Chapter 9
The Federal Courts and Society

PLANNING for the federal courts' role in the justice system is no easy task; planning for their proper role in society is even harder. While the Constitution's Framers intended the federal courts to be ultimately accountable to the people, they also sought to insulate the courts from direct popular pressure. This tension endures to this day.

The federal courts' link with the nation's earliest history, their roots in the Constitution, and their enduring role as "keepers of the covenant," have an incommensurable impact on how society views the federal courts. These attitudes help explain their popularity with Congress and litigants, and why many perceived solutions to societal problems involve litigation in the federal courts. The federal courts must come to terms with these popular views in anticipating future needs, but they must also, in conserving their core values, educate society about the limitations of the federal courts.

Learned Hand's warning—that we sometimes rest our hopes too much on constitutions, laws, and courts—bears repetition. Cultural and moral attitudes, changing demographics, the impact of education, families, and neighborhoods—all the multitude of influences on human behavior—have a far greater impact on society than the actions of the federal courts. Consequently, many of the problems now causing popular dissatisfaction with the administration of justice cannot be solved simply by court reform, improved procedures or greater justice system resources. As Chief Justice Charles Evans Hughes said:

> We must rely upon the civilizing influences which create standards and traditions beyond and above the law and upon which we must finally depend for the improvement, the adaption and the efficiency of the administration of the law.[1]

Yet, despite these limitations, the federal courts unquestionably have an obligation to meet society's expectations that "equal justice" be more than a platitude. To serve as a fair and impartial administrator of justice, the federal courts must be open and accessible to those who are drawn into or use the judicial process, including litigants, lawyers, jurors, and witnesses. They must be scrupulously fair, and free from bias and prejudice. As America enters the 21st century, the federal courts must plan to meet the needs of a population increasingly diverse in racial, ethnic, and cultural identity. Moreover, the disparities in wealth that now exist will not have disappeared; many members of society will continue to lack the means to afford legal representation. The federal courts must also recognize the need to deal with this reality.

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[1] Charles Evans Hughes, Speech to the Annual Meeting of the American Law Institute (1929).

All members of society, therefore, should have a meaningful opportunity to use and participate in the judicial process. All must be treated as valued customers of the courts. To that end, judicial proceedings should be comprehensible, physically accessible, and affordable to ordinary users, including persons with disabilities and litigants not represented by counsel.

For no one is the need for counsel greater than the individual accused of a crime. The federal courts remain committed to the provision of quality legal services to financially eligible criminal defendants consistent with the mandates of the Sixth Amendment and the Criminal Justice Act. Increasing demands are being placed on the defender services program as a result of more challenging criminal caseloads, federal sentencing guidelines, and added prosecution resources and initiatives. The constitutional mandate, however, has not changed. Indigent defendants still must have effective assistance of counsel, despite the growing costs of meeting the constitutional obligation. The task is to meet that need in an increasingly efficient and economical manner.

Accomplishing many of the initiatives outlined in this plan will require society's support and, ultimately, the acts of its elected representatives. Regular, direct, formal channels of communication should be maintained between the judiciary and its co-equal branches. An institutional mechanism for regular contact among the branches could serve to enhance mutual understanding, obtain needed assistance, and protect the courts from unwise action. Closer working cooperation between state and federal courts should occur as efforts proceed to increase cooperation between federal and state systems as the nation moves toward recognizing the interdependence of what is ultimately one justice system.

Public confidence in the administration of justice by the federal courts must be maintained. The courts depend on the public for support of their functions. Confidence and support can be enhanced, and user participation in judicial procedures made more meaningful, by educating the public about the role and functions of the federal courts. The judicial branch must act to enhance general public understanding of the federal courts. Better communication would inform the judicial branch of public discontent while it would educate the public regarding the federal courts' problems and limitations.

In some circumstances it will be appropriate for the judicial branch, especially after implementing programs to educate the public about the role of the courts, to take steps to enlist public support to assist the judiciary. In all these endeavors to improve the relationship of the federal courts with society, the courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.

Equal Justice

❒ RECOMMENDATION 78: **Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts.**

Bias is patently inconsistent with effective justice, especially bias that is based on invidious classifications by lawyers, judges, court employees, or jurors. The

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courts must initiate and reinvigorate efforts to elicit, investigate and resolve claims of bias. They must also do a better job of educating judges, court employees, lawyers and litigants about how both intended bias and the perception or appearance of bias can adversely affect all those who seek and dispense justice.

The Judicial Conference, the states' Conference of Chief Justices, and the Federal Courts Study Committee have all studied bias and urged that it be combatted through increased education. Several studies of state court systems have identified bias as a significant problem and numerous states have convened commissions to combat bias based on gender, race, ethnicity, and disability.

