



**THE
JUDICIAL COUNCIL
OF
NEW MEXICO**

**TENTH
ANNUAL REPORT**

DECEMBER 31, 1978

54607

**NEW MEXICO
JUDICIAL
COUNCIL**

NEW MEXICO LAW CENTER
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January 2, 1979

NCJRS

The Honorable Bruce King, Governor
State of New Mexico

FEB 14 1979

The Honorable Members of the
New Mexico State Legislature

ACQUISITIONS

The Honorable Justices of the
New Mexico Supreme Court

Dear Governor, Members of the Legislature, and Justices of
the Supreme Court:

I am submitting herewith the 1978 annual report of the New Mexico Judicial Council pursuant to Section 16-10-5, New Mexico Statutes Annotated, 1953 Compilation, which directs the Judicial Council to "submit a report of its proceedings and recommendations to the legislature, the governor and the Supreme Court each year."

Respectfully submitted,

B. C. Hernandez
B. C. Hernandez, Chairman
New Mexico Judicial Council

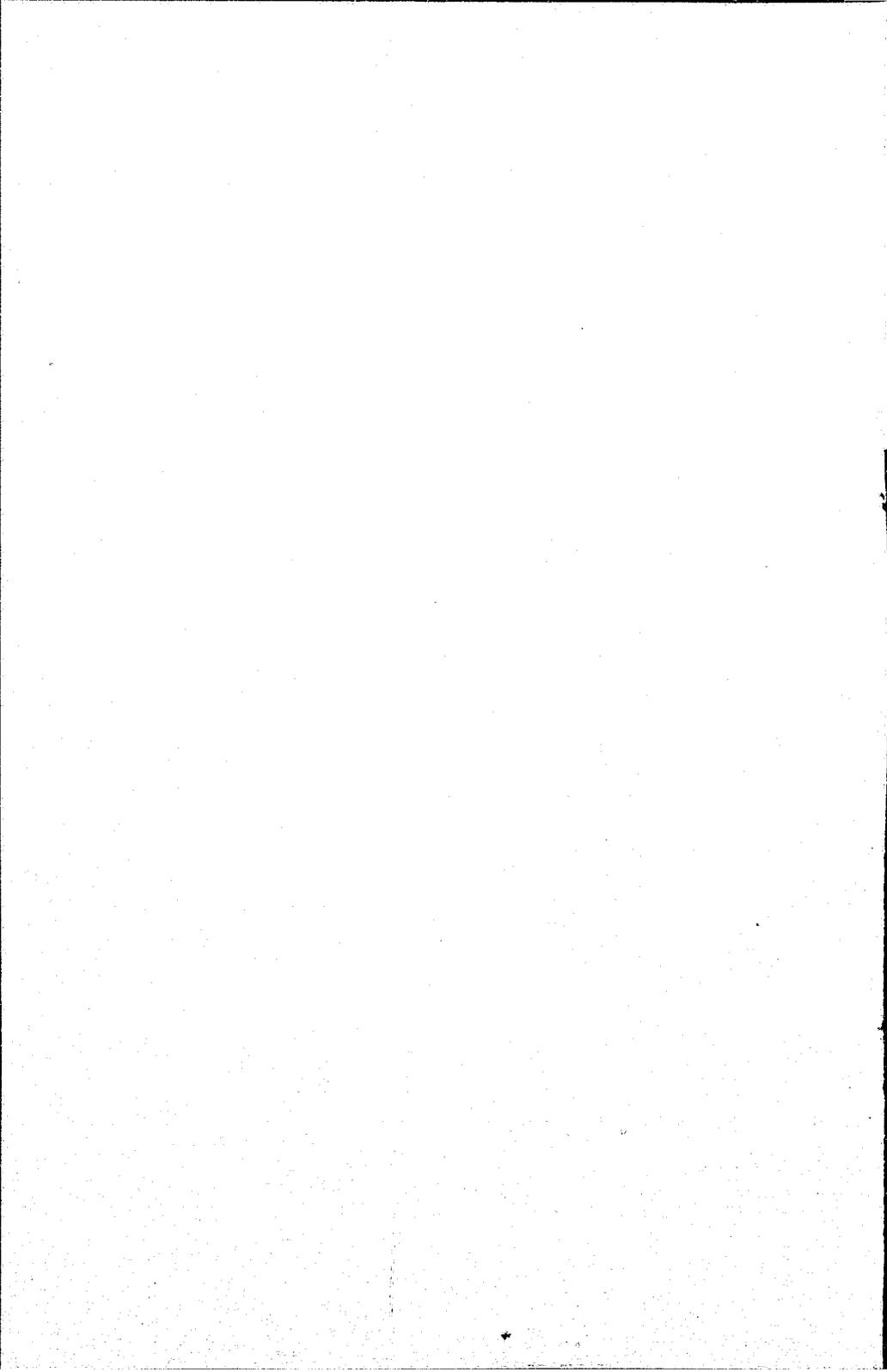
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MEMBERSHIP

Dr. James A. Beall, Rioádo • Paul F. Becht, State Senator, Albuquerque • Mack Easley, Supreme Court Justice, Santa Fe • B.C. Hernandez, Court of Appeals Judge, Albuquerque • Edmund H. Kase, III, District Judge, Socorro • James A. Maloney, District Judge, Albuquerque • Russell D. Mann, Lawyer, Roswell • Marshall Martin, Lawyer, Albuquerque • Theodore Monroy, State Senator, Páedas • Walter R. Parr, State Representative, Las Cruces • Lidio Rainaldi, Magistrate, Gallup • Carlos Salas, Mesilla Park • Boyd F. Scott, State Representative, Farmington • Harry E. Stowers, District Judge, Albuquerque • Mary M. Wilson, Albuquerque. Toney Anaya, Attorney General, ex-officio, Santa Fe • Larry Coughenour, Director of Administrative Office of the Courts, ex-officio, Santa Fe • Frederick M. Hart, Dean of UNM Law School, ex-officio, Albuquerque.

