Judicial Misconduct: Bench Behavior and the New Disciplinary Mechanisms

By John H. Culver and Randal L. Cruikshanks

Since 1960, California has utilized a Commission on Judicial Qualifications to receive and investigate allegations of judicial misconduct. This paper examines the effectiveness of procedures modeled after the California commission, suggesting specific criteria for evaluating that effectiveness.

Various methods for improved nonpolitical judicial selection have been debated in the literature and at bar meetings for some time. Yet, until recently, there has been scant regard to the problems and procedures for removing incompetent and unfit judges from the bench. Because most judges in the state court system are rarely voted out of office, elevation to the bench amounts to life tenure. The options most states traditionally could employ to discipline judges for noncriminal behavior have been woefully inadequate for dealing with the judge who is habitually tardy, alcoholic, senile, or simply ill-suited for judicial office.

The failings of the traditional removal and disciplinary devices were recognized in California in 1960 with the creation of a Commission on Judicial Qualifications. The independent commission was authorized to receive and investigate allegations of judicial misconduct and to recommend to the state supreme court whether a judge should be removed from office. In 1966 the commission's authority was expanded to include the recommendation of censure where disciplinary action was justified for conduct which did not warrant removal. Since 1960, thirty-one states have established similar disciplinary bodies modeled after the California commission and eight additional states have created their own tribunals to deal with judicial impropriety.

It is the purpose of this paper to examine how these new procedures are working and to suggest specific policy criteria by which their effectiveness can be determined. What follows is a discussion and analysis of 1) traditional removal procedures, 2) the extent of judicial misconduct, 3) commission plans like that of California, 4) alternative disciplinary systems, and 5) policy dimensions for measuring the results of these new procedures as a viable solution to judicial misbehavior.

TRADITIONAL JUDICIAL REMOVAL PROCEDURES

Prior to the establishment of judicial commissions, the three most common procedures for removal were impeachment, recall, and state legislative recommendation (concurrent resolution) to the governor for action. The failure of these mechanisms lies in their clumsiness and time-consuming length (recall and impeachment), rare use (all), and political hazardousness (legislative resolution). These methods have been employed infrequently and generally unsuccessfully. One source notes that there were nineteen removal actions and three resignations brought about by fifty-two impeachment attempts in seventeen states as of 1960.[1] In Illinois only one judge has been subject to impeachment (unsuccessfully) in 160 years.[2] Although three California judges were recalled in 1932, the last successful impeachment attempt occurred in 1862.[3] In one of the few comparative studies of judicial misconduct it is reported that only in five states has impeachment been attempted within

Disciplinary options have been woefully inadequate for dealing with the judge who is not well suited to the office.

the last fifteen years while the use of the concurrent resolution and recall has been ignored for the last thirty.[4] As stated by one contemporary observer, "It is extremely rare for a judge to be removed on the grounds of incompetency, neglect of judicial duty, or unethical conduct."[5]

Another constitutional means of changing bench occupants and other public officials is through the election. While the election is generally regarded as a selection device, it can also be considered a method for removing unpopular officials from office. Where partisan politicians may fall to the whims of the electorate, few voters express much interest in the generally nonpartisan judicial races. Herbert Jacob reports that none of the twenty circuit court judges seeking reelection in Wisconsin between 1940 and 1963 was defeated while less than five percent of the district judges in Minnesota between 1912 and 1941 were voted out of office.[6] During one ten-year period in Texas (1952-1962), only one out of twenty trial judges suffered electoral defeat in a primary or general election.[7] In seventeen states employing a merit selection plan, only twelve judges met election defeat in recent years.[8] In May 1976, Alabama witnessed its first retirement by the voters of an incumbent appellate judge in over fifty years.[9] Other examples could be cited on the low turnover rate of judges in elections to support Jacob's conclusion that judges need not fear the voters at the polls.[10]

Since 1960, thirty-nine states have created some disciplinary body to deal with judicial impropriety. Evidence suggests that the bench is no less tainted by misconduct than any other profession.

The argument illustrated by these and other examples is that judicial behavior has gone largely unchecked by both constitutional mechanisms and the voters. While it may be tempting to justify the infrequent removal of judges because the bench has remained above reproach over the years, this argument is not very convincing in light of recent accounts of misbehavior.

JUDICIAL MISCONDUCT AND INCOMPETENCY

Most traditional disciplinary methods as well as the new procedures are directed at misconduct rather than incompetency, even though the line separating the two terms may be very fine in some cases. Incompetency is a rather vague term with serious implications and few specifics to aid the observer in determining the mental state or personality fitness evidenced by a magistrate suspected of inadequacy.

Despite the generally high regard in which the judicial office is held by the public, there are sufficient instances of misconduct to suggest that the bench is no less tainted than other professions. For example, the public is becoming more aware of the way judicial positions are sometimes filled for political considerations.[11] One observer has said of some Cook County, Illinois, judges that several of them "are so incompetent that lawyers go to any extreme to duck them."[12] More recently, two supreme court judges in Oklahoma were impeached and one resigned under pressure as a result of a bribery scandal.[13] In 1975, the Florida supreme court experienced resignation of two of its members and implication of four others in a tax evasion case.[14] As of midsummer 1976, two judges in New York were under investigation for taking gifts and operating a business in a conflict of interest situation.[15]

According to one estimate, over half of the 15,000 magistrates sitting in lower courts are unfit for various reasons.[16] That figure is consistent with one presidential commission which reported that lower courts attract less competent personnel than the higher courts.[17] Because of the lack of legal qualifications for some lower court positions, efforts are being made to eliminate those courts in which nonlawyers are permitted to occupy the bench. Such efforts support the proposition that the use of lay magistrates is inconsistent with the complexities of an increasingly litigious society.

Both practical and methodological obstacles prohibit a systematic assessment of errant judicial behavior. First, while the public may abhor the conduct of a magistrate, there exists a mystique surrounding the judicial office that numbs retaliatory action. In spite of whatever unpopularity their office manifests, most judges are invisible enough to avoid being voted out of office. Second, the legal profession is a closed profession and those best situated to observe judicial misconduct are those most reluctant to report it—lawyers and other judges. Third, mindful of the notoriety which accompanies judicial scandals, many judges opt to retire for "personal" or "health" reasons before media publicity discredits them. Voluntary retirement also ensures pension rights, which can be restricted if a judge is removed from office.

THE CALIFORNIA COMMISSION MODEL

The California Commission on Judicial Qualifications (now the Commission on Judicial Performance) has served as a prototype for thirty-one other states. It is a nine-member com-

mission composed of five judges appointed by the state supreme court, two lawyers selected by the California State Bar Association, and two laymen chosen by the governor, each serving four-year terms, in addition to its own independent staff directed by a full-time executive secretary. The commission is constitutionally authorized to receive and investigate charges against occupants of the bench for 1) habitual intemperance, 2) misconduct in office, 3) consistent failure to perform duties, 4) prejudicial conduct impugning the judicial office, and 5) permanent disability.[18] The commission's first task, understandably, is to determine the validity of the complaint(s). If the charge warrants further investigation, the judge in question is notified in writing and requested to respond to the allegations. Should this response prove unsatisfactory, the commission can expand its review by appointing a special panel of masters to question the judge. The commission then recommends censure, removal, or retirement action to the state supreme court on the basis of its investigation report. If action is directed at a supreme court justice, then special provisions ratified by the voters in 1976 transfer the final authority to a tribunal consisting of seven court of appeals justices selected by lot.

Since 1961, the California supreme court has formally censured five judges upon the recommendation of the commission. In the five instances in which the commission found that removal was warranted, the court removed the judges in three cases, dismissed action in the fourth, and reduced the sanction to censure in the fifth case.[19] All actions concerned trial court judges, and for the first time since the creation of the commission a supreme court justice is under investigation.[20] The actual number of complaints registered against judges remains unknown since the commission does not maintain, or at least acknowledge, statistics on their aggregate number by judicial level. Until the final sanction is applied by the court, all proceedings are confidential. Only nine magistrates were formally and publicly rebuked by the supreme court although an additional fifty-seven trial court judges resigned "voluntarily" while under investigation. Although five municipal and superior court judges have been censured by the supreme court, all three removals have been at the municipal court level and were based upon two grounds: willful misconduct in office and conduct prejudicial to the administration of justice.

The reasons for censure and removal are not easily categorized. In two of the censures, the judges were found guilty of providing presigned bail release forms to bondsmen.[21] Two censure and two removal actions involved the utterances and gestures of the judges which were considered prejudicial to defendants in court.[22] One censure and one removal action primarily involved the judges' adverse admonitions of deputy public defenders who were trying cases.[23] Only in one case did media publicity focus attention on a judge's conduct. In that particular censure action, ethnic slurs made by a superior court judge during a juvenile hearing resulted in at least one critical newspaper editorial.[24]

One can only speculate on why fifty-seven judges retired while under investigation by the commission. While retirement does not indicate an impropriety, the fact that so many did retire seems significant in view of the infrequent recommendations by the commission for supreme court action. It may be understating the obvious to suggest that once a judge becomes aware of an actual or potential commission investigation, the opportunity to retire in honor is much more attractive than the possibility of having one's judicial conduct resolved by the supreme court, especially with the accompanying publicity.[25] Whatever the reasons for voluntary retirement, the chance to do so apparently is more powerful in eliminating allegedly unfit judges than the formal charges and procedures carried through to their conclusion.

The subtlety of the commission's impact is also evident in its ability to realign judicial conduct without public attention or formal action by means of letters of inquiry regarding questionable practices that have been brought to the commission's attention. Once a judge is aware that his behavior has warranted a letter from the commission, the motivation to take corrective action is great. Most often, such letters do not suggest improprieties requiring censure or removal but focus on "questionable" demeanor which should be halted. According to Jack Frankel, executive secretary of the commission

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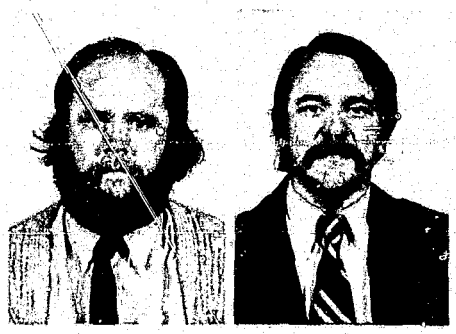

Culver *Cruikshanks*

since 1961, a judge receiving such a letter often replies by denying such conduct but noting that it will not occur in the future.[26] Thus, while the formal power of the commission lies in recommending censure or removal action to the supreme court, its actual potential for correcting improper conduct and removing unfit judges lies in informing a judge that his deportment is officially under investigation. This gives the judge the opportunity to correct his conduct or resign without attracting attention.

OTHER MODELS

An alternative method for disciplining judges is offered in the "special court" and "dual court" model in which the investigative and adjudicative functions are allocated to two separate bodies which are both staffed and controlled by the judiciary. This procedure is employed in Alabama, Connecticut, Illinois, New York, and Oklahoma. A variation of it exists in Delaware where the Court on the Judiciary possesses sole responsibility for the discipline of errant judges. Unlike plans of the commission type, the special courts typically restrict the contribution of non-judge members. In Delaware and Oklahoma lay members are excluded entirely. The lack of lay representation fosters the suspicion that the disciplinary boards may be protective of fellow lawyers and judges. In Illinois, the Judicial Inquiry Board and Courts Commission have sanctioned fifteen judges, including four removals, since 1970. New York's dual court also has been quite active (see Table 3), but the record in the other four states is mixed. There has been one recent action in Alabama, two in Oklahoma, and nothing reported for Connecticut and Delaware. Additionally, these bodies generally meet only on a case by case basis whereas the commissions convene regularly.

New York was the first state to establish a special court system in 1947. The inadequacies of the Court on the Judiciary led to its revision in 1974 with a constitutional amendment creating a temporary commission component to investigate complaints.[27] This Commission on Judicial Conduct, made permanent in 1976, was given the authority to admonish, censure, and suspend judges for up to six months. The Court on the Judiciary was to be employed only for removal proceedings or in an appellate capacity. In the first twenty-nine years of the original disciplinary system, the court was convened only on three occasions with the last reported action, a removal, occurring in 1963. However, during the twenty months of the temporary commission's existence it received 724 complaints and investigated 283 of these which resulted in private admonishment of nineteen judges, public censure of three, and removal of one. Five removal recommendations are currently pending.[28]

Two other states employ formal disciplinary mechanisms which share features of both the commission and special court plans but are unique to themselves for obvious reasons. The Commission for Judicial Qualifications in Hawaii is a five-member board, appointed by the governor and subject to confirmation by the senate. The commission receives complaints, investigates, and reports to the governor who then can appoint a three-member Board of Judicial Removal should disciplinary action be recommended. The board conducts its own investigation and recommends retirement or removal to the governor.

