

**TESTIMONY TO THE
ABA JOINT COMMISSION
TO EVALUATE THE MODEL CODE
OF JUDICIAL CONDUCT**

**SUBMITTED
BY THE**

NATIONAL JUDICIAL EDUCATION PROGRAM*

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* A project of Legal Momentum (the new name of NOW Legal Defense & Education Fund) in cooperation with the National Association of Women Judges

**National Judicial Education Program Testimony to the
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The National Judicial Education Program (NJEP), a project of Legal Momentum¹ in cooperation with the National Association of Women Judges, was established in 1980 to educate judges about the ways gender bias undermines fairness in decision making and court interaction. NJEP has created and presented judicial education programs at state and national judicial colleges throughout the country. These programs were the catalyst for the supreme court task forces on gender bias in the courts established by almost every state to investigate gender bias in their own jurisdictions and make recommendations for reform. NJEP works with those task forces in all phases of investigation and implementation.

NJEP offers this testimony to comment on the clarifications to the ABA Model Code of Judicial Conduct proposed by the American Judicature Society (AJS) respecting biased behavior, sexual harassment and judicial participation in government commissions, and to respond to the Commission's query about the involvement of judges in problem-solving courts with community organizations. We also commend to this Commission a code amendment adopted by the Washington State Supreme Court respecting judicial education, and urge the Commission to comment on the need for every state to make the language in its code of judicial conduct gender neutral.

CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

Manifestations of Bias:

CANON 3B (5) and CANON 3B (6)

The findings of the task forces on gender bias in the courts and the task forces on racial and ethnic bias in the courts which they prompted were of significance to the predecessor of this Commission when the ABA revised the Model Code of Judicial Conduct in 1990² and created Canons 3B (5)³ and (6).⁴ These Canons direct that judges may not manifest bias or prejudice based on eight non-exclusive enumerated grounds⁵ nor permit those under their direction and control to do

¹ Legal Momentum is the new name of NOW Legal Defense and Education Fund.

² Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53 (1990).

³ Canon 3B (5): A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

⁴ Canon 3B (6): A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

⁵ Race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

so. The AJS now proposes adding four enumerated grounds⁶ and amending the commentary to 3B (5) as follows.

Examples of manifestations of bias include but are not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating or hostile acts, suggesting a connection between race or nationality and crime, irrelevant references to personal characteristics, and insensitive statements about crimes against women. This rule does not preclude legitimate references to those factors when relevant to an issue in a proceeding.

While the findings of the gender, race and ethnic bias task forces document significant progress toward fairness over the last two decades, they also document continuing problems. The most recent task force to report, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, wrote in 2003:

[R]acial, ethnic, and gender bias does exist and...it infects the justice system at many key points in both overt and subtle ways. Even when controlling for other factors such as economic status, familial status and geographic diversity, the studies demonstrate that racial, ethnic, and gender bias still emerge as significantly affecting the way an individual (be it a party, witness, litigant, lawyer, court employee, or potential juror) is treated.⁷

It is deeply unfortunate that the detailed list of unacceptable behaviors that AJS proposes adding to the Commentary to 3B (5) should be necessary. But task force findings, news articles, judicial conduct commission rulings and lawsuits document that some judges do not grasp what many consider the most basic concepts of appropriate judicial behavior, and that some judicial disciplinary committees trivialize this misconduct when it is brought to their attention. Providing these specific examples of manifestations of bias within the Commentary to the Code will be a valuable aid in judicial education programs and in sanctioning judges who manifest these and similar biased behaviors.

⁶ Marital status, parenthood, language, ethnicity.

⁷ FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 14 (2003). Available online at <http://www.courts.state.pa.us/Index/Supreme/biasreport.htm>.

Sexual Harassment:

PROPOSED CANON 3B (7)

AJS proposes adding to Canon 3 an entirely new section on sexual harassment with a detailed Commentary as follows:

(7) A judge shall not engage in sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

Commentary:

“Sexual harassment” includes but is not limited to sexual advances, requests for sexual favors, comments about physical attributes, repeated and unwanted attempts at a romantic relationship, sexual gestures, offensive or suggestive remarks, sexually explicit questions, improper touching, lewd and vulgar language, suggestive or explicit pictures or images, and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender.

Sexual harassment by judges is a problem that requires more focused attention in the ABA Model Code of Judicial Conduct for multiple reasons:

- The significant harm to victims.
- The indifference to this harm often displayed by state court systems when they are asked to intervene.
- The failure of some court systems to have effective sexual harassment policies and training programs in place.
- The trivializing attitude sometimes displayed by judicial conduct commissions toward complaints of sexual harassment by judges.
- The damage to public trust and confidence in the courts when the community learns of judges' misconduct and court systems' failure to respond appropriately.

Three cases and findings from state and federal inquiries illustrate the nature of this ongoing problem. Some details of the harassment are included in the description of the cases because the term sexual harassment alone does not convey the humiliation, degradation and fear this conduct engenders in its victims.

The first case involves New Jersey Superior Court Judge Edward Seaman and is the paradigm example of public outrage at an inadequate response from the court system. Judge Seaman was charged with sexually harassing his law clerk, Barbara Denny.⁸ Ms. Denny alleged that the judge initiated talk of sexual relations, bragged of his sexual prowess, asked her about her views on premarital sex and various sexual acts, questioned her about her underwear, attempted to place her hand on his crotch, and touched her inappropriately.⁹ Two other female law clerks testified that they had witnessed an incident of touching in which Judge Seaman reached under Ms.

⁸ *In re Seaman*, 627 A.2nd 106 (N.J. 1993).

⁹ *Id* at 111; Russ Bleemer, *Former Clerk Sues Seaman for Sexual Harassment*, N.J. L.J., Apr. 12, 1993 at 3.

Denny's skirt and touched her knee.¹⁰ The law clerk filed a complaint with the New Jersey Advisory Committee on Judicial Conduct (ACJC) in 1989; however, the committee took no action until 1992, after Ms. Denny filed a Title VII suit.¹¹ After considerable public pressure, the ACJC held hearings and finally forwarded an opinion to the New Jersey Supreme Court finding that Judge Seaman had engaged in sexual harassment and thus violated several Canons of the Code of Judicial Conduct, and recommending public censure.¹² The Supreme Court decided that public censure was insufficient, imposed a sixty-day suspension without pay and mandated Judge Seaman's attendance at a court-approved sensitivity program.¹³

The community refused to accept this determination as final. Not only did the law clerk and her attorney express outrage, so did a variety of organizations and several newspapers, which wrote scathing editorials about this "slap on the wrist."¹⁴ This public outcry brought attention from state legislators. The Assemblywoman representing the district in which Judge Seaman sat said that her constituents considered the Supreme Court's proposed punishment laughable and that she planned to draft articles of impeachment.¹⁵ While the Assembly considered whether to move toward impeachment, Judge Seaman resigned.¹⁶ In an editorial condemning the New Jersey Supreme Court's failure to take serious action despite its own findings that Judge Seaman "committed acts of sexual crudity, deeply offensive to another person," one newspaper wrote, "[p]ublic outrage and threats of impeachment that followed the court's action were the real force that drove Seaman out...if not for an engaged and outraged public, a statewide storm of protest might never have formed to pressure Seaman to resign."¹⁷

A case from the late nineties that again demonstrates the trivializing of sexual harassment by both a court system and a judicial conduct commission involves the Nebraska Supreme Court and District Court Judge Bryce Bartu. Debbie Keslar was a Nebraska court reporter who in 1996 brought a Title VII suit against Judge Bartu for sexual harassment. The harassment she experienced included the judge repeatedly touching her buttocks as she entered the courtroom, asking her to sit in his lap, pressing her to come to his hotel room at a court convention, watching her home and commenting on who entered and left, and walking into her home unannounced without knocking. In the course of Ms. Keslar's litigation it became public knowledge that the Nebraska Commission on Judicial Qualifications had received numerous complaints about this judge over twenty-five years but had never taken action.¹⁸

Witnesses in the case also revealed that the Nebraska Supreme Court's Workplace Harassment policy (which included a sexual harassment policy) had never been applied to the conduct of judges and that Ms. Keslar, as a court reporter, had no grievance rights under the Court's

¹⁰ *Seaman*, 627 A.2d at 111.

¹¹ *Id.* at 109.

¹² *Id.*

¹³ *Id.* at 124.