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JUDICIAL COUNCIL MEMBERSHIP

December 31, 1978

Chairman: B. C. Hernandez

Vice-Chairman: James A. Beall

* * *

Dr. James A. Beall, Ruidoso

Paul F. Becht, Senator, Albuquerque

Mack Easley, Justice, New Mexico Supreme Court, Santa Fe

B. C. Hernandez, Judge, New Mexico Court of Appeals,
Santa Fe

Edmund H. Kase, III, District Judge, Socorro

James A. Maloney, District Judge, Albuquerque

Russell D. Mann, Attorney, Roswell

Marshall G. Martin, Attorney, Albuquerque

Theodore Montoya, Senator, Placitas

Walter R. Parr, Representative, Las Cruces

Lidio Rainaldi, Magistrate, Gallup

Carlos G. Salas, Mesilla Park

Boyd F. Scott, Representative, Farmington

Harry E. Stowers, Jr., District Judge, Albuquerque

Mary M. Wilson, Albuquerque

Toney Anaya, Attorney General, Santa Fe, ex-officio
member

Larry Coughenour, Director, Administrative Office of the
Courts, Santa Fe, ex-officio member

Frederick M. Hart, Dean, University of New Mexico School
of Law, Albuquerque, ex-officio member

THE NEW MEXICO JUDICIAL COUNCIL

MEMBERSHIP

Created by the legislature in 1969, the Judicial Council is a statutory body of eighteen members. The membership consists of one Supreme Court justice, one court of appeals judge, one magistrate, three district judges, two state senators, two state representatives, two lawyers, three non-lawyers, the attorney general, the dean of the law school at the University of New Mexico and the director of the Administrative Office of the Courts.

DUTIES

The functions of the Judicial Council are:

- a. to continuously study the administration and operation of all courts in the state;
- b. to investigate criticisms and suggestions pertaining to the administration of justice;
- c. to keep advised concerning the decisions of the courts and the legislature affecting the organization and operation of the courts; and
- d. to recommend desirable changes to the legislature and the Supreme Court.

The Council adopted the following statement of Justice Cardozo as best summarizing its functions: "to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged - to act as mediator and research assistant as a means of adapting law to justice." (U.S. Supreme Court Justice Benjamin Cardozo, then New York Chief Justice, 1921.)

MEETINGS

During 1978 the Council held nine meetings including one public meeting. All meetings are open to the public, but at least one meeting during the year is held after special efforts are made to invite the public, requesting testimony on any matter involving the courts in New Mexico. Two of the regular meetings were held in Santa Fe, and the rest were in Albuquerque.

COOPERATION AND ASSISTANCE

The Judicial Council has received valuable cooperation from several sources during the year which has greatly aided the Council in performing its duties. The Administrative Office of the Courts; the justices, judges, clerks, and other personnel of the Supreme Court, Court of Appeals and district courts, as well as officials of other state agencies and members of the general public, have been very responsive to requests for information and opinions. The Judicial Council is grateful for that help and the willing attitude with which it was given.

PROJECTS AND STUDIES

Following the 1978 session of the Legislature, the Judicial Council drew up a list of the topics felt by the members to be of interest and importance in improving the court system. Over twenty topics were suggested. In order to develop a manageable list, a Priorities Committee, consisting of Justice Easley, Judge Stowers and Senator Becht, was appointed. The committee settled on eleven topics and arranged them in order of importance. The topics, in order of priority were:

1. Jury Selection
2. Restitution
3. Jury Term
4. Juror Protection
5. Additional Judgeships
6. Sentencing Act
7. Court Clerks Legislation
8. Grand Jury Reform
9. Increased Mileage for Jurors
10. Judicial Qualifications
11. Elimination of Separate Appeals Division from Public Defender Department.

The list was then sent to each of the members with a request that each select those topics he was interested in studying. It was recommended that related topics be grouped together for study by committees, and at the May meeting this recommendation was adopted. Five committees were appointed. Their findings and recommendations were reported to the full Council for approval or modification, and those findings, with the Council's recommendations are set forth below.

JURY ADMINISTRATION COMMITTEE

The Jury Administration Committee was assigned the topics of jury selection, jury terms, juror employment protection and increased mileage for jurors. Members of the committee were: Judge Kase, chairman; Mr. Coughenour; Ms. Wilson; Mr. Salas; Senator Montoya; and Mr. Mann. Each topic is treated separately.

Jury Selection

Section 19-1-1, et seq. of the New Mexico Statutes Annotated, 1953 Compilation, establishes the procedures to be followed in selecting juries. Under the current law the names of prospective jurors may be selected randomly from a computerized voter registration list, if the county operates under the Optional Registration

Act, or from a jury wheel containing the names derived from poll books. Only registered voters are eligible for jury duty. Prospective jurors are mailed or served with a summons and jury questionnaire. Those who qualify for jury duty and are not excused may then be called to serve on juries during the jury term.

Two questions were addressed under this topic. One was whether the voter registration list (or poll books) is a sufficient source of names for prospective jurors. The other question was whether there is a more efficient way of drawing the names of prospective jurors. One of the problems with limiting jury service to voters is that the burden of jury duty falls only on the registered voters. Some people are reported to affirm that they will not register to vote because they do not want to be called for jury duty. Another problem is that juries are not reflective of the population of the community because some segments of the population (e.g., young adults, minority groups, and lower income groups) are under-represented on the voter registration lists.

With regard to the first question, the committee did not find that any district is in danger of running out of jurors. There were instances of persons who seem to be called for jury duty every year or two, but there were also instances of persons who had been registered to vote for years and had never been called.

The presiding judges in each judicial district were asked whether they felt the juries were representative of the general population. In only one of the thirteen districts was it felt that the composition of the juries did not match the composition of the population. In that particular area there is a large Indian population and possibly a substantial number of transient workers.

