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JUDICIAL WORK IN THE 1980s: NUTS AND BOLTS*

*Paul Nejelski***

I have seen the future, and it works about as well as the past, but with some differences. For many judges, there will be little change because of institutional constraints. There will, however, be an increased use of non-judicial, adjudication alternatives. Technology will play a larger role, but it will create new problems and is not a panacea. The importance of the bench-bar-client triangle will increase; its proper use will be a predicate for meaningful change in the future.

Each of these topics could provide the basis for a separate article. My purpose here is to raise issues to provoke further thought and research, rather than provide a definitive look at the nature of judging in the next ten years (a risky business at best). The comments here are largely confined to state courts and civil disputes, although the criminal docket has had an important impact on the processing of civil cases—both in terms of numbers and philosophy of case management.

I. INSTITUTIONAL CONSTRAINTS

There will be little change in the judicial branch because judges and courts are not masters of their own ships. They are held in perpetual bondage by the legislature and, to a lesser extent, by the executive branch. Our federal and state constitutions and a deep belief in the balance and division of powers have established this situation—certainly not concerns about efficient or even effective management of the courts. (Indeed, sometimes outside forces such as legislative or executive action may be necessary to force tradition-bound judges to make necessary changes).

Court reformers for decades have been fond of saying that the courts should be run “just like any business.” This well-meaning pronouncement does have some legitimacy. Certainly management principles, accounting, technology and so forth can be useful. Business principles often have lim-

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ited utility, however, because they are constantly undercut by institutional and constitutional considerations.

The other two branches of government create statutes which change the jurisdiction of courts, either through unification or by creating new special courts. More importantly, they can create new causes of action.¹ The other branches also determine the method of selection and criteria for discharge of judges. They determine the conditions of employment, and, in particular, they set judges' salaries.²

At budget time, the courts are largely at the mercy of the two other branches of government. There are often reprisals for unpopular decisions. This may relate to problems caused by judicial activism in striking down statutes, imposing new burdens on legislatures, or in raising questions which lawmakers would rather forget. For example, a court may find that a mental institution is operating in an unconstitutional fashion and that new facilities must be built. Although the legislature may comply with this request, it may not be very favorably disposed to the courts in other dealings—especially for salaries or new programs in the courts.

The courts have some tools of their own to fight back against the legislature and to keep their own houses in order. Rulemaking is one example. However, the creation of rules of procedure, management, and even evidence by the supreme court of a state can cause serious conflict with a legislature which may feel that the court is usurping its elected function. Consequently, this tool can cause friction and exacerbate, at least in some instances, some of the separation of powers problems already mentioned.

Some constraints on changes in the operation of the judiciary are, on the whole, quite good—worth the price which must be paid. For instance, although many are attempting to undermine and limit the function of the jury, it is often a useful institution for bringing citizens into the decisional process. It is worth remembering that the right to a jury trial was a hard-fought touchstone of our liberty. When William Penn was put on trial in

1. In recent years, there has been increased attention to how new causes of action will increase the workloads of federal courts. See Davis & Nejelski, *Judicial Impact Statements: Determining How New Laws Will Affect the Courts*, 62 JUDICATURE 18 (1978); Burger, *State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049 (1972). People concerned with the improvement of the justice system have emphasized the importance of planning for the proper allocation of judicial resources. See *Hearings on the State of the Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

2. Some have argued that judges are overpaid—making twice the salary of the average lawyer. Most—especially judges—would argue that judges are grossly underpaid compared to what they might normally be making in the larger, more affluent law firms. Issues of salaries, benefits, tenure, support staff and conditions of employment will have an increasingly significant impact in the future.

England for practicing his religion, the jury refused to convict him. The judge found the *jury* in contempt of court and placed *them* in prison. Only after Penn had successfully appealed the case all the way to the House of Lords was the protection of the jury from official reprisal established.