¹⁴ E.g., Kathy Barrett Carter, *Judge Seaman Is Unfit To Serve on Bench*, N.J. L.J., Aug. 9, 1993 at 19; *Justice Delayed and Justice Denied*, N. JERSEY HERALD NEWS, Aug. 10, 1993 at A11.

¹⁵ *Anti-Seaman Mood Grows in Statehouse*, N.J. L.J., Aug. 23, 1993 at 8.

¹⁶ Jim O'Neill, *Suspended Judge Quits over Sex Case*, STAR-LEDGER (Newark), Aug. 31, 1993 at 1.

¹⁷ *Judge Seaman Himself Did What Supreme Court Didn't*, NEWS TRIB. (New Jersey), Sept. 1, 1993 at A10.

¹⁸ *Keslar v. Bartu* No. 4:96 CV3072 (D.) Neb. Mar. 18, 1999, *aff'd*, 210 F. 3d 1016 (8th Cir. 2000).

personnel rules. Prior to Ms. Keslar's case, no judge in Nebraska had been disciplined for engaging in sexual harassment, although several had been reported for such conduct.

Approximately 19 months after Ms. Keslar initially reported to the judicial hierarchy that Judge Bartu was sexually harassing her, and after she hired counsel and filed an EEOC complaint against the Nebraska court system, the Nebraska Judicial Qualifications Commission filed a complaint against Judge Bartu based on his conduct toward Ms. Keslar. Within three days after the Commission authorized its attorney to draft a complaint against Bartu, Judge Bartu suffered an alleged stroke. Shortly before the scheduled hearing on the Commission's complaint against him, the JQC allowed Judge Bartu to take a disability retirement and dismissed all JQC charges against him.

After nearly four years of bitter litigation, the case settled on the eve of trial with the State and Judge Bartu agreeing to pay Ms. Keslar a lump sum and the Nebraska Supreme Court agreeing to develop and implement a policy to cover all court employees and be applied to unlawful discrimination complaints against any member of the Nebraska judiciary. But this was not the end of the matter. When Ms. Keslar's attorney sought her fees and costs, the district court demonstrated its indifference to sexual harassment by a judge when it trivialized this lawsuit as "only slightly more than a run-of-the mill case" and failed to express even the slightest concern with the egregious facts.¹⁹ The court's demeaning attitude toward this very serious issue is further revealed in its trivialization of the important injunctive relief obtained as "minimal," even though it significantly vindicated not only Ms. Keslar's civil rights, but those of all other court employees.²⁰ The district court's disdainful opinion was then upheld by the 8th Circuit Court of Appeals, despite a strong dissent by Judge Arnold, who recognized the tremendous courage it took to bring this case.²¹

A pending case is *Robinson v. Sappington*, recently reversed and remanded for trial by the Seventh Circuit.²² Melissa Robinson was judicial clerk to Judge Warren Sappington of the Sixth Circuit Court in Macon County, Illinois. When he learned she was seeking a divorce he began making overtly sexual and physically threatening remarks to her and stalking her. For example, Judge Sappington offered to buy her a vibrator so she would not "mess around" with other men, told her he wanted her to "sit on his face," told her he would kill her if learned she was "shacking up" with another man, and flew over her mother's home in a small plane when he knew she was there. Ms. Robinson sought protection from the presiding judge of her court, Judge John Greanias, and from Chief Judge John P. Shonkwiler. The presiding judge told her he had to protect Judge Sappington and ultimately told her it would be in her best interest to resign.

When Ms. Robinson brought suit under Title VII the magistrate judge gave summary judgment to the defendants on the ground that while Judge Sappington's behavior was sexual harassment, it was not sufficiently "hellish" to warrant liability. Fortunately the Seventh Circuit understood just how hostile and intimidating Judge Sappington's behavior was, especially "in the context of the close working relationship...any judge has with the staff in his or her chambers"²³

¹⁹ Memorandum and Order, *Keslar v. Bartu*, NO.4:96CV3072, at 2 (D. Neb. Mar. 18, 1999).

²⁰ *Id.* at 1.

²¹ 210 F. 3d 1016 (8th Cir. 2000).

²² *Robinson v. Sappington*, 351 F. 3d 317 (7th Cir. 2003).

²³ *Id.* at 331.

and that this behavior coupled with the utter failure of Judge Greanias and Judge Shonkwiler to respond properly to Ms. Robinson's complaints, thus forcing her to resign, constituted constructive discharge and a tangible employment action.

It is cases like these that lead many of the state supreme court task forces on gender bias in the courts to scrutinize the issue of sexual harassment by judges. Their reports cited this as a problem requiring attention and reform, including effective sexual harassment policies and training for all judicial and non-judicial court personnel on what constitutes sexual harassment and how to use the court's sexual harassment policies.²⁴

The Georgia Supreme Court Commission on Gender Bias in the Judicial System wrote:

[S]exual harassment is considered in this Report and in those of other states because incidents of sexual harassment are reported by female court employees...Although overt sexist behaviors—sexist remarks and jokes and demands for sexual favors are not tolerated in most courts in Georgia, sexual harassment in the work place continues to be a fact of life for some employees. Treating an employee or co-worker as a sexual object rather than as a professional, even to a small degree or only occasionally, cannot be tolerated in the Georgia court system.²⁵

These reports noted the extreme difficulty of seeking protection from sexual harassment by a judge. The Oregon Supreme Court/Oregon State Task Force on Gender Fairness reported court employees survey responses:

It appears people are afraid of judges and allow them to do as they wish.²⁶

It is often believed to be better to endure a hostile working environment than to confront or report a manager or judge. There is a definite need to develop a complaint process that is fair to both parties.²⁷

The report of the North Dakota Commission on Gender Fairness in the Courts stated:

²⁴ DISTRICT OF COLUMBIA COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 69-70 (May 1992); SUPREME COURT OF GEORGIA, COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM, GENDER AND JUSTICE IN THE COURTS 253-254 (1991); MARYLAND SPECIAL JOINT COMM., GENDER BIAS IN THE COURTS 83 (May 1989); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT 105-109 (1989); REPORT OF THE MISSOURI TASK FORCE ON GENDER AND JUSTICE 264-269, 278-281 (Mar. 1993); *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L. J., 155-161; *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1239-1240 (1996); OREGON SUPREME COURT/OREGON STATE BAR, REPORT OF THE TASK FORCE ON GENDER FAIRNESS 102 (1998); VERMONT SUPREME COURT AND VERMONT BAR ASSN., GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 80-81 (Jan. 1991); WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, FINAL REPORT 134 (1989); WISCONSIN SUPREME COURT GENDER EQUALITY COMMITTEE, FINAL REPORT 16-17 (July 1995)

²⁵ SUPREME COURT OF GEORGIA, COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM, GENDER AND JUSTICE IN THE COURTS 253 (1991).

²⁶ OREGON SUPREME COURT/OREGON STATE BAR, REPORT OF THE TASK FORCE ON GENDER FAIRNESS 102 (1998).

²⁷ *Id.*

[S]ome of the women who reported harassment in the survey had the perception that they did not have recourse if they wanted to retain their position. Employees must have a “safe harbor.” Because authority to hire and fire district court employees is vested in the presiding judge, if the harasser is a judge, court employees may perceive a lack of recourse. A policy emphasizing the importance of notification of any harassment is vital to the morale and well-being of the court personnel. The Commission recommends that court personnel be informed that judges are not absolutely immune from liability arising out of sexual harassment.²⁸

With respect to the federal system, in the early 1990s, Congress convened The National Commission on Judicial Discipline & Removal to examine judicial disciplinary procedures in the federal courts. The Commission received extensive testimony about sexual harassment, especially sexual harassment of female law clerks.²⁹ The Commission’s Research Papers, produced in response to its hearings, include a paper titled “Accountability for Racial, Religious, Ethnic and Gender Bias Misconduct and Sexual Harassment by Federal Judges”.³⁰ The Report details the serious harm of judicial sexual harassment to the individuals targeted and to the judiciary itself and makes numerous recommendations for dealing with this problem.

As these cases demonstrate, action is needed to change this pattern. In the current ABA Model Code of Judicial Conduct reference to sexual harassment is confined to the Commentary to Canon 3 B (5). That Commentary states:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

As AJS notes in its testimony, California amended its Code of Judicial Conduct to make the prohibition on sexual harassment part of Canon 3 rather than part of the commentary because its judicial conduct commission received so many sexual harassment complaints.³¹ Canon 3 B (5) of the California Code of Judicial Conduct now reads:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin,

²⁸ *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV, 1239-1240 (1996).