The Judicial Conference's commitment to ending any bias that may exist in the federal judiciary has been demonstrated on three recent occasions. In 1992, the Conference concluded that "bias, in all of its forms, presents a danger to the effective administration of justice in federal courts" and resolved to "encourage each circuit not already doing so to sponsor educational programs for judges, supporting personnel, and attorneys to sensitize them to concerns of bias . . . and the extent which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch."[2] The following year, the Conference found "great merit" in proposed legislation that "encouraged circuit judicial councils to conduct studies with respect to gender bias in their respective circuits."[3] And in March 1995, the Conference declared that "[i]nvidious discrimination has no place in the federal judiciary" and again encouraged the circuits to study "whether bias exists in the federal courts . . . and whether additional education programs are necessary."[4] Several federal circuits have undertaken such studies; the Ninth Circuit's sets a high standard, one that other courts would do well to emulate. The ongoing educational process in the circuits should continue.

Combatting bias and prejudice requires the vigorous leadership of the federal bench. Strong statements and actions by federal judges have shown and continue to demonstrate that bias cannot be tolerated. The need is to maintain and expand this judicial leadership to eradicate any bias that exists in the federal courts. Court users should be convinced that they have the right and the responsibility to complain about bias and unequal treatment. Each circuit should maintain and promote mechanisms to investigate and resolve bias complaints.

❒ RECOMMENDATION 79: **Federal judges and all court personnel should strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them.**

In coming decades, the nation's demographics will continue to change in ways that will affect the substance of disputes, the ability of litigants to use the courts, and the way evidence is understood and presented. All court personnel should receive enlightened education and training that addresses the difficulties experienced by court users unfamiliar with the courts, who speak a language other than English, who have difficulty balancing family and work responsibilities, and whose cultural background leaves them unfamiliar with American justice. This should include assessing the need for court-based child-care

[2] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 64 (Sept. 1992).
[3] *Id*. at 28 (Mar. 1993).
[4] *Id*. at 13 (Mar. 1995).

The Future Nation

In America today, old definitions of minority groups are changing as the nation's social landscape tilts toward more concentration of population growth, greater dispersion of population density, and increasing ethnic and racial diversity.

The courts cannot ignore the profound changes underway in our population. Their effect on the future relations of the federal courts and society will shape the nature of our structure and procedures for distributing justice.

Highlights of the changes underway in our society follow:

Population growth

- The 1990 census shows that the nation's population growth is slowing. Growth, moreover, is concentrated in fewer places. City population growth is slowing for a number of reasons, while suburban area population growth is continuing to expand.

- During the 1980s, over half the nation's population growth was concentrated in three states: California, Florida, and Texas. Other growth areas are Arizona, Georgia, North Carolina, Virginia, Washington, and Nevada.

Immigration and migration

- Immigration already accounts for about one-third of the nation's population growth and appears to be increasing. Welcoming newcomers and native-born minorities into the economic and social mainstream is one of the biggest challenges facing contemporary America.

- In the 1980s, population gains through migration were largely in Southeastern, Southwestern, and Pacific states, while losses concentrated in states with high international immigration or weak economies.

- Six states—California, New York, Texas, New Jersey, Illinois, and Massachusetts—experienced high immigration from abroad but did not attract large numbers of internal migrants. In fact, these states exhibited an outflow of American-born whites and minorities to nearby states. This pattern may be a response to economic, demographic, and social pressures brought about by the continuing wave of immigrants.

Age

- The median age of the U.S. in 1978 was 28. In 1990 it was about 33. By 2005 the median age will be close to 38. In the new century's second decade, it will pass 40.

- In 1965, 29% of the population was under 14 years old, and about the same percent was 45 and older. By 2005, the under-14 population will have declined to about 22%, while those 45 and older are expected to be nearly 40% of the population.

- That means older Americans will increase in number and grow in influence. While about 12% of today's population is 65 or older, in 2020 20% of the population will be 65 or older.

Work force

- A significant labor force development in the United States generally over the last several decades has been the increase in the minority share of the

facilities in the federal court system and developing needed programs patterned after state court services which have proven effective.

After assuring that the particular need in a defined locality is sufficient and continuing, courts should ensure that their personnel understand the diverse cultural perspectives and that they are providing quality service to those justice seekers not fluent in English.

❒ RECOMMENDATION 80: **Justice should be made fully accessible to individuals with disabilities. Facilities should be constructed or renovated to ensure physical access and to remove attitudinal barriers to providing full and equal justice to those with disabilities.**

Federal courts should be physically accessible to all, including individuals with

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work force. In 1980, minorities composed 18% of the U.S. labor force. By 1992, their share had increased to more than 22%.

- During the past four decades, the number of women in the work force rose significantly. By 1990, women constituted about 45% of the work force, and the percentage will rise to over 47% by 2000. Over 81% of women ages 25 to 54 will be in the labor force in 2000.

- Two-worker families rose from about 32% of all families in 1960 to 70% in 1990.

- By the year 2000, minorities are expected to account for 43% of new entrants into the work force.

- As the work force growth slows with the aging population, more non-traditional groups will be called to participate. This will include people with various disabilities.

Race and ethnicity

- The census shows that, taken as a whole, racial and ethnic minority groups are growing more than seven times as fast as the non-Latino white majority.

- The black population grew by 13% during the 1980s. The Latino population grew 50% to 22.5 million while Asian population doubled to over 7 million. Researchers forecast these growth rates will stay about the same the next ten years.