The jury should not be lightly cast aside as an inefficient anachronism. But, clearly there is a price for exercising rights. Jury trials are more difficult to manage and are more expensive than a trial by the court. While the jury system represents a major constraint upon efficient management of the judicial system, the key is not to abolish or abridge the right but rather to improve our management in order to maximize its use.³

Some of the institutional and constitutional restraints are problematic. The election of clerks of court, which occurs in a majority of our states, is a good example. The clerk may be running against the judge in the next election. In any event, a judge often cannot always rely upon his or her staff for cooperation in efforts aimed toward judicial innovation. The elected clerk owes no allegiance to the judge. In many jurisdictions, the only way to get anything approaching reasonable management is to inject a professional court administrator who must do the work of the clerk.⁴

An example of restraint stemming from tradition and resulting in poor court management is the constant rotation of judges. In Maine, for example, each of the fourteen superior court judges of the court of general jurisdiction is rotated generally within one of the three geographical areas. There is rarely an assignment of cases to an individual judge or calendar. There is only corporate responsibility, with some working hard and others less so. It is difficult to make improvements because a new approach may be tried for a month, only to be dropped by the next judge. By and large, lawyers favor this system because they are afraid they may be stuck with the same judge year in and year out. The present system gives them considerable opportunity for judge shopping. If they do not like the judge currently sitting, they simply wait until the next month to bring their mo-

3. For analyses of several proposals to alter the jury system, see Stoeber, *The Expendable Resource: Studies to Improve Juror Utilization*, JUST. SYS. J., Winter 1974, at 39 (excerpts reprinted in L. BERSON, S. HAYS, & S. CARBON, *MANAGING THE STATE COURTS* 239 (1977)); Lumbard, *Let the Jury Be—But Modified*, TRIAL, Nov.-Dec. 1971, at 17 (excerpts reprinted in L. BERSON, S. HAYS, & S. CARBON, *supra*, at 245).

4. See, e.g., Gable, *Modernizing Court Administration: The Case of the Los Angeles Superior Court*, 31 PUB. AD. REV. 133 (1971) (containing a discussion of the resistance of county clerks to reform in the court system in the county of Los Angeles); Cheatham, *The Making of a Court Administrator*, 60 JUDICATURE 128-33 (1976) (discussing the task of convincing members of the criminal justice system of the Eastern Judicial Circuit, Georgia, of the benefits of bringing "business like methods" into the administrative affairs of the judicial process through the appointment of a court administrator).

tion. Even the judges like geographical rotation because it relieves the boredom of being in the same place with the same people, and it provides some limited recreational travel. It is, however, terrible management. For example, if you are a judge, why take on a tough case—when you can just leave it for the judge who will be taking over next week.

The crowded criminal dockets continue to have an important impact on court management. In the federal area, the Speedy Trial Act⁵ has resulted in relatively current criminal dockets, but at the expense of civil cases. In some federal jurisdictions, a civil case is tried by a magistrate, or it is not tried at all. State court systems are also stressed, and serious backlogs in civil cases exist. When I was a court administrator in Connecticut five years ago, there were six superior court judges in Hartford. In an attempt to clear up the criminal backlog, five were usually assigned to criminal dockets. With only one judge on civil, the court was handling only emergency matters and a handful of trials.

In an attempt to clear up a similar backlog, New York state's chief judge instituted a system for reassigning large numbers of upstate and suburban judges to New York City to preside over civil cases. The backlog was attributed to "the forced shift of limited resources"⁶ from the civil to the criminal area. The shift resulted in a situation where more than two-thirds of the 200 supreme court judges in the five boroughs of New York handle criminal cases and only one-third handle civil cases, instead of the usual 50-50 split. The reason given for the shift was a twenty percent increase in felony indictments in the city, but, as a result, the drive to cut the supreme court's civil case backlog was impeded. The spokesman for the chief judge of the state supreme court noted, "We are now trying to put out two fires with the same water."⁷

A consequence of the underfunding and new burdens being placed on the courts is an increased sense of frustration for judges. Judges are quitting, and shorter terms may become the norm.⁸

The lack of adequate resources and support can be particularly frustrating to judges who have come from private practice. I know of one excellent judge who quit after two years because he did not have a secretary of his

5. 18 U.S.C. §§ 3161-3174 (Supp. III 1979).