²⁹ Hearings of the National Commission on Judicial Discipline and Removal, Washington, D.C., January 29, 1993 (statement of Lynn Hecht Schafran, National Judicial Education Program to Promote Equality of Women and Men in the Courts) at 454; (statement of Barbara Safriet, Associate Dean of the Yale Law School) at 421.

³⁰ Michael Straight, *Accountability for Racial, Religious, Ethnic and Gender Bias Misconduct and Sexual Harassment by Federal Judges*, in RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1679 (1993).

³¹ Jean Guccione, *Harassment by Judges seen as No. 1 Complaint*, L.A. DAILY J., June 4, 1997 at 1.

disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.³²

By contrast, AJS proposes creating an entirely new section of Canon 3 focused solely on sexual harassment, with detailed Commentary about the behaviors that constitute this kind of misconduct. The AJS proposal is a better approach than California's because it highlights the problem rather than presenting it almost as an afterthought. The detailed Commentary proposed is necessary for the same reason this level of detail is necessary in the AJS proposal for a new Commentary to Canon 3B (5). Despite the intense attention to sexual harassment in every sector of society since the Anita Hill/Clarence Thomas hearings, there are still judges and others who don't "get it" and for whom this level of guidance is essential. Having this focus on sexual harassment within the ABA Model Code of Judicial Conduct will spur attention to this issue in judicial education for new and sitting judges, creation and maintenance of effective sexual harassment policies by the courts, and a more serious response to the issue from judicial conduct commissions and state supreme courts.

CANON 4: A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

This Commission's invitation for comments and recommendations includes these two questions:

- Should judges assigned to "family," "drug," or other "restorative justice" or "problem-solving" courts be authorized to participate as members of or interact with a wider range of community organizations?
- Are the limitations on judges' involvement with civic, charitable, educational, and other organizations appropriate and necessary?

The AJS response focuses on the second question and is a proposed new Commentary to Canon 4C (2), as follows:

C. Governmental, Civic or Charitable Activities.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Commentary:

³² Appendix. Division II: California Code of Judicial Ethics. Available online at: <http://www.courtinfo.ca.gov/rules/appendix/appdiv2.pdf>.

Canon 4A(1) and Canon 4C(2) read in conjunction require a judge to gather sufficient information to determine whether the work of a particular government commission concerns “the improvement of the law, the legal system, or administration of justice” and whether the judge’s participation on the commission would “cast reasonable doubt” on a judge’s capacity to act impartially.

To come within the exception for improvement of the law, the legal system, or the administration of justice, the government commission must have a direct connection with how the court system meets its statutory and constitutional responsibilities, in other words, how the courts go about their business, and the commission should relate to matters a judge, by virtue of judicial experience, is uniquely qualified to address. Commissions designed to improve the operation of another branch of government, for example, law enforcement or prison reform, do not fall within the exception. Moreover, membership by a judge on a commission may create the appearance that the judge could not act impartially if the commission does not have a diverse membership that represents more than one point of view or the commission advocates the rights of specific types of participants in the justice system. Even if a judge may not be a member of a commission, a judge may educate and assist the commission by offering the judge’s expertise on the law, the legal system, or administration of justice.

[The proposed clarifications are based on the numerous advisory opinions that address the propriety of a judge’s involvement on government commissions on such issues as domestic violence, substance abuse, protection of children, juvenile justice, victim services, and anti-crime initiatives as discussed in the paper “Ethics and Judges’ Evolving Roles Off the Bench: Serving on Governmental Commissions” by Cynthia Gray published in AJS in 2002.]

NJEP agrees that there is urgent need for clarification on the issue of judges’ involvement in government commissions and in all community activities. However, we ask this Commission to consider whether both the Canon and the Commentary could be cast in more positive language to clearly affirm that judges *can and should* be active in both community outreach and membership in or assistance to specific commissions, within the parameters of the code of judicial conduct. For example, language which the AJS places in its proposed Commentary could be added to the Canon. Thus:

C. Governmental, Civic or Charitable Activities.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. However, even if a judge may not be a member of a commission, a judge may educate and assist the commission by offering the judge’s expertise on the law, the legal system, or the administration of justice. A judge may, ~~however,~~ represent a country, state or locality on ceremonial occasions

or in connection with historical, educational or cultural activities. A judge may take an active part in the life of the community where, consistent with the Code of Judicial Conduct, the participation of the judiciary will serve to increase public understanding and promote public confidence in the integrity of the court system.

The last sentence above is adapted from Section 39 (e) of the California Rules of Court, *The Role of the Judiciary in the Community*, discussed below.

The need for judicial involvement in community outreach emerged clearly at the National Conference on Public Trust and Confidence in the Courts, convened by the National Center for State Courts in 1999. For example, one panelist, California Superior Court Judge Veronica McBeth, observed, “I think that one of the...base reasons...that we have for a lack of public trust and confidence and the reason there is diminishing confidence in judges generally is because judges have isolated themselves from the communities we serve.”³³ Judge McBeth then related the story of how she came to participate in a two-month series of community meetings in one of the poorest socio-economic areas of Los Angeles. She described how she was able to both educate the community about the fundamental role of the judiciary in our society and judges’ role in resolving disputes in a fair and just manner, and, by listening to the community’s complaints, make the courthouse more effective, efficient and accessible to that community.

Also in 1999 the ABA conducted a national survey of the public’s attitude toward the courts. The survey led to a publication by another Los Angeles Superior Court Judge, Richard Fruin, titled *Judicial Outreach on a Shoestring: A Working Manual*.³⁴ Judge Fruin is a past chair of the ABA Judicial Division, and his publication is regularly advertised in the ABA Judicial Division’s magazine, *The Judges’ Journal*. The text of that advertisement is instructive with respect to the questions posed by this Commission. It reads in part:

Have you ever wondered how you, despite the strictures of the Judicial Code and a limited budget, could have a positive impact on your community? **DO YOUR PART: Let Judicial Outreach on a Shoestring Be Your Guide.**

The importance of an independent judiciary is not understood by Americans in 1999. Citizens are often cynical or ignorant in viewing and understanding the justice system and the national media have been more concerned with headlines than substance in presenting what happens in America’s courtrooms. There is a growing need for public knowledge, trust, and confidence in the justice system. And it is becoming more and more clear that judges must get involved in ethical and appropriate efforts to teach their communities about the work done by our nation’s courts and the importance of an independent judiciary.

³³ *Potential Strategies for Improving Public Trust and Confidence in the Courts*, CT. REV., Fall 1999 at 65.

³⁴ See also Judge Richard Fruin, *JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL* (1999), Available from American Bar Association, Publication Orders, P.O. Box 10892, Chicago, IL 60610-0892; Rush delivery (800) 258-2221.

A survey sponsored by the ABA and released in 1999 found most people prefer to learn about the judicial system from judges. And more and more judges are accepting their responsibility, as judges, to educate the public.

The full text of this advertisement is an appendix to this testimony.

Many judges do not want to be involved in educating their communities or being educated by them, and these judges are happy to hide behind the constraints of the Code of Judicial Conduct. But for other judges who want to follow the lead of Judge McBeth and Judge Fruin, the Code as it stands leaves many fearful that they will be disciplined if they do so.

To address this problem, California adopted the rule of court noted above which reads in its entirety:

2002 California Rules of Court

Sec. 39. The role of the judiciary in the community

Judicial participation in community outreach should be considered an official judicial function to promote public understanding of and confidence in the administration of justice. This function should be performed in a manner consistent with the California Code of Judicial Ethics. The judiciary is encouraged to:

- (a) Provide active leadership within the community in identifying and resolving issues of access to justice within the court system;
- (b) Develop local education programs for the public designed to increase public understanding of the court system;
- (c) Create local mechanisms for obtaining information for the public about how the court system may be more responsive to the public's needs;
- (d) Serve as guest speakers, during or after normal court hours, to address local civic, educational, business, and charitable groups that have an interest in understanding the court system but do not espouse a particular political agenda with which it would be inappropriate for a judicial officer to be associated; and
- (e) Take an active part in the life of the community where the participation of the judiciary will serve to increase public understanding and promote public confidence in the integrity of the court system.

Language in this affirmative spirit is needed in the ABA Model Code of Judicial Conduct to clarify that there are many contexts in which judges' participation in community education, process-oriented conferences, court-convened and community roundtables and similar efforts is not only appropriate but essential.