- By the year 2000, minorities are expected to reach 25% of the total work force. This represents an 8% growth since the late 1980's. In 1990, 6% of U.S. counties experienced a majority of combined numbers of blacks, Latinos, Asians, and other minorities. Forty-five counties have near 50-50 balance; most are in metropolitan areas.

- By 2005, California is expected to have a population that is 50% people of color speaking 80 different languages.

Social economics

- The child poverty rate has risen by one third over the past 20 years. In 1991, almost 22% of the nation's children—approximately 14.3 million young people—lived in families with annual incomes below federal poverty thresholds. This is two to four times the child poverty rate in Canada and Western Europe.

- One in four households with children is headed by a single parent, up from one in eight in 1970.

- Families maintained by women with no husband present doubled from 1970 to 1990 to 10.9 million.

- In the past 30 years, the birthrate among unmarried women 15 to 19 has almost tripled to 45 births per thousand.

- It is a commonly accepted estimate that 20 million people in this country are functionally illiterate. These people cannot hold a job, balance a checkbook, or read and understand a newspaper. Even though 86% of our population receives diplomas, approximately 25% cannot read or write at the 8th grade level.

Crime

- In 1992 about 57% more juveniles were arrested for violent crimes than were arrested in 1982, a near-peak year for violent crime.

disabilities. Creating a barrier-free and user-friendly environment to accommodate the entire population requires implementation of "universal design" principles in order to produce facilities that are not only accessible but easy to use.

The Judicial Conference has approved steps to be taken both in new courthouse construction and alteration of existing facilities. Architects will be instructed to be "handicapped aware." Improvements will include the following: witness and jury boxes will be handicap accessible, spectator areas of courtrooms will include wheelchair stations, and service counters will have stations available for persons in wheelchairs. Systems to assist those who are hearing-impaired will also be available in all courts. The Conference also approved the use of real-time reporting technologies that provide instantaneous translation of the court re-

porter's shorthand notes and allow display of the text on a monitor.[5]

Identifying and eliminating the barriers, including those not readily visible, and creating a model of full accessibility, must be the courts' first priority in this realm. The second objective—which can be pursued simultaneously—must be the development of an ongoing education program to make all judges and court system support personnel aware of and sensitive to the needs of disabled users. "Courts are required [by the Americans with Disabilities Act of 1990] to make reasonable accommodations to persons with disabilities in employment unless such an accommodation would result in undue hardship. They are required to make reasonable modifications to provide services unless [those] would fundamentally alter the nature of the service . . . or present an undue burden."[7]

> "As stewards of the justice system, judges and court personnel need to understand both the nature of the aging process and the range of disabilities so that stereotypes don't negatively guide their actions toward members of either group . . . . Providing information in formats usable by a range of individuals ensures fairness to all."[6]

❐ RECOMMENDATION 81: **Court interpreter services should be made available in a wider range of court proceedings in order to make justice more accessible to those who do not speak English and cannot afford to provide these services for themselves.**

The obvious desirability of achieving this goal should not obscure the complexity of fashioning a plan for its accomplishment. As the numbers of non-English speakers and the number of languages spoken in the U.S. population increase, the courts will be challenged as they seek to ensure the integrity of the truth-finding process. Under the provisions of 28 U.S.C. §§ 1827-1828, the federal courts must supply interpreters in cases instituted by the United States Government where interpreters are needed. The need for accurate and precise translation services in other civil litigation must also be addressed.[8] The Judicial Conference is seeking amendment of the Federal Interpreters Act to allow reimbursement for sign language interpreters in proceedings not initiated by the government. The federal courts should work with the state courts to develop testing and training procedures for court interpreters and to establish a nationally accessible database of qualified interpreters.

Non-fluency in English is only one of the linguistic issues facing the courts. The language of justice in the federal courts should be comprehensible and clear to English speakers too. Much has already been accomplished in simplifying federal court forms and in providing explanatory pamphlets and fact sheets, especially in the bankruptcy courts. Businesses and state courts have launched forms-simplification projects that seek to ensure the use of "plain English." Such initiatives can serve as models for federal courts as they seek to make justice comprehensible to all.

Keeping Federal Courts Affordable

❐ RECOMMENDATION 82: **Litigants should pay reasonable filing fees, and**

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[5] See *id*. at 49 (Sept. 1994); Judicial Conference Press Release, Sept. 20, 1994.

[6] John Albrecht, *Meeting the Needs of the Disabled and Elderly in Court*, 33 JUDGES' JOURNAL 10-11 (Summer 1994).

[7] *Id.* at 15.

[8] See Recommendation 79 *supra*.

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certain services above a basic level should be funded by reasonable user fees.

Federal courts are an indispensable forum for the protection of individual rights. Accordingly, the costs of federal courts, properly borne by all citizens, have traditionally been funded primarily through appropriations rather than user fees.

Adjudication and resolution of civil disputes in the federal courts create external benefits beyond the obvious private benefits received by individual litigants. These include the creation of precedent, general increases in social harmony, discouragement of violent self-help, and establishment of verdict ranges used by other litigants in settlement calculations.