6. N.Y. Times, Dec. 28, 1981, at 1, col. 6.

7. *Id.* at B9.

8. In the federal judiciary, just a few examples can be named: Wade McCree leaving the Sixth Circuit to become Solicitor General; Shirley Hufstедler leaving the Ninth Circuit to become Secretary of Education; Charles Renfrew leaving the federal district court in San Francisco to become Deputy Attorney General; and Griffin B. Bell leaving the Fifth Circuit to go into private practice and later to become Attorney General.

own; at best, he would have to share one secretary with five other judges. There was no dictating equipment, and everything had to be written in longhand. He had no personal law clerk for researching questions.

Another institutional problem is simply that judging can be very boring. It is not for lack of work. There is extremely high volume, especially in the lower state courts. But these are largely routine matters, and, after a few years, a judge learns most of the "ins and outs" of a particular type of case. In such situations, reasonable rotation by subject matter could be a great help.⁹ Some judges, however, only want to hear one type of case, perhaps large civil cases. At the other end of the spectrum, some judges prefer permanent assignment to juvenile, traffic, and small claims.

There are solutions to some of these problems, but because of hostility from the legislature and society at large, it is doubtful that many will be widely implemented. Sabbaticals or leaves for judges are needed, but it is doubtful that they will be formally approved by the legislatures. It may be possible for judges to "do it themselves" by taking a leave of absence for six months or a year, for example, to teach in a law school or work in a research facility.¹⁰

Retirement provisions for the judiciary need to take into account the possibility that judges will not stay on the bench until they retire. At least one state has attempted to preclude judges who retire from receiving a pension if they practice law, although the provision was found unconstitutional.¹¹ It is doubtful that many individuals would want to join the judiciary if they knew that they would be subject to such a penalty for engaging in the practice of law. There also should be some pro rata system for judges to receive a reasonable share of a pension which they have earned if they leave before retirement age. It is of no benefit to the system for judges to stay in a job beyond their interest or ability.

Hopefully, the 1980's will recognize that judging often will not be a terminal vocation, and that many individuals may become judges for a relatively short time and then go on to some other aspect of the practice of law.¹²

9. See AMERICAN BAR ASSOCIATION COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, TRIAL COURTS § 2.35 (1976).

10. McCree, *Sabbatical Rejuvenation: A Cure for Judicial Blahs?*, *Legal Times of Washington*, Nov. 3, 1980, at 10, col. 1.

11. See *Chairman of the Bd. of Trustees v. Waldron*, 285 Md. 175, 401 A.2d 172 (1979).

12. Encouraging shorter terms for judges, however, creates other problems. For example, if a judge goes on the bench for a few years of service and then joins a firm which has litigated extensively in front of that judge, serious problems concerning the propriety of such moves may arise.

II. NON-JUDICIAL ALTERNATIVES

The United States has had a long history of alternatives to courts. Arbitration, for example, has been a familiar way to resolve disputes for 200 years, especially in commercial cases.¹³ Administrative agencies have been created over the years to deal with special types of cases—often having a high volume.

The 1980's will undoubtedly see more experimentation with alternatives. Is this progress? I recently visited the District of Columbia Bureau of Traffic Adjudication, witnessing some cases and interviewing some of the "judges." In the opinion of the chief judge, the major difference was that now, instead of having to pay \$50,000 for a judge, you could get one for \$25,000. This raises questions, at least in my mind, as to who would want to have those jobs and for how long. While courts may have problems with funding and career advancement, these problems may be even worse for adjudication functions buried at the bottom of a bureaucracy.