In Ohio the task of the Board of Commissioners on Grievances and Discipline of the Supreme Court is just as cumbersome. The seventeen lawyers who are appointed by the supreme court to the board receive and investigate complaints and report back to the court. If disciplinary action appears warranted, the court then creates a special five-member Commission of Judges to adjudicate the charge. One drawback is that a citizen's complaint has to be signed by a lawyer before the board will accept it. It is likely that such a requirement would discourage complaints from citizens and intimidate lawyers who may be none too eager to have their names associated with a complaint in the first instance.

Each commission and special court functions distinctly. There are variations in member composition, the vote needed to take action, terms of office, the final enforcing authority, as well as the reasons for action and the type of discipline which can be administered. A summary display of this information is included in Tables 3 and 4. Additional data are provided in the following analysis of the performance of these new disciplinary boards.

DIMENSIONS OF PERFORMANCE

The role of any judicial reviewing agency is two-fold: it must protect the integrity of the bench from unwarranted public criticism and it must also remove or discipline judges whose conduct adversely reflects upon their ability to serve the public. One means of determining the efficacy of these overseeing bodies is to measure their general strengths and weaknesses along five public policy dimensions.

Political Autonomy of the Reviewing Agency

There are at least two facets to the political autonomy of the reviewing tribunals: 1) their independence from other governmental institutions, and

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Commission plans

Table 1
General Characteristics

State	Year Created[a]	Name	No. of Members	Req. Vote	Terms (Yrs.)	Enforcing Authority
Alaska	1968	Commission on Judicial Qualifications	9	maj.	4	Sup. Ct.
Arizona	1970	Commission on Judicial Qualifications	9	maj.	4	Sup. Ct.
California	1960	Commission on Judicial Performance	9	maj.	4	Sup. Ct.
Colorado	1970	Commission on Judicial Qualifications	9	maj.	4	Sup. Ct.
Florida	1972	Judicial Qualifications Commission	13	2/3	6	Sup. Ct.
Georgia	1972	Judicial Qualifications Commission	7	maj.	7	Sup. Ct.
Idaho	1968	Judicial Council	7	maj.	6	Sup. Ct.
Indiana	1970	Judicial Qualifications Commission	7	maj.	6	Sup. Ct.
Iowa	1972	Commission on Judicial Qualifications	7	maj.	6	Sup. Ct.
Kansas	1974	Commission on Judicial Qualifications	9	maj.	4	Sup. Ct.
Louisiana	1969	Judiciary Commission	7	maj.	4	Sup. Ct.
Maryland	1965	Commission on Judicial Disabilities	7	maj.	4	Ct. of Appeals
Michigan	1968	Judicial Tenure Commission	9	maj.	3	Sup. Ct.
Minnesota	1971	Judicial Tenure Commission	9	maj.	4	Own and Sup. Ct.
Missouri	1972	Commission on Retirement, Removal and Discipline	6	2/3	6	Sup. Ct.
Montana	1972	Judicial Standards Commission	5	maj.	4	Sup. Ct.
Nebraska	1966	Commission on Judicial Qualifications	11	maj.	4	Sup. Ct.
New Jersey	1974	Advisory Commission on Judicial Conduct	9	maj.	nft[b]	Sup. Ct.
New Mexico	1968	Judicial Standards Commission	9	maj.	4	Sup. Ct.
North Carolina	1972	Judicial Standards Commission	7	2/3	6	Sup. Ct.
North Dakota	1975	Judicial Qualifications Commission	7	maj.	3	Sup. Ct.
Oregon	1968	Commission on Judicial Fitness	9	maj.	4	Sup. Ct.
Pennsylvania	1969	Judicial Inquiry and Review Board	9	maj.	4	Sup. Ct.
Rhode Island	1974	Commission on Judicial Tenure/Discipline	13	maj.	3	Sup. Ct.
South Dakota	1972	Judicial Qualifications Commission	7	maj.	4	Sup. Ct.
Tennessee	1971	Judicial Standards Commission	9	maj.	6	Legislature
Texas	1965	Judicial Qualifications Commission	9	maj.	6	Sup. Ct.
Utah	1969	Commission on Judicial Qualifications	7	maj.	2 & 4	Sup. Ct.
Virginia	1971	Judicial Inquiry and Review Commission	5	maj.	4	Sup. Ct.
Wisconsin	1972	Judicial Commission	9	maj.	3	Sup. Ct.
Wyoming	1972	Judicial Supervisory Commission	7	2/3	4	Sup. Ct.
Dual, special, "other" court plans						
Alabama	1973	Judicial Inquiry Commission	7		4	Ct. of the
		(Court of the Judiciary[c])	5	maj.	nft[b]	Judiciary
Connecticut	1969	Judicial Review Council	7	maj.	4	Governor & Legislature
Delaware	1969	Court on the Judiciary	5	2/3	nft	Own
Hawaii	1969	Commission for Judicial Qualifications	5	maj.	4	Governor
Illinois	1970	Judicial Inquiry Board	9		4	Courts
		(Courts Commission[c])	5	maj.	nft[b]	Commission
New York	1975	Commission on Judicial Conduct	9	maj.	4	Court on the
		(Court on the Judiciary[c])	6	2/3	nft[b]	Judiciary
Ohio	1966	Board of Commissioners on Grievances and Discipline of the Supreme Court	17	2/3	3	Commission of Judges est. by Sup. Ct.
Oklahoma	1966	Court on the Judiciary (divided into trial and appellate divisions)	9	maj.	2	Appellate
			9			Division

Source: Winters and Lowe, eds., *Judicial Disability and Removal Commissions, Courts and Procedures* (American Judicature Society: Chicago, 1973); Schoenbaum, ed., *Resource Materials for 5th National Conference of Judicial Disciplinary Commissions* (American Judicature Society: Chicago, 1976); and reports from the Commissions and Special Courts when available.

[a]Or when the board was revised to include present authority. [b]No fixed term. [c]Sanctioning authority.

Offices *cont'd*

North Central

American National Bank Building
St. Paul, Minnesota 55101
612/222-6331

Northeastern

723 Osgood St.
North Andover, Massachusetts 01845
617/687-0111

Southern

1600 Tullie Circle, NE
Atlanta, Georgia 30329
404/634-3366

Western

235 Montgomery Street
San Francisco, California 94104
415/557-1515

California *cont'd.*

affecting jury service are found in six codes. Many contain needless length and complexity.

At least five states and the Federal government have enacted unified jury acts. They deal with the sources of names of prospective jurors, qualification, summoning, length of service, payment of jurors, and certain administrative or policy requirements. With few exceptions they are short, well organized, and give courts flexibility in adapting them to local requirements.

The National Center has drafted a model of such an act for California. Staff of the Administrative Office of the Courts in consultation with the California Court Administrators and California Jury Commissioners Associations should use the draft as the basis for development of a unified jury act. □

NOTES

[1]National Center for State Courts, Western Regional office: *A Report to the Judicial Council on Jury Selection and Management,* September, 1976; and Lightfoot, Clifford S., "Jury Selection and Management," *State Court Journal,* Spring 1977, pp. 12-13, 25.

Nebraska *cont'd.*

mittee recommended that the position of non-lawyer associate county judge be abolished; that certain ministerial functions now performed by both lawyer and non-lawyer associate county judges be statutorily delegated to the clerks of court; and that the position of associate county judge be recognized as a proving ground for subsequent judicial service at the trial court level.

The special committee also proposed recommendations designed to clarify judicial nominating commission and judicial appointment procedures, to establish a judicial compensation commission, and to provide the Judicial Qualifications Commission with a broader range of sanctions for judicial misconduct, including suspension and censure, as well as the flexibility to issue advisory opinions regarding prospective judicial conduct, if desired.

In all, the special committee proposed fifty-four recommendations, including twenty-one recommendations for "immediate action" — recommendations that can and should be implemented as soon as enabling legislation, procedural rules, or policy statements can be brought to the attention of the appropriate bodies; and thirty-three recommendations for "further study" —worthwhile recommendations that either require further analysis by the judicial council and the supreme court or that cannot realistically be implemented in the near future without significant intervening activity or additional study. Included in this latter category are recommendations relating to statewide personnel systems, financial systems, and information systems development that, of necessity, depend on supreme court and judicial council decisions regarding future directions of statewide judicial system organization and administrative system development.

During 1978, the Nebraska State Bar Association will seek to implement its recommendations for immediate action. The National Center has again been asked to provide staff assistance to the association in the drafting of legislative and procedural rule materials necessary to support this effort. □

Judicial Misconduct *cont'd.*

2) where authority is allocated to administer the sanction. By this standard, the ideal disciplinary body should be independent of the three major branches of government at those stages where complaints are received and investigated. For discipline short of removal, the model agency would be given sufficient discretion to correct judicial improprieties according to their seriousness. This gives the bodies the responsibility to act swiftly without waiting for action from another institution. In those instances when a judge's behavior is so offensive as to justify removal, the sanctioning power should be carried out by another body, such as the state supreme court, upon the recommendation of the reviewing agency. In this way, the offending magistrate is afforded full constitutional protection and the use of the supreme court, or highest court, serves official notice that judicial misconduct will not be tolerated.

The California commission type of plan is politically independent. These commissions have their own staff and financing, and can act on their own initiative. In some cases they have the ability to sanction judges on their own authority.[29] Conversely, the disciplinary boards in Connecticut, Hawaii, and Ohio are mired in legislative and judicial politics. In these states, the boards seem particularly vulnerable to political

pressures because of the number of actors involved in the investigative-sanctioning process.

In most of the commission plans, the state supreme court is the final executor of discipline. The dual court and special court models assume this function for themselves. The supreme courts have the authority to accept, reduce, or reject commission recommendations. In two states, Hawaii and Tennessee, the governor and legislature, respectively, determine the final sanctioning action. Recognizing that no state agency is apolitical, it nonetheless seems more judicious to have the courts determine the final outcome rather than either of the two other branches of government.

Composition and Appointment of Membership

Another aspect of political autonomy is found in the second dimension concerning the staffing of the agencies. Ideally, all members should be appointed for their ability rather than for political purposes. Additionally, there is the question of the proper ratio between legally trained and lay personnel. Most of the commission plan members are appointed on a nonpolitical basis. Where the governor, legislature, or single group of judges has sole appointment authority, the opportunity for abusing the purpose of the committee is far greater than where the appointment power is shared among several sources. The special courts in Alabama, Delaware, Ohio, and Oklahoma exclude lay representation. The commission plans generally share appointment power, although exceptions to this are found in Maryland, Rhode Island, Utah, and Virginia.[30]

Typically the commissions are composed of judges, lawyers, and lay members. The standard procedure is for the judiciary to choose members from their own judicial level, the state bar to select the attorney members, and the governor to appoint, with senate approval, the lay representatives. Most terms of office are either for four or six years, often staggered, which provides continuity in membership without excluding new blood.

The proper ratio of judges to lawyers to citizen members on the boards is the source of some concern and controversy. The National Advisory Commission on Criminal Justice Standards and Goals recommends an ideal membership composed of judges, lawyers, and lay persons wherein no more than one-third of the members should be judges but with at least two lay people.[31] By this standard, eleven state agencies are properly staffed.[32]

Many judges retire for "personal" or "health" reasons before media publicity discredits them.