With respect to the interaction of judges on problem-solving courts with the wider community, the importance of this interaction cannot be overstated. The critical importance of judicial involvement is captured in an ethical opinion from West Virginia. The Judicial

Investigation Commission of West Virginia was asked for an advisory opinion on the propriety of a request that family law masters, magistrates, probation officers and circuit judges participate in a statewide conference on full faith and credit for domestic violence protection orders. The West Virginia Coalition Against Domestic Violence sponsored the conference.

The Commission ruled that participation would give the appearance of impropriety because one its objectives was to develop ongoing coordinated community responses to enforcement of the “full faith and credit” provisions of the Violence Against Women Act.

The West Virginia Supreme Court of Appeals issued an administrative order overruling the Commission and holding that it would not violate the Code of Judicial Conduct for the judicial officers to attend. The court wrote:

[T]he practical effect of the advisory opinion is to undo the many efforts of this Court to develop and encourage judicial involvement and cross-disciplinary training, coordinating councils and other multi-disciplinary programs designed not only to improve the judicial system and the fair administration of justice with respect to the domestic violence matters, but in all areas.³⁵

In 1993 the Iowa Supreme Court formed a task force to examine the handling of domestic violence cases. The Supreme Court emphasized the courts working with the community. Many task force recommendations focused on judges taking leadership to improve case processing. The Supreme Court approved the recommendation that judges participate in domestic violence coalitions so long as their obligation to remain neutral in individual cases is not compromised. To carry out this recommendation, the chief judge in each judicial district appointed a judge to serve on the local domestic violence commission. When a domestic violence defendant sought the recusal of the judge hearing his case because she served on one of these commissions, the Iowa Court of Appeals held that the judge’s participation did not compromise her neutrality. The relevant section of that opinion reads:

[The judge’s] activities in the area of domestic abuse were not in the nature of victim advocacy, but were geared towards case management issues. Her work, along with others, on a domestic abuse coalition looks not to a particular case but to improve the general framework of the system. It does not, by itself, support a claim for recusal.³⁶

In the appendix to this testimony are an article by Iowa Court of Appeals Judge Mark S. Cady, “Domestic Violence Creates an Important New Role for Judges and Lawyers”³⁷ and an article by the Iowa Domestic Abuse Intervention Coordinator, Jennifer Juhler, “Community Domestic Violence Coalitions: A Resource for the Legal System.”³⁸ These articles explore the

³⁵ State of West Virginia ex rel. the West Virginia Coalition Against Domestic Violence, Petitioner v. The Judicial Investigation Commission, Respondent, No. 990528 (West Virginia, Supreme Court of Appeals, March 16, 1999).

³⁶ *State v. Haskins*, 573 N.W.2d 39, 45 (Iowa App. 1997).

³⁷ Judge Mark S. Cady, *Domestic Violence Creates an Important New Role for Judges and Lawyers*, IOWA LAWYER, August 1996 at 10.

³⁸ Jennifer Juhler, *Community Domestic Violence Coalitions: A Resource for the Legal System*, IOWA LAWYER, August 1996 at 14.

importance of judges participating in multidisciplinary domestic violence commissions, and how to structure such a commission to ensure that judges can participate without violating the Code of Judicial Conduct.

In my own state of New York, Chief Judge Judith Kaye has created integrated domestic violence courts where this multidisciplinary approach is lead by judges within the courthouse. The appendix to this testimony includes an article by Chief Judge Kaye and her then general counsel, Susan Knipps, titled “Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach.”³⁹ After describing the integrated court they write:

And beyond the courtroom, the presiding judge holds a monthly meeting with all the participants in the process—police, prosecutors, defense attorneys, Family Court judges, victim advocates, treatment providers, representatives from the Departments of Health, Probation, Parole, Corrections, Social Services and others—to discuss how to improve systemic performance. The synergies created by this collaborative process have been extraordinary...⁴⁰

With respect to the concerns for judicial neutrality, working to devise a system that will better serve the needs of the public need not affect a court’s ability to judge the merits of an individual case fairly....By keeping clear that the goal is to improve outcomes within the framework of the rule of law, problem solving jurists should be able to avoid any rule confusion.⁴¹

A problem solving approach to domestic violence cases posits several new roles for judges: active case manager, creative administrator and **community leader**. These are, admittedly, different from traditional conceptions of the judge’s role as a remote and passive adjudicator. Different, but not inappropriate. By taking a more active approach, by working to foster communication among all the players, judges can help to build a justice system that better responds to the needs of all citizens in the 21st century.⁴² (emphasis supplied)

When judges are not part of this multidisciplinary approach, courts’ effectiveness is compromised, as demonstrated by the experience in Massachusetts. Last year the Massachusetts court system issued a self-assessment titled *Progress and Challenges: Viewpoints on the Trial Court’s Response to Domestic Violence*.⁴³ One section of the report is titled “Domestic Violence Roundtables.” It describes the origins, makeup and purpose of these roundtables, and the impact of an ethics opinion on judges’ participation.

³⁹ Judge Judith Kaye and Judge Susan Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W.ST. U.L. REV. 1 (2000).

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 4.

⁴² *Id.* at 5.

⁴³ PROGRESS AND CHALLENGES: VIEWPOINTS ON THE TRIAL COURT’S RESPONSE TO DOMESTIC VIOLENCE, REPORT OF THE DOMESTIC VIOLENCE COURT ASSESSMENT PROJECT ADMINISTRATIVE OFFICE OF THE TRIAL COURT (August 2003). Available online at <http://www.mass.gov/courts/domviolrep03.pdf>.

In the 1980s many Massachusetts communities formed domestic violence roundtables composed of service providers, advocates, members of the court and members of law enforcement involved in domestic violence. In 1998 the Massachusetts Supreme Judicial Court Committee on Judicial Ethics issued an opinion on judges' attendance at the roundtables.⁴⁴ It ruled that because the defense bar rarely attended and issues were often discussed from a prosecution/law enforcement standpoint, judicial participation had to be strictly limited lest it be perceived that judges were on the victim's "team." This is how *Progress and Challenges* described the Ethics Committee's delineation of when participation would be appropriate, and the actual result of the opinion.

The Opinion does, however, acknowledge that there are institutional benefits to the court system from judges having some contact with advocacy groups regarding issues such as how complaints are processed, the efficiency of special or designated sessions, and the availability of interpreters. Therefore, occasional attendance by judges at roundtables so that such topics can be discussed would be permissible. The Opinion specifically states that participation was permissible when topics of court administration were to be discussed and the private and defense bar could be notified when a judge intended to participate. **However, it was uniformly reported that the actual result of the Opinion was that judges no longer attend domestic violence roundtables under any circumstances. Once the judges stopped attending the roundtables, the attendance rate of other court personnel (such as clerks' office staff and probation) fell, affecting the ability to use the roundtables to raise and resolve the issue with the court.**

In several counties, SAFEPLAN advocates have been organizing special meetings with local judges to specifically address these court administration issues. Advocates felt that these meetings are useful and they greatly appreciate the participation of judges. However, it was also clear that **these meetings did not take the place of and do not have the same value as ongoing roundtables that involve court personnel and can address issues on an ongoing basis.**⁴⁵ (emphasis supplied)

The positive experience with court/community involvement in Iowa and New York compared to the negative experience in Massachusetts makes clear several points. Because of judges' role and standing in the courts and the community, they are essential to an effective multidisciplinary approach to problem-solving in the courts. When judges are the conveners of multidisciplinary meetings or regular participants, all the players show up. Multidisciplinary approaches must and can be structured to focus on the improvement of systemic performance with no compromise of judicial neutrality.

As Chief Judge Kaye wrote, we are in a new era where judges have a new role as community leaders. The ABA Model Code of Judicial Conduct should affirm this role and provide

⁴⁴ Supreme Judicial Court Committee on Judicial Ethics Opinion 98-16 (Sept 15, 1998).

⁴⁵ PROGRESS AND CHALLENGES: VIEWPOINTS ON THE TRIAL COURT'S RESPONSE TO DOMESTIC VIOLENCE, at 98.

judges with clear guidance as to how to fulfill it while maintaining impartiality and the appearance of impartiality.

JUDICIAL EDUCATION:

Judicial education is essential to judges' ability to meet the obligations of Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently. In his 2000 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist observed that:

Federal judges today face cases involving complicated statutes and factual assertions, many of which straddle the intersections of law, technology, and the physical, biological and social sciences. [Federal Judicial Center] education programs and reference guides help judges sort out relevant facts from the panoply of information with which the adversary system bombards them. The FJC thus contributes to the independent decisionmaking that is the judge's fundamental duty.⁴⁶

In 2002 Washington State amended its Code of Judicial Conduct to make judicial education mandatory. The preamble and the amendment in part read:

MANDATORY CONTINUING JUDICIAL EDUCATION

Preamble. The protection of the rights of free citizens depends upon the existence of an independent and competent judiciary. The challenge of maintaining judicial competence requires ongoing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society. This rule establishes the minimum requirements for continuing education of judicial officers

(e) Delinquency. Failure to comply with the requirements of this rule may be deemed a violation of the Code of Judicial Conduct that would subject a judicial officer to sanction by the Commission on Judicial Conduct.

The full text of the amendment is an appendix to this submission.

Mandatory judicial education is a vexed question. Many judges find it insulting and strenuously oppose it. However, from the community standpoint, a judge who knows nothing about, for example, the impact of domestic violence on children or why rape victims delay reporting should not be sitting in cases where these issues are key. When litigants, victims and defendants find themselves before judges who lack the necessary background for particular cases, public trust and confidence in the courts are undermined.

Canon 3B(5) as it exists and the new Commentary proposed by AJS address manifestations of bias that are essentially behavioral. 3B(5) does not clearly address the bias that results from a lack of substantive knowledge about matters fundamental to a case, such as the social and economic

⁴⁶ THE THIRD BRANCH, Jan. 2001 at 1, 6.

realities of women's and men's lives, and this lack of knowledge has produced many biased opinions. A judge who runs a courtroom in which outward behavior is respectful and dignified may nonetheless render biased decisions because the judge is not knowledgeable about issues such as child development, the dynamics of domestic violence or the cultural mores of an immigrant community.⁴⁷

Even without making judicial education mandatory, the ABA Model Code of Judicial Conduct could include language akin to the Washington State preamble that would encourage judges to understand ongoing participation in judicial education as an essential aspect of their official duties. For further information on how Washington State came to adopt this amendment to its Code, the Commission should contact Justice Barbara Madsen at the Washington State Supreme Court.⁴⁸ For additional information about the importance of judicial education, the Commission is also invited to contact Utah Chief Justice Christine Durham, Chair of the Conference of Chief Justices Committee on Education.⁴⁹

Including judicial education in the Code of Judicial Conduct has important implications for judicial branch funding. Judicial education has been a major casualty of the steep cuts state legislatures are making in courts' budgets.⁵⁰ Making participation in judicial education a part of the Code will help court systems obtain adequate funding for this essential court system function.

GENDER NEUTRAL LANGUAGE:

NJEP urges this Commission to include in its final report a comment on the need for all states to make the language in their codes of judicial conduct gender neutral. NJEP has not surveyed every state's code, but we do know that as of last fall at least one state code, Pennsylvania's, still employed only masculine pronouns. There may be other states which have not yet brought their codes up to date in this respect.

The need for gender-neutral language in all written and oral court and court-related communications was a topic of concern in almost every report from the task forces on gender bias in the courts. In response to this problem, many state implementation committees published and distributed widely handbooks on appropriate court conduct, speech and writing. For example, the New York Judicial Committee on Women in the Courts published *Fair Speech: Gender Neutral Language in the Courts*. The Georgia Equality in the Courts Commission published *Guide to Bias-Free Communication*. The New Jersey Administrative Office of the Courts published *Using Gender Neutral Language: A Guide for Speakers and Writers in the Judiciary*. New York Chief Judge

⁴⁷ Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237 (1989); Lynn Hecht Schafran with Elizabeth J. Vrato, GENDER, JUSTICE & LAW—FROM ASYLUM TO ZYGOTES: ISSUES AND RESOURCES FOR JUDICIAL, LEGAL, AND CONTINUING LEGAL EDUCATION (2004).

⁴⁸ Justice Barbara Madsen, Washington State Supreme Court, Temple of Justice Building, P.O. Box 40929 Olympia, WA 98502-0929; (360) 357-2038.

⁴⁹ Justice Christine Durham, Utah Supreme Court, 450 South State, Salt Lake City, UT 84114; (801) 238-7945.

⁵⁰ See, e.g. Lisa Stansky, *The Big Squeeze: State Legal Systems are Feeling the Pain of Tight Budgets*, NAT'L L.J., Monday, May 19, 2003.

Judith Kaye wrote an article for the New York Law Journal about the importance of gender neutral language in court documents, titled “A Brief for Gender-Neutral Brief-Writing.”⁵¹

Gender neutral, inclusive language that acknowledges that women as well as men are judicial officers, court personnel, lawyers and users of the court system is important in Codes of Judicial Conduct as well as in all other court and court-related documents.

⁵¹ Judge Judith S. Kaye, *A Brief for Gender-Neutral Brief-Writing*, N.Y. L. J., May 21, 1991 at 2.

APPENDICES

- A. Advertisement for Judge Richard Fruin, JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL (1999). This runs regularly in THE JUDGES' JOURNAL.
- B. Judge Judith Kaye and Judge Susan Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W.ST. U.L. REV. 1 (2000).
- C. Judge Mark S. Cady, *Domestic Violence Creates an Important New Role for Judges and Lawyers*, IOWA LAWYER, August 1996 at 10; Jennifer Juhler, *Community Domestic Violence Coalitions: A Resource for the Legal System*, IOWA LAWYER, August 1996 at 14.
- D. Washington State, Mandatory Continuing Judicial Education Standards, Supreme Court Mandatory Continuing Judicial Education Rule (Adopted 2002).

Appendix B

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ESSAY: Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach

Judith S. Kaye and Susan K. Knipps*

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SUMMARY:

... What is the responsibility of a court in dealing with a case of domestic violence? Is it to serve as a passive adjudicator of the issues presented by the parties, concerned only that the case is legally resolved? Or is there a larger role for a court to play in crafting a meaningful intervention that may change future behavior? ... The basic outlines of our criminal justice system - including what we expect courts to do and how we expect them to do it - were formed long before domestic violence was recognized as an act deserving criminal sanction. ... If domestic violence defendants present a particular risk of future violence, then why not enhance monitoring efforts to deter such actions? If victims remain in abusive situations due to fear for their own and their children's well-being, then why not provide links to services and safety planning that may expand the choices available to them? If cases are slipping between the cracks of a fragmented criminal justice system, then why not work together to improve coordination and consistency? If domestic violence cases don't fit the mold, then why not change the mold? ... In addition to fairly judging the merits of each case, the court has three key goals: promote victim safety, increase defendant accountability and encourage better coordination among all the institutions in the criminal justice system that deal with domestic violence. ... A problem solving approach to domestic violence cases posits several new roles for judges: active case manager, creative administrator and community leader. ...

TEXT:

[*1]

I. Introduction

What is the responsibility of a court in dealing with a case of domestic violence? Is it to serve as a passive adjudicator of the issues presented by the parties, concerned only that the case is legally resolved? Or is there a larger role for a court to play in crafting a meaningful intervention that may change future behavior?

And what is the responsibility of a court system with respect to the subject of domestic violence? Should it view domestic violence as a serious social problem that courts can and should help solve? Or should it remain scrupulously detached, processing each case as it would any other and leaving it to the other branches of government to pass laws and execute strategies that will constitute society's response?

For centuries, questions like these never much troubled the waters of Anglo-American jurisprudence. In large part, this was because domestic violence was viewed as a private matter best not discussed even behind closed doors, let alone in public settings. n1 [*2] Prevailing social attitudes shaped the judicial response, which typically ranged from outright hostility to formal "neutrality" in a system marked by numerous stumbling blocks to the validation of women's claims of abuse. n2

In recent years, however, public attitudes toward domestic violence have changed. No longer viewed as just a private family matter, domestic violence is now recognized as a public policy issue with major implications for the health and safety of women and children. n3 This new awareness, in turn, is leading many to question the adequacy of traditional approaches to cases involving violence between intimates.

Indeed, in New York State and other jurisdictions, a number of experiments are currently underway that seek to change "business as usual" by casting the judicial role as stopping the violence, not just deciding the case. Part of a broader movement that has been called "problem solving justice," n4 these new models differ from traditional responses in several significant ways.

In this essay, we sketch some of the thinking behind these new models, and outline issues they raise. Far from presuming to state the last word, we intend this as an invitation for further [*3] discussion that hopefully will advance the delivery of justice in this complex area.