Over time, many of these alternative judicial functions, such as administrative agencies, have been reorganized as courts; for instance, workman's compensation boards have become "courts," with the referee called a judge, wearing a black robe, employing the rules of evidence, and having a three-year backlog.¹⁴

In part because of the underfunding and institutional problems found in our court system and in part because of courts' heavy reliance on the adversary system, a host of community justice programs have grown up. (An ABA survey has counted over 140 programs across the country).¹⁵ Many of these rely on mediation or some other nonadjudicative model which can be particularly effective as a supplement to the judicial process. Mediation projects, for example, can be used to determine child custody questions or the allocation of property in divorce cases.¹⁶ An important challenge in the next decade is to prevent these alternatives from becoming overwhelmed

13. Nejelski, *Jeffersonian/Hamiltonian duality: a framework for understanding the reforms in the administration of criminal justice*, 64 JUDICATURE 450 (May 1981).

14. P. NONET, ADMINISTRATIVE JUSTICE (1973).

15. For a discussion of the survey, see Nejelski & Ray, *Dispute Resolution Alternatives to Court and Trial*, ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (to be published).

16. See Pearson, *The Denver Custody Mediation Project*, 8 COLO. LAW. 1210 (1979). Dr. Pearson cites the following justifications for mediation as an alternative in child custody cases: (1) sheer numbers of broken homes; (2) changes in the law away from narrow application of specific rules and standards to the "more elusive best interest of the child" standard which many feel enables judges to act on their own biases and values; and (3) many divorce settlement agreements do not effectively resolve critical issues and even require additional court intervention in later years.

by the same problems of poor case management and starvation of resources which presently plague the courts.¹⁷

Another model for alternatives to court trials is to use someone other than a judge to adjudicate, or at least to facilitate settlements. Many people have an initially negative reaction to such proposals, perhaps exemplified in the fullest by the California Rent-A-Judge program.¹⁸ Such alternatives, however, have been with us for a long time. Special masters have been in the federal system, and their counterparts in the state systems, for decades.¹⁹ Referees have been used in all types of judicial proceedings, including specific types of cases such as in juvenile court. Recently, the magistrates in the federal system have been given increased power.²⁰ Temporary judges have been widely used, especially in the sparsely populated West, with a member of the trial bar sitting for a period of a few weeks. Temporary judges have also been used as part of crash programs attempting to clear up dockets.

Settlement facilitation procedures which use persons other than full time

17. P. EBENER, INSTITUTE FOR CIVIL JUSTICE, RAND CORPORATION, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 87-103 (1981). The report discusses, *inter alia*, screening panels to reduce court congestion through the weeding out of frivolous cases and the promotion of earlier settlement of meritorious claims.

18. See Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981). Under CAL. CIV. PROC. CODE §§ 638-645 (West 1976), a court, upon agreement of the parties, may order a general referee for trial of all matters of fact and law. The referee is selected by the parties and is not required to have any special qualifications, CAL. CIV. PROC. CODE § 640 (West 1976), except that following a related procedure under the California Constitution, a referee acting as a judge pro temp must be an attorney. CAL. CONST. art. VI, § 21. The referee's findings are treated as findings of the trial court, with final judgment entered when the referee files his report with the clerk of the court. CAL. CIV. PROC. CODE § 3644 (West 1976).

Criticism of the rent-a-judge type programs include the following: a referee's dispute settlement does not allow for the creation of general rules, and the development of the law may suffer as a result of litigation that is dealt with through the referee system; litigant financing may violate equal protection and due process; and closed proceedings may violate the public's first amendment right of access to civil trials. See Bird, *The Instant Society and the Rule of Law*, 31 CATH. U.L. REV. 159, 167-68 (1982).

19. Fed. R. Civ. P. 53.

20. In 1968, the Federal Magistrate Act, 28 U.S.C. §§ 631-639 (Supp. III 1979), became effective in all federal district courts on July 1, 1971, and has been subsequently amended. For a description of the present role of magistrates in the federal system, see Puro, Goldman & Padawer-Singer, *The evolving role of U.S. magistrates in the district courts*, 64 JUDICATURE 436 (1981).