Ability to Act Expeditiously

A third dimension of performance can be determined by the amount of time it takes to remove, retire, or discipline a judge. Obviously, all interests are best served by swift resolution of a complaint. All of the states specify the amount of time the commissions have in handling a valid complaint. That is, once an accusation is to be investigated, time parameters are established for notifying the judge in question, the period for his response, time when a hearing is called, appeal, and other such procedural matters. This is not to imply, however, that the commissions act expeditiously, for they do not. In California, the three removal actions averaged one and one-half years from notice of Commission investigation to supreme court action. In Michigan the

Table 2
Composition

State	Number	Judges	Lawyers	Lay	Other
Commission Plans					
Alaska	9	5	2	2	
Arizona	9	5	2	2	
California	9	5	2	2	
Colorado	9	5	2	2	
Florida	13	6	2	5	
Georgia	7	2	3	2	
Idaho	7	2	2	3	
Indiana	7	1	3	3	
Iowa	7	1	2	4	
Kansas	9	4	3	2	
Louisiana	7	4	2	1	
Maryland	7	4	2	1	
Michigan	9	4	3	2	
Minnesota	9	3	2	4	
Missouri	6	2	2	2	
Montana	5	2	1	2	
Nebraska	11	7	2	2	
New Jersey	9	2	3	4	
New Mexico	9	2	2	5	
North Carolina	7	3	2	2	
North Dakota	7	2	1	4	
Oregon	9	3	3	3	
Pennsylvania	9	5	2	2	
Rhode Island	13	4	3	3	3 from General Assembly
South Dakota	7	2	3	2	
Tennessee	9	3	3	3	
Texas	9	4	2	3	
Utah	7	0	3	0	4 from legislature
Virginia	5	2	2	1	
Wisconsin	9	4	2	3	
Wyoming	7	2	2	3	
Dual court, special court and "other" plans [a]					
Alabama	7/5	3/3	2/2	2/0	
Connecticut	7	4		3, not specified whether lawyer or lay	
Delaware	5	5	0	0	
Illinois	9/5	2/5	3/0	4/0	
Hawaii	no distinction specified regarding composition				
New York	9/6	2/6	5/0	2/0	
Ohio	17/5	0/5	17/0	0/0	
Oklahoma	9/9	8/9	1/0	0/0	

[a] In two court states, the investigative body is indicated by the first number and the court responsible for administering the sanction by the second figure.

Source: Winters and Lowe, eds. *Judicial Disability and Removal Commissions, Courts and Procedures* (American Judicature Society: Chicago, 1973); Schoenbaum, ed., *Resource Materials for 5th National Conference of Judicial Disciplinary Commissions* (American Judicature Society: Chicago, 1976); and reports from the commissions and special courts when available.

time involved was slightly more than one year.

When the disciplinary bodies have to report to the legislature, as in Connecticut and Tennessee, or the governor, as in Hawaii, it is likely that action will be delayed longer than in those states where the supreme court acts as the final authority. The point, put simply, is that action would appear more feasible when the number of decision-makers and institutions is kept to a minimum.

Two states, Minnesota and Wisconsin, have partially solved one aspect of the time problem by vesting their commissions with the authority to discipline errant judges on their own where action short of removal or retirement is warranted. When the more serious sanction is applicable, the state supreme court assumes responsibility.

The dual court procedure in Illinois acts often and swiftly. Since 1972, the Illinois Judicial Inquiry Board has forwarded eighteen cases to the Courts Commission with a recommendation for action. The disposition of these cases by the Courts Commission averaged slightly more than three months. The longest period involved was eight months and the shortest was one month. The Illinois disciplinary apparatus is paradoxical, for the statutory language suggests unwieldy procedures for processing a complaint but in reality the system operates as the most flexible of any of the disciplinary tribunals.[33]

Viability as a Deterrent to Misconduct

The fourth dimension is a difficult one to resolve because the frequency of judicial misconduct is unknown. Presumably, any disciplinary agent must act as a deterrent to be effective. The reviewing agencies can discourage misconduct in two ways. First, and most dramatic, they can publicize their existence and actions taken in disciplining judges. Second, and equally effective although less visible, they can hasten a judge's decision to retire. Along with the fifty-seven California judges who voluntarily retired while under commission investigation, so have fourteen judges in Colorado since 1967. Regardless of the circumstances surrounding voluntary retirement, which in no way suggests improprieties, the opportunity to do so appears to create as many bench vacancies as the formal sanctioning process.

A second aspect of a tribunal's deterrent ability rests with its function as perceived by the public. For it to be a credible threat to the recalcitrant judge the public must be aware of its existence. Unfortunately, evidence suggests that when the public is conscious of such a watch-dog agency, its function is misperceived. Instead of notifying a commission of questionable behavior, complainants will be irritated over the decision in a particular matter. For example, forty-two percent of the accusations received by the Michigan Judicial Tenure Commission from 1969 to 1972 concerned the judges' decisions, not their behavior.[34] Sixteen of the twenty-seven complaints received by the Wisconsin Judicial Commission during a recent period were expressions of dissatisfaction with the outcome of the litigation.[35]

While citizens in general may be ignorant of the existence of the tribunals, as dissatisfied litigants they represent the major source of complaints. Lawyers appear a distant second in notifying the agencies of offensive judicial conduct and the aggregate statistics indicate that rarely do other judges initiate complaints against fellow judges.[36]

Regardless of variations in the mechanisms of the disciplinary bodies, the boards all present a fairly tight

screening device through which only a relatively few complaints result in actual punitive action. For the reasons discussed above, most complaints can be dismissed early in the filtering process. A comparison of the disposition of complaints for five states appears in Table 3. Although the time periods are not uniform, this does not alter the basic conclusion that few complaints are sustained formally.

The low incidence of sustained complaints does not mean that the agencies are unwilling to resolve judicial improprieties. Again, most complaints are frivolous in the first instance. Second, as the data indicate, some judges voluntarily remove themselves from the system, an important factor which is not usually reflected in the official statistics. Third, minor infractions often are resolved in an exchange of letters between the tribunals and judges; thus their corrective value is great but also is not reflected in the aggregate figures.

Available Options to Correct Errant Judicial Conduct

The authority of the disciplinary body should be broad enough to employ the proper corrective remedy to misconduct where action is necessary. As mentioned earlier, the California commission initially was limited to a recommendation of removal to the supreme court. The difficulties posed by this singular charge led to the constitutional change in 1966 allowing for a recommendation of censure where discipline short of removal was necessary. This change was hastened by the supreme court's refusal to remove a judge in 1964. The court felt that while the judge should be disciplined, the commission's request for removal was too severe.[37]

The present options available to the disciplinary bodies are evident in Table 4 along with the reasons for disciplinary action. In viewing the sanctions employed by the commissions and special courts, it is apparent that they all have the authority to remove and

Table 3
Disposition of Complaints: Five States

State and Year	Complaints	Dismissed	Investigation	Dismissed or Resolved after Investigation	Action Terminating Proceeding	Formal Sanction Requested[a]	Results of Sanctioning Authority
Illinois (1974)	132	59	73	15	(not indicated)	7	2 censures 3 reprimands 1 removal 1 suspension
New York (1974-1976)	724	441	163[b]	77	5 voluntary retirements	43	19 admonitions (2 public, 17 private) 7 requests for removal. (5 unresolved, 1 removal, and 1 reduced to censure)
Louisiana (1969-1973)	43	17	26	16	1 voluntary retirement	2	1 removal 1 retirement prior to hearing
Minnesota (1971-1972)	19	9	10	9	1 private censure	0	
California (1974)	247	211	36	31	3 voluntary retirements	2	1 removal 1 recommendation for removal reduced to censure

[a]Some judges are subject to multiple complaints, thus the figures in this column and those indicating final action may not correspond

[b]Some investigations are still pending.

Source: Illinois—Report from the Judicial Inquiry Board, December 31, 1975; New York—Final Report of the Temporary State Commission on Judicial Conduct, August 31, 1976; Louisiana—"Record of Complaints Presented to the Judiciary Commission and Route Taken to Conclusion," in Winters and Lowe, *op. cit.*, p. 406; Minnesota—"Minnesota Commission on Judicial Standards Annual Report," in Winters and Lowe, *op. cit.*, p. 417; California—Commission on Judicial Qualifications 1974 Annual Report.

retire judges for specific cause. The mildest form of punishment, the reprimand, is an option in eighteen percent of the cases. While in none of the states is the penalty of "discipline" specified, it is used in twenty-one percent of the examples. Censure is employed in half of the states. Even though most states have provisions for the suspension of a judge once formal charges have been filed, only half of the states allow for the suspension of a judge as a penalty once a charge of improper conduct is sustained. Although none of these sanctions can be taken lightly by a judge, his suspension from office is the harshest penalty available short of removal, as the three milder actions generally go unknown to the public. Few lawyers or judges and scarcely any lay persons are aware when a magi-

Table 4
Sanctions and Cause for Disciplinary Action

	Sanctions Available						Cause[a]					
State	Retire (disability)	Reprimand	Discipline	Censure	Suspend	Remove	Disability	Willful Misconduct	Failure to Perform Duties	Habitual Intemperance	Prejudicial Conduct	Other
Alabama	X			X	X	X	X	X	X	X	X	
Alaska	X				X	X	X	X	X	X	X	
Arizona	X			X		X	X	X	X	X	X	
California	X			X		X	X	X	X	X	X	
Colorado	X			X		X	X	X	X	X	X	
Connecticut	X					X	X					
Delaware	X			X		X	X	X	X			
Florida	X	X				X	X	X			X	
Georgia	X		X	X		X	X	X	X	X	X	
Hawaii	X					X	X	X	X	X	X	
Idaho	X		X			X	X	X	X	X		
Illinois	X	X		X	X	X	X	X	X	X	X	
Indiana	X			X		X	X	X	X	X	X	
Iowa	X		X		X	X	X	X	X	X	X	
Kansas	X		X	X	X	X	X	X	X	X	X	
Louisiana	X			X	X	X	X	X	X	X		
Maryland	X			X		X	X	X	X		X	
Michigan	X			X	X	X	X	X	X	X	X	
Minnesota	X			X	X	X	X	X	X	X	X	
Missouri	X		X		X	X	X	X	X	X		incompetency
Montana	X			X	X	X	X	X	X	X		
Nebraska	X					X	X	X	X	X		
New Jersey	X			X	X	X	X	X	X	X	X	
New Mexico	X		X			X	X		X	X		
New York	X	X		X	X	X	X	X	X	X	X	incompetency
North Carolina	X			X		X	X	X	X	X		
North Dakota	X		X	X	X	X	X	X	X	X	X	
Ohio	X	X			X	X	X		X	X	X	
Oklahoma	X					X	X		X	X	X	
Oregon	X			X	X	X	X	X		X		
Pennsylvania	X		X		X	X	X	X	X	X	X	
Rhode Island	X	X		X	X	X	X	X	X	X	X	
South Dakota	X			X		X	X	X	X	X	X	
Tennessee	X					X	X	X	X			
Texas	X			X		X	X	X			X	
Utah	X	X			X	X	X	X	X	X		
Virginia	X			X	X	X	X	X	X		X	
Wisconsin	X	X		X	X	X	X	X	X	X	X	
Wyoming	X			X		X	X	X	X	X	X	

[a]Willful misconduct includes willful and persistent violation of the Canons of Judicial Ethics; failure to perform includes neglect of duties; prejudicial conduct includes: (a) conduct unbecoming to a member of the judiciary, (b) reprehensible conduct, (c) gross partiality, (d) oppression in office, and (e) conduct which discredits the judiciary.

strate is reprimanded, disciplined, or censured. However, the penalty of suspension is an action on misconduct which is publicly visible.

Even when a judge has been sanctioned, this does not seem to affect his professional status at the polls. Of the five judges who have been censured in California since 1970, none has suffered an election defeat. Two magistrates retired recently, both four years after they had been censured, and the other three remain on the bench.

All of the states can retire a judge for reasons of a mental or physical disability which does, or could, permanently impair the performance of judicial duties. Only in Missouri and New York is the charge of incompetence designated as a cause for discipline although incompetence is not explicitly defined to give the term any real meaning.

CONCLUSIONS

The development of judicial qualifications commissions and special courts represents an attempt to protect judges and the public alike. Although most states have constitutional procedures for removing judges, their infrequent use does not serve as an adequate check on the competence of the bench. And, while the public can vote a judge out of office, this is rarely done. Elections are no more effective as a public means of judicial accountability than the traditional removal mechanisms.

The plans discussed in this paper can be identified as following the California commission model or the special court arrangement. Most of the attention has been directed at the California plan because it is the one most states have adopted and it appears to function more efficiently than the special court procedure, the flurry of activity in Illinois notwithstanding. The main defects with the special court plan are its lack of political autonomy, lack of flexibility in disciplining judges, membership composition (solely judges), and ability to act on a case by case basis. The commission plans are independent and enjoy the flexibility of action essential to a reviewing agency.

In evaluating any disciplinary device, one must be wary of placing too much stress on the procedural aspects. These mechanisms do not operate in a vacuum and it would be misleading to suggest that one system is more efficacious than another simply because more judges are disciplined by the former. As one observer notes, there are "subsidiary mechanisms" in the sociopolitical arena which may lessen the duties of a commission or special court.[38] Dedicated personnel can make the most laborious instrument work just as others can bring the most modern system to a grinding stop if desired.

