A legal note from Marshal Willick about the current inadequate state of substantive education of the family court and other judiciary, and how it should be improved.

This note follows the discussion in legal note No. 33 of how to make CLE for lawyers more meaningful, and more useful to the public (posted at http://www.willicklawgroup.com/newsletters).

Daniel J. Boorstin once said that "The greatest obstacle to discovery is not ignorance – it is the illusion of knowledge." We can and should take every opportunity to increase the odds that the decisions reached in our courts are as legally sound and well-supported as possible.

Would we get better decisions if the judiciary received more advanced training? Is there any reason in the world that we should not expect our judicial officers to be at ***least*** as well educated in developments in the areas they adjudicate as the attorneys who practice in those courts?

I. CONTINUING LEGAL EDUCATION (CLE) APPLIES TO JUDGES

As detailed in legal note No. 33, the Nevada Supreme Court Rule stating the "purpose" of the CLE requirements proclaims that "it is of primary importance to the state bar and to the public that attorneys continue their legal education throughout the period of their practice of law or judicial service."

In other words, district judges, like lawyers in private practice, are required to get CLE each year. If the statement of purpose is not to be cynically perceived as mere lip-service, it is necessary that the "continuing legal education" received be relevant to the jobs actually done by judges.

And, for some, that education might well be necessary for competence. The only requirement to ***be*** a district court judge is ten years of admission to the Bar (and even ***that*** was a recent development). With the defeat of Question One, the populace has retained the selection of judges by way of colorful-poster lottery, so an incoming judge in family court need never have actually handled such a case, or know the difference between, say, the time rule and a tuna fish.

In the modern era, our courts have been increasingly self-specializing. In Clark County we now have dedicated courts not just for family law, but criminal, civil, and business cases, and even so narrow a focus as construction defects. All of those specialty courts require the jurists sitting in them to have mastery of their particular subject matter, in addition to the "regular" judicial requirements of impartiality, patience, diligence, etc.

One family court judge has stated that the job is the hardest he's ever had, requiring far more dedication than his work as a lawyer. Done as it should be done, he's right. The bench is not a place to "retire to" or vegetate at – judging is a job which, done correctly, requires not just diligent attention to the cases at hand, but also continuous learning on both substantive and procedural matters, so as to retain the capacity to fairly and competently adjudicate those cases.

II. WHY SHOULD ANYONE CARE?

I recently completed a writ proceeding in the Nevada Supreme Court dealing with the right of a former spouse of a PERS participant to survivorship benefits under the PERS retirement system. I had been hired by the former spouse to unravel a mess ten years in the making, consisting of dozens of hearings, really bad orders, and general confusion all around.

The record made it painfully clear that neither lawyer understood how the PERS retirement system worked, and the (now retired) judge was worse – his on-record comments reflected a knowledge of Nevada retirement benefits law predating the time he had taken office over a decade earlier, and ***obviously*** not supplemented since then.

It was this collective ignorance that permitted the lawyers and judge to engage in a years-long legal equivalent of a Monty Python skit of unfounded motions, ridiculous demands, and legally unenforceable orders – to the massive cost of both clients.

Judges should care about their ability to discern the difference between cogent legal argument and utter nonsense.

Lawyers should be concerned with whether those deciding cases have a clue what to do with issues under submission, in the hopes of minimizing the "random number generator" effect.

Clients should be keenly concerned with the substantive legal education of those ruling on their cases, both because they should not have to pay their lawyers to provide that education to the bench, and because they have a right to expect that the person deciding the fate of their freedom, fortunes, and families has done everything possible to be knowledgeable about the subjects at issue.

And in an era in which about half the litigants in family court do not ***have*** a lawyer, the need for independent judicial knowledge of all applicable law is even greater – the proper person litigants certainly are not going to know it. In what is now a majority of cases, apparently, the judge might be the only person in the courtroom with any legal education. In such circumstances, it would seem to be a good idea for the judge to actually know what the law on the subject might be.

The Supreme Court has a dog in this fight as well. With the defeat of Question Two, the formation of an intermediate court of appeals to handle most of the "error correction" cases has been put off for at least several years. The Court might be able to lessen the time it spends dealing with correcting errors that should not be made if it could improve the quality of the decision-making at the trial level. It might not be possible to command the development of ***wisdom***, but there are steps that could be taken to increase the chances of relevant ***knowledge*** actually being known and applied.