II. The Problem: Domestic Violence Cases Don't Fit The Mold

Domestic violence is the number one source of injury to women in the United States, "causing more injuries than rapes, auto accidents and muggings combined." n5 The most conservative estimates put the number of women annually assaulted by an intimate partner at one million. n6 Other surveys project that as many as four times this number are battered each year. n7

Numbers like these suggest a crime wave of tsunamic proportions, but for years it went unnoticed by the criminal justice system. Beginning in the 1970s, the first challenge for battered women's advocates was to secure better access to the legal system for victims of family violence. After years of advocacy and education - and numerous statutory and law enforcement reforms n8 - we are beginning to see the fruits of these efforts, as [*4] increasing numbers of domestic violence cases now make their way to the courthouse door. n9 Building on these achievements, a second challenge looms: ensuring that the intervention the courts provide is meaningful.

This new challenge is far from trivial. The basic outlines of our criminal justice system - including what we expect courts to do and how we expect them to do it - were formed long before domestic violence was recognized as an act deserving criminal sanction. Not surprisingly, a system built on the model of offenses against strangers may falter when applied to crimes that occur in the context of intimate human relationships.

Without question, the relationship between the perpetrator and victim makes domestic violence different from prototypical "stranger" crimes. Unlike participants in a barroom brawl or street skirmish, perpetrators of domestic violence present a particularly high risk for continuing, even escalating violence against the complainant as they seek further control over her choices and actions. n10 Unlike victims of random attacks, battered women often have compelling reasons - like fear, n11 economic dependence n12 or affection - to feel ambivalent about cooperating with the legal process. In a system that generally assumes a victim's willingness to cooperate, this ambivalence is an anomaly that frequently results in the dismissal of the case. n13

[*5] Domestic violence cases are more volatile, more dangerous, harder to prosecute. These characteristics raise the risk that traditional case processing methods will fail to sanction or deter this type of violence. The fragmented nature of the criminal justice system exacerbates this risk. With little coordination or communication between police, prosecutors, the defense bar, victim advocates, probation, corrections and the courts, the chances are good that some of these problematic cases will slip between the cracks - and that battering will continue, sometimes with tragic results. n14

This fragmentation also makes systemic reform difficult. Individual players in the system may see little point in improving their performance when others do not. And when tragedies do occur, fragmentation means that institutional responsibility is easily diffused, misdirected or just ignored.

III. Don't Blame The Cases - Change The Mold

One possible judicial response to the current situation is to continue to process domestic violence cases as any other kind of case, and to continue to observe systemic failures. Another response, however - the problem solving response - is to try to [*6] design court programs that explicitly take into account the special characteristics that domestic violence cases present. If domestic violence defendants present a particular risk of future violence, then why not enhance monitoring efforts to deter such actions? If victims remain in abusive situations due to fear for their own and their children's well-being, then why not provide links to services and safety planning that may expand the choices available to them? If cases are slipping between the cracks of a fragmented criminal justice system, then why not work together to improve coordination and consistency? If domestic violence cases don't fit the mold, then why not change the mold?

A. The Brooklyn Felony Domestic Violence Court

In New York, we have developed several model programs that seek to apply these basic insights in different contexts. To date, our most advanced experiment is the Brooklyn Felony Domestic Violence Court ("the DV Court").

Launched in June 1996 through the collaborative efforts of the New York State courts, the Kings County District Attorney, Victim Services, n15 New York's Center for Court Innovation n16 and others, the Brooklyn Domestic Violence Court was the State's first specialized court

dedicated to hearing domestic violence felonies. In addition to fairly judging the merits of each case, the court has three key goals: promote victim safety, increase defendant accountability and encourage better coordination among all the [*7] institutions in the criminal justice system that deal with domestic violence.

To promote victim safety, every complainant in the DV Court is provided with a victim advocate who can explain the process, assist in safety planning and provide social service referrals. n17 This reduces some of the greatest risks to victim safety, and minimizes some of the greatest obstacles to victim cooperation. The advocate also provides a vital communication link, keeping the complainant informed of the status of the case and keeping the court informed of any reports of potentially dangerous situations at home. n18

To increase defendant accountability, the DV Court strictly monitors defendants' compliance with court orders. The court requires those defendants out on bail to appear regularly so that the judge may check their status. This simple calendaring function sends a message to defendants that the court takes these cases - and their conduct - seriously. As one of the DV Court's presiding judges, John Leventhal, puts it, "'I see defendants every two to three weeks just to let them know the court is watching them.'" n19

Defendants sentenced to probation are strictly monitored after the legal case is over. They receive intensive supervision by specially trained probation officers, and are required to appear in court so that the judge can personally confirm their compliance.

[*8] The DV Court plays an active role in trying to improve communication and collaboration within the system as a whole. Within the court itself, a core set of dedicated personnel - including the judges, prosecutors, victim advocates and probation officers - handles each case from start to finish. This process reduces the number of "hand-offs" within the system, and thereby reduces the opportunities for cases to fall between the cracks.

In addition, a new court staff person - called the Resource Coordinator - gathers information from all outside agencies involved in a case (such as treatment programs or Victim Services) before every court appearance. This ensures that the court has the best information available when making decisions that can turn out to be a matter of life or death. Work is currently underway to develop computerized linkages between the court and these agencies to allow real-time on-line reporting of significant developments related to the parties or the case.

And beyond the courtroom, the presiding judge holds a monthly meeting with all the participants in the process - police, prosecutors, defense attorneys, Family Court judges, victim advocates, treatment providers, representatives from the Departments of Health, Probation, Parole, Corrections, Social Services and others - to discuss how to improve systemic performance.

The synergies created by this collaborative process have been extraordinary. The Department of Parole, for example, recently invited Victim Services to provide training on domestic violence issues for its line officers. The Administration for Children Services has requested training for its case workers, and begun discussion of a domestic violence protocol for child neglect investigators. Finding a need in some cases for victim advocates to continue their involvement even after the sentencing of the defendant, Probation also has strengthened its links with Victim Services. The DV Court has even improved communications with its nearby judicial neighbor, the Family Court, and established new procedures for sharing information regarding families involved in both forums.

[*9] Preliminary statistics suggest that these systemic changes are making a difference. In the first two years of the Brooklyn Domestic Violence Court's operation, dismissal rates declined almost sixty percent - with the rate now the lowest for any felony bureau in the Brooklyn District Attorney's office. Probation violation rates of DV Court defendants are nearly half the typical rate. And while unfortunately there have been recent domestic violence fatalities in Brooklyn, none of these fatalities has involved victims with cases in the DV Court.

B. Translating the Lessons

The New York State Unified Court System is now working on translating the lessons from the Brooklyn Domestic Violence Court to other court settings, n20 including high volume misdemeanor courts n21 as well as courts that hear a mix of felony and misdemeanor matters. n22

The lessons are also being applied in civil Family Court settings. Recently, the Westchester County Family Court entered into a collaborative effort with the Westchester County Executive, Pace University Law School, Westchester Putnam Legal Services [*10] and others to improve legal representation of family offense petitioners. This collaborative approach is improving the quality of applications for protective orders, reducing the number denied for lack of formal sufficiency and enhancing the court's ability to craft comprehensive orders tailored to the parties' situation. The program is also training a new generation of advocates on domestic violence issues. n23

With each experiment, we learn new lessons and expand our understanding of how courts can deal more effectively with this significant segment of our docket.

IV. Is "Problem Solving" an Appropriate Role for the Courts?

Not everyone, of course, agrees that courts should take a problem solving approach to their caseloads. Some object that it interferes with courts' core value of neutrality or turns judges into social workers. Others assert that problem solving is inappropriate "policymaking" by the judiciary. All these objections flag concerns that must be dealt with by problem solving judges. But none necessarily preclude tempered and balanced efforts to improve the handling of domestic violence cases.

With respect to the concerns for judicial neutrality, working to devise a system that will better serve the needs of the public need not affect a court's ability to judge the merits of an individual case fairly. n24 Defendants in domestic violence courts are unquestionably [*11] entitled to the full panoply of due process protections; appellate review still exists to check any erroneous applications of law. Indeed, problem solving courts seek to improve victim safety not through more partial justice but through more complete justice - decisions that are based on more, not less, information; orders that achieve more, not less, compliance. In the final analysis, the key to these courts' effectiveness is their ability to get more out of the system, not less out of the Bill of Rights. n25

By keeping clear that the goal is to improve outcomes within the framework of the rule of law, problem solving jurists should be able to avoid any role confusion. n26 A judge can be interested in the details of the parties' situation without crossing the professional divide between jurist and therapist. Hands-on justice doesn't have to mean hand-holding by the judge.