Nonetheless, several observations can be made about these new disciplinary methods *vis-á-vis* the traditional ones:

Quantitatively, more judges are being disciplined now than in the pre-1960 period. Where the formal procedures were employed rarely to remove a judge, the contemporary devices allow for disciplining judges according to the severity of their offensive behavior. Through the new disciplinary plans at least eighty-nine judges have been formally sanctioned within the last ten years in twenty-one states. This figure includes twenty admonishments, six reprimands, thirty-five censures, nine suspensions, and nineteen removal actions. Additionally, a significantly large number of judges are resigning from the bench while under official investigation.

Qualitatively, the new procedures are more realistic and workable than the other disciplinary methods. They take less time, provide constitutional protections for the judge (lacking in the use of the concurrent resolution, for ex-

ample), and hopefully serve a deterrent function. Most importantly, the commissions, and to a lesser extent the special courts, have the political freedom absent in the traditional mechanisms.

Visibility affects discipline, and trial court judges are more susceptible to complaints because they are visible actors in the legal system. Appellate court judges are generally invisible to the public and their improprieties are known only among themselves. Additionally, trial court judges have more opportunities to exhibit improper behavior than higher court judges. Many complaints concern a judge's berating lawyers for the defense or prosecution, or the witnesses, or outbursts directed at the spectators. This situation would not occur for the appellate judge. As mentioned previously, the problems surrounding the case of a California supreme court justice resulted in the passage of a constitutional amendment to resolve similar situations in the future. The point, however, is that it is rare for an appellate court judge to be caught in the same accusatory web as a trial court judge.

In analyzing the performance of the reviewing agencies five standards have been suggested for measurement. These guidelines are rather basic and are derived more from common sense and sound administrative practices than any deeply rooted tenets of jurisprudence. As more is known of the various functions and operations of the tribunals, sophisticated indices can be employed.

NOTES

[1]George E. Brand, "The Discipline of Judges," *American Bar Association Journal* 46 (December 1960): 1315, note 2.

[2]Frank Greenberg, "The Task of the Judges," *Judicare* 59 (May 1976): 461.

[3]Jay J. Stein, "Should the Judicial Council Supervise and Investigate Judicial Conduct?" *California State Bar Journal* 15 (May 1940): 136.

[4]William T. Braithwaite, "Judicial Misconduct and How Four States Deal With It," *Law and Contemporary Problems* 35 (Winter 1970): 54.

[5]Murray S. Stedman, Jr., *State and Local Governments* (Cambridge: Winthrop, 1976), p. 157.

[6]Herbert Jacob, *Justice in America*, 2nd ed. (Boston: Little Brown, 1972), p. 109.

[7]James Eisenstein, *Politics and the Legal Process* (San Francisco: Harper and Row, 1973), p. 29.

[8]R. Stanley Lowe, "Principles of Merit Selection and Tenure Re-Examined," in *Materials from the National Conference on Judicial Selection and Tenure*, Denver, Colorado (March 19-22, 1974), compiled by the American Judicature Society, p. 140.

[9]*New York Times*, May 19, 1976.

[10]Jacob, *Justice in America*, p. 112.

[11]The standard procedure in New York City calls for potential appointees to bench vacancies to kick back a substantial sum to party coffers; See Wallace Sayre and Herbert Kaufman, *Governing New York City* (New York: Russell Sage, 1960), p. 542.

[12]Louis Banks, "The Crisis in the Courts," *Fortune* (December 1961): 90.

[13]*New York Times*, March 25, 1965.

[14]"Disorder in the Court," *Newsweek* (May 19, 1975), p. 59.

[15]*New York Times*, May 21, 1976.

[16]Howard James, *Crisis in the Courts* (New York: David McKay, 1968), p. 4.

[17]The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington: Government Printing Office, 1967), p. 32.

[18]The statutory authorization of the Commission is found in the California Constitution, Art. VI, Sec. 18. For several accounts of the Commission see Jack E. Frankel, "Judicial Ethics and Discipline for the 1970s," *Judicature* 54 (June-July 1970): 18-23, and Richard S. Buckley, "The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct," *University of San Francisco Law Review* 3 (April 1969): 244-260.

[19]The three removal actions are: Leland W. Geiler v. Commission on Judicial Qualifications, 110 Cal. Rptr. 201 (1973); Spruance v. Commission on Judicial Qualifications, 119 Cal. Rptr. 841 (1975); and Noel Cannon v. Commission on Judicial Qualifications, 122 Cal. Rptr. 778 (1975). The Supreme Court dismissed action in Charles F. Stevens v. Commission on Judicial Qualifications, 39 Cal. Rptr. 397 (1964). The Court reduced a charge of removal to censure in James J. McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512 (1974).

[20]This action is pending before a panel of seven Court of Appeals judges. See *Los Angeles Times*, January 8, 1977 for a background account of the case.

[21]*In re* Antonio E. Chavez, 9 Cal. 3d 846 (1973) and *In re* Leopoldo Sanchez, 109 Cal. Rptr. 79 (1973).

[22]The two censures are *In re* Gerald S. Chargin, 2 Cal. 3d. 617 (1970) and *In re* Bernard B. Glickfield, 3 Cal. 3d 980 (1971); the two removals are Geiler and Spruance.

[23]Censure: Chargin; removal: Cannon.

[24]*In re* Chargin.

[25]A California Superior Court judge retained 65 percent of his $45,299 annual salary for life having been granted a medical disability retirement following his plea of no contest to trespassing charges resulting from his arrest on a lewd conduct charge at a Hollywood adult theater. See, *Los Angeles Times*, November 28, 1975.

[26]Phone interview with Jack Frankel, May 30, 1975.

[27]Problems with the Court on the Judiciary have resulted in a new reform proposal. The New York legislature will consider an amendment to abolish the court in 1977, to increase the Commission to eleven members, and to give it sole power over the discipline of judges. For an anlaysis of the problems historically associated with the Court on the Judiciary see, Edwin L. Gasperini, Arnold S. Anderson and Patrick W. McGinley, "Judicial Removal in New York: A New Look," *Fordham Law Review* XL (October 1971): 1-40.

[28]See, Final Report of the Temporary State Commission on Judicial Conduct to the Governor, The Legislature and The Chief Judge of the Court of Appeals of the State of New York, August 31, 1976.

[29]Both Minnesota and Wisconsin commissions can sanction judges, short of removal, without the approval of the state supreme courts.

[30]In Maryland the governor appoints all members of the Commission on Judicial Disabilities while in Virginia the General Assembly is the sole selection body for her Judicial Inquiry and Review Commission. The Utah legislature is responsible for selecting four of its own to her seven-member Commission on Judicial Qualifications and the thirteen-member Rhode Island Commission on Judicial Tenure and Discipline elects three persons from her General Assembly.

[31]National Advisory Commission on Criminal Justice Standards and Goals, *Courts*. (Washington: Government Printing Office, 1973)
nating Commissioners' Institute, May 16, 1975,

Supreme Court of Arizona; prepared by the American Judicature Society.

[32]These states are: Georgia, Idaho, Iowa, Minnesota, Missouri, New Jersey, New Mexico, Oregon, South Dakota, Tennessee, and Wyoming.

[33]See, Report of the "Judicial Inquiry Board, State of Illinois," December 31, 1975. For a background account of the resistance of the Illinois bench to the disciplinary procedures see, "Recent Cases," *Harvard Law Review* 84 (February 1971): 1002-1012.

[34]Michigan Judicial Tenure Commission, 1972 Annual Report.

[35]Wisconsin Judicial Commission, 1972 Annual Report.

[36]Edward Schoenbaum, ed., *Resource Materials for 5th National Conference of Judicial Disciplinary Commissions* (Chicago: American Judicature Society, 1976): 134-5.

[37]Stevens v. Commission on Judicial Qualifications.

[38]Note, "Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges," *New York University Law Review* 41 (March 1966): 175.

Court Filing Fees *cont'd.*

jectionable ways filing fees can be earmarked.

> [T]he benefit derived from the efficient administration of justice is not limited to those who utilize the system for litigation, but is enjoyed by all those who would suffer if there were no such system —the entire body politic. It makes no more sense to burden litigants with paying for judicial retirement than it would to install a turnstile at the door to the governor's office and to pay his salary with admission fees charged to those who seek his counsel. If no one were to utilize the court system in any given terms, the judges' salaries would still have to be paid, and the retirement system would still require funding.[34]

It is also suggested that the constitutional infirmity in assessing costs not truly related to the conduct of a particular case is that the assessment represents a tax that the courts should be constitutionally barred from collecting. The main case cited as authority for this position is a 1951 Oklahoma case in which the court ruled that the collection of one dollar as costs for the parole fund was not a necessary expense incident to the prosecution and trial of criminal cases and that it was repugnant to the concept of separation of powers.[35] Although the case involved a cost assessed in a criminal case, not a civil case filing fee, the court's reasoning in arriving at its conclusion clearly suggests a potential legal pitfall in extensive earmarking of filing fees.

CONCLUSIONS

Many types of monetary charges are imposed by courts, usually pursuant to statutory requirements or guidelines. While fines, forfeitures, and penalty assessments are charges related to criminal cases, costs and fees are typically associated with civil cases, although some criminal courts also assess court costs against defendants. Fees are charged for a variety of court services, including case filing, probating estates, marriages, support payment, transcript preparation, and recording of titles. However, in order to simplify the issues related to court fees, this article has considered only the case filing or docket fees that are charged in all state courts to initiate civil lawsuits.

Filing fees can be classified or characterized by the methods used to compute the total fee. Itemized fees or step costs, which are charges computed for each separate paper processed or function performed by the court, have been used by state and local courts since the founding of the nation. The trend in most states, however, is to consolidate itemized fees into a single filing or flat fee, with additional costs or fees assessed only for extraordinary court services. A very few courts now use graduated fee schedules in which the filing fees vary according to the amount claimed or, in one state, the amount of judgment. Even fewer states use variable systems in which different types of cases are assessed different fees. Filing fees vary greatly throughout the country, and it is not unusual to find differences in fee structures in similar courts within individual states.

The use of filing fees in state courts in this country is based on traditions inherited from English courts where all court functionaries were compensated from fees collected for their services. As in England, fee system courts in this country gradually decreased, and most if not all judges are now paid by state or local governments.[36] However, the use of filing fees in courts continues to be looked upon as a way to offset the costs of maintaining judicial systems.

Several arguments are frequently used to support filing fee increases. The most common is that filing fees are necessary to deter frivolous litigation or to channel different types of cases to appropriate courts or other nonjudicial dispute resolution forms, such as counseling, mediation, or arbitration. Also heard is the argument that litigants should be charged fees for the private benefits they derive from the court system. And some courts and legislatures have used fee increases as the justification for obtaining needed improvements in judicial services or increasing judicial compensation.

It is doubtful that filing fees now serve to deter litigation. Filing fees are small in comparison to the overall costs of litigation, and it is likely that they can be raised or lowered within a relatively broad range with no significant impact on the number of cases filed. However, increasing or decreasing fees may have an impact on case volume in those courts where filing fees are the most significant costs that litigants pay, such as small claims courts where lawyers are not permitted or bankruptcy courts in which fees are not waived. Filing fees have also been used to channel cases to different courts within the same jurisdiction. This practice has been criticized as being unresponsive to public needs because different income classes may not have access to the same courts, or litigation for lower income groups may in fact be diverted away from the judicial system.

Court systems provide private as well as public benefits, and it is difficult, if not impossible, to separate the two types of benefits so that a "fair share" of court expenses can be assessed against litigants in the form of filing fees. Certainly justice is a general governmental function that benefits those who may not ever be litigants.[37] Rather than trying to increase or readjust fees on the basis of private benefits, it is better to acknowledge that filing fees represent charges levied by legislative bodies to raise revenue to offset the costs of operating courts, and that they have only marginal relationships to the actual costs of administering justice. From this perspective, filing fees are more like sales taxes than user fees; if you purchase certain goods, you will be required to pay taxes for the general support of the government. It is the same with fees. "It may be assumed that the administration of justice is a state function to be furnished at the state expense, but that the use made of the court by individuals is a proper source of revenue, not related to the cost of administration, but simply designed to bring money into the state treasury."[38]

Although courts should not be looked upon as sources of revenue, filing fees are and will likely continue to be significant sources of income for local and state governments. Judicial decisions have upheld the right of courts to charge fees, as long as access is not completely barred to those who cannot pay them, especially where use of the courts is mandatory. With increasing frequency, filing fees are waived for indigents, so the effect of larger filing fees probably will be felt most by lower- to middle-income groups with relatively modest claims.