Because litigants receive a private benefit from their use of the federal courts, it is appropriate to charge users a reasonable filing fee for court usage. These fees should be significant enough to encourage citizens to be serious in their use of court facilities. Fees, however, should not be so high as to discourage appropriate recourse to the courts. Nor should fee imposition be extended to indigents now exempted. This issue is somewhat different in the bankruptcy court, where policy and case law mandate filing fees regardless of ability to pay. A pilot program now underway in bankruptcy court will provide useful data on this policy.

Fees also should be adjusted to take account of inflation and rising costs. These adjustments might occur every five years to reduce the administrative burden of collecting new fee amounts each year.[9] Special

[9] *Cf.* 11 U.S.C. § 104 (1994) (requiring the Judicial Conference to recommend to Congress uniform percentage adjustments in the dollar amounts in the bankruptcy laws every six years).

Principles Relating to Revenues and Fees

The following principles relating to revenues and fees have been recommended by the Judicial Conference Committee on Court Administration and Case Management as a basis for reviewing and recommending changes and modifications to the fee schedules:

1. The federal judiciary should be funded primarily from appropriated funds.

2. The federal courts provide a significant benefit to litigants. Therefore it is appropriate for all litigants to pay reasonable fees. Fees should be adjusted to take account of inflation and rising costs, but they should not be used as a means of generating revenue and addressing momentary budget shortfalls.

3. Fees should not be so high that they discourage access to the courts. Nevertheless, they should be significant enough to discourage inappropriate or frivolous use of the courts.

4. Certain services above a basic level should be funded by reasonable user fees.

5. The administrative burden of collecting fees should not outweigh the benefit of the fee.

6. The judiciary generally should be the recipient of fees charged to users of court services.

7. Fees should be assessed to encourage the use of court resources more responsibly.

8. Whenever possible, fees should be consistent from district to district.

services, such as file searches, copying, and electronic docket access,[10] are provided as a convenience and warrant an additional fee.

Representation of Criminal Defendants

Under laws passed by Congress, the federal courts are responsible for administering defender services programs for those who cannot afford counsel. The demands on such programs are increasing in direct response to more challenging criminal case loads, federal sentencing guidelines, new prosecution initiatives, and shortages of qualified, available private attorneys. As a consequence, the cost of providing defender services has increased greatly, at the same time that appropriations for this constitutionally mandated function have become harder to find. In several recent years, funds for defender services have been exhausted before the end of the fiscal year. In the future, the courts must find ways to administer such programs in an increasingly efficient and economical manner.

❒ RECOMMENDATION 83: **Federal defender organizations should be established in all judicial districts (or combined districts), where feasible, to provide direct representation to financially eligible criminal defendants and serve as a resource to private defense counsel who provide such representation.**

[10] Fees for electronic docket access have been approved by the Judicial Conference of the United States. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (Mar. 1991); *id*. at 16 (Mar. 1994); and *id*. at 47-48 (Sept. 1994). A court "may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information." Misc. Fee Schedules promulgated pursuant to 28 U.S.C. §§ 1913, 1914, 1926 and 1930.

Implementation Strategies:

83a *Full-time federal defenders should train and serve as a resource to panel attorneys, thus assuring competence of appointed counsel.*

83b *A study should be conducted to determine whether guidelines may be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case, if such representation is otherwise appropriate.*

83c *Federal defender organizations should represent individuals who present more complicated issues or otherwise require more defense resources.*

In its March 1993 report, the Judicial Conference recommended that the Criminal Justice Act (CJA) be amended to require establishment of a federal public defender or community defender organization in all judicial districts or combinations of districts, where (1) such an organization would be cost effective, (2) more than a specified number of appointments is made each year, or (3) the interests of effective representation otherwise require establishment of such an organization. To control the heavy costs of the CJA system, a study should be initiated to determine whether protocols—including judicially approved guidelines—could be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case if such representation is otherwise appropriate. Federal defender organizations also should be encouraged to represent, in those cases, individuals who present more complicated issues or otherwise require more defense resources.

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The recent CJA study disclosed that those districts with a federal defender organization generally provide higher quality representation to financially eligible criminal defendants than do districts without one.[11] Federal defenders are federal criminal law specialists. They understand the intricacies of the sentencing process, receive regular training by the Administrative Office and the Federal Judicial Center, and become experienced at dealing with other components of the criminal justice system, *i.e.*, United States attorneys' offices, law enforcement agencies, probation and pre-trial offices, and the courts.

As specialists, federal defenders are well equipped to train and serve as a resource for panel attorneys appointed under the Criminal Justice Act (CJA). Although better data on cost effectiveness is needed, based on available information the Conference has concluded that federal defender organizations generally provide CJA services at less cost than do private panel attorneys. Beyond the difference in direct costs (salaries and fees), the Conference found that federal defender organizations save money by sparing the judiciary: the administrative costs of case-by-case appointment of panel attorneys; a judge's review of compensation and expense vouchers; and voucher processing and payment.

❐ RECOMMENDATION 84: **Highly qualified, fairly compensated, and optimally sized panels of private attorneys should be created to furnish representation in those cases not assigned to a defender organization.**

[11] REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM 21 (Mar. 1993).

Implementation Strategies:

84a *The federal courts should establish local qualification standards, provide better training, and seek improved compensation for panel attorneys.*

84b *To improve the quality of representation, adequate funding should be obtained so that the Administrative Office, in coordination with the federal defenders, the Federal Judicial Center, the United States Sentencing Commission, bar associations, and local courts, can provide panel attorneys with the training needed to assure effective assistance of counsel to their clients.*

84c *In districts and locations where it is not feasible to establish a federal defender organization, the courts should be encouraged and afforded sufficient funding to establish panel attorney support offices which can provide the needed advice and assistance.*

84d *The Judicial Conference should continue its efforts to obtain sufficient funding to permit compensation rates to be adjusted up to the maximum amount authorized by law.*

84e *The federal courts should continue to seek authority under the Criminal Justice Act to establish and modify dollar limitations on panel attorney and other compensation.*

84f *Adequate funding for the defender services program should be secured by ensuring that the program is efficient and well-managed.*

84g *Courts should be discouraged from peremptorily reducing fees to panel attorneys and should strive to create a system that ensures fair compensation to such attorneys.*

Although the quality of representation by federal defender organizations has been remarkably high, the representation provided to defendants by panel attorneys varies in quality from district to district and within districts. In reporting to Congress on needed changes in the panel attorney system, the Judicial Conference recommended that the judiciary establish qualification standards, provide better training, and seek improved compensation.[12]

The CJA does not establish qualification standards for attorneys serving on CJA panels. The practice of federal criminal law has become highly specialized. Defendants face increasingly lengthy prison terms. It is time for panel attorneys to be held to certain minimum qualifications.

Federal defender organizations often provide legal advice, support services, and training to panel attorneys. The nature and extent of such training, however, depends on available funding. In districts without defender organizations, panel attorneys receive little substantive guidance on federal law and procedure. Nor do they receive continuing support or advice regarding procedures for obtaining approval of investigative and expert services necessary to an adequate defense. To improve the quality of representation, adequate funding will be needed.

The single most important problem to confront the defender services program in recent years has been the judiciary's inability to secure appropriation of sufficient funding to meet the sharp cost increases attributable to rising criminal caseloads, substantial expansion of prosecutorial and law enforcement resources, and the impact of guideline sentencing and mandatory minimum sentences.

In many locations, the $40 or $60 per hour paid to panel attorneys does not even cover basic overhead costs of a law office. Thus, a lawyer who accepts a panel appointment may actually be making a financial sacrifice. Sufficient funding is needed to allow the Judicial Conference to adjust compensation rates to the maximum authorized by law. Another approach would be to amend the CJA to authorize the Conference to establish and modify dollar limitations on CJA compensation, and to mandate (not merely authorize) cost-of-living adjustments.

In order to compete more successfully for increasingly scarce federal dollars, the defender services program must demonstrate in the years ahead that it is efficient and well-managed. Several initiatives designed to achieve this are now underway or soon will be. They include development of a work measurement formula for CJA representation, and implementation of a comprehensive management and operational review program for federal defender organizations and CJA attorney panels.

Improved efficiency and reduced costs can also be achieved by enhancing coordination and communication among the criminal justice system's various participants. And because program costs are frequently influenced by factors and decisions outside the judiciary's control, it will be essential to maintain a high level of communication and coordination with the nation's executive and legislative branches.[13]

[12] *Id*. at 26-32.

[13] For example, the Conference has endorsed creation of district CJA committees in which agency and private attor-

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Ensuring Justice for Those Who Cannot Afford Counsel in Civil Cases

❒ RECOMMENDATION 85: **Provision of counsel should be increased for civil litigants, and mechanisms, including legal aid societies and similar organizations, for handling indigent and pro se cases in federal courts should be enhanced.**

Implementation Strategies:

85a *Bar associations should be encouraged to promote pro bono programs to make civil counsel available to assist litigants who otherwise would have to represent themselves in federal courts. Funding sources should be developed for provision of legal assistance by legal aid societies and similar organizations.*

85b *Law schools should be encouraged to expand legal clinics to provide competent counsel for prisoner claims, and to low and moderate income persons in need of counsel.*

85c *Federal courts should adopt local rules authorizing law students involved in legal clinics to represent—with appropriate supervision—parties in need of counsel in federal courts.*

85d *Special mechanisms should be created to handle pro se cases efficiently. The frequency of pro se filings, and the frequency of repeat filings by particular litigants, should be tracked through the judiciary's statistical system to allow informed assessment of the amount and impact of judge time and court resources devoted to pro se filings.*

85e *Through the use of centralized staff operating under court supervision, district courts and courts of appeals should continue to screen pro se cases.*

"Pro se" litigants (parties without counsel) face several obstacles to effective use of the federal courts, including unfamiliarity with procedural and substantive law, and ignorance of time limits for filing claims. Such parties are distinctly disadvantaged in an adversary system that relies on the parties themselves to evaluate and present their claims.