Jurisdictions in other states have supplemented the voter registration list with other lists in order to have a broader source of jurors. Other lists which have been used include driver license lists, city directories, Fish and Game license lists, state income tax lists, a state census, utility lists, welfare lists, and real property lists. Arguments for and against supplementing the voter registration list were made in the committee, and, later, in a meeting of the Judicial Council. There was a strong feeling that by using the voter registration list those people who do not have a feeling of civic responsibility are screened out. In response it was claimed that registering to vote is not necessarily an indication of community consciousness.

It was recognized that persons accused of crimes have a legal right to a jury of their peers and that has come to mean a jury that is representative of the make-up of the community. *The Council consequently recommended that the Legislature be made aware of the issue of incorporating supplemental lists.* There was no decision that the use of supplemental lists is necessary. However, if it is decided to be necessary it was felt that an effort should be made to make the combined lists as universal as possible.

As to the question of finding a more efficient way of drawing names of prospective jurors, there are two procedures now in use, as was explained above. Where the voter registration list is already computerized, the district court clerk is saved much time since it is only necessary to request from the computer a print out of every nth name on the list. Where the computer is not in use the clerk must go to the poll books and manually prepare juror lot slips which are placed in the jury wheel and thereafter drawn from the wheel manually to obtain the required number of names. At the present time, county clerks are already preparing an alphabetized list of voters in each precinct which is sent to the Secretary of State every two years, just prior to the general election. It was proposed by members of the Interim Legislative Elections Committee that a mandatory computerized voter registration program be implemented. The newspaper article which reported that proposal said the twelve counties which are not already using a computerized registration system are DeBaca, Guadalupe, Mora, San Miguel, Colfax, Union, Taos, Catron, Sierra, Socorro, Lincoln and Rio Arriba. In addition, the Administrative Office of the Courts is considering the inclusion of a juror selection program as a component of the work to be done by a computerized Statewide Judicial Information System.

If either the mandatory computerized voter registration program or the Statewide Judicial Information System becomes a reality, it should be less expensive and less time consuming for the district courts to request the computer to make a random selection of voters in the county where a jury is needed. The computer can also print out the names and addresses of those potential jurors, possibly on mailing labels, which can be used to mail the jury summons and questionnaire to each prospective juror.

Jury Terms

Section 19-1-12 of the New Mexico Statutes Annotated, 1953 Compilation, has been amended in recent

years to vary the length of time a person could be required to remain as a member of a petit jury panel in any one year. In 1970 the period was decreased from six months to three months. In 1971 it was changed back to six months. In 1977 it was again changed to three months. The statute grants to the district judge the discretion to determine the length of time jurors are retained for service within the three or six month period. In Counties with over 300,000 population, a person may not be required to remain a member of a jury panel for more than six weeks.

Efforts have been made across the country to reduce the burden of jury service imposed on citizens by reducing the amount of time they may be called upon to be absent from home and jobs to serve. Some jurisdictions have instituted a one day/one trial policy which requires a juror to serve on only one trial or be available at the courthouse for jury service only one day. If he is empaneled on a trial jury he serves only for that one trial and may not be called again for a year. If he is not picked for a trial on the day he reports, he leaves after that day and may not be called again for a year. The last statutory reduction in New Mexico from a six month to a three month jury term was an effort to reduce the burden on both jurors and their employers. Employers do have problems when one or more employees are subject to call for jury duty over a long period.

On the other hand, there are counties in the state where there are not enough jury trials in three months to justify the time and expense of summoning and qualifying new jurors that often. A poll of the district court clerks showed that the time and expense involved had doubled under the three month law. At the same time, judges had shown their sensitivity to the problems of jurors and employers in some districts while the six month law was still in effect by dividing the panels in two and requiring that each division serve only three months. Other districts were examining ways to further limit the requirements, such as instituting a five days/two trials maximum.

In order to allow more flexibility, with counties with few jury trials permitted to retain the same panel for a longer time while retaining the discretion of the judge in cutting the service of jurors to a shorter period where there are a greater number of jury trials, the Judicial Council has recommended that the maximum jury term be changed again to six months.

Juror Employment Protection

Several states have adopted all or portions of a uniform jury selection and service act which includes provisions for safeguarding persons called for jury service from being fired for absence from work while fulfilling that civic obligation. New Mexico law contains no such safeguards. In fact, at least one judge has had employers tell him that they will fire an employee unless the employee is excused from jury duty. Judges generally try to minimize the hardship caused to employers and employees by jury service, but the excusing of members of a large working segment of the population from jury duty makes the juries less representative of the population, and increases the burden on other people.

The Judicial Council discussed at length the proposal for penalizing employers who coerce or fire employees who are called to jury duty. *The recommendation of the Council is that a law be enacted that would make it a petty misdemeanor for an employer or his agent to fire or threaten to fire, or otherwise coerce, an employee because of the employee being summoned to or attending court for jury duty.* This would apply to both magistrate and district court juries.

Mileage and Compensation for Jurors

Section 19-1-15 of the New Mexico Statutes Annotated, 1953 Compilation, was amended in 1976 at the urging of the Judicial Council to provide that jury commissioners, persons summoned for jury service and jurors shall be reimbursed for travel from their residence to the courthouse at the rate of 12 cents per mile, and that they shall be compensated for their time in travel, attendance and service the sum of \$2.30 per hour. Prior to the amendment, the rates had been 10 cents per mile and \$1.60 per hour. The rates of compensation for jurors had lagged behind increases in mileage paid to state employees and behind the state minimum wage law. In 1978 the mileage reimbursement to state officials and employees was increased to 17 cents per mile, so again jurors are being compensated at a lesser rate.

Although jury service will always pose a financial hardship for some, the Council feels it is not necessary that it be a completely out-of-pocket expense. *Rather than frequently seeking amendments to the law, the Council recommends that the mileage and compensation rates be tied directly to the laws setting state minimum wages and mileage reimbursement rates for state employees.*

Proposed legislation on the recommendations of the Jury Administration Committee of the Judicial Council were presented to the Interim Legislative Criminal Justice Study Committee in July, and that committee approved those recommendations with the exception of those dealing with jury selection. It is anticipated that bills to implement the approved recommendations will be introduced in the 1979 Legislative session.

SENTENCING COMMITTEE

The Sentencing Committee was assigned the topics of restitution and the sentencing act. Members of the committee were Representative Parr, chairman; Judge Maloney; Judge Rainaldi; Judge Stowers; Mr. Salas; and Mr. Coughenour. Since the laws on the subjects were enacted in 1977 after prior study by the Judicial Council, the committee's task was one of scrutiny to determine how well the laws would perform their tasks.

Restitution

Prior to the legislative session of 1977, district judges had statutory as well as inherent authority to order a convicted defendant to make restitution to the victims of his crime as a condition of a deferred or suspended sentence. In 1977, Section 40A-29-18.1, New Mexico Statutes Annotated, 1953 Compilation, was added. The new section makes it the policy of the state that restitution be made by each violator of the criminal code to the victims of his criminal activities to the extent the violator is reasonably able to do so. The section establishes a procedure to be followed in preparing a plan of restitution and following it. The 1977 law also amended Section 41-17-24, providing that if the district court has ordered that a prisoner make restitution to a victim as provided in Section 40A-29-18.1, the parole board may include restitution as a condition of parole.

It is generally agreed that restitution paid by the offender to his victim is desirable. It not only helps the victim recover his losses, but it helps the offender recognize the results of his crime, requires him to pay for the damage done, and aids in his rehabilitation. Those benefits are seldom enjoyed, however. Judges have found that there are comparatively few situations where the offender is able to pay restitution, and there are problems in getting the offender to make the payments as ordered.

In reviewing the law the Sentencing Committee

found some apparent gaps in it. It refers directly to district courts and deferred and suspended sentences, providing no direct authority to judges of municipal and magistrate courts to require payment of restitution, and leaving no option to require restitution where a fine or incarceration is imposed. It also refers to violations of the Criminal Code specifically, which would make use of the statute inapplicable to violations of the Children's Code and municipal ordinances.

The Judicial Council heard a report from the Criminal Justice Subcabinet of the State of New Mexico on a pilot restitution project taking place in the Twelfth Judicial District. The pilot project addressed the problem of most criminal offenders not being able to pay restitution. The project, using federal tax funds, placed offenders accepted by the project in jobs where they received job training and paid restitution from their salaries. The criteria for accepting an offender into the pilot project were that restitution be ordered in the sentencing of the offender, that he have no marketable skills, and that the crime of which he was convicted be non-violent. Other characteristics of the offender, such as attitude, were also screened before accepting an offender.

Representative Parr, chairman of the Sentencing Committee, and a proponent for the restitution law in the Legislature, reported to the Judicial Council that he had received reports from around the state on the amount of restitution that had been paid since the passage of the law, and that there was a great deal of disparity among the different judicial districts both in the amount paid and in the use of restitution by judges as a condition of probation.

Sentencing Act

The new sentencing act passed during the 1977 legislative session has an effective date of July 1, 1979. The delay in its taking effect has provided an opportunity to study its provisions further and has allowed time to provide additional penal facilities which were seen to be needed under the stricter incarceration provisions. The new sentencing act is entitled the "Criminal Sentencing Act", and comprises Sections 40A-29-26 to 40A-29-34, New Mexico Statutes Annotated, 1953 Compilation. The basic change from the existing sentencing act is that whereas a judge now sentences a convicted defendant to an indeterminate term having a statutory minimum and maximum with the actual time to be served eventually set by the parole board, under the

new act the judge will set a definite term within the statutory minimum and maximum.

The Criminal Sentencing Act was passed largely in answer to a general feeling that criminals were not being punished sufficiently. The answer to what was seen to be an intolerable crime rate was to lock up more criminals for longer terms. The concept of rehabilitation was declared in national literature to be a failure. Judges were, and are, criticized as being soft on criminals, and the parole board was blamed for releasing criminals from prison too soon.

The Judicial Council this year, and in past years, has received input from various state agencies, private organizations and other sources, regarding sentencing. The Council found that under the existing law an offender is eligible for parole from prison after serving one-third of the minimum sentence. This allowed some convicts who were sentenced to a 1 to 5 year term to be released after six months (the minimum for parole eligibility) and some sentenced to a 2 to 10 year term were out in eight months. Even though the parole board was doing a conscientious job, there were many complaints about this situation, and some judges said they deferred or suspended sentences so they could ensure that an offender would at least be under surveillance on probation for five years rather than be released after six or eight months.

Under the Criminal Sentencing Act the convict will have to serve his full sentence less any time allowed off for good behavior. Since each judge will have full discretion as to the length of the sentence (within the minimum and maximum) there is likely to be some disparity in sentencing from one judge to another. The problem with that arises when two inmates convicted of similar crimes compare their sentences. Corrections officials fear that the discontent that will result when one inmate finds he was sentenced to five years for the same crime for which another got two years will make prison discipline more difficult.

The Sentencing committee foresaw other problems of disparity in that the new act makes enhancement of a sentence mandatory if a deadly weapon was used in the commission of the crime, but enhancement is not mandatory in sentencing under the new habitual criminal provisions. There were also questions as to how the mandatory parole provision would work. The new law requires the sentence to include authority for a period of parole to be served following the time of actual imprisonment.

The question is how this will be implemented. Will a person sentenced to five years with two years on parole be required to serve five years in prison with two more years on parole for a total sentence of seven years, or will it mean three years in prison with two on parole? If the convict violates parole, how long will he be imprisoned therefor?

The Council recognizes that the real problems will become manifest only after the new law goes into effect, and that the solutions will have to come at that time. The Council will continue to observe the functioning of the law and make recommendations when that is appropriate.