III. WHAT'S AVAILABLE, AND WHO ATTENDS

At the State Bar of Nevada's Advanced Family Law Seminar in Las Vegas last December, 15 speakers gave rapid-fire presentations on a wide variety of cutting edge family law subjects, ranging

from enterprise versus personal goodwill (Rad Smith) to bankruptcy complications (Shelley Krohn) to tax problems (Ken Burns and Neal Chambers). (For anyone interested, my materials for that seminar, "Selected Topics Concerning Enforcement of Judgments: Appeals, Stays and Liens," are posted at http://www.willicklawgroup.com/published_works).

Surveys were given to all attendees. 94% of those attending thought the subjects were beneficial, the materials were helpful, and the speakers were effective. ***100%*** of those attending answered "yes" to the question "Do you believe it would be helpful for Family Court Judges to attend this CLE seminar?"

And the total number of family court judges, out of the 26 we now have in Nevada, who actually attended the seminar? ***One*** (Hon. Chuck Hoskin, who was one of the presenters).

This was not a fluke. At the 2009 Advanced Seminar, two judges showed up. And the Advanced Track CLE at Ely in March, 2010, was graced by a single Washoe County judge (for materials, see http://www.willicklawgroup.com/ely_2010_advanced_track_materials). In 2011, I saw two judges in attendance.

There is no reason to suppose this situation is confined to the family law area. Are the judges presiding over construction defect cases attending the seminars on that subject?

So, if continuing education of judges as well as lawyers is ***really*** of "primary importance," and family court judges are no-shows at advanced family law seminars, just what are the members of our judiciary doing to stay at the fore-front of knowledge? I have no idea. I asked, but apparently, information about what CLE judges (or anyone else) have attended is "confidential."

All the reasons set out in legal note No. 33 why CLE information about lawyers should be public apply equally – or perhaps much more – to judges. They are public officials, and the general public – including potential election opponents – deserves to know whether judges have sought and obtained meaningful education in the areas they adjudicate.

IV. A MOSTLY-REFUSED INVITATION

In August, 2009, I wrote a letter to the presiding judge of the Clark County family court detailing a number of ongoing problems, and suggesting solutions. One part of that letter stated:

> Fourth, get the judges adequately trained as to the basic statutory and rule-based requirements of their jobs. It is just obscene that litigants – and counsel – are paying the cost of ignorance on matters as basic as jurisdiction, liens, and substantive statutes. If lawyers in practice can be compelled to maintain significant CLE requirements, the obligations of judges should be ***greater***. They sought those positions, and basic competence in the operating statutes and rules should be not just expected, but demanded, of them. Any who cannot or will not gain that competence should be referred to judicial discipline for removal.

Unsurprisingly, this missive was not particularly well-received by the bench. In fact, some had rather creative, if not anatomically appropriate, suggestions for where a proposal addressing judicial competence should be placed.

In fairness, the ensuing year ***did*** see a number of initiatives in which there was substantial judicial participation – formation of a (now depressingly moribund) Uniform Practices Committee, acceptance of proposals for lowering costs by using runners to pick up reports, permitting submission without oral argument of uncontested motions, adopting rational and less wasteful procedures for Orders to Show Cause, etc.

But there has been no outwardly-perceptible movement to more intensive substantive education of the judiciary, despite multiple advanced practitioners volunteering to supply whatever assistance, support, and education might be desired.

On one of the subjects discussed in 2009 – getting increased judicial recognition and addressing of "the real-world costs to real-world people of legal proceedings" – there was zero movement. An intermittent series of these notes (see Nos. 28 – "Attorney's Fees and Burden Shifting," and 30 – "Attorney Fees: Deferring & EDCR 5.11," posted at http://www.willicklawgroup.com/newsletters) was intended to convey some of that information, for whichever judicial officers might be paying attention to them.

But when that subject was raised at the 2011 Ely conference (the referenced legal note was in the materials), not ***one*** of the 20+ judges assembled on the stage expressed a whiff of intent, attention, or even understanding of the concept of subjecting fee award requests to a logical, analytical, and consistent analysis from case to case.

V. PERCEPTIONS AND REALITY

Some lawyers – privately – deride the apparent lack of substantive legal knowledge of certain judges; unscrupulous lawyers attempt to capitalize on that lack of knowledge to obtain unjustifiable advantages. There is a perception by many members of the Bar – usually spoken out of earshot of anyone wearing black robes – that whatever CLE judges ***do*** take must be of the underwater basket-weaving variety. That perception is quite sad. The reality, if so, would be far sadder.