And finally, with respect to the charge of judicial "policymaking," much of the discretion that problem solving judges exercise occurs within a sphere that is unquestionably within the purview of the courts: how to put the resources that have been allocated to us to their best and most effective use. In other words, much of this so-called "policymaking" is nothing more than sound court administration.

[*12] To the extent that problem solving judges reach out to other agencies to seek joint solutions to common problems, this enhances - not usurps - the authority of the other branches of government. The concreteness of the cases courts face on a daily basis gives us the motivation to find approaches that work. It also gives us the hard facts and immediate feedback by which new approaches can be tested. Unlike other branches of government, courts don't need to hold lengthy investigative hearings or rely on anecdotal reports to get a sense of what the problems are. We simply need to look down the day's docket for all the data we need. When we share our experiences with the policymaking branches, everyone potentially gains.

But perhaps the ultimate answer to these objections is: what's the alternative? Domestic violence cases - hundreds of thousands of them - are in our nation's courthouses, and we have to deal with them one way or another. If we handle them inadequately, tragedies occur. Lives are lost. And public confidence in our justice system moves down yet another notch. If we refuse to take action, refuse to change, we may preserve our traditions and decorum. But at what cost?

A problem solving approach to domestic violence cases posits several new roles for judges: active case manager, creative administrator and community leader. These are, admittedly, different from traditional conceptions of the judge's role as a remote and passive adjudicator. Different, but not inappropriate. By taking a more active approach, by working to foster communication among all the players, judges can help to build a justice system that better responds to the needs of all citizens in the 21st century.

V. Remaining Challenges

Courts are, of course, only one institution among many in society that have an obligation to respond to domestic violence. Social service providers, law enforcement, schools, religious organizations, the medical profession - all have a role to play in stemming the epidemic. Since courts don't become involved until after an act of violence has occurred, we are effectively the [*13] institution of last resort in this area. That makes it all the more critical that we perform our role well.

We still have much to learn about domestic violence. What are the strong predictors for violence against intimates? How can we interrupt intergenerational patterns of behavior? What kind of sanctions and services work best? A problem solving approach requires that we recognize that our understanding of this issue is still evolving. n27 As our understanding deepens, that may well affect both how we define the problem and how we construct the solutions.

For too long, our legal system either ignored the issue of domestic violence or uncritically applied traditional case processing methods without regard to what outcomes these procedures were achieving. Our justice system can and should do better. With a problem solving attitude, the judicial branch can begin to play a more active role in ensuring that our courts deliver justice that is both fair and effective - justice that respects rights and saves lives.

FOOTNOTES:

n1. As the North Carolina Supreme Court stated in 1874: "if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive." *State v. Oliver*, 70 N.C. 60, 61-62 (1874) (affirming a fine of \$ 10 imposed upon husband for whipping wife and inflicting bruises that remained for two weeks).

n2. These stumbling blocks have historically included police inaction in response to complaints of domestic violence and prosecution policies based on stereotypical views of victims of domestic violence. See Leonore M.J. Simon, A Therapeutic Approach to the Legal Processing of Domestic Violence Cases, reprinted as adapted in Law in A Therapeutic Key 243, 266-76 (David B. Wexler & Bruce J. Winick eds., 1996).

n3. See infra text accompanying note 5. Children who witness violence against their mothers may suffer a number of psychological impairments. American Bar Association, The Impact of Domestic Violence on Children 1 (1994). Children who live with a batterer face an increased risk that they themselves will be abused, or become victims or perpetrators of violence later in life. Anne H. Meltzer, Child Witnesses to Domestic Violence, in Lawyer's Manual on Domestic Violence: Representing the Victim 205 (Anne D. Lopatto & James C. Neely eds., 1995).

n4. "Problem solving justice" is a term that describes judicial efforts to use the authority of courts not just to resolve the legal questions presented in a case, but also to address the deeper social issues that may underlie a significant portion of the caseload. Other examples of problem solving courts include Criminal Drug Treatment Courts, Family Treatment Courts and Community Courts. See Judith S. Kaye, Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run, 48 *Hastings L.J.* 851, 855-62 (1997) (describing New York's Midtown Community Court and Family Treatment Courts); David Rottman & Pamela Casey, Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts, Nat'l Inst. Just. J., July 1999, at 13.

n5. Tonya McCormick, Note and Comment, Convicting Domestic Violence Abusers When the Victim Remains Silent, 13 *B.Y.U. J. Pub. L.* 427, 428 (1999) (citing NOW Legal Defense and Education Fund, Domestic Violence Fact Sheet (1995)). While men may also be victims of domestic violence, women are much more likely to be victimized and are much more likely to suffer severe injury at the hands of an intimate partner. See Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 *Harv. L. Rev.* 1849, 1854 n.20 (1996) (reporting Department of Justice figures indicating 90-95% of all domestic violence victims are women); Andrea D. Lyon, Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan, 5 *Mich. J. Gender & Law* 253, 261-62 (1999) (reporting a study

showing that when men are injured by female partners, their injuries tend to be far less severe than the partner's injuries).

n6. Ronet Bachman & Linda E. Saltzman, Bureau of Justice Statistics, NCJ-154348, Special Report: Violence Against Women: Estimates from the Redesigned Survey 3 (1995).

n7. See American Bar Ass'n, *supra* note 3, at 1.

n8. In New York, for example, the Family Protection and Domestic Violence Intervention Act of 1994 repealed the three-day choice of forum rule that formerly precluded victims of domestic violence from pursuing remedies in both Family and Criminal Court, established mandatory arrest provisions, and increased the penalties for various family offenses, including violations of orders of protection. Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 31-32, 46-47, 1994 N.Y. Laws 786.

n9. A study of domestic violence filings in 21 states found a 239% increase between 1985 and 1997. Examining the Work of State Courts, 1997: A National Perspective from the Court Statistics Project 39 (Brian J. Ostrom & Neal B. Kauder eds., 1998).

n10. The recidivism rate for crimes of violence between intimates is two and one-half times that for violence between strangers. Elena Salzman, The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention, *74 B.U. L. Rev.* 329, 344 n.83 (1994).

n11. Their fear is well founded: the risk of injury increases substantially when women separate from their partners. Lyon, *supra* note 5, at 262.

n12. When a battered woman separates from her partner, one study found a 50% chance that she will slip below the poverty line. Margi Laird McCue, Domestic Violence: A Reference Handbook 113 (1995). It has been estimated that half of homeless women lack housing due to domestic violence. Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice, *63 Geo. Wash. L. Rev.* 1071, 1075 (1995).

n13. In a study of felony arrests in New York City in the early 1970s, researchers from the Vera Institute of Justice reported that "the most striking finding of all" in its review of crimes of personal violence was the "high incidence of prior relationships and the frequency with which those relationships result in dismissal of charges." Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* 61 (1977). The

researchers further found that the reluctance of the complainants to pursue prosecution (often because they were reconciled with the defendants or in some cases because they feared the defendants) accounted for a larger proportion of the high rate of dismissal than any other factor. *Id.* at 135.

n14. An uncoordinated response can raise risks at every juncture:

If police arrest offenders and judges release them without punishment... the result is offenders who feel licensed by the court to carry on, and to scoff at the police as well. If social workers... encourage women to take the dangerous step of running from batterers and no shelter is available, the result is homeless women who are doubly endangered. If judges issue restraining orders but police do not enforce them, the result is often another headline femicide: "Murdered Wife Had Protection Order."