Given the durability of filing fees, legislatures should use more rational bases to determine the proper amount of filing fees. There are several alternatives for computing fees, any of which would provide a more consistent and logical basis than many existing arbitrary methods. Obviously, filing fees could be established on the same basis as taxes, that is, by considering the revenue needed to maintain or increase government services and calculating the amount that must be produced

from all tax sources to meet the service requirements. However, this method could be easily abused and lead to the appearance of rationing justice.

Filing fees could be set by averaging the most frequently occurring fees and periodically readjusting the resulting average fee, using some type of cost-of-living index. Although the initial average fee might be based on traditional amounts, a base fee would be established that would assure local and state governments that court-generated revenues would continue to be readjusted on a regular basis.

Filing fees can also represent the actual minimum cost to local or state governments to commence litigation in their court systems. This method of computing fees would require an analysis of the various steps involved in commencing a lawsuit and an allocation of cost to each step of the work. Once determined, it would be easy to revise the fee on a regular basis.

Graduated fee schedules have been developed that tie fees to amounts claimed or recovered. These schedules can be related to net worth or income of complainants on a basis comparable to current income tax schemes, and fees can be varied according to the nature of the legal action. Alternatives to filing fees might also be explored, such as requiring that the fee be paid out of the amount recovered.

All of these proposals involve complicated policy questions. However, filing fees should be uniform throughout a state regardless of their method of computation. They should be simple and easy to administer, and a single filing fee is preferable to charging different filing fees for various court procedures. Certainly the system for charging fees should be logical, and circular fees, that is, fees assessed of government agencies which will eventually flow back to the same government units through the courts, should be discouraged.

The appropriate method of allocating court revenues must involve a balancing of the goals of the financing plan and the practical and political realities of the state involved. Judges and court administrators should be on guard for proposals to increase filing fees that would improperly limit public access to the courts or negatively affect the image of the judicial system. In this regard, the practice of earmarking court revenues for programs totally unrelated to courts is inappropriate. Moreover, the disadvantages and potential constitutional problems associated with earmarking strongly suggest that this practice should be discouraged by courts.

Court fee schedules that emphasize revenue production aspects of filing fees should also be avoided. The courts should be treated as essential public services, and expenditures necessary for judicial improvements should not be dependent upon increasing court revenues.

The survey demonstrated that there are no ideal fee systems. Each state has and will continue to develop its own method for setting filing fees. Court fees have existed for so long that there is a tendency to regard them as fundamental and immutably bound up with our legal institutions.[39] Perhaps it is time to look more critically at the use of court fees. The appearance of justice is important, and any system of fees that detracts from the proper administration of justice should be re-evaluated by legislatures and courts. □

NOTES

[1]The Alabama Judicial System, for example, recently faced a serious crisis when the legislature restricted judicial expenditures to the amount of revenues collected by the courts through fines and fees. Before the situation was resolved, civil

jury cases had to be delayed. *The Denver Post*, May 31, 1977.

[2]Administrative Office of the Courts, *1976 Annual Report of the Idaho Courts* (Boise, Idaho), p. 17.

[3]State of Colorado, Office of the State Court Administrator, *Annual Statistical Report of the Colorado Judiciary*, September 28, 1976, p. 33.

[4]An additional $372,659 was raised by filing fees to the Court of Appeals, and $13.7 million, or about 98 percent, of the total fees was attributable to traffic fines. An adjustment for these amounts would substantially change the civil fee percentage. The Joint Committee on Judicial Administration in the District of Columbia and the Executive Officer, *1976 Annual Report of the District of Columbia Courts*, p. 95.

[5]However, the early English law had no system of costs or court fees, and statutory fees first came into existence in the thirteenth century. "Costs have existed so long that there is a general disposition to regard them as fundamental, as immutably bound up with our legal institutions. This is a mistake; costs are not established by our constitutions, they are not the product of common law, they exist solely and entirely as creatures of statutes." Reginald Heber Smith, *Justice and the Poor*, 3rd ed. (Montclair, New Jersey: Paterson Smith, 1972), p. 20.

[6]Alaska Judicial Council, *Report on Policy Considerations for Court Fee Structures* (Anchorage, Alaska: February 1974), p. 2.

[7]Arthur D. Lynn, Jr., "Financing Modernized and Unmodernized Local Government in the Age of Aquarius," *Utah Law Review* 1971, p. 30.

[8]Alaska Judicial Council, *supra note 6*, p. 2. For a more detailed discussion of the concept of public-private benefits, we recommend Phillip Spector's article cited in the bibliography.

[9]Judge Justin Miller, quoted in American Bar Foundation, *Public Provision for Costs and Expenses of Civil Litigation* (Chicago: June 1966), pp. 20-21.

[10]Citizens Study Committee on Judicial Organization, *Report to Governor Patrick J. Lucey* (Madison, Wisconsin: January 1973), pp. 104-105.

[11]*Ibid.*, p. 105.

[12]"It is difficult to say with any degree of exactness how much it costs the taxpayer for the disposition of each case, and any effort to do so must of necessity be a mere approximation. Again, figures to compute even a rough guess are not conveniently available for any but the federal system . . . ." Leland L. Tolman, "The Taxpayer's Stake in the Courts," *Annals of the American Academy of Political and Social Science*, Vol. 287, pp. 132-133.

[13]U. S. Congress, House Committee on the Judiciary, *Fees and Costs in the United States Courts*. Hearings before Subcommittee No. 4 of the Committee on the Judiciary. Public Document No. 20, 78th Congress, First Session, November 1943.

[14]This does not mean that jury fees, witness fees, service of process fees, and other fees that vary with a case should not continue to be charged separately. This is a separate policy question that we have not addressed in this report.

[15]See American Bar Foundation, *supra note 9*, p. 9; and Phillip L. Spector, "Financing the Courts Fees: Incentives and Equity in Civil Litigation," *Judicature* 58 (February 1975), p. 330.

[16]Kentucky Revised Statutes 23A.200 (2).

[17]Lawrence H. Sharf and Frederic M. Shulman, *How Much Should We Charge for Justice? Fees and Statutory Costs Paid by Litigants in New York State* (New York: National Center for State Courts, New York State Court Financing Project, November 1977).

[18]Alice John Vandermeulen, "Reform of a State Fee Structure: Principles, Pitfalls, and Proposals for Increasing Revenue," *National Tax Journal* 17 (December 1964), p. 402.

[19]*Boddie v. Connecticut*, 401 U.S. 371 (1971).

[20]*Ibid.*, p. 383.

[21]*United States v. Kras*, 409 U.S. 434 (1973).

[22]*Manes v. Goldin*, 400 F. Supp. 23 (1975). U. S. District Court, Eastern District Court of New York.

[23]*Ibid.*, p. 30.

[24]*Ibid.*, p. 25.

[25]"Indigent Access to Civil Courts: The Tiger is at the Gates," *Vanderbilt Law Review* 26 (1973), p. 29. See also American Bar Foundation, *supra*, pp. 11-12.

[26]American Judicature Society, *Financing Massachusetts Courts* (Chicago: American Judicature Society, 1974), p. 81.

[27]California Legislature. Joint Committee on the Structure of the Judiciary. *Minutes of the Advisory Commission*, September 9, 1975.

[28]For example, Utah enacted a Judicial Retirement Act in 1971 that provided for an earmarked fee on all complaints, counter claims, and other selected pleadings. Utah Code Annotated 49-7a-15. Also, when South Dakota recently implemented a new judicial article creating a unified court system, the legislature provided specific allocations of court revenues. Public Administration Services, *The Implementation of the South Dakota Unified Judicial System* (Chicago: 1974), pp. 9-41.

[29]Richard F. Hayse, "Kansas Court Costs: The Quality of Mercy is Strained," *Washburn Law Journal* 9 (1969), p. 95.

[30]American Judicature Society, *supra* note 26, p. 82.

[31]Michigan Supreme Court, *State Financing and Management Reorganization of the Michigan Court System* (Lansing, Michigan: February 1973), p. 6.

[32]Hayse, *supra* note 29, p. 94.

[33]*Ex parte Miller*, 263 P.2d523 (1953).

[34]Hayse, *supra* note 29, pp. 96-97.

[35]*Ex parte Coffelt*, 228 P.2d 199 (1951).

[36]Justice of the Peace Courts have been among the last to discontinue compensating judges with filing fees. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the U. S. Supreme Court declared unconstitutional fee compensation systems for justices of the peace where payment depended upon a finding of guilt. Despite this ruling, fee compensation still exists in some states — for example, Arkansas and Mississippi — though payment is made based on the number of cases regardless of the justice's finding.

[37]David J. Saari, "An Overview of Financing Justice in America," *Judicature* 50 (May 1967), pp. 299-300.

[38]Kenneth Dayton, "Costs, Fees, and Expenses in Litigation," *Annals of the American Academy of Political and Social Science*, Vol. 167 (May 1933), pp. 44-45.

[39]Reginald Heber Smith, *Justice and the Poor*, 3d. ed. (Montclair, New Jersey: Paterson Smith, 1972), p. 21.

Table 1
Civil Filing Fees for Courts of General Jurisdiction
(Compiled September 1977)

State	Filing Fee	Answer Fee
Alabama	35.00	—0—
Alaska	50.00	—0—
Arizona	30.00	20.00
Arkansas	20.00[a]	—0—
California*		
Five major counties[b]	49.50	34.50
	-55.50[c]	-40.50[d]
All other counties	29.00	14.00
	-54.00[e]	-39.00[f]
Colorado*	40.00	20.00
Connecticut	50.00	—0—
Delaware		
Superior	1.00[g]	1.00
Chancery	.50[h]	.50
District of Columbia	20.00	—0—
Florida	22.00[i]	—0—
Georgia	4.00[j]	1.00
Hawaii	30.00	—0—
Idaho*	35.00	16.00
Illinois*		
Cook County	14.00	5.00
All other counties	25.00	10.00
Indiana	19.00	—0—
Iowa	7.00[k]	—0—
Kansas	35.00	—0—
Kentucky	70.00	—0—
Louisiana		
Parish of Orleans	60.00	45.00
All other parishes	1.00[l]	1.00
Maine	10.00[m]	—0—
Maryland	40.00	—0—
Massachusetts	5.00[n]	—0—
Michigan	30.00[o]	—0—
Minnesota	15.00	10.00
Mississippi		
Chancery Court	2.00	.05[p]
Circuit Court	1.00	.10[q]
Missouri	25.00	—0—
Montana	20.00	10.00
Nebraska	30.00	—0—
Nevada	32.00	25.00
New Hampshire	14.00[r]	—0—
New Jersey	60.00	30.00
New Mexico	20.00[s]	.50
New York		
Counties within NYC	50.00	—0—
Counties outside NYC	25.00	—0—
North Carolina	34.00	—0—
North Dakota	15.00	—0—
Ohio	7.50[t]	—0—
Oklahoma	25.00	—0—
Oregon	24.00	12.50
Pennsylvania		
Philadelphia and counties of second class	15.00[u]	—0—
Counties of third to eighth class	5.00	—0—
	-40.00[u]	
Rhode Island	10.00	—0—
South Carolina	12.15	—0—
South Dakota	20.00[v]	—0—
Tennessee	1.00[w]	1.00
Texas	25.00	—0—
Utah	25.00	10.00
Vermont	25.00	—0—
Virginia*	15.00	—0—
Washington	45.00	—0—
West Virginia	10.00	—0—
Wisconsin	6.00	—0—
Wyoming	5.00[x]	.50

*These states have graduated civil filing fee schedules which are described in Table 2. The fees calculated and shown in this table are based on claims of $2,000.

[a]Minimum filing fee is $20. In lengthy cases where this uniform advance fee is inadequate to cover the schedule of fees set forth in the Arkansas Statutes, additional fees may be assessed. The schedule includes some of the following fees: $2.50 for drawing, issuing, and sealing any summons or subpoena; $.60 for every motion, rule, answer, interrogatory or other miscellaneous filing; $3.00 for entering each judgment; $2.00 for swearing jury; and $1.00 for trial before court.

[b]Alameda, Los Angeles, Orange, Santa Clara, and San Diego.

[c]These figures represent the range in filing fees for these five counties. The clerk's fee, which includes a $3 Judges' Retirement Fund fee, is uniformly $33 when claims exceed $1,000. The law library fee and reporter fee vary by county.