And the negative perception of judicial education has consequences, both within the Bar and in the general community. When the Family Law Section proposed the creation of Specialist certification, there was a chicken-and-egg problem of how to get a group to create and administer the testing and certification of applicants. The Section suggested "grandfathering" two groups as Specialists – the (then) 13 Nevada Fellows of the American Academy of Matrimonial Lawyers, and the family court bench. When the proposal went to the Board of Governors, they accepted the former, but required deletion of the latter.

The point here is the ***perception*** that those on the family court bench were not already sufficiently expert in the subject matter to be considered Specialists. While it is a slow process, the best way to

address an undesired perception is to ensure that the reality is otherwise. In other words, the best way to ensure that the Bar and public perceive the family court bench as experts in the field is to make sure that those on the bench actually ***are*** experts in the field.

In December, 2003, the Nevada Supreme Court first authorized the Nevada State Bar to certify legal specialists. It is unknown whether any judicial officer has applied for specialist recognition in any field, because the State Bar of Nevada has inexplicably failed for seven years to post the names of certified specialists on its web site. This is "inexplicable" because one of the primary reasons certification of specialists was approved in the first place was to give the public more information about the qualification of lawyers in various subjects.

As to family law, in the five years since the first specialization test was administered in 2006 (see http://www.willicklawgroup.com/specialization), not a single judge in Nevada has sought specialist certification.

Some have suggested altering the requirements for running for district court judge to include Specialist certification in the field addressed by that court. Since the Legislature has already prescribed ***some*** eligibility requirements to hold judicial office, it appears that imposing such a requirement is within the legislative power. Most of those discussing the subject, however, do not perceive sufficient political will to make the selection criteria for judges more stringent. Perhaps, with the defeat of merit selection, this proposal deserves another look and further discussion.

And a legislatively-imposed precondition for eligibility to run for office is not the only option. If the judiciary really believes that merit selection was and is a good idea, as I do, it would be possible for the judiciary itself to create a system of testing and certification under which any lawyer could ***get*** a judicial seat, but only those demonstrating specialist-level competence in the subject area affected by the position could ***keep*** it. But unless a legislator proposes new eligibility requirements, or the Supreme Court wants to address head-on the level of demonstrable knowledge possessed by judges, these ruminations will have to await another day.

VI. A MODEST PROPOSAL OR TWO

Some baby steps in the direction of substantive education of the bench are achievable without structural changes.

It should start with the judicial college, at which intensive substantive education in the subject matter a judge is expected to address should be a larger part of the curriculum. Judges, once elected, are required to go (see NRS 3.028), but more than one judicial officer has reported not getting that much out of the program. Wouldn't it be nice if judges leaving judicial college were completely conversant with the modern state of the art in every subject they were likely to touch?

Ideally, judicial officers should also be personally dedicated to life-long learning to give them the education they require to do their jobs as well as they might. In the absence of that dedication, a poor substitute is the requirement to at least be present for such continuing education.

Whether trial court judges are getting the steady stream of relevant education necessary to competently perform their job functions as the law evolves may be beyond the information available to the public – but it is not to the Nevada Supreme Court. The topic of substantive judicial education is relevant to the Court's obligation to administer the court system, and it is in the Court's own enlightened self-interest to reduce the number of appeals caused by avoidable trial court ignorance of relevant legal developments.

Accordingly, the Court should appoint a task force to review what CLE is actually being taken by judges throughout Nevada. It would be reassuring to discover that the Nevada judiciary has self-focused on keeping itself current on the state of the art in every specialty area. If, however, the cynical commentary by some members of the Bar proves even slightly justified, the Court should take action by increasing the relevance of continuing education ***mandatory*** for those seeking and holding the office of district court judge. In the long run, this would serve the public's interest in getting the most competent decisions possible, and might lessen the Court's own workload.

VII. QUOTES OF THE ISSUE

"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."
– Mark Twain

"Knowledge can be communicated, but not wisdom. One can find it, live it, be fortified by it, do wonders through it, but one cannot communicate and teach it."
– Hermann Hesse, *Siddhartha*.

"Nothing is more terrible than ignorance in action."
– Johann Wolfgang von Goethe (1749-1832).

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