JUDGESHIPS COMMITTEE

The Judgeships Committee was assigned two topics: criteria for recommending additional judgeships and judicial qualifications. Appointed to the committee were: Dr. Beall, chairman; Justice Easley; Judge Hernandez; Ms. Wilson; Judge Stowers; Mr. Salas; Mr. Coughenour; and Mr. Mann.

Criteria for Recommending Additional Judgeships

The Judicial Council is approached periodically by district judges or other officials requesting the Council's endorsement for their request for an additional judgeship in their district. The Council has often complied with the request after reviewing the caseload and travel situations in the districts, and finding that the request appeared to be justified. However, the Council has had no set guidelines to be followed in justifying its recommendations.

The most common practice has been to compare the case filings and projected increases in filings in a district with a commonly accepted standard of 1000 cases per year per judge to show that another judge is needed. The problem with using raw caseload figures is that those figures reveal little about the workload of a judge. A criminal case in one district may reflect only one charge against one defendant and in another district it may reflect several counts against two defendants being tried jointly. Each case is different in complexity. One divorce case may occupy less than ten minutes of a judge's time, and another may involve repeated hearings to settle property and custody disputes and problems with past-due support payments.

A weighted caseload system has been developed in

other jurisdictions to help in assessing the need for more judges, but the weightings must often be revised, and the system has not proven entirely satisfactory. New Mexico is still trying to get reliable case reporting.

The Judgeships Committee discussed several suggestions for criteria in making recommendations for additional judgeships. No conclusions were reached by the committee in 1978. Following is a list of the suggestions:

- time from case filing to earliest trial setting
- lawyer population growth
- general population growth
- composition of caseload
- percentage of jury trials
- quality of cases filed
- the effect of prepaid legal services, legal aid and other changes in the delivery of legal services
- the impact of legislation
- travel
- disqualifications and designations
- administrative load
- alternatives available for disposing of cases
- subjective assessments of attorneys, clerks, juvenile probation officers and others on the need for more judges in the district

Judicial Qualifications

Article VI, Section 8 of the New Mexico Constitution provides that no person shall hold the office of justice of the Supreme Court unless he is at least 30 years old, learned in the law, and have been in the actual practice of law and resided in New Mexico for at least three years. Section 14 says that the qualifications of district judges shall be the same as those of justices of the Supreme Court, and Section 28 sets the same qualifications for judges of the Court of Appeals.

In actuality, "learned in the law" means having graduated from law school, and "actual practice of law" means being licensed to practice law. In comparison with other states where candidates for judicial office are screened or required to have more legal experience, New Mexico's requirements appear to be minimal.

In discussing the topic the Judgeships Committee reviewed the laws of other states and considered such

suggestions as mandatory retirement, barring persons removed from judicial office from again assuming judicial office, judicial training, and increasing the qualifications. The committee did recommend to the Judicial Council that:

- a candidate for district judge, Court of Appeals judge or Supreme Court justice be at least 30 years old, have practiced law 10 years with 5 years of active trial practice, and be of good moral character and sober habits;
- the Supreme Court issue an order that all judges attend a training seminar at least once every 3 years; and
- any person removed from judicial office be prohibited from holding judicial office thenceforth.

The Judicial Council reviewed the recommendations at length. *It was decided to suggest that the Supreme Court, by rule, require that every new judge attend a training seminar within the first two years of his assumption of judicial duties, and that attendance at judicial seminars in connection with Judicial Conference meetings be made mandatory.*

With regard to judicial qualifications, the Council agreed that it would be difficult to determine whether a candidate met the requirement of five years of active trial practice, and that suggestion was dropped. *It was felt, however, that ten years of legal experience is not an excessive requirement and that it would make it more likely that the candidate had some experience in trial work.* This recommendation was made after considering the fact that some judges have gone on the bench with less than ten years experience and become very good judges. The fact that in some areas of the state candidates having ten years experience would be difficult to find was also considered, and the consensus was that ten years should be proposed but five years would be acceptable.

GRAND JURY COMMITTEE

The Grand Jury Committee was appointed to study proposals for reforming the grand jury system. Members appointed to the committee were; Justice Easley, chairman; Judge Kase; Ms. Wilson; Mr. Martin; and Senator Montoya.

Grand Jury Reform

Article 2, section 14 of the constitution and Sections 41-5-1 to 41-5-13 of the New Mexico Statutes Annotated, 1953 Compilation contain the present constitutional and statutory law governing grand juries.

There has been a national interest in grand jury reform in recent months, and that interest has been reflected in New Mexico by the number of newspaper articles that have been written on the subject. The Grand Jury Committee reviewed articles for and against suggested reforms, promoted a panel discussion on the subject at the first annual Judicial Conclave and obtained input from newsmen, defense attorneys and prosecuting attorneys. The potential for abuse of the grand jury system was found to exist in New Mexico. For example, a district attorney who fails to obtain an indictment from one grand jury can wait until a new grand jury is impaneled and present the evidence again, recalling the same witnesses, in hopes of obtaining an indictment from the new jury. Grand jury reports can include damaging statements critical of public officials' actions or moral character when there was not sufficient evidence for the grand jury to return an indictment. A prosecutor may go "off the record" during grand jury proceedings to express his view to the jurors. A prosecutor may use the grand jury, once he already has an indictment, to call more witnesses to help prepare his case for trial. A prosecutor may attach a note to a subpoena to a grand jury witness, telling the witness to come to his office at a certain time, even though the grand jury is not in session at that time, so the prosecutor can interview the witness.

In addition to the potential abuses, there are other matters which can pose unnecessary problems. These include the fact that only 75 signatures are needed to petition for a grand jury - which results in a significant expenditure of public money. Witnesses have little protection from being repeatedly called to appear, and if they wish to have an attorney's advice before responding to a question by the grand jury they must go outside the grand jury room to see their attorney before giving each answer. A witness who wishes to assert his fifth amendment rights may be indicted on the basis of his refusal to answer rather than on evidence introduced against him. The target of an investigation may have witnesses and evidence which would exculpate him and save the further expense of indictment and trial, but he has no right to appear before the grand jury or introduce that evidence.