Because judges in our adversarial system rely on litigants and their counsel to unearth facts and present legal arguments, there is an increased risk of decisional error in cases where parties lack counsel. Where counsel is not present the federal courts bear the extra administrative burden of ensuring that unrepresented parties with meritorious claims obtain the relief to which they are entitled, as well as ensuring that the litigant adversaries are not burdened by unduly protracted proceedings. Here again, the system works better when counsel are available to screen out frivolous claims, ensure procedural compliance, present cases on the merits, and settle cases where appropriate. Legal aid and similar organizations have provided much of this needed legal assistance in the past; it will be important to assure adequate funding for this essential function.

The federal courts cannot, of course, eliminate the economic disparity that underlies the inability of many litigants to obtain counsel. Nor, in this time of tight state and federal budgets, is society likely to have the

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ney representatives propose changes in local rules and practice aimed at reducing CJA and other costs of the criminal justice system. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17-18 (Mar. 1994).

resources to provide counsel to all who need it. The courts can, however, encourage ongoing efforts to resolve this problem.

Two organized efforts outside government have made real strides in providing counsel to pro se litigants. The ABA Model Rules of Professional Conduct provide that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this obligation, the lawyer should . . . provide a substantial majority of [those] legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means . . . . In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."[14] A number of state and local bar associations have launched effective pro bono programs that provide counsel to federal court litigants. The bar should extend such efforts into geographical areas not now served.

Second, many law schools have active clinical programs that provide competent counsel for prisoner claims, and to low and moderate-income persons in need of counsel. In addition to providing counsel to those in need, these programs provide valuable education and instill in law students a sense of responsibility to society. Where necessary, local federal court rules should be amended to permit law student court appearances under these programs.

These programs can only provide for a small percentage of the need. The federal courts should encourage local initiatives that provide pro bono representation, study additional means of providing counsel for those who need it, and experiment with new mechanisms for handling pro se cases fairly and efficiently.[15]

Customer Service Orientation

The public sector is taking a lesson from private enterprise and is increasingly emphasizing the need to serve the consumer. Federal judges, administrators, and support personnel, and the bar, should actively seek to learn what their customers expect from the courts. They might consider a precept stating the customer service ideal recently adopted by the California court system: "Nonjudicial court personnel should be trained as service providers and facilitators. Their primary responsibility should be to provide timely, accurate, and efficient service to all persons having business with the courts, and to assist litigants in reaching the next step in resolving their disputes . . . . Prohibitions against providing advice to litigants should be reexamined and modified to allow court personnel to assist in moving disputes toward resolution."[16]

❒ RECOMMENDATION 86: **The judicial branch should act to enhance understanding of the federal courts and ensure that the fundamentals of the litigation process are understood by all who use it. The federal courts should encourage feedback from the public on how successfully the judicial branch meets public expectations about the administration of justice.**

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[14] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1 (amended 1990).

[15] See Chapter 6, Recommendation 33 and supporting commentary *supra*.

[16] JUSTICE IN THE BALANCE 2020—REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS §§ 11.10a and 11.10b, at 180-181 (1993).

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Implementation Strategies:

86a *Information on using the courts should be provided through community institutions and in formats aimed at an increasingly diverse citizenry.*

86b *Judicial outreach programs should be brought to educational and community organizations and other public institutions.*

86c *Relations with the bar and law schools should be maintained and enhanced by participating in legal education and training programs and activities that enlist those institutions in educating the public about the legal system.*

86d *Press and public access to court proceedings should be presumptively unrestricted, but access should be balanced with the court's primary mission to administer justice.*

Effective justice presupposes effective understanding. Information on the law and dispute resolution options and processes should be readily available in all appropriate languages in schools, libraries, government facilities, and other public places as well as in the courts themselves.[17] Justice information should be provided through all widely available technologies including telephone, computer, and interactive video. Information kiosks staffed by knowledgeable employees should provide information and guidance on the dispute resolution process to court users, especially those unrepresented by counsel.

An active role for the judiciary in educating the public has been supported by the American Bar Association in a resolution urging: "judges, courts, and judicial organizations to support and participate actively in public education programs about law and the justice system." The resolution also urged that "judges be allotted reasonable time away from their primary responsibilities on the bench to participate in such public education programs, consistent with the performance of their primary responsibilities and the Code of Judicial Conduct."[18]

Although experimentation with cameras in the federal courts concluded in December 1994, it is possible that the issue may be revisited at some future time. Even if the current prohibition on cameras were to be lifted, however, there will always be cases where judges must exclude cameras from court facilities to promote confidentiality, safety, or other compelling interests. Due consideration of the rights, needs, and safety concerns of parties, jurors, and witnesses must inform any policy allowing camera coverage of court proceedings. Access for non-participants, by whatever means, must not hinder the administration of justice.

