mean Rank***
	Subhash	***Usha***	***Bijender***	
Sanjeev	2	4	3	3
Vinod	1	2	1	1.3
Tilak	3	1	2	2

Pradeep	5	3	4	4
Mahesh	4	5	5	4.6

One represents the highest rank. The individual rankings of three supervisors are added and they divided by the number of supervisors. The mean ranks are given in the last column. Since Vinod gets rank of 1.3, he is on an average, the best of all five subordinates.

The difficulty of this system is that the rater is asked to consider rated as a wholeman. It is quite obvious that human personally is very complicated and to ask a human being to pass a judgments on another human being in terms of saying he is 'good' or 'bad' is not only difficult but also undesirable. Asking the appraiser to rank employee on certain desirable traits can reduce the subjectiveness of this method.

3. Paired Comparison Method

Pair comparison force raters to compare each employee with all the employees in the same group who are being rated. For every trait (quantity of work, quality of work and so on) every subordinate is paired with and compared to every other subordinate.

Suppose there are five employees to be rated. In the paired comparison method one can make chart, as in following Figure, of all possible pairs of employees for each trait. Then for each trait indicate (With a + or -), who is the better employee of the pair. Next the number of items an employee is rated better is added up. In Figure, employee B ranked highest (has the most + marks) for quantity of work, while employee A was ranked highest for creativity.

For the trait **'Quantity of Work'**

As compared to	A	B	C	D	E
A		+	+	–	–
B	–		–	–	–

C	–	+		+	–
D	+	+	–		+
E	+	+	+	–	
	↓ B ranks highest here				

For the trait **'Creativity'**

As compared to	A	B	C	D	E
A		–	–	–	–
B	+		–	+	+
C	+	+		–	+
D	+	–	+		–
E	+	–	–	+	
	↓ A ranks highest here				

Note: + means 'better than'-- means 'worse than'. For each chart add up the number of +'s in each column to get the highest ranked employee.

4. Forced Distribution Method

Some appraisers suffer from the constant error, i.e. they either rate all workers as excellent, average or poor. They fail to evaluate the poor, average or excellent employees clearly and cluster them closely around a particular point in the rating scale. The forced distribution system is devised

to force the appraiser to fit the employees being appraised into predetermined ranges of scale.

The forced distributor system is applicable to a large group of employees. This system is based on the presumption that all employees can be divided into five-point scale of excellent, very good, average, acceptable and poor.

For example, he may be asked to identify and rank employees according to the following percentages:

Percentage of Employees	***Ranking***
10%	Poor
20%	Acceptable
40%	Average
20%	Very good
10%	Excellent

This method obviously eliminates the scope for subjective judgment as the part of the supervisors. Besides this, the system is easy to understand and administer. The objective of this technique is to spread out rating in the form of normal distribution. Many times this categorization is not found in work groups particularly when the group is comparatively small.

5. Checklist Method

In the checklist, the evaluator uses a list of behavioral descriptions and check-off those behaviors that apply to the employees. As Figure illustrates on preceding page, the evaluator merely goes down the list and gives ‘yes’ or ‘no’ responses.

Once a checklist is complete, the staff of personnel department, not the manager giving the checklist, usually evaluates it. Therefore, the rater does not actually evaluate the employee’s performance. He merely records it. An analyst in the personnel department then scores the checklist, often weighting the factors in relationship to their importance. The final evaluation can then be returned to the rating manager for discussion with the subordinate, or someone from the personnel department can provide feedback to the subordinates.

Sample of checklist for appraising Sales Clerks

[Answer in Yes/No]

1. Are supervisor's orders usually followed?
2. Does the individual approach customers? promptly?
3. Does the individual suggest additional merchandise to customers?
4. Does the individual keep busy when not servicing the customers?
5. Does the individual lose his or her temper in public?
6. Does the individual volunteer to help other employee?