To mitigate the above problems, the Grand Jury Committee suggested, and the Judicial Council adopted, the following recommendations:

- No. 1 *The target of any grand jury investigation shall be entitled to have an attorney present to advise him. The*

attorney shall be in the grand jury room only during the period of time that the target is testifying and will be unable to participate in the proceedings except to advise his client outside the hearing of the jurors.

- No. 2 The target shall not be subpoenaed except where it is found to be essential to the investigation.
- No. 3 Where appropriate, targets shall be notified of their target status and be given an opportunity to testify, if they desire to do so.
- No. 4 In case the target and his attorney, if he has one, sign a document that a target will assert the fifth amendment, he shall be excused from testifying unless there are strong reasons compelling his personal assertions of his fifth amendment rights before the grand jury. Whether there are such compelling reasons shall be passed upon by the district judge.
- No. 5 Other witnesses called to testify shall be permitted to have an attorney to accompany them inside the grand jury room for purposes of advising them, in the same manner as provided for a target.
- No. 6 In granting immunity to a witness, "transactional", not the much more limited "use" immunity, shall be granted.
- No. 7 Witnesses shall be protected against harassment, unreasonable delays and repeated appearances.
- No. 8 The prosecutor shall not use evidence which he knows was obtained as a direct result of a clear constitutional violation.
- No. 9 The prosecutor shall present evidence that directly negates the guilt of the target of the investigation.
- No. 10 After a grand jury acts on the merits and declines to indict, the same matter shall not again be presented to another grand jury on the same evidence.
- No. 11 The practice of naming "unindicted co-conspirators" in indictments shall be abolished.
- No. 12 Grand jury reports shall not denigrate a person's moral fitness to hold public office, in the absence of an indictment against that person.
- No. 13 All proceedings in the grand jury room, with the exception of the deliberations of the grand jury, shall be recorded.

- No. 14 *The prosecutor shall not use the grand jury to assist in an administrative re-inquiry or to obtain evidence against an already indicted person.*
- No. 15 *The prosecutor shall at all times conduct himself fairly.*
- No. 16 *A penalty shall be provided for the statutes that are now on the books calling for secrecy on the part of the grand jurors and the staff serving them.*
- No. 17 *Subpoenas directed to witnesses shall be returnable only when the grand jury is sitting.*

As to recommendations 4 and 10, minority reports were approved. The minority report on No. 4 would allow a target to assert his fifth amendment rights in an appearance before the grand jury if he wished to, but would not have a district judge make a finding that there were or were not compelling reasons to order the target to appear and assert those rights.

The minority report on No. 10 would state, "After a grand jury acts on the merits and declines to return an indictment, the same matter shall not again be presented to another grand jury without securing approval of the district judge responsible for the grand jury. In all cases approval will only be given where there is a clear circumstance of a miscarriage of justice."

The following suggestions were also mentioned but not presented for Council action:

1. that there should be a special attorney to aid the grand jury rather than have the grand jury remain in the hands of the prosecutor;
2. that subpoenas to witnesses identify the subject area of the investigation;
3. that secrecy be abolished;
4. that ten rather than eight of the twelve jurors must agree on an indictment;
5. that the jurors themselves select the grand jury foreman rather than have the district judge appoint the foreman; and
6. that the number of petitioners needed to call for convening a grand jury be changed from 75 resident taxpayers to ten percent of the number of registered voters in the county voting in the last gubernatorial election.

PROCEDURES COMMITTEE

The Procedures Committee was composed of Senator

Becht, chairman; Judge Stowers and Judge Rainaldi. It was assigned the topics of court clerks legislation and elimination of the public defender appeals division.

Court Clerk Legislation

The district court clerks asked for help from the Judicial Council in changing some of the laws which specify the duties of the clerks. The list of changes was given to the Procedures Committee to study. The sections of the New Mexico Statutes Annotated, 1953 Compilation, with which the committee was concerned included:

59-10-3, which requires district court clerks to handle filings of workmen's compensation insurance certificates;

64-13-64.1, dealing with applications for limited driver licenses;

21-9-7 to 21-9-12, dealing with obsolete dockets and procedures for docketing judgments;

25-1-10 and 25-1-11, specifying obsolete procedures for collecting and recording costs;

41-21-3 and 41-21-4, requiring the collection of fees and imposing a penalty if different fees are charged, for docketing criminal cases;

16-3-20, to eliminate reference to two sets of records no longer kept by court clerk;

16-3-24, to allow five days instead of two to deposit trust monies paid in to the court;

16-3-26, to shorten to three years the time for disposing of unclaimed trust monies;

16-3-28, which establishes different fees for docketing and copying different documents; and

19-1-10, which specifies that jury summonses should be sent by registered or certified mail if mailed.

The committee found that the records of workmen's compensation insurance certificates would be more accessible if located in one place in the state. Considerable time is taken up in handling correspondence and filings related to this matter and most of the inquiries as to the existence of a certificate of insurance comes through one state agency - the Labor and Industrial Commission. *The Council adopted a recommendation that the certificates and related work be handled by the Superintendent of insurance.*

The Judicial Council also adopted a committee recommendation that applications for limited drivers licenses be handled by the Motor Vehicle Department rather than the courts. The judges reported that processing the applications was largely

an administrative matter which required the courts to check with the MVD on the applicant's driving record and that the final issuance of a limited license was still up to the MVD's discretion even if the court approved the application.

The Committee declined to recommend any change in the laws governing the time for depositing trust monies or disposing of those monies as unclaimed, and the Council concurred. *The Committee did recommend repeal or amendment of other statutes, and the Council again concurred.* Some changes have already been made under the authority of Supreme Court rules, and since a court clerks manual of procedures is scheduled to be issued by the Administrative Office of the Courts, it may not be necessary to change the statutes. The manual will have the force of Supreme Court rule under section 16-6-8, New Mexico Statutes Annotated, 1953 Compilation, and the Supreme Court has superintending control over all inferior courts which includes the power to provide rules of pleading, practice and procedure for the conduct of litigation. (See State v. Roy, 40 NM 234, and Sections 21-3-1, 2, New Mexico Statutes Annotated, 1953 Compilation.)