The Act increased magistrates' civil and criminal jurisdiction. When all parties agree, a new tier of adjudication is created. Magistrates can assume both case disposition and jurisdiction, conduct jury trials, and decide civil cases. If all parties consent, cases can be sent directly to magistrates in district courts, 28 U.S.C. § 636(c)(1) (Supp. III 1979). See also McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. OF LEGIS. 343 (1979); Sinclair, *Responsibilities are Growing for U.S. Court Magistrates*, THE NAT'L L.J., Sept. 1980, at 22.

judges are increasing. In New Jersey, for example, a retired judge is sitting by consent of both plaintiffs and defendants as a private estimator of the value of medical malpractice claims, where liability is admitted but the damages are in doubt.²¹ Each side puts on its case in relatively quick fashion, and the "facilitator" gives an estimate of the value of the case. Cases have been settled quickly at or near the amount determined by the facilitator.²²

Similarly, in the United States District Court for the Central District of California, an experimental dispute resolution mechanism was developed in a patent infringement suit between two large corporations.²³ The procedure was a nonbinding "mini-trial" before top corporate officials and a neutral advisor who previously had served as a United States Court of Claims trial judge. In an article written by the attorneys in the case, the author reported that the entire procedure took only two days of presentation time, and "within one-half hour of the close of the procedure, the parties reached a settlement in principle of what had been a long and bitterly fought lawsuit."²⁴

A factor which may increase the use of these and other types of alternatives is the specialization of the law and the bar. Historically, the ideal has been that the judges of the court of general jurisdiction should be generalists by training and by inclination. The specialization of the law and the bar suggests, however, that while the need for the generalist model will prevail, there is a growing need for specialists who can handle certain types of cases more effectively. Since in many of the alternatives to traditional trials the parties will have chosen the judge, they presumably will have greater faith in that person's decision as well as greater willingness to abide by the schedule and other dictates of their judge.

Whether the trend toward adjudication by nonjudges is good or bad depends on a number of variables, such as:

- (1) Who serves in these alternatives, and how they are selected;
- (2) Whether the reference is voluntary by the parties or is mandated by court or statute;
- (3) Who pays for the services of the adjudicator;²⁵

21. Telephone interview with Judge Alexander Waugh (Sept. 1981).

22. *Id.*

23. See Green, Marks, & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 501 (1978).

24. *Id.*

25. In Connecticut, an alternative is provided as a public service by the state from a pool of retired judges who are paid by the taxpayers. CONN. GEN. STAT. § 524-34 (1980). In the California alternative, the parties pay their own judge. The cases may be put on quickly

(4) Whether the decision is final.²⁶

These alternatives provide competition for a state monopoly. Whether it is education, law enforcement or any other service, if the state is the only provider, there may be little urgency to provide adequate services. One problem with alternative approaches, however, is that the private market will become a forum solely for complicated cases where parties have the resources to purchase their own justice. Some judges with whom I have spoken find this to be a problem. Others say that they are delighted to see *any* cases removed from the system.

Will these alternatives simply create the same problems which face our courts now, but with less visibility and less ability to obtain resources in the long run? For example, the traffic adjudication bureaus, being at the bottom of a bureaucracy, may encounter greater difficulty getting funds, space, and resources than the judiciary. At least four medical malpractice panels have been held unconstitutional because of long delays and an excessive amount of resources spent in their administration.²⁷

Courts will have a new role in administering and monitoring some of these alternatives.²⁸ Should courts take on a general responsibility for monitoring these alternatives by taking quality control measures, such as random study of unappealed cases, to assure that proper procedures have been used and correct decisions reached?²⁹

III. TECHNOLOGY

Technology can be helpful, but it is not a panacea. A study conducted by the National Center for State Courts on computer-assisted transcription of the record shows that few of the state-operated systems are cost effective, and few result in either a greater number of pages per case reported or

and inexpensively—perhaps an hour for each side—rather than through a long, drawn out trial which the parties have no incentive to expedite. CAL. CIV. PROC. CODE §§ 638-645 (West 1976). See Weisman, *Shortcut to Trial: Use of Orders of Reference and Judges Pro Tem*, 3 ASS'N BUS. TRIAL L. REP. 3 (1980); *Retired Judges Hired to Decide Lawsuits in Private*, N.Y. Times, Oct. 26, 1980, at A 25, col. 1; Hill, *Rent-A-Judge: California is Allowing its Wealthy Litigants to Hire Private Jurists*, Wall St. J., Aug. 6, 1980, at 1, col. 1.