Ann Jones, *Next Time She'll Be Dead: Battering and How to Stop It* 212 (1994).

n15. Victim Services is a nonprofit organization based in New York City that has for the past 21 years provided practical services, counseling and courtroom assistance for crime victims.

n16. The Center for Court Innovation is a public-private partnership that functions as the New York State court system's research and development arm. By investigating chronic problems seen daily in New York's trial courts - like domestic violence, drug abuse, quality of life crimes and child neglect - the Center develops groundbreaking model approaches to address these deep-rooted problems. In 1998, the Center was one of 10 programs selected from 1,500 nominees to receive the prestigious Innovations in American Government Award from the Ford Foundation and Harvard University's John F. Kennedy School of Government.

n17. Victim advocates are assigned from either the District Attorney's Office or Victim Services. Service referrals may address both emergency and long-term issues, such as food, shelter, welfare benefits, job training and immigration status. One complainant recently described how victim advocates helped her avoid eviction and obtain a job. She summed up her experience by saying "they make you feel like you have backup. They know the most important thing is that your kids eat. They have made the courts human." Nanci L. Katz, *Targeting Spousal Abuse: Get-Tough Effort Links Numerous Agencies*, N.Y. Daily News, July 4, 1999, at Suburban 1.

n18. In one case, for example, the advocate learned that the defendant was making threatening telephone calls. She immediately notified the District Attorney and the Court's Resource Coordinator so that the court could address this potentially dangerous situation before it escalated.

n19. Susan R. Paisner, *A Court Grows in Brooklyn: Dedicated Domestic Violence Court Serves as National Model*, *Domestic Violence Prevention*, Sept. 1999, at 5, 6 (quoting Judge Leventhal).

n20. A second felony domestic violence court has recently opened in Bronx County.

n21. The New York City Criminal Court, for example, last year arraigned close to 20,000 misdemeanor domestic violence matters. That court is currently developing specialized Domestic Violence Parts to handle this enormous volume fairly and effectively. Since June 1998, the Bronx County Criminal Court has operated a Domestic Violence All-Purpose Part, to which all domestic violence cases are adjourned after arraignment; a Domestic Violence Trial Part to try cases not otherwise resolved; and a brand-new type of part - a Domestic Violence Compliance Part - to monitor defendants' compliance with court-ordered conditions of a sentence, such as completion of a batterers' intervention program or compliance with an order of protection. In March 1999, a Domestic Violence Court was also opened in the Buffalo City Court. See Gene Warner, *Courting Trouble: Judge Plays Hardball on Domestic Violence*, *Buffalo News*, July 9, 1999, at A1.

n22. In June 1999, the state's first combined felony-misdemeanor domestic violence court was opened in Westchester County. See Donna Greene, *New Court to Handle Domestic Abuse Cases*, *N.Y. Times*, June 20, 1999, at WC7. For a description and evaluation of several model programs, see Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on An Effective Innovation*, 68 *Fordham L. Rev.* 1285 (2000).

n23. See Oliver W. Prichard, *Network To Help Battered Women*, *Westchester J. News*, Oct. 27, 1999, at B1.

n24. So long as the activity does not cast doubt on the judge's capacity to act impartially, New York's Rules of Judicial Conduct permit judges to participate in groups devoted to the "improvement of the law, the legal system or the administration of justice." N.Y. Comp. Codes R. & Regs. tit. 22, 100.4(C)(3) (1998). Citing this rule, New York's Advisory Committee on Judicial Ethics has opined that a judge may serve on a "Domestic Violence Task Force" that seeks to improve the handling of domestic violence matters and that includes representatives from the offices of both the District Attorney and the Public Defender. See Opinion 95-34 (Mar. 9, 1995), reprinted in *New York Unified Court System, XIII Selected Opinions of the Advisory Committee on Judicial Ethics* (Jan. 1, 1995-Dec. 31, 1995). Of course, participation in groups that do cast doubt on a judge's impartiality must be avoided. See *New York Advisory Committee on Judicial Ethics Opinion 99-46* (Mar. 11, 1999) (advising that a judge should not serve on a Domestic Violence Coordinating Council that engages in vigorous advocacy on behalf of domestic violence victims); *Massachusetts Supreme Judicial Court Committee on Judicial Ethics Opinion 98-16* (Sept. 15, 1998) (stating that a judge may occasionally attend a domestic violence roundtable but should avoid

"repeated attendance at meetings where substantive issues are to be discussed in a one-sided fashion").

n25. Judge John Leventhal is very clear about his role as a judge in the DV Court: ""I see my role as a dual obligation: to preserve and protect defendant's constitutional and procedural rights, but also to see that the complainant is safe both during the proceedings and after as well." Paisner, *supra* note 19, at 7 (quoting Judge Leventhal).

n26. Judge JoAnn Ferdinand, the presiding judge of another problem solving court, the Brooklyn Drug Treatment Court, put it this way:

The challenge of working in the Treatment Court is to figure out a role for the judge in the treatment process. It is very important that I be viewed as a judge - not a counselor, not a probation officer, not a friend. Defendants have to understand that if they fail to fulfill the treatment mandate, it will be a judge that responds.

Perspectives from the Bench, *Treatment, News from the Brooklyn Treatment Court* (Fund for the City of New York), Winter 1998, at 2, 2.

n27. In New York, we have institutionalized our commitment to keeping abreast of the latest learning in this area through the establishment of a Family Violence Task Force. Comprising judges and practitioners from around the state, the Task Force conducts year-round training programs for both judicial and nonjudicial staff on the legal, medical and psychosocial aspects of family violence.

Appendix D

WASHINGTON STATE JUDICIAL EDUCATION
**MANDATORY CONTINUING JUDICIAL EDUCATION
STANDARDS**

**SUPREME COURT
MANDATORY CONTINUING JUDICIAL EDUCATION RULE**

GR 26

MANDATORY CONTINUING JUDICIAL EDUCATION*

Preamble. The protection of the rights of free citizens depends upon the existence of an independent and competent judiciary. The challenge of maintaining judicial competence requires ongoing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society. This rule establishes the minimum requirements for continuing judicial education of judicial officers.

- (a) Minimum Requirement. Each judicial officer shall complete a minimum of 45 credit hours of continuing judicial education approved by the Board for Court Education (BCE) every three years, commencing January 1 of the calendar year following the adoption of this rule. If a judicial officer completes more than 45 such credit hours in a three-year reporting period, up to 15 hours of the excess credit may be carried forward and applied to the judicial officer's education requirement for the following three-year reporting period. At least six credit hours for each three-year reporting period shall be earned by completing programs in judicial ethics approved by the BCE. The fifteen credit hours that may be carried forward may include two credit hours toward the judicial ethics requirement.
- (b) Judicial College Attendance.
 - 1) A judicial officer shall attend and complete the Washington Judicial College program within twelve months of the initial appointment or election to the judicial office.
 - 2) A judicial officer who attended the Washington Judicial College during his or her term of office in a court of Limited jurisdiction shall attend and complete the Washington Judicial College within twelve months of any subsequent appointment or election to the Superior Court. A judicial officer who attended the Washington Judicial College during his or her term of office in the Superior Court shall attend and complete the Washington Judicial College within twelve months of any subsequent appointment or election as a judicial officer in a court of limited jurisdiction. A judicial officer who attended the Washington Judicial College during his or her term of office in a superior court or court

of limited jurisdiction and is subsequently appointed or elected to an appellate court position is not required to attend the Washington Judicial College.

- 3) A judicial officer of a district court, municipal court, superior court, or an appellate court, who has been a judicial officer at the time of the adoption of this rule for less than four years but has not attended the Washington Judicial College shall attend and complete the Washington Judicial College program within twelve months of the adoption of this rule.
- (c) Accreditation. BCE shall, subject to the approval of the Supreme Court, establish and publish standards for accreditation of continuing judicial education programs and may choose to award continuing judicial education credits for self-study or teaching. Continuing Judicial education credit shall be given for programs BCE determines enhance the knowledge and skills that are relevant to the judicial office.
- (d) Compliance Report. Each judicial officer shall file a report with the Administrative Office of the Courts (AOC) on or before January 31 each year in such form as the Administrative Office of the Courts shall prescribe concerning the judicial officer's progress toward the continuing judicial education requirements of sections a) and (b) of this rule during the previous calendar year. By April 15, BCE shall send a reminder of the requirements of this rule to any judicial officer who has not filed the annual progress report. AOC shall publish a report with the names of all judicial officers who do not fulfill the requirements of sections (a) and (b) of this rule. The AOC report shall be disseminated by means that may include, but are not limited to, publishing on the Washington Courts Internet web site, publishing the information as part of any voter's guide produced by or under the direction of the Administrative Office of the Courts, and releasing the information in electronic or printed form to media organizations throughout Washington State.
- (e) Delinquency. Failure to comply with the requirements of this rule may be deemed a violation of the Code of Judicial Conduct that would subject a judicial officer to sanction by the Commission on Judicial Conduct.
- (f) Definition. The term "judicial officer" as used in this rule shall not include judges pro tempore but shall otherwise include all full or part time appointed or elected justices, judges, court commissioners, and magistrates.

[Adopted effective July 1, 2002.]

* As amended November 7, 2002.

Amended December 31, 2003.