Elimination of the Public Defender Appeals Division

Section 41-22A-8, New Mexico Statutes Annotated, 1953 Compilation, creates an appellate division within the Public Defender Department with responsibility for assisting in the representation in appellate, review and postconviction relief procedures of persons eligible for assistance under the Public Defender Act or Indigent Defense Act.

It was suggested at a public meeting of the Judicial Council that when criminal cases handled by a public defender are appealed, the public defender that represented the accused at trial should also represent him on appeal. The rationale behind the suggestion was that the trial lawyer would have a better understanding of the case than a lawyer in the appeals division. As the Committee investigated the topic the view was also expressed that the trial lawyer, being familiar with the case and being too busy to take on unnecessary work, would only appeal those cases where a valid basis for appeal existed and would decline to handle frivolous appeals.

In meeting with representatives of the Public Defender Department it was ascertained that there are numerous frivolous appeals because indigent defendants,

like all defendants, have an absolute right to appeal (New Mexico Constitution, Art. 6, Section 2) and it does not cost the indigent defendant anything. The Public Defender Department felt it had no alternative but to handle the appeals and that the appellate division was better able to handle the appeals efficiently than the trial defenders. They felt the pre-hearing division of the Court of Appeals was able to weed out the frivolous appeals so that they did not clog the Court.

The information on the functioning of the appeals division of the Public Defender Department was presented at a meeting of the Judicial Council, along with the assessment of the Court of Appeals that it was having no problems with appeals from the Public Defender Department. Alternatives to the procedure followed by the appellate division were discussed, comparing the costs in terms of time and money. On the basis of the information obtained, the Council decided against the recommendation of abolishing the appellate division of the Public Defender Department.

MISCELLANY

STATE JUDICIAL INFORMATION SYSTEM

In January, 1978, representatives of the Administrative Office of the Courts met with the Judicial Council to provide additional information as requested by the Judicial Council in the previous year to justify the proposed State Judicial Information System.

The proposed system would be used to perform the functions of case docketing, registering new motions and actions, indexing, scheduling, calendaring, notice preparation and preparation of reports and statistics. It would also provide computerized criminal histories and offender-based transaction statistics to aid prosecutors, law enforcement and probation and parole agencies, and public defenders.

Captain Kingsbury of the State Police and Curtis Wolfe of Kasonic & Assoc. also attended the January meeting to answer questions. Emphasis was placed on the fact that all segments of the criminal justice system were cooperating to make the system useful to District Attorney's, law enforcement agencies and correctional agencies as well as to the courts.

A major draw back was seen to be the cost of maintaining the system. It was pointed out that the cost of the system would eventually be balanced by the savings to the courts in not having to continue to hire clerical personnel. The automated system would allow more work to be done by fewer people. The consensus of the Council was in favor of having the State Judicial Information System funded by the Legislature. The House Appropriations and Finance Committee, however, was in favor of delaying funding for the program pending further study on the utility of the program to the several criminal justice agencies. The request for funding got no further than that committee in the Legislature.

JUDICARE

The Judicial Council continued its discussions from last year of judicare as an alternative to the public defender program of the state. Information on the functioning of judicare of Canada, particularly in the province of Ontario, was examined. The relative costs of judicare and the public defender program became an issue. Following a committee study of a proposal to eliminate the appellate division of the Public

Defender Department, reported on page 19 above, the subject has been dropped as not feasible at this time.

Under *judicare*, in Ontario, an eligible defendant may select his own attorney who will be reimbursed by the government-funded *judicare* program. That program had 46 area offices in Ontario with a budget of four million dollars, and that administrative cost was reportedly 25% of the total cost of the program. New Mexico's Public Defender Program, on the other hand had a budget of \$2,113,500 for 1977-78. While the relative caseloads are not available for comparison, it may be noted that Ontario has nearly seven times the population of New Mexico.

JUVENILE COURT ADVISORY COMMITTEE

At the request of the Juvenile Court Advisory Committee appointed by the Supreme Court, the Judicial Council established a liaison in the person of Judge Rainaldi to provide some assistance to the committee. The Council provided some assistance by mailing to each district judge a copy of draft legislation which would repeal the Children's Code and substitute a Juvenile Code. The judges were asked for their comments assessing the strengths and weaknesses of the proposed bill.

ARSON LAWS

The attention of the Council was drawn to the increase in arsons in other states and the likelihood of increases here. The laws of Massachusetts were reviewed since that state has passed new laws to help in combating arson. One of the reported ploys used to cash in on arson is to buy a piece of property (a building), and run it through several fraudulent sales, increasing the price on paper each time, insuring it for the final "sales price" which may be several times the original cost, and then burning it down to collect the insurance. Massachusetts enacted laws to require insurance companies to cooperate with the state fire marshall in investigations and to supply information on insurance policies. In comparing New Mexico's laws, *the Council felt that new legislation is not needed so much as greater investigative capacity in the state fire marshall's office and local law enforcement agencies and fire departments.*

ADMINISTRATIVE PROCEDURES ACT

New Mexico has an administrative procedures act which was passed in 1969. That act establishes some basic steps for the administrative agencies to follow

in making rules or adjudicating matters within their scope of duties. The declared purpose of the act is to promote uniformity in administrative procedures and judicial review of administrative decisions. In practice, only one agency is subject to the act.

Each administrative agency has developed its own procedures for carrying out its functions, and the procedures may vary for different functions within the same agency. As an example, there are 14 different ways to appeal a decision within the State Corporation Commission, depending upon the aspect of the agency's dealings with which the public is faced. On one hand, a citizen is faced with a variety of procedures in seeking to deal with different agencies. On the other, each agency has some grounds for claiming that it is operating in a specialized field that requires particular knowledge and procedures. A major problem is that the appellate courts are faced with deciding appeals from administrative decisions on the basis of a record made in the administrative tribunal where that record may be very sketchy or include almost nothing on the reasons for the agency's action.