6. Critical Incident Appraisal

With the critical incident method, the supervisor keeps a log of desirable or undesirable examples or incidents of each subordinates work related behaviour. Then every six months or so, the supervisor and subordinates meet and discuss the latter's performance using the specific incidents as examples.

This method can always be used to supplements another appraisal techniques and in that role it has several advantages. It provides you with specific and hard facts for explaining the appraisal. It ensures you to think about the subordinates' appraisal all during the year because the incidents must be accumulated. Keeping a running list of critical incidents should also provide concrete examples of what especially your subordinate can do to eliminate any performance deficiencies.

Given below are a few typical incidents from a checklist for the appraisal of an individual in purchase department:

- Displayed unpleasant behaviour to a supplier.
- Consistently absent from work.
- Refused to work over-time when asked for.
- Talked rudely and abruptly on the telephone.
- Created a disturbance with loud speaking.
- Accepted inferior quality goods from a supplier.
- Failed to follow a chain of command.
- Suggested a new method to work.
- Accepted inferior quality goods.
- Developed a new procedure that reduced paper work.
- Rejected a bid that was unreasonably priced.
- Helped fellow employees to solve their problems.

7. Behaviorally Anchored Rating Scales (BARS)

This method assists upon accurate measurement and improvement of job performance through feedback to appraisees. It provides statements of standards against which the performance of an appraisee is evaluated. These standards are put on the scales in BARS. There is one scale for each significant broad performance area or job dimension. While developing BARS, small group discussions are conducted with would-be appraisers and appraisees with a view to identifying the significant dimensions of a job, which need to be evaluated. Different job dimensions identified in this way tend to form varied behaviorally anchored scales. For example, for a managerial position, the significant job dimensions may include: planning, organizing, controlling, leadership, motivation, communication and coordination.

Frequently, the scale is presented vertically with "excellent" performance at the top and "very poor" performance at the bottom. There are a number of scale points ranging between five and nine in between these two extremes. Suppose, five job dimensions have been identified in a particular job. There will be five scales in the appraisal format, each having several anchors illustrating varied amounts of performance along the scales. These scales may also embody statements to facilitate the clarity of the job dimension being evaluated. To cite an example of BARS for the position of an equipment operator-one job dimension in this position is verbal communication. The excellent performance on this scale may contain the following statements: checks verbal instructions against written procedures, checks to ensure he/she heard others correctly, brief replacements quickly and accurately—giving only relevant information. On the other hand, a very poor performance on this scale may contain the following statements: not answers when called, refuses to brief replacements, gives a person relieving him/her inaccurate information deliberately. The appraiser is required to indicate on each scale the level of performance he/she visualizes is revealed by the appraisee's typical job behaviour. While doing so, he/she makes use of the behavioural anchors and dimensions— clarification statements as guidelines and cues to recall the appraisee's job behaviour. Explicitly, it is not possible for the appraisers to place behavioural statements embracing all dimensions of job performance on the scales. Therefore, they merely indicate specific behavioural examples, which can be recalled for each appraisee at appropriate levels on the scale. In this way, these added anchors represent their own examples and rationale for an appraisal at a particular level.

BARS are useful for varied reasons. Their major characteristic relates to behavioural orientation. They are based on job behaviour—what individuals really do on their jobs, which is within their control.

Attachment of behavioural anchors to different scales enables the appraisees to understand what they must do to organizing the dimension of a managerial job may include the following: assigns/delegates tasks, identifies alternative approaches to resource applications, coordinates human, financial and material resource applications and divides unit objective into identifiable tasks and sets due dates. This feature of specificity of these scales also enables the appraisers to provide relevant feedback to appraisees why they received a particular level of appraisal, and what they can do to improve their performance. This quality of the scale minimizes subjectivity in appraisal as well as also enables the appraisees to overcome their anxiety related to such appraisals.