26. If the case can be appealed quickly and easily to a regular court, a tier of quasi-courts may be superfluous and only add to the expense of the litigants. Moreover, if cases initially decided using an alternative to courts may be appealed in the normal fashion, they will be years ahead of cases that were initially decided in courts. Such alternatives may impose serious new workloads on appellate courts.

27. See P. EBENER, *supra* note 17, at 91-94.

28. For a discussion of the role courts might play in alternative dispute resolution, see Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

29. See Nejeleski & LaPook, *Monitoring the Juvenile Justice System: How Can You Tell Where You're Going if You Don't Know Where You Are?*, 12 AM. CRIM. L. REV. 9, 28 (1974).

a speedier transcript.³⁰ Nevertheless, there will be many opportunities for the application of technology in the courts in the 1980's:

(1) Video-taped depositions of testimony is one example,³¹ although the greatest potential use of taped depositions may be as a settlement device, rather than for use at trial if a witness is unavailable;

(2) Computer statistics concerning the time aspects of case loads should result in better management of the system;

(3) Telephone conference calls will become commonplace. Research by the ABA Action Commission shows that over forty judges hold multiparty telephone conferences on a regular basis to conduct pretrial motions and other business.³² Extensive experiments are being conducted in Maine, Colorado, and New Jersey.³³

The list of potential technological improvements is long, but the experiences with technology, already introduced in some courts, should be examined before new technological tools are introduced. Change is complex. In Maine, the introduction of telephone conferences to hear civil motions required at least five other changes to be made. For example, judges had to be assigned to motions for specific periods of time, and two counties were merged for the purpose of hearing motions. There are many consequences of technology, some intended, some unforeseen.

The ability to generate statistics about judges also presents difficult policy questions. To what extent should statistics about individual judges be made public? While data on caseload and delay for each judge are routinely published in some jurisdictions, court administrators have been known to be fired for even attempting to make this information public. A more sensitive and potentially dangerous subject is the compilation of sentencing records of the judges, collectively or individually.

IV. THE BENCH-LAWYER-CLIENT TRIANGLE

Court reform in the past understandably has been largely from the top down. The judges are concerned about their workload and related administrative problems. Too often, the client has been forgotten. As former Chief Justice C. William O'Neill of Ohio pointed out, much of past court reform has been a concern only to judges and professional court reform-

30. NATIONAL CENTER FOR STATE COURTS, COMPUTER-AIDED TRANSCRIPTION IN THE COURTS 47-106 (1981).

31. O'Neill, *How to Force Faster Litigation*, JUDGES J., Winter 1979, at 7, 9.

32. See Hanson, Mahoney, Nejelski & Schuart, *Lady Justice—Only a Phone Call Away*, JUDGES J., Spring 1981, at 40, 42.

33. *Id.* The projects are under a grant from the National Science Foundation and National Institute for Justice and involve criminal as well as civil cases.

ers.³⁴ Examples of such reforms include unification of courts, merit selection of judges, and higher salaries and better pensions for judges.³⁵ These improvements have very little impact on the elimination of delay or the cost of litigation.³⁶

The 1980's should bring about an increasing concern by society and by the judges about the client. Judges, for example, are beginning to send notice to the *client* when the case is filed. In the past, there have been cases where some lawyers simply interviewed the client and failed to file a complaint for months or years after the case should have commenced—all the time blaming court delay for the lack of action. Similarly, courts are beginning to require notice or even consent of the client for the continuance of a trial.