[d]These figures represent the range in answer fees for these five counties. The clerk's fee, which includes a $3 Judges' Retirement Fund fee, is uniformly $18 regardless of the amount claimed. The law library fee and reporter fee vary by county.

[e]These figures represent the range in filing fees for all counties, excluding the five major ones. The clerk's fee, which includes a $3 Judges'

Retirement Fund fee, is uniformly $28 when the claim exceeds $1,000. The law library and reporter fees vary by county.

[j]These figures represent the range in answer fees for all counties excluding the five major ones. The clerk's fee, which includes a $3 Judges' Retirement Fund fee, is uniformly $13 regardless of the amount claimed. The law library and reporter fees vary by county.

[g]A deposit of $75 is required before any suit, action, or proceeding is instituted. This deposit is applied to step costs which range from $.50 to $25. Some of these costs include: $1 for filing reply to counter claim; $15 for issuing writ of summons; $15 for drawing jury and all services in respect to trial; $5 for entering judgment in docket, except when confessed under warrant of attorney; $1 for filing and giving written notice of interrogatories and making entry of such actions; and $1 for issuing a subpoena for each witness.

[h]The initial fee of $.50 covers the filing of any paper. Step costs, which range from $.50 to $10, include the following: $.50 for taking an affidavit; $1 for issuing subpoena or citation to give evidence; $1 for filing interrogatories, giving notice, and making entries; and $3.50 for issuing commission to take depositions.

[i]Florida has a two-part general trial court filing fee consisting of mandatory and optional filing fees. There are two mandatory fees in a civil action: a $20 statutory civil filing fee, which the clerk remits to the county general fund, and a $2 statutory general service fee, which goes to the state general fund. Optional filing fees such as those charged in Dade County ($1 docket fee for the publication of legal notices for indigents; $4.75 for law library system; $2.50 for legal aid program; and $15.25 for county capital outlay account for court facilities) can boost the total civil filing fee to as much as $45.50.

[j]A deposit of $20 is required from which step costs are drawn. The step costs range from $.25 to $15, which includes some of the following: $4 for copying and issuing process of summons; $2 for entering verdict or judgment on minutes; $.50 for issuing subpoena or summons; and $1 for the filing of each pleading or instrument subsequent to the complaint.

[k]In counties having a population of 100,000 or more, an additional fee of $1 is charged for a "journal publication" fee. Step costs range from $.50 to $5 and are charged for other services, such as $2 for every attachment; $5 for every cause tried by jury; $2.50 for every cause tried by the court; $1 for entering any rule or order; and $2 for issuing writ or order, not including subpoenas.

[l]$1 is charged for endorsing, registering, and filing the petition with the clerk of court. The following fees are some of the step costs (range $.50 to $10) charged for other services: $1 for endorsing, registering, and filing supplemental or amended petitions; $1 for issuing subpoena or summons with seal; $1 for issuing notice of judgment with seal; and $1 for swearing jury.

[m]The $10 fee covers entry of an action or entering up and recording the judgment. Step costs ($.50 to $5) are charged for other services: $.50 for every blank writ of attachment with a summons or an original summons; $.50 for entry of a rule of court upon parties submitting a cause to referees; $.50 for a subpoena or a subpoena *duces tecum;* and $2 for a writ of protection or *habeas corpus.*

[n]Step costs are charged for the following: $.10 for a blank writ of attachment and summons or an original summons; $.10 for a subpoena; and $.06 for *venire facias* for jurors.

[o]Step costs are charged for the following: $10 for each trial, with or without a jury, in counties having a population of less than 100,000; $15 for each trial without a jury and $30 for each trial with a jury in counties having a population of 100,000 or more; and $10 for the entry of any final judgment in all counties.

[p]Step costs, which range from $.05 to $3, include: $2 for docketing each case; $.10 for setting down cause for hearing; $.25 for administering and certifying each oath; $.10 for swearing each witness; $1 for each subpoena; and $.05 for filing each bill, answer, or other paper.

[q]Step costs, which range from $.10 to $10, include: $1 for docketing a case; $.25 for entering each appearance of a defendant; $1 for entering each motion or rule on the docket; $.10 for swearing each witness; $.50 for receiving and entering verdict; $1 for recording each judgment; $1 for each subpoena; and $.10 for filing each bill, answer, or other paper.

[r]Step costs, which range from $.20 to $10, include some of the following: $1 for each additional party, plaintiff, or defendant; $10 for petition to attach, *ex parte;* $5 for petition to attach with notice; $3 for executions; and $.20 for an original writ.

[s]This $20 initial fee is computed as follows: $13.75 base rate; $2.75 for compilation fund; and $3.50 for Supreme Court building addition fund.

[t]This initial fee of $7.50 includes docketing in the appearance docket, filing and noting the filing of necessary documents except subpoenas, entering cause on trial and motion dockets, and indexing pending suits and living judgments. Step costs which range from $.35 to $6 include: $.75 for issuing each writ, order, or notice, except subpoena; $.75 for each name for issuing subpoena, swearing witnesses, entering attendance and certifying fees; and $6 for calling a jury in each cause.

[u]According to the Administrative Office of Pennsylvania Courts, passage of a bill to change these fees is expected in the fall of 1977.

[v]Includes $10 paid when case is filed and $10 paid when case goes to trial by judge or by jury.

[w]The $1 initial fee covers the filing of each bond, bill, complaint, motion, or other pleadings, documents, exhibits, or articles, affidavit, record or papers. Court clerks for both circuit and chancery courts may charge the following step costs which range from $.50 to $35: $1.50 for issuing subpoena for each witness; $4 for taking a deposition; $1 for empaneling a jury; $4 for examining a party in interrogatories; and $2 for entering judgment.

[x]The initial fee of $5 is charged for a case with five defendants or less and $.25 for each additional defendant. Step costs which range from $.25 to $10 include: $.75 for issuing a commission to take deposition; $.50 for taking, certifying, and sealing an affidavit; and $.50 for each certificate and seal.

Table 2
Courts of General Jurisdiction with Graduated Civil Filing Fees
(Compiled September 1977)

California

Filing fee (based on amount claimed of $1,000 or less)	*All Counties*
Clerk's fee	$15.00
Law Library fee	1.00-7.00
Reporter fee	0-20.00
Total	$16.00-41.00

Filing fee (based on amount claimed of over $1,000)	*Alameda, Los Angeles, Orange, Santa Clara, San Diego*	*All other counties*
Clerk's fee	$ 33.00	$ 28.00
Law library fee	5.00- 7.00	1.00- 7.00
Reporter fee	10.50-15.50	0-20.00
Total	$ 49.50-55.50	$ 29.00-54.00

Answer fee (regardless of amount claimed)	*Alameda, Los Angeles, Orange, Santa Clara, San Diego*	*All other counties*
Clerk's fee	$ 18.00	$ 13.00
Law library fee	5.00- 7.00	1.00- 7.00
Reporter fee	10.50-15.50	0-20.00
Total	$ 34.50-40.50	$ 14.00-39.00

Colorado

Filing fee of $40 (plus an additional fee based on amount of judgment)	*Additional fee*	*Answer fee*
Over $ 5,000-10,000	$10.00	None
Over $10,000-20,000	30.00	
Over $20,000-30,000	50.00	
Over $30,000-50,000	90.00	
Over $50,000	90.00 plus $2.00 for each $1,000 above $50,000	

Idaho

Filing fee (based on amount claimed)	*Filing fee*	*Answer fee*
$0-300	$15.00	$5.00
Over $300-1,000	17.00	16.00
Over $1,000	35.00	16.00

Illinois

Cook County

Filing fee (based on amount claimed)	*Filing fee*	*Amount claimed*	*Appearance fee*
$0-500	$ 7.00	$0-200	$ 1.00
Over $500-1,000	10.00	Over $200-5,000	5.00
Over $1,000-5,000	14.00	Over $5,000-10,000	10.00
Over $5,000-10,000	25.00	Over $10,000	12.00
Over $10,000	30.00	Over $10,000	12.00

Illinois *cont'd.*

All other counties

Filing fee (based on amount claimed)	*Filing fee*	*Answer fee*
$0-500	$10.00	$5.00
Over $500-10,000	25.00	10.00
Over $10,000	40.00	15.00

Virginia

Filing fee (based on amount claimed)	*Filing fee*	*Answer fee*
$0-500	$5.00	None
Over $500-5,000	15.00	
Over $5,000-50,000	25.00	
Over $50,000	30.00	

Table 3
Civil Filing Fees
For Selected Courts of Limited Jurisdiction
(Compiled September 1977)

State	Filing Fee	Answer Fee
Alabama: District	25.00	—0—
Arizona: Justice*	10.00	5.00
California:		
Municipal	11.00	6.00
	-31.50[a]	-26.50[b]
Justice	5.00	2.00
	-11.00[c]	
Colorado: County	8.00	8.00
Connecticut: Common Pleas	25.00	—0—
Delaware: Common Pleas	2.00	1.00
Florida: County*	20.00	—0—
Georgia: Justice	.50[d]	.50
Hawaii: District	10.00	—0—
Idaho: Magistrate Division*	35.00	16.00
Indiana: County	10.00[e]	—0—
Kentucky: District*	25.00	—0—
Maine: District	5.00	—0—
Massachusetts: District	5.00	—0—
Michigan: District	12.00	—0—
Minnesota:		
County	15.00	10.00
Municipal	3.00	3.00
Nebraska:		
County	11.00[f]	—0—
Municipal	11.00[f]	—0—
New Hampshire: District	3.00	—0—
New Jersey: County*	10.00	—0—
New York: County		
Counties within New York City	25.00	—0—
All other counties	10.00	—0—
North Carolina: District*	24.00	—0—
North Dakota: County	15.00	—0—
Oregon: District	10.00	3.50
Rhode Island: District	3.00	—0—
South Dakota: County	20.00[g]	—0—
Utah: Salt Lake City Court[h]	7.00	—0—
Vermont: District	10.00	—0—
Virginia: District	5.00	—0—
Washington:		
Justice	6.00	—0—
Municipal	6.00	—0—
Wyoming: Justice	5.00	1.00

*These states have graduated civil filing fee schedules which are described in Table 4. The fees shown on the chart are based upon claims of $2,000.

[a]These figures represent the range in filing fees. The clerk's fee, which includes a $2 Judges' Retirement Fund fee, is $10 in all counties. The law library and reporter fees vary by county.

[b]These figures represent the range in answer fees. The clerk's fee, which includes a $2 Judges' Retirement Fund fee, is $5 in all counties. The law library and reporter fees vary by county.

[c]These figures represent the range in filing fees. The clerk's fee is $4 in all counties; the law library fee varies by county; but the reporter fee is not included in the filing fee.

[d]Step costs, which range from $.50 to $5.00, include: $1 for docketing each case; $2 for each original summons: $2 for entering judgment in each case; $.75 for each witness sworn; and $3 for trial of each case.

[e]The $10 filing fee consists of $4 for clerk's service fee and $6 for sheriff's service fee.

[f]Includes $1 retirement fee.

[g]Of the $20, $10 paid when case is filed and $10 paid when case goes to trial by judge or by jury.

[h]All city courts in Utah will become circuit courts in 1978 and will have uniform fees.