BARS also provide participation to both appraisee and appraiser in their development. They become familiar with different aspects of the job as a result of discussions of job dimensions and anchors in small group meetings. This understanding provides guidelines to the appraiser while observing performance and enables the appraisee to judge the expectations of his/her superior. Any conflict between the appraiser and appraisee over the desired performance can be clarified in subsequent discussions. The participation of their ultimate users in the design of BARS also ensures their commitment to this method of appraisal.

As BARS are based on quantity measures, an attempt may be made to relate appraisal scores to current wage and salary structure with a view to ascertaining varying extents of rewards to different behaviors. Thus, the management may link different levels of merit raises to different ranges of scores on BARS. In addition, certain job dimensions can be singled out for bonus administration and allied purposes. Last but not the least, the scales can also be used to identify behavioural criteria to facilitate selection decisions, construct selection tests and specify behavioural training objectives. Explicitly, the job dimensions in BARS can help in formulating training courses, and the behaviour anchors can indicate the specific behaviors to be learned in different content areas. The poor performance areas can be pinpointed to improve performance. Notwithstanding these advantages, BARS form a time-consuming method. Although it is promising, much more research is required to demonstrate its ability to eliminate certain types of rater errors.

8. Management by objectives (MBO) Method:

This method of appraisal was introduced and made popular by Peter F. Drucker. Management by objectives requires the manager to get specific measurable goals with each employee and then periodically discuss his or her progress towards these goals. You could engage in a modest MBO

program with subordinates by jointly setting goals and periodically providing feedback. However, the term MBO almost always refers to a comprehensive, organization wide goal setting and appraisal program that consist of following steps:

(i) **Set the organization's goal:** Establish on organization wide plan for next year and set goals.

(ii) **Set departmental goals:** Here department/heads and their superiors jointly set goals for their departments.

(iii) **Discuss departmental goals:** Department heads discuss the department's goals with all subordinates in the department and ask them to develop their own individual goals; In other words, how can each employee contribute to the department's attaining its goals.

(iv) **Define expected results:** Here department heads and their subordinates set short-term performance targets.

(v) **Performance reviews:** Department heads compare the actual performance of each employee with expected results.

(vi) **Provide feedback:** Department heads hold periodic performance review meetings with subordinates to discuss and evaluate the latters' progress in achieving expected results.

MBO, thus, is a performance-oriented system. A well thought out MBO system provides the following benefits to the organization.

(i) The setting up of objectives provides a basis for coordinating between and among various units of the organization.

(ii) It establishes a linkage between the performance of the individual and organizations. Hence, both move in the achievement of same objectives.

(iii) It becomes easy to implement because those who carry out the plans also participate in setting up these plans.

(iv) Each employee becomes aware of the exact task that he is supposed to perform leading to better utilization of capacity and talent.

(v) The communication chain between and among employees and units are clearly established facilitating information sharing.

(vi) The performance appraisal is built in the system itself. It provides the guidelines for self as well as evaluation by the supervisor against the set tasks and goals.

(vii) It facilitates the task of employee guidance and counseling.

Notwithstanding the above merits, the result-oriented procedure has several limitations. The procedure is impracticable in situations where the superior is decisive and seldom bothers to involve the subordinates in goal-setting goals. Moreover, the procedure stresses tangible goals (i.e. production) and ignores intangible goals (i.e. morale). This may also cause concealment of poor performance, distortion of data and the fixation of low goals.

MBO is a time-consuming. Taking the time to set objectives, to measure progress and to provide feedback can take several hours per employee per year, over and above the time you spent doing each person's appraisal. Setting objectives with the subordinate sometimes turns into a tug of war with you pushing for higher quotas and the subordinate pushing for lower ones.