An important part of developing a strong working partnership with the public is creating an effective means for justice system customers—*i.e.*, litigants, witnesses, jurors, the bar, the press, and the public at large—to register their feedback on how well the institution is meeting their needs. Increasingly, cost-conscious litigants have begun to bring their concerns about the courts to their counsel; they are often outspoken when given the chance to be heard. One litigant complained about the arguably

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[17] See, *e.g.*, Deanell R. Tacha, *Renewing Our Civic Commitment: Lawyers and Judges As Painters of the 'Big Picture,'* 41 KAN. L. REV. 481 (1993).

[18] Resolution of the ABA House of Delegates (Aug. 1992), *quoted in* James A. Noe, *Public Education: A Judicial Imperative*, 32 JUDGES' JOURNAL 28 (Winter 1993).

outdated practice in some courts of ruling on motions at the eve of trial, and the unnecessary expense to which that practice had subjected him.

❒ RECOMMENDATION 87: **Public understanding of the nature and significance of the federal judiciary's role in the constitutional order (and the constraints under which the judiciary functions) should be improved.**

With few exceptions the public and the courts share common hopes and goals with respect to justice. They seek justice that is accessible, affordable, comprehensible, and as speedy as fairness allows. Better two-way communication would inform the third branch of public satisfactions and discontent, at the same time that it educated the public about the federal courts' challenges and limitations. The courts should include significant public representation on some advisory committees, much as members of the bar are included on the rules committees. Surveys of public opinion regarding the federal courts would also benefit the system. The courts should also consider how they may best address the needs and rights of victims of crimes.[19]

❒ RECOMMENDATION 88: **A comprehensive program should be developed to educate jurors about the role and function of federal courts.**

The jury system offers a ready-made opportunity to educate the public about the mission of the federal courts. Not only should judges and administrators take steps to ensure that jurors are treated with dignity and respect, but the system should take advantage of the presence of the jurors in the courthouse—often with inevitably spacious blocks of time to spend waiting to serve—to share with jurors educational films and other materials to increase public understanding of the role and functions of the courts.

❒ RECOMMENDATION 89: **The judiciary should seek public support on specific issues where the objective is approved by the Judicial Conference and where the issue has wide acceptance among the judiciary as a whole.**

In some circumstances it is appropriate for the judicial branch to seek public support for the federal courts, although the practice should not be overused lest it damage the judiciary's good reputation for objectivity and being above politics. Public initiatives should be employed only when they are: (1) approved by the Judicial Conference; and (2) have wide acceptance among judges generally.

Judges should also be encouraged to participate actively in organizations interested in improving the judicial process. In expressing opinions, however, judges should be careful to preserve the impartiality of the judicial office. Such participation places judges in a position to effectively enlist such organizations as allies. Judges who serve on committees of the American Bar Association or the Federal Judges Association would be particularly effective liaisons to local bar associations to communicate public policy objectives favored by the judicial branch.

❒ RECOMMENDATION 90: **Mechanisms should be established or simplified to receive and address public complaints about improper treatment by judges,**

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[19] See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982).

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attorneys, or court personnel in federal court proceedings and operations.

Formal procedures exist today for filing complaints with the clerks of the courts of appeals in each circuit regarding alleged judicial misconduct.[20] Despite this fact, the public is not always sure that it has an effective mechanism for voicing complaints alleging improprieties by judges and others involved in court proceedings or administration. Grievances unrelated to judicial acts may not fall within the jurisdiction of the councils. In minor matters, many aggrieved parties wish only to be heard. In more serious matters—involving bias or prejudice, for instance—more formal procedures and responses are needed. Such procedures should be sufficiently flexible to accommodate the needs and resources of the districts and circuits.

Communications With Other Branches of Government and the Public

❒ RECOMMENDATION 91: **Positive communication and coordination between the judicial branch and the executive and legislative branches should be enhanced.**

Implementation Strategies:

91a *The Chief Justice should annually deliver an address to the nation regarding the state of the federal judiciary.*

Regular, direct, formal channels of communication should be maintained between the judiciary and its co-equal branches. The Chief Justice should speak annually to the nation on matters of concern to the judiciary. In a related vein, judges should invite members of Congress to visit their courts and to discuss the work of the judiciary and the justice system generally.

91b *Congress should be encouraged to require the legislative staff of all substantive congressional committees and the Offices of Legislative Counsel in the Senate and the House of Representatives, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a legislative "checklist."*

This recommendation follows a similar proposal by the Federal Courts Study Committee. The rationale for a legislative checklist is to reduce the frequency of new legislation that—because of vagueness or ambiguities (*e.g.*, private rights of action, available defenses and immunities), technical errors, or gaps (*e.g.*, applicable limitations periods)—increases uncertainty and unfairness for litigants and promotes additional litigation. The checklist would require legislative staff to address such issues and would help to ensure that Congress's intent is clear.

Statutory vagueness and imprecision is often the product of necessary legislative compromise rather than the result of oversight or omission. Whatever the cause, eliminating such ambiguities tends to improve clarity and reduce litigation. A legislative checklist (see chart on next page) would advance that objective.

91c *Judicial branch representatives should continue to hold periodic meetings with Justice Department officials and members of Congress to discuss matters of common interest.*

Recently, a number of working groups composed of Justice Department per-

[20] *See* 28 U.S.C. § 372(c) (1988 & Supp. V 1993).