Table 4
Courts of Limited Jurisdiction with Graduated Civil Filing Fees
(Compiled September 1977)

State and Amount Claimed	Filing Fee	Answer Fee
Arizona		
$0-500	$ 5.00	$ 5.00
Over $500	10.00	5.00
Florida		
Less than $100	$ 6.00	None
Between $100 and 1,000	15.00	
Over $1,000-2,500	20.00	
Idaho		
$0-300	$15.00	$ 5.00
Over $300-1,000	17.00	16.00
Over $1,000	35.00	16.00
Kentucky		
$0-500	$10.00	None
Over $500	25.00	
Michigan		
$0-500	$ 5.00	None
Over $500-3,000	12.00	
Over $3,000	20.00	
New Jersey		
$0-500	$ 8.00	None
Over $500	10.00	
North Carolina		
$0-500	$11.00	None
Over $500	24.00	
Utah		
$0-500	$ 5.00	None
Over $500-$2,500	7.00	

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Table 5
Civil Filing Fees for Selected Small Claims Courts

Court Location	*Filing Fee*	*Answer Fee*	*Service of Process by*	*Separate Fee for Service*	*Minimum Total Fees*
Alabama (Birmingham)	$ 10.00	—0—	Certified Mail	None	$ 10.00
California (Sacramento)	2.00	—0—	Certified Mail	$ 1.50	3.50
Colorado (Denver)	9.00	$ 4.00	Certified Mail or Personal Service	Varies	13.00
Connecticut (Bridgeport)	6.00	—0—	Certified Mail	None	6.00
District of Columbia	1.00	—0—	Certified Mail	.55	1.55
Idaho (Boise)	5.00	—0—	Registered or Certified Mail or Sheriff	Varies	5.00
Iowa (Des Moines)	9.00	—0—	Certified Mail	None	9.00
Michigan (Grand Rapids)	5.00	—0—	Certified Mail	2.00	7.00
Minnesota (Minneapolis)	2.00	—0—	First Class Mail	None	2.00
Nebraska (Omaha)	3.00[a]	—0—	Certified Mail	None	3.00
New York (Manhattan)	2.00	—0—	Certified Mail	2.48	4.48
Oklahoma (Oklahoma City)	3.00	—0—	Certified Mail	1.00	4.00
Oregon (Eugene)	8.00	1.00	Sheriff	6.00	15.00
South Dakota (Pierre)	5.00[b]	—0—	Certified Mail	.98	5.98
Texas (Dallas)	7.00	—0—	Sheriff	None	7.00
Utah (Salt Lake City)	3.00	—0—	Sheriff	2.00 plus .50/mile	5.00
Vermont (Montpelier)	10.00[c]	—0—	Certified Mail	.98	10.98
Washington (Spokane)	1.00	—0—	Certified Mail	1.00	2.00
Wyoming (Cheyenne)	5.00	—0—	Sheriff	2.00	7.00

Source: Small Claims Court Project, National Center for State Courts, and telephone survey. Cities in parentheses are the locations of the courts supplying information shown in the table.

[a]Includes a $1.00 judicial retirement fee.

[b]Includes a $1.00 law library fee.

[c]Graduated Schedule: 0 to $100, $5; above $100, $10.

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TV Comes to the Courts *cont'd.*

sentiments are echoed on the trial level by Judge Robert Hodnette, Jr., of Mobile, who allowed coverage of a first degree murder trial. "They [the cameras] kept me . . . and all the personnel on [our] toes." He added that the coverage "increased the dignity of the proceedings."[43]

Nevada

Despite a permissive canon,[44] trials have rarely been televised in Nevada. Judge Keith Hayes allowed television coverage of the Howard Hughes probate hearings in 1977, one of the few cases to be so covered. More noteworthy is the murder trial of Xavier P. Solarzano. In June 1976, KLAS TV in Las Vegas became the first commercial station to broadcast in color an actual murder trial during prime time.[45] The broadcast, which lasted five hours and was aired on three consecutive evenings, resulted from sixty hours of videotaped courtroom activities. Reaction to the broadcast was favorable. Judge Carl J. Christensen, who presided over that trial, stated in a letter to the station manager, "I am very proud of our association in this television production which very accurately portrayed to the general public a little understood procedure."

Washington

Effective September 20, 1976, the Supreme Court of Washington amended Canon 3A(7) of the Code of Judicial Conduct to allow photographing, broadcasting, and television news coverage of court proceedings for the first time in the state's history. Coverage is allowed in both the trial and appellate courts. Washington's new rule resulted from the efforts of that state's Bench-Bar-Press Committee. At the request of the committee, the Washington Supreme Court authorized the experimental videotaping of a negligent

homicide trial in December 1974. According to Superior Court Judge Stanley C. Soderland, who presided over the trial, "All judges and lawyers who viewed the cases were surprised at the minimal or nonexistent distraction caused by the camera and news media. Everyone, without exception, came into church to scoff and stayed to pray."

As a result of the highly favorable reaction to the experiment, the Washington Supreme Court amended the code of judicial conduct 3A(7) to permit broadcasting under certain circumstances, and published illustrative guidelines that, while not officially adopted by the court, discuss pooling arrangements, broadcast equipment, and the decorum of broadcast representatives.

According to Judge Soderland, "News coverage of trials in Washington has been a success [and] no major problems have developed."

Statistics have not been kept on the number and type of trials that have been covered by the broadcast media. According to Judge Soderland, however, the news media have used the privilege sparingly, as there are not many trials worth the cost and effort. James Murphy, President of the Washington State Association of Broadcasters, estimates that no one television station has made more than fifteen appearances with cameras in the courtroom in the one year since adoption of the new rule.

Georgia

In February 1977, Chief Justice H. E. Nichols announced the Georgia Supreme Court's intention to allow cameras in the courtroom, stating that it will help "move the legal system of Georgia into the Twentieth Century."

In late March, Nichols invited twenty-nine representatives of the Georgia news media to propose rules for televising and broadcasting supreme court proceedings. The committee's proposed rules emphasized the importance of maintaining courtroom decorum: "Although the court is making an extraordinary effort to open up its proceedings to broader media coverage, it is essential that the dignity and purpose of the Court be maintained. Therefore those agencies admitted for news coverage should be legitimate and are expected to familiarize themselves with the rules of the Court."

The committee also recommended that the court appoint one officer to manage press credentials and other arrangements, including publishing a court calendar of cases that have been cleared for media coverage well in advance.

As a result of the advisory committee's report on May 12, 1977, the Supreme Court adopted an amendment to Canon 3(A) of the Code of Judicial Conduct and adopted rules requiring that written consent from attorneys and parties, if present, shall be obtained on a form available from the clerk's office. They also allow no more than four still photographers and three television cameras in the courtroom at any one time. The Supreme Court's plan for camera coverage of its proceedings encompasses nineteen rules in all, most concerning the location and movement of media personnel.

On September 12, 1977, Georgia's Supreme Court made its broadcasting debut. As of this writing, five or six oral arguments have been televised. According to Charles Webb, an aid to Chief Justice Nichols, there have been "no complaints, no incidents, and no playing to the cameras."

Television has not yet reached Georgia's trial courts, but it is only a matter of time. In October 1977, the Supreme Court approved the first plan for trial court coverage by the electronic media.

Florida

On July 5, 1977, the Florida Supreme Court began a one-year experiment allowing cameras in both the appellate and trial courtrooms. The experiment is unusual in that Florida became the only state to permit camera coverage without the consent of courtroom participants.[46]

In an effort to ensure that court proceedings would not be disrupted, the Supreme Court set down specific guidelines for the pilot program, including a list of approved cameras and tape recorders by brand name.

Some of the more important guidelines state:

—Only one television camera, one still photographer, and one audio system shall be permitted in the courtroom.

—Equipment must not produce distracting sound or light. No auxiliary lighting may be used.

—There shall be no audio pickup between attorneys and their clients, between counsel of a client, or between counsel and the presiding judge held at the bench.

—No media materials from trials during the pilot program may be used as evidence in any related proceedings.

To date, courtroom proceedings have been broadcast an average of three times a week in Florida. (Judging from experience in other states, this will probably decrease substantially when the novelty wears off.) The reaction so far has been predominantly favorable.

"I was pleased," said Judge C. Michael Shallowag. "I didn't think the filming was distracting or disruptive, which was my biggest fear since I was opposed to it initially."

The final verdict on Florida's cameras in the courtroom pilot project will not be rendered until June 30, 1978, when the experiment ends. At that time, judges, media, and courtroom participants will furnish the Supreme Court with a report of their experiences so that the court can determine whether the canon should be modified to allow permanent broadcast coverage in the courts of Florida.

Kentucky

On August 23, 1977, fourteen judges from the Jefferson Circuit Court (the circuit encompassing Louisville) signed the following resolution:

> In recognition of the First Amendment of the Constitution of the United States, Sections 8 and 14 of the Bill of Rights of the Constitution of Kentucky, and in the interest of the general public in the judicial system, the undersigned judges of this Court grant unrestricted access to their respective Courts to the media (press, television, radio), except as hereinafter provided:
>
> Unrestricted access includes, but is not limited to, filming and recording of public trials.
>
> The undersigned judges, however, reserve the right to restrict access in the following situations:
>
> 1) If the media coverage becomes disruptive to the orderly proceedings;
>
> 2) in sensitive situations involving children and in any matters of domestic relations.

The decision of fourteen of the sixteen circuit judges to allow cameras in their courtrooms was made after a demonstration in June of the unobtrusive operation of broadcast equipment.

The resolution is unusual in that it grants the broadcast media unrestricted access to the courtroom; that is, permission of the parties need not be obtained.

New Hampshire

On October 12, 1977, the Supreme Court approved an amendment to the

Code of Judicial Conduct (Supreme Court Rule 25) to allow recording, photographing, and radio and television broadcasting in New Hampshire's Superior Court (the trial court of general jurisdiction). The decision on whether to allow broadcast coverage of a trial will be left to the discretion of the trial judges, provided that disruption, inconvenience to the parties, and other reasonable objections are considered. The rules, however, contain no provision requiring the written permission of the parties involved.

On December 6, 1977, an order was adopted allowing broadcast coverage of oral arguments heard before the New Hampshire Supreme Court. Prior notice to the clerk and consent of the court are prerequisites for such coverage.

The rule changes became effective January 1, 1978, and as of this writing, there have not been any trials televised pursuant to the change in rule.

FUTURE DEVELOPMENTS

The status of camera coverage of court proceedings is changing rapidly. As of December 1977, four states were considering some modification of their judicial canons governing broadcasting of trials, and the ABA House of Delegates again addressed the issue at their February 1978 midyear meeting.

On June 24, 1977, several Montana newspeople made a presentation regarding camera coverage of courtroom proceedings before a meeting of the Montana Bar Association. The presentation, made at the suggestion of Chief Justice Paul Hatfield, included videotapes, film strips, and a panel discussion involving representatives of the news media and judges who had presided over televised trials. As a result of the favorable reaction to the presentation, the Supreme Court of Montana appointed a committee to investigate and consider proposed changes to Canon 35 of the Canons of Judicial Ethics that currently bars cameras from the courtroom. Montana Judicial Canon 35 notwithstanding, District Court Judge Gordon Bennett, formerly a news reporter who believes that the courtroom falls under Montana's open meetings statute, [47] has allowed a reporter to record a kidnaping trial for radio broadcast.

In July 1977, Idaho Chief Justice Joseph McFadden, in his State of the Judiciary address, called for the Supreme Court to consider allowing television broadcasting of judicial proceedings in the Idaho Supreme Courts.[48] The Idaho Supreme Court has yet to reach a determination in the matter.

In West Virginia, Professor William Seymour of the West Virginia University School of Journalism has conducted a demonstration of the use of modern broadcasting equipment in the courtroom. Circuit Judge Lawrence Starcher, who witnessed the demonstration, has agreed to allow camera coverage of a trial of his choice, provided the attorneys involved give their consent. Professor Seymour is hopeful that the results of this experiment will be presented to the West Virginia Supreme Court and eventually lead to a modification of the state's current antibroadcast stance.

Members of the broadcast media in Minnesota have approached that state's chief justice for a change in the court rules restricting broadcasting. Chief Justice Sheran has indicated he would like to have the recommendation of the bar before modifying the rule. In their November 1977 meeting, the Board of Governors of the Minnesota Bar unanimously approved a set of guidelines for broadcast coverage of court proceedings. A media presentation will be made at the next convention in June 1978, at which time the state bar association will vote on the proposed guidelines.

New York's rules governing judicial conduct currently indicate that with appropriate safeguards, a judge could properly admit camera crews into court to record trials.[49] To date, this proviso has apparently not been used to permit broadcasting in the courtroom.

At the American Bar Association's annual meeting in August 1977, the Legal Advisory Committee on Fair Trial and Free Press of the ABA reported that it "favors the emerging trend" toward allowing cameras in the courtroom. Taking the position that electronic coverage does not inherently interfere with the right to a fair trial, the committee said, "As long as this coverage does not upset courtroom decorum or unduly distract trial participants, there is no sound reason for refusing to allow it."[50]

The committee's guidelines were refined and presented in their final form for action by the ABA House of Delegates at the ABA's midyear meeting in February 1978.

In July 1977, Richard Spangler, President of the Radio and Television News Association of Southern California (RTNASC), taped a divorce proceeding taking place in the Los Angeles Superior Court. Although all parties had consented to the recording, Judge Harry T. Shafer invoked the ban contained in California Judicial Conduct Rule 980[51] and took custody of the tapes. As a result, the RTNASC intends to seek a writ of mandate to overturn California Rule 980. According to the Association's attorney, the issue will be carried to the United States Supreme Court if necessary.