V. GREY AREAS IN PERFORMANCE APPRAISAL

The ideal approach to performance evaluation is that in which evaluator is free from personal biases, prejudices and idiosyncrasies. This is because when evaluation is objective, it minimizes the potential capricious and dysfunctional behaviour of the evaluator, which may be detrimental to the achievement of the organizational goals. However a single foolproof evaluation method is not available. Inequities in evaluation often destroy the usefulness of the performance system—resulting in inaccurate, invalid appraisals, which are unfair too. There are many significant factors, which deter or impede objective evaluation. These factors are:

(i) Halo Error

It occurs when the rater allows one aspect of a man's character or performance to influence his entire evaluation. It is the tendency of many raters to set their rating is excessively influenced by one characteristic rather than on all subsequent characteristics.

This problem often occurs with employees who are especially friendly or unfriendly toward the supervisor. For example, an unfriendly employee will often be rated unsatisfactory for all traits rather than just for trait "gets along well with others". Being aware of this problem is a major step toward avoiding it. Supervisory training can also alleviate the problem.

(ii) Central Tendency

Many supervisors have a central tendency when filling in rating scales. For example, if the rating scale ranges from 1 to 7, they tend to avoid the highs (6 and 7) and lows (1 and 2) and rate most of their people between 3 and 5. If you use a graphic scale, this central tendency could mean that all employees are simply rated "average". Such a restriction can distort the evaluations, making than less useful for promotion, salary or counseling purposes. Ranking employees instead of using a graphic rating scale can avoid this central tendency problem because all employees must be ranked and this cannot all be rated averages.

(iii) Leniency or Strictness

The leniency bias results when raters tend to be easy in evaluating the performance of employees. Such raters see all employee performance as good and rate it favourably. The strictness bias is the opposite; it results from raters being too harsh in their evaluation. Sometimes, the strictness bias results because the rater wants others to think he or she is a 'tough judge' of people's performance. Both leniency and strictness errors more commonly occur when performance standards are vague.

(iv) Cross cultural biases

Every rater holds expectations about human behaviour that are based on his or her culture. When people are expected to evaluate others from different cultures, they may apply their cultural expectations to someone who has a different set of beliefs or behaviors. In many Asian cultures the elderly are treated with greater respect and are held in higher esteem than they are in many western cultures. If a young worker is asked to rate an older subordinate, this culture value of "respect and esteem" may bias the rating. Similarly, in some Arabic cultures, women are expected to play a very subservient role, especially in public. Assertive women may receive biased rating because of these cross-cultural differences. With greater cultural diversity and the movement of employees across international borders, this potential source of bias becomes more likely.

VI. SUGGESTIONS FOR IMPROVEMENT

The fact that managers frequently encounter problems with performance appraisal should not lead you to throw up your hands and give up on the

concept. There are things that can be done to make performance appraisal more effective. The following are the suggestions in this regard:

(i) Behaviourally based measures

Many traits often considered to be related to good performance may in fact, have little or no performance relatively. Traits like loyalty, initiative, courage, reliability and self-expression are intuitively appealing as desirable characteristics in employees. But the relevant question is, are individual who are evaluated as high on those traits higher performances than those who rate low? We cannot answer this question. We know that there are employees who rate high on these characteristics and are poor performers. We can find others who are excellent performers but do not score well on traits such as these. Our conclusion is that traits like loyalty and managers may prize initiative, but there is no evidence to support that certain traits will be adequate synonyms for performance in a large cross-section of jobs.

A second weakness in traits is the judgment self. What is loyalty? "When is an employee reliable? What you consider 'loyalty', I may not. So traits suffer from weak interrater agreement.

Behaviorally derived measures can deal with both of these objectives. Because they deal with specific examples of performance - both good and bad - we avoid the problem of using inappropriate substitute.

(ii) Trained Appraisers

If you cannot find good raters, the alternative is to make good raters. The training of appraisers can make these more accurate raters.

Errors can be minimized through training workers. Training workshops are usually intended to explain to raters the purpose of the procedure, the mechanics of 'how to do it', pitfalls or biases they may encounter and answer to their questions. The training may include trail runs evaluating other classmates to gain some supervised experience. Companies even use videotapes and role playing evaluation sessions to give raters both experience with and insight into the evaluation process. During the training, the timing and scheduling of evaluations are discussed.