A Proposed Legislative Checklist

- the appropriate statute of limitations
- whether a private right of action is contemplated
- whether adequate remedies are provided by state law
- whether pre-emption of state law is intended
- the definition of key terms
- severability
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation
- whether state courts are to have concurrent jurisdiction and, if so, whether and to what extent an action would be removable to federal court
- the types of relief available
- whether retroactive applicability is intended
- the conditions for any award of attorney's fees authorized
- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized
- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation
- the viability and/or effect of private arbitration and other dispute resolution agreements under enforcement and relief provisions
- whether any administrative proceedings provided for are to be formal or informal

The legislative checklist could also provide for consideration of:

- whether any time deadline for judicial action appearing in proposed legislation is necessary and, if so, reasonable
- in the case of proposed legislation providing for judicial review by a multi-judge panel, whether the same policy objectives could be achieved by providing for single-judge review
- whether the statute applies to the territories, the District of Columbia, and the Commonwealth of Puerto Rico, as well as the states or other governmental unit.

sonnel, federal judges, and Administrative Office staff have successfully explored issues that include: security, budgets, civil litigation, and the probation system. This sort of operating level contact should continue. Not only does it produce immediate improvements in the system, but it serves as a forum to develop agendas for more significant change in the courts, the Justice Department, and the executive branch generally.

91d *A permanent National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of the federal government, and members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts including,*

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but not limited to, their appropriate civil and criminal jurisdiction.

Respect for the judiciary and confidence in the rule of law depends on the judiciary's ability to be independent from political and other influences that could improperly influence, or appear to improperly influence, decisions in individual cases. An institutional mechanism to insulate the judiciary from politics could serve to ensure the independence of the judiciary and to enhance the stature of the judicial branch.

One such mechanism is an interbranch commission, consisting of representatives from the three branches of government and persons from outside the federal government. The commission should consult with academicians, members of the bar and other interested persons. It should be small, consisting of not more than eleven members who are sufficiently possessed of institutional memory to address the problems of the judiciary effectively. The commission should be permanent, and the terms of its members should be staggered to assure continuity of membership.

The commission should be charged with monitoring the federal courts and making periodic recommendations. It should pay special attention to the factors listed in Chapter 10 that would indicate the onset of systemic breakdown.

The commission's purpose would be to complement—not supplant—the Judicial Conference in making policy for the federal judiciary. It should study ways to improve federal justice—*e.g.*, how best to address the growth in pro se litigation.[21] It should be authorized to review conflicting statutory and federal rules interpretations, and to make recommendations for resolving those conflicts by legislative action or rule revision.

The Attorney General recently convened a meeting of representatives of the three federal branches of government that included representatives of state judiciaries and legislatures. Among other issues, the participants discussed the respective roles of the federal and state courts and where jurisdictional lines should be drawn between them. The exercise was a positive step toward the goal that is the subject of this recommendation—intergovernmental coordination and cooperation. Similar efforts should continue on a regular basis.

91e *All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same.*

This project had its origins in the opinions of the U.S. Court of Appeals for the District of Columbia Circuit. It is supported by the leadership of both parties in Congress and the Offices of Legislative Counsel, who have called for its expansion to all circuits. It is hoped that it will ultimately yield improvements in drafting, interpreting, and revising federal statutory law.

❒ RECOMMENDATION 92: **The federal and state courts should communicate and cooperate regularly and effectively.**

Great progress has been made in building closer working relationships between the federal and state court systems. State judges have been appointed by the Chief Justice to the Judicial Conference Committee on Federal-State Jurisdiction and the Conference's rules committees. Federal

[21] See Chapter 6, Implementation Strategy 33a *supra*.

judges attend meetings of the state Conference of Chief Justices' comparable panel. State and federal judges participate in the recently formed National Judicial Council of State and Federal Courts. Coordination of research efforts occurs among the Administrative Office, the Federal Judicial Center, and the National Center for State Courts.

Many more opportunities will exist for closer relations in the future. Federal and state judges already have established procedures to administer related litigation jointly.[22] State-federal judicial councils have been established or rejuvenated in many states. Both court systems would benefit from shared use of facilities and other resources. Both systems will gain from the nation's evolving recognition that our judicial systems comprise an interdependent whole.

Communications With the Bar

❒ RECOMMENDATION 93: **The federal courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.**

The American bar, and in particular, the bars of the respective federal courts, are especially well situated to educate court users and the general public about the mission of the federal courts and to assist in winning legislative and public support for justice system improvements.

Participation by the organized bar is critical to success in the courts' performance of their role as supervisors of the bar and in ensuring its continued integrity. Working together, the courts and the bar can make real progress in effectively addressing the need for legal services for those otherwise unable to afford them.

Organizations which provide advice and assistance to the courts and which often include many members of the bar and frequent litigants, offer another useful source of obtaining information and support for further improvements, as well as generating better understanding of the special role of the federal courts in the justice system.

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[22] See William W Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

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