CONCLUSION

It is difficult to measure the relative merits of the arguments for and against televising trials. Both sides have their ardent supporters. Every cry of "psychological disturbance" is met with an equally loud response of "freedom of the press." Nevertheless, the telling voice of experience cannot be ignored. In the jurisdictions that have allowed cameras in the courtroom, the response has been overwhelmingly favorable.

The broadcast media have not, as opponents feared, inundated the courts. The high cost involved in covering a trial (estimated at $12,000 for the five and one-half hour telecast of the Solarzano trial in Nevada) combined with the great demands of personnel time, which most television and radio news departments can ill afford, have kept broadcast coverage of trials to a minimum. In twenty-one years of trial broadcasting in Colorado, the grave apprehensions postulated by opponents to televised trials have not come to pass. Significantly, in Colorado there has not been one reversal due to television's alleged infringement of one's right to a fair trial.

Safeguards such as pooling arrangements, the requirement of written consent of all parties, and the ability of any witness to halt the broadcasting or photographing by his or her expressed objection have been and should continue to be provided to ensure that the administration of justice is not hindered. The use of these safeguards should allow every state in the country to open the doors of its courtrooms to the broadcast media, if only on an experimental basis. □

See chart on page 55

Update

Since the writing of this article a number of important developments have occurred that indicate television may have begun to have an effect on the courts.

After six months of the one-year experiment involving caseloads in Florida courtrooms, a recent report, "Conduct of Audio-Visual Trial Coverage," considers the pilot experiment a success. An example is the conduct of the Zamora trial viewed by millions as a regularly scheduled program on WPBT.

The Conference of Chief Justices discussed and debated the pros and cons of the media coverage of court proceedings during its midyear meeting held in New Orleans, February 9-10. The Conference adopted a resolution for appointment of a committee "to study the possible amendment of Canon 3A(7) of the Code of Judicial Conduct to permit electronic and photographic coverage of the courts." A committee of 15 chief justices has been named with Chief Justice Ben F. Overton of Florida as the chairman. The committee will present its report and recommendations at the 1978 annual meeting to be held in Burlington, Vermont.

Fair Trial and Free Press Committee of the American Bar Association during its midwinter meeting in New Orleans, February 8-15, released a revised draft of proposed standards that, for the first time, recognizes that cameras in the courtroom are "not . . . inconsistent with the right to a fair trial."

The draft, which the ABA will consider at its annual meeting in August, states that "such coverage should be permitted if the court in the exercise of sound discretion concludes that it can be carried out unobtrusively and without affecting the conduct of the trial."

Four more states—Louisiana, Minnesota, Montana, and Wisconsin—in addition to the nine listed in the article, now permit partial or experimental television of their courts.

NOTES

[1]This article deals with still camera, radio, and television coverage of trials. Unless otherwise noted, the terms *camera coverage, broadcasting,* and *televising of trials* are used interchangeably.

[2]American Bar Association Canons of Judicial Ethics No. 35 (1937).

[3]Warden, "Canon 35: Is There Room for Objectivity?" 4 *Washburn Law Journal* 211 (1965).

[4]Special Committee on Proposed Revision of Judicial Canon 35, *Reports of American Bar Association* (1963), vol. 88, p. 305.

[5]*Id.* at 305.

[6]*Id.* at 308.

[7]381 U.S. 532 (1965).

[8]Warden, *supra* note 3, at 228.

[9]*In re Hearings Concerning Canon 35,* 132 Colo. 591, 296 P.2d 465, 470 (1956).

[10]Cantrall, "A Country Lawyer Looks at Canon 35," 47 *ABA Journal* 761 (1961).

[11]381 U.S. at 545-547.

[12]384 U.S. 333 (1966).

[13]Roberts, "The Televised Trial: A Perspective," 7 *Cumberland Law Review* 323, 333 (1976).

[14]381 U.S. at 571 (1965).

[15]Simonberg, "TV in Court: The Wide World of Torts," *Juris Doctor,* April 1977 at 44, quoting Richard M. Schmidt, Jr., general counsel to the American Society of Newspaper Editors.

[16]*Whitney v. California,* 274 U.S. 357, 376 (1927).

[17]*United States v. Dickinson,* 465 F.2d 496, 507 (5th Cir. 1972), quoting *Craig v. Harney,* 331 U.S. 367, 376 (1946).

[18]Roberts, *supra* note 13, at 335.

[19]381 U.S. 532 (1965).

[20]*Id.,* at 542. See *id.* at 596 (concurring opinion).

[21]Daly, "Radio and Television News and Canon 35," 6 *Nebraska State Bar Journal* 125 (1957).

[22]"In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial . . . ." *U.S. Constitution,* Amendment VI.

[23]*People v. Kerrigan,* 73 Cal. 222, 224, 14 P. 849, 850 (1887).

[24]*United States ex rel. Orlando v. Fay,* 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied,* 384 U.S. 1008 (1966).

[25]*United States v. Kobli,* 172 F.2d 919, 924 (3d Cir. 1949).

[26]381 U.S. at 588 (Harlan, J., concurring).

[27]*In re Hearings Concerning Canon 35,* 132 Colo. 591, 296 P.2d 465, 469 (1956).

[28]The states are covered in rough chronological order according to the date when television coverage was first allowed. A definite chronological ranking is difficult, as some states—such as Texas—have changed their regulations several times.

[29]Remarks by Colorado Chief Justice Edward Pringle to the Montana Bar Association (June 25, 1977).

[30]*In re hearings Concerning Canon 35,* 132 Colo. 591, 296 P.2d 465 at 468 (1956).

[31]Colorado Code of Judicial Conduct No. 3A(8)-(10).

[32]Warden, *supra* note 3, at 228. Justice Hall's speech is reported in abbreviated form in 48 *ABA Journal* 1120 (1962).

[33]*Id.* at 228.

[34]Simonberg, *supra* note 15, at 44.

[35]*Id.* at 44.

[36]"Judicial Canon 28 of the Integrated State Bar of Texas," 27 *Texas Bar Journal* 102 (1964).

[37]381 U.S. 532 (1965).

[38]*Bird v. State,* 527 S.W.2d 891, 895-896 (Tex. Crim. App. 1975).

[39]Alabama Canons of Judicial Ethics No. 3A(7A)(a).

[40]*Id.,* No. 3A(7A)(b)(c).

[41]*Id.,* No. 3A(7A)(c).

[42]*Id.,* No. 3A(7B).

[43]Associated Press Managing Editors Association, "Cameras in the Courtroom: How to Get 'Em There," at 11 (an Associated Press Managing Editors Association Freedom of Information Report).

[44]Nevada Supreme Court Rule 240.

[45]Robert Stoldal, News Director of KLAS TV, indicated that it took several months to choose a suitable trial for broadcast. One defendant who gave his permission pleaded guilty before the trial. Another, while out on bail, was shot and killed during a holdup.

[46]While consent of the courtroom participants is not formally required in New Hampshire, the trial judge must take into account inconvenience to the parties and other reasonable objections. See section on New Hampshire, *infra.* See also section on Kentucky, *infra.*

[47]Montana Revised Codes Annotated, §82-3405.

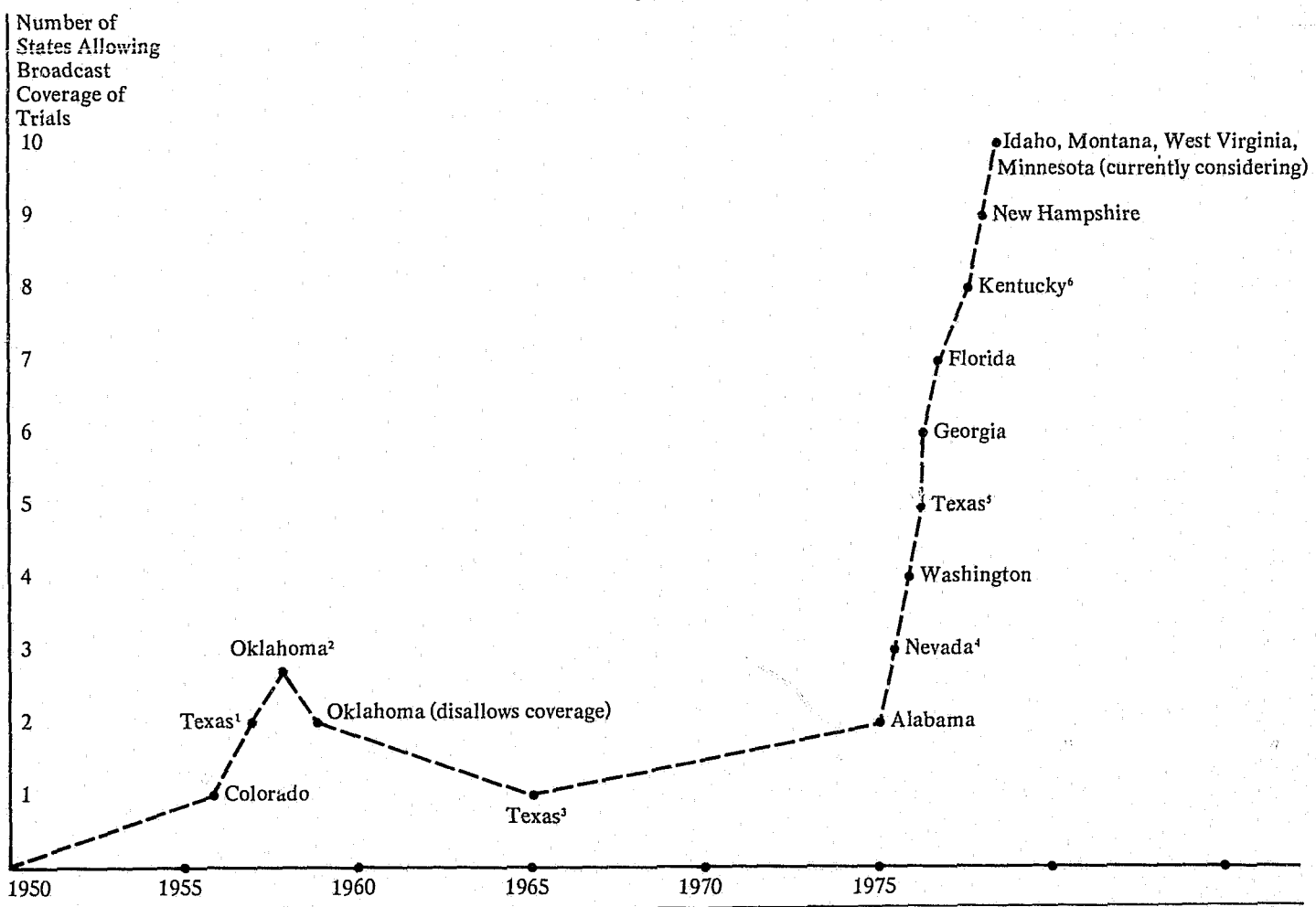
[48]Idaho Chief Justice McFadden said, "There is a need to open up judicial proceedings to the public and provide a heightened awareness of legal rights and responsibilities. Television drama and government scandals involving lawyers are not the best conveyors of understanding about the courts and the legal community."

[49]Judicial Conference Rules §33.3(a) (7), 25 N.Y. Civ. Prac. Supp. 54-55 (1976) (permission of Chief Judge of Court of Appeals or Presiding Justice of Appellate Division required). App. Div. Rule §605.1 at 125. *Cf.* N.Y. Code of Judicial Conduct, Canon 3(A)(7) (McKinney 1975).

[50]"Fair Trial Guides Have New Tone, Emphasis," 63 *American Bar Journal* 1186 (September 1977).

[51]Rule 980 allows photographing, recording, or videotaping to perpetuate the record but mandates that "the court must take adequate precaution to assure that any photographs, tapes or recordings of court proceedings will remain in the custody of the court or its offices and will be used only for judicial purposes."

HISTORY OF BROADCAST COVERAGE OF TRIALS



[1]Report of Special Bar Committee recommends allowing trial coverage.

[2]The Oklahoma Supreme Court held in *Lyles v. State* (Okla. 1958) 330 P.2d 734 that trial judge may allow television coverage. In 1959, Oklahoma adopted a restrictive canon prohibiting television coverage.

[3]Coverage in Texas slackens as a result of *Estes v. Texas* U.S. Supreme Court decision.

[4]Although Nevada adopted a permissive canon in 1965, first major television coverage did not take place until June 1976.

[5]Texas modifies canon to allow coverage in appellate courts.

[6]Jefferson County, Kentucky, allows cameras in the courtroom.

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