(iii) Multiple Raters

As the number of raters increases, the probability of attaining more accurate information increases. If person has had ten supervisors, nine having rated him or her excellent and one poor, we can discount the value of the one poor evaluation. Therefore, by moving employees about within the organizations so as to gain a number of evaluations, we increase the probability of achieving move valid and reliable evaluations.

(iv) Peer Evaluations

Periodically, managers may find it difficult to evaluate their subordinates' performance because they are not working with them every day. Unfortunately, unless they have this information, they may not be making an accurate assessment. And of their goal of the performance evaluation is to identify deficient areas and provide constructive feedback to their subordinates, they may be providing a disservice to these subordinates by not having all the information.

Yet, how do they get this information? One of the easiest means is through peer evaluations. Employees' co-worker, people explicitly familiar with the jobs involved mainly because they too are doing the same thing, conducts peer evaluations. They are the ones most aware of co-workers' day - to - day work behaviour and should be given the opportunity to provide the management with some feedback.

The main advantages to peer evaluation are that (i) there is a tendency for co-workers to offer more constructive insight to each other so that, as a unit, each will improve and (ii) their recommendations tend to be more specific regarding job behaviour-unless specificity exists, constructive measures are hard to gain. But necessary condition for this method is that the environment in the organization must be such that politics and competition for promotion are minimized. This environment can only be found in the most "mature" organizations.

(v) Evaluation Interviews

Evaluation interviews are performance review sessions that give employees essential feedback about their past performance or future potential. Their importance demands preparation. Normally this includes a review of previous appraisals, identification of specific behaviours to be reinforced during the evaluation interview and a plan or approach to be used in providing the feedback.

The evaluator may provide this feedback through several appraisals: tell and sell, tell and listen and problem solving. The tell and sell approach reviews the employee's performance and tries to persuade the employee to perform better. It works best with new employees.

The tell and listen allows the employee to explain reasons, give excuses and describe defensive feelings about performance. It attempts to overcome these reactions by counseling the employee on how to perform better.

The problem solving approach identifies problem that are interfering with employee performance. Then, through training, coaching or counseling goals for future performance are set to remove these deficiencies.

VII SUMMARY

Performance appraisal is a critical activity. It includes counseling and coaching as well. Its goal is to provide an accurate picture of past and/or future performance of an employee. To achieve this, performance standards are established. The standards are based on the job-related criteria that best determine successful job performance. Where possible, actual performance is measured directly and objectively. From a wide variety of appraisal techniques, specialists select the methods that most effectively measure employee performance against the previously set standards. Techniques can be selected both to review past performance and to anticipate performance in the future.

The human resources department, often with little input from other parts of the organization usually designs the appraisal process. When it is time to implement a new appraisal approach, those who do the rating may have little idea about the appraisal process or its objectives. To overcome this shortcoming, the human resources department may design and conduct appraisal workshops to train managers.

A necessary requirement of the appraisal process is employee feedback through an evaluation interview. The interviewer tries to balance positive areas of good performance with areas where performance is deficient so that the employee receives a realistic view. Perhaps the most significant challenge raised by performance appraisals is the feedback they provide about the human resources department's performance. Human resources specialists need to be keenly aware that poor performance, especially when it is widespread, may reflect problems with previous human resources management activities.

VIII. SELF ASSESSMENT QUESTIONS

1. Define performance appraisal. How does it differ from counseling? Describe the process of appraisal.
2. Explain in detail the following:
   (a) Graphic Rating Scale
   (b) Management by Objectives
   (c) Critical Incident Method
   (d) Behaviorally Anchored Rating Scale
3. What are the uses of performance appraisal? Discuss.
4. What are the limitations of performance appraisals? Give suggestions for improvement in performance appraisal.