Judges have become increasingly concerned about case management. Much of this concern stems from the speedy trial requirements of statutes and constitutions of criminal adjudication. Clearly, there is a strong public interest in eliminating delay in criminal trials. Innocent people may be sitting in jail before trial, or dangerous persons may be out on pretrial release because trials take so long. The interest in speedy resolution of civil cases, however, is less clear. Often, at least one party in civil litigation wants delay. In commercial cases, questions of prejudgment interest and inflation are important. If you owe \$100,000, would you rather pay it now or in five years—when inflation will have diminished the amount greatly, and, in the meantime, the money can be invested at high interest rates?

What is the lawyer's role in increasing the efficiency of the court system? With 500,000 lawyers in this country, it is difficult to generalize. Some lawyers are concerned about such issues, while others are content to benefit from the inefficiencies of the system. I would predict, however, that the next decade will evidence these trends:

The need for limitation of discovery. Many lawyers conduct excessive pretrial discovery for fear of malpractice allegations. Also, a considerable amount of money is made by "papering" a case.³⁷ If the number of depositions and interrogatories were limited in some manner, there could be an objective standard for judging performance.³⁸

Lawyers becoming part of the planning process. The bench-bar committee in Phoenix, Arizona is an example of cooperation between judges and

34. O'Neill, *supra* note 31, at 7.

35. *Id.*

36. *Id.* at 7-8.

37. Green, Marks & Olson, *supra* note 23, at 498-99.

38. See Proposed Amendment to F.R. Civ. P. 26(b), COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (June 1981).

lawyers. In most jurisdictions, however, the ABA Action Commission and other reform groups perform shuttle diplomacy between bench and bar. Lawyers are not accustomed to being part of the planning process. Often, they would rather sit back and criticize the judges and the system. They are going to have to recognize a positive obligation to improve the administration of justice—even if it hurts their practice financially.³⁹

Emphasis on training for litigation. The size of the bar has mushroomed in recent years, and there are many young lawyers with little training in litigation. Fifty percent of today's lawyers have had less than ten years of practice. Law school has been an almost total failure in preparing people for dispute resolution and litigation. Our law schools today have almost nothing to do with training lawyers to operate in the real world. Furthermore, apprenticeships, such as the New Jersey Preceptor System which required a nine-month apprenticeship to a judge or member of the bar, have been abolished. Virtually the only way to get training now is with a large firm or in the government.

Increased attention to the relationship of law office management to case management. One cause of court delay is that files become lost in the law firm; a firm simply may be unaware that it has the case.⁴⁰ This is an area where the courts can help lawyers through the use of automated information systems.

Judges grading lawyers. It has become common practice for the lawyers to grade judges through bar polls. Judges may start rating the lawyers. At the least, there should be some kind of post-mortem, especially for long cases, to discuss the reasons a case was tried in a certain fashion and why certain expenses were incurred. This type of scrutiny is increasing in judicial review of petitions for attorneys' fees.⁴¹

Judicial liability. There may be increases in judicial liability, with judges being sued because of failure to move cases and provide proper superintendance.

V. COST OF THE JUDICIAL SYSTEM

The courts of the 1980's increasingly will have to pay for themselves.

39. Lawyers, in some cases, have opposed changes in the law that would have resulted in improvements in the judicial system. For example, the personal injury bar virtually killed no-fault insurance. Many cases simply do not belong in court, but lawyers have resisted alternatives.

40. Private interview with Judge August Goebel of Los Angeles, California (May 1980).

41. See, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469-70 (2d Cir. 1974); *Merola v. Atlantic Richfield Co.*, 493 F.2d 292, 297-98 (3d Cir. 1974); *Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973).

Courts always generate revenues through fines or filing fees. Often, for the sake of appearance, these revenues go into the general fund and do not directly benefit the judiciary. But, in speaking to a state legislature, a court official almost invariably attempts to justify the judicial budget by reference to the amount of revenue generated by the courts. Consequently, in an age of shrinking resources, it may not be unrealistic to see the implementation of such controversial measures as both higher filing fees and "user" fees where a party elects trial by jury, and an occupational tax on lawyers to help run the court systems.