The Judicial Council sought the assistance of Professor Al Utton of the UNM School of Law and Gary O'Dowd of the Institute of Public Law and Services in assessing the need for an effective act. Both had worked toward improving the law in the past. Prior to the Council's meeting on the subject, a discussion draft of a new administrative procedures act was made available to the Council which would accomplish most of the things the Council hoped to see improved. *The Council made some suggestions to the drafters and reaffirmed its support for an act which would have broader application to the state's administrative agencies.*

JUDICIAL CONCLAVE

In September the Judicial Council sponsored, along with the Judicial Conference, the State Bar of New Mexico, the Supreme Court and the Administrative Office of the Courts, a Judicial Conclave. The Conclave was the first in what is hoped will be an annual gathering of judges, lawyers, newsmen, legislators, and the general public to increase the mutual respect for each and to improve the understanding of the functions and problems of the judicial system. This year's conclave heard reports on the activities of the Judicial Council, Judicial Standards Commission, State Bar Association, Supreme Court, Court of Appeals, Attorney General, Legislative Interim Criminal Justice Study Committee,

and the Administrative Office of the Courts. There were addresses on creating additional district judgeships, the Mental Health Act, and juvenile justice, and panel discussions of the interrelations of courts, bar and media; plea bargaining; sentencing; bench-bar-media communications; and grand jury reform.

LEGISLATION

One of the duties of the Judicial Council is to keep advised concerning legislation affecting the organization, operation, procedure and practice of the courts. The Judicial Council meets once during the Legislative session in Santa Fe, and receives reports throughout the session to stay abreast of legislation affecting the courts. Following each session the Council devotes most of one meeting to discussing bills that did and did not pass.

Some of the bills that did pass in the 1978 session that were of interest to the Council were:

House Bill 15 which allows a district attorney to move for a court order to take a videotaped deposition of any alleged victim under age sixteen in prosecutions of criminal sexual penetration or criminal contact of a minor. The deposition is taken in chambers in the presence of the district attorney, the defendant and the defense counsel. This is to avoid embarrassment to the victim who might be reluctant to testify in open court. The videotape can be shown at the trial and is subject to a protective order.

House Bill 33 which created a Four million dollar fund to help counties and municipalities build detention facilities for alleged juvenile delinquents.

House Bill 168 which approved the creation of a separate facility within the corrections division for intake and classification of convicted felons.

House Bill 187 which appropriated \$200,000 to provide community based shelter-care facilities for children in need of supervision and delinquents who pose no threats to society. It gives juvenile probation officers another detention placement option.

House Bill 246 which repealed the law requiring all out-of-state motorists arrested for motor vehicle code violations to immediately appear before a magistrate.

Senate Bill 133 which added two judgeships to the Court of Appeals.

JUDICIAL COMPENSATION

The National Center for State Courts' July 1978 report on judicial salaries shows that New Mexico ranks 36th among the states in the amount paid to supreme court justices, and 28th in the amount paid to general trial (district) court judges.

The same report ranks New Mexico 45th in per capita income and 37th in population.

Pay for New Mexico's Supreme Court justices is \$5,763 below the national average, and pay for the district court judges is \$1,338 below the national average. The Court of Appeals is \$7,555 below the average salary of the twenty-seven states that have a comparable court.

The legislature in 1978 again increased the salaries of the judges of the district court, Court of Appeals and Supreme Court, but inflation has continued to nullify the raises. Table 1 on the next page shows the effect of inflation on judicial salaries in New Mexico since 1967.

ADDITIONAL JUDGESHIP

In November the Judicial Council considered the findings of a committee from the Fifth Judicial District Bar Association. That committee had been formed to determine whether additional judges were needed in the Fifth Judicial District. The committee findings based on projected civil and criminal case filings and re-openings for 1978 indicated there would be 1,171 new cases for each of the five judges currently serving in the district. The committee also indicated that the backlog of cases was growing. The Judicial Council was urged to endorse the bar association's request for an additional judgeship. *The Council voted to recommend to the Legislature that an additional judge be provided in the Fifth Judicial District and that the initial vacancy be filled by appointment.*

TABLE 1

NEW MEXICO JUDICIAL SALARIES AS RELATED TO CONSUMER PRICE INDEX

1967 = \$1.00 Purchasing Power of the Dollar

as of:	1967 Price Index	<u>Supreme Court</u>		<u>Court of Appeals</u>		<u>District Judges</u>	
		<u>Annual Salary</u>	<u>Purchasing Power</u>	<u>Annual Salary</u>	<u>Purchasing Power</u>	<u>Annual Salary</u>	<u>Purchasing Power</u>
12/31/67	100	\$20,000	\$20,000	\$18,500	\$18,500	\$17,500	\$17,500
12/31/68	104.2	21,000	20,154	19,500	18,714	18,500	17,754
12/31/69	109.8	21,000	19,126	19,500	17,760	18,500	16,849
12/31/70	116.3	22,500	19,347	21,000	18,057	20,000	17,197
12/31/71	121.3	22,500	18,549	21,000	17,312	20,000	16,488
12/31/72	125.3	29,500	23,543	28,000	22,346	27,000	21,548
12/31/73	133.1	29,500	22,164	28,000	21,037	27,000	20,285
10/31/74	153.2	29,500	19,256	28,000	18,277	27,000	17,624
10/31/75	164.6	32,000	19,441	30,500	18,530	29,500	17,922
10/31/76	173.3	33,500	19,331	32,000	18,465	31,000	17,888
10/31/77	184.5	36,348	19,700	34,720	18,818	33,635	18,230
10/31/78	200.9	38,165	18,997	36,456	18,146	35,317	17,579

END