Hostility Toward Judges Is the Result of Ignorance

By Cragg Hines

Just because much of Washington so easily turns to wallowing in eruptions such as the House page outrage doesn't mean that some of the nation's best minds — or even Newt Gingrich — don't have time for more far-reaching issues.

That was the case when Justice Stephen G. Breyer and former Justice Sandra Day O'Connor led a conference on fair and independent courts at Georgetown University Law Center co-sponsored by the American Law Institute. It was a natural outgrowth of recent oral assaults on the judiciary from the Republican right, including suggestions that there should be no surprise at violence against judges.

There was a robust call from Gingrich, the reliably incendiary former House speaker, for what sounded like popular nullification of judicial decisions "so clearly at variance with the national will." And a riposte from former Senate Majority Leader Tom Daschle that Gingrich's view would have people "out in the streets" like Mexico after its presidential election this year.

Daschle, D-S.D., asked, in effect, where Gingrich, R-Ga., and his inflammatory theory were when George W. Bush was elected by a 5-4 Supreme Court vote in 2000.

Ever-sensible former Sen. Warren Rudman, R-N.H., observed the obvious, that the nation has an established way, however intentionally cumbersome, to address Gingrich-style outrage. It's called a constitutional amendment.

I was out of town during the conference but have caught up by way of Georgetown Law's superb Internet coverage at www.law.georgetown.edu/judiciary/program.html.

The conference was part of what Stanford Law School professor Pamela Karlan called "a two-centuries-long conversation" about the role of the judiciary begun by Alexander Hamilton and other founders.

O'Connor recalled that Thomas Jefferson was "a very spirited antagonist" of Federalist judges.

Michael Traynor, president of the American Law Institute, noted that the conference came on the 100th anniversary of the talk by Roscoe Pound, who became dean of the Harvard Law School, on "the causes of popular discontent with the administration of justice."

And Chief Justice John G. Roberts Jr., in a featured speech, contended that attacks on the Supreme Court historically had been "utterly bipartisan." He recalled the "almost universal revulsion against FDR's court-packing plan."

But Roberts also recalled the observation of his predecessor, William H. Rehnquist, that the independent judiciary was the novel contribution of our founders.

The historic conversation has been a wide-ranging one that can become a shouting match, such as the one sparked by the 1954 *Brown v. Board of Education* desegregation decision.

The most recent piece of the conversation was set off by intemperate exasperation with courts' decisions on highly charged issues such as the death penalty and even the Pledge of Allegiance, with seeming suggestions from some Republicans that there should not be surprise if people are moved to violence — even against judges. Such comments were calculatedly outrageous and deplorable.

O'Connor's most startling observation had nothing to do with courts directly but certainly must bear on why Americans may be susceptible to attacks on an independent judiciary.

"A majority of school districts around the country have stopped teaching government and civics altogether," O'Connor said.

How can that be? Not teaching music and art is shortsighted. Not teaching government and civics is catastrophic.

And the evidence of failure and omission is apparently not limited to podunk public secondary systems. Karlan cited a study that found "even students at elite educational institutions," including the Ivy League, "are just plain ignorant about the basic nature of American government, and, even worse, students seem to get dumber the longer they stay in college."

That's as astounding and incredible as it is unpardonable. As O'Connor observed: "So perhaps it isn't a surprise that courts and judges are not well understood." It's a condition that plays into the hands of the Newt Gingrichs.

The lack of basic education in governmental fundamentals leads to a condition described by Breyer in his closing comments: "You have to have courts that everyone understands are part of America and part of a country where we follow it even though we don't agree with it."

This article originally appeared in the Houston Chronicle.

Veto Keeps Permanent Disability Dilemma at Bay

By Ronald A. Peters

Gov. Arnold Schwarzenegger did employers a good turn by vetoing SB 815, legislation that would increase permanent disability benefits paid to employees suffering from work related injuries. This is the first of many efforts to undo the workers' compensation reforms he championed and signed in 2004. To understand the significance of the governor's veto, we need to understand the recent history of workers' compensation reform in California and the nature of permanent disability benefits.

Schwarzenegger's first priority upon entering office in 2004 was to reform the workers' compensation system. Although the number of workers' compensation claims had remained flat for many years, costs per claim had risen sharply beginning since the late 1990s. Things got so bad that several major workers' compensation insurance carriers went into liquidation (insurance version of bankruptcy), which foisted a sizable chunk of the state's existing workers' compensation claims upon the California Insurance Guarantee Association, the agency responsible for paying claims for insolvent insurers. The reasons for the crisis were many, and in fairness, there was more than enough blame to go around.

Insurance companies had done a poor job controlling costs, particularly medical costs, by applying existing medical fee schedules and utilization review procedures. Medical providers increased both the price they charged for procedures not covered by existing fee schedules and pushed for more medical care than was appropriate. To increase their own fees, applicant's attorneys pushed the system to provide more benefits for injured workers. In 2002, the California Legislature and former Gov. Gray Davis compounded the problem by passing and enacting AB 749, which increased all monetary benefits paid to injured workers without any significant reforms to defray the resulting costs to employers.

The 2004 reforms attempted to address all benefit issues. First, new scientifically based treatment guidelines were put in place to limit medical care to only that which was deemed medically necessary. Second, temporary disability benefits were limited to just two years for injuries occurring after April 19, 2004. Previously there was no limit on how long an employee could remain off work collecting up to two-thirds of his or her average weekly wage, tax free. Third, the reform legislation created a new definition of permanent disability for the purpose of providing monetary benefits, and created a new permanent disability schedule based on the American Medical Association Guidelines for the Evaluation of Permanent Impairment, (5th Ed). The result was a fairly dramatic reduction in permanent disability benefits paid to injured workers. Recent studies show that permanent disability ratings under the new system have declined by as much as 42.8 percent.

Employees would resolve their cases, receive the permanent disability benefits, and then return to their physician to get a medical release permitting them to return to work.

Permanent disability compensates employees for permanent impairments directly affecting an employee's ability to work. It is not direct wage loss, as is temporary disability, but rather contemplates that an employee who has permanent impairment will suffer lost future earning capacity. Permanent disability benefits are measured as a percentage of permanent impairment, which is translated into weekly benefits paid for a statutorily scheduled number of weeks, depending on the percentage of disability and the date of injury. For instance, 10 percent disability for a 2003 injury would mandate 30.25 weeks payable at $185 per week for a total of $5,596.25.

The California Applicant's Attorneys Association and other employee-friendly groups helped mount several attacks on the reform legislation both in the courts and through their lobbyists. The majority of them failed. The most recent and effective effort was the passage of SB 815, which increased permanent disability benefits twofold by doubling the number of weeks an employee receives statutory permanent disability benefits.

Schwarzenegger has repeatedly stated that he would veto any bill that sought to turn back or alter any of the workers' compensation reforms put in place in 2004 unless and until a comprehensive study had been conducted on the effects of the reform legislation on injured workers. This study is set to be completed by the end of the year. Meanwhile he made good on this promise by vetoing SB 815.

The reduction in permanent disability benefits resulting from applying the AMA guidelines was particularly problematic for applicants' attorneys because, by statute, they cannot charge their clients up front for their fees. Applicants' attorneys collect a fee only if the employee receives an award of permanent disability. The attorney fee is calculated as a percentage of this award, usually 15 percent. Because the fee is based on the amount of permanent disability benefits awarded, the reduction in the amount of permanent disability paid would reduce the amount of fees collected by attorneys.

Employers, their insurance carriers, and attorneys have long believed that the workers' compensation system spun out of control because applicants' attorneys had a monetary incentive to maximize an employee's permanent disability. Prior to reforms, permanent disability was most often defined and quantified by scheduled permanent work limitations or restrictions provided by treating or examining physicians. The more work restrictions an employee had, the more permanent disability benefits (money) the employee would receive. High levels of permanent disability also wouldn't necessarily have to be supported by protracted periods of temporary disability and, therefore, necessarily greater amounts of medical care.

It is difficult to justify a high level of permanent impairment unless there is also substantial medical care and substantial periods of time off work. Therefore, such work restrictions also made it difficult or impossible for an employer to return an employee to work. This in turn caused an increase in vocational rehabilitation benefits, which provide retraining to employees who can't return to their former jobs.

After receiving an award of permanent disability, it became very common for employees to complain that the work restrictions that garnered them the money also resulted in a loss of employment because their work limitations conflicted with essential functions of their former jobs. Even more alarming was a trend where employees would resolve their cases, receive the permanent disability benefits, and then return to their physician to get a medical release permitting them to return to work.

This bait-and-switch technique put employers in an awkward position. Presented with a medical release, employers would be left with the dilemma of how to accommodate an employee who had claimed severe work limitations for workers' compensation purposes, but who now claimed to have few or no work limitations for the purposes of maintaining his or her employment.

What all this means is that permanent disability, although not the largest single benefit category in our workers' compensation system, is still the fuel that runs the engine. Some have suggested that increasing permanent disability benefits is a reasonable way to counteract the perceived unfairness of the 2004 reforms, while still guarding some of the other benefits employers derived. However, increasing permanent disability benefits will increase all other benefits notwithstanding the limitations placed on such benefits by the 2004 reforms.

More than anything else, workers who are permanently unable to return to their former jobs need assistance in returning to gainful employment. Permanent disability benefits have never been proven to provide meaningful assistance in this regard. In fact, all evidence seems to indicate that it has the opposite effect. Early sustained return to work should be our primary goal. The governor's veto of SB 815 is a step in the right direction.

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L.A. Court Must Do Better to Be Inclusive, Equal on Mediators

By Elizabeth A. Moreno

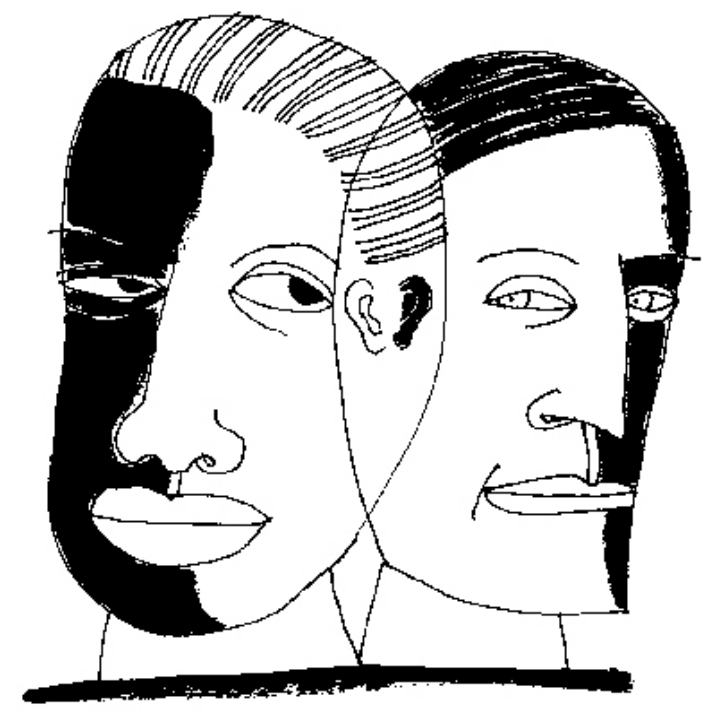
The Los Angeles Superior Court's Civil Mediation Panel is not inclusive and destroys the public trust and confidence in the justice system. To restore confidence, the court must make the selection of pro bono mediators on its panel totally random and discontinue the self-selection process by the attorneys.

The administration of any court-supported mediation panel should be held to the same standards as the judiciary in terms of promoting an inclusive and equal justice system. But unfortunately, the administration of the Los Angeles Superior Court's mediation panel promotes an exclusive system that has the effect of favoring a racial and gender homogenous group of mediators. It is no surprise that there is an ethnic, racial and gender imbalance that greatly affects the dispute resolution profession and its legal and lay participants.

It is unacceptable for the court to administer a program that favors one group. The selection of a mediator should be the same as the selection of a judge who presides over a case, whether or not the parties stipulate to mediation.

The current system grants attorneys (where 84.4 percent of the attorneys are white and 66 percent male) the unfettered right to choose a specific mediator from the thousands of mediators on the court's panel. Although the list does not specifically identify a mediator's ethnicity, culture or gender, it is relatively easy by viewing the mediator's profile available on the Web site for a lawyer, whether consciously or not, to exclude minority and women mediators.

Typically, an attorney will select someone they know on a professional or personal basis. As a result, mediators who are minorities and under-represented in the legal community, or who are not lawyers, may never be chosen. Many of the court's pro bono mediators can attest to the fact that they have requested more and received less than a handful of cases in a year, while others are receiving as many as they can handle.



This system does not promote an inclusive, representative and equal justice system. Assuming that the court's alternative dispute resolution program pursues diversity among the panel of mediators, then mediator selection should follow a procedure that insures that the selection process is neutral on ethnicity, culture and gender. The only way to achieve this is by random selection.

The racial and ethnic imbalance in the legal and dispute resolution field causes minorities to lack confidence in and perceive the judicial system as unfair. This was reinforced in the findings of the National Center for the State Courts survey "2005 — Trust and Confidence in the California Courts," where the confidence in the judiciary is much lower among minorities than among Caucasians. In 1994, the Commission on the Future of the California Courts issued a report entitled "Justice in the Balance, 2020." The report's purpose was to explore how the judicial system can provide equal, assessable, and affordable justice to all California citizens. In part, the commission recognized that "the virtues of a culturally diverse court system need no argument. Through its inclusiveness such diversity promotes public trust in justice. Through its diversity such a court system enhances its own cultural competence.

The National Center for State Courts recommended that California courts insure that its programs promote procedural fairness which will reduce the gap between approval of the California courts by African-Americans and other racial and ethnic groups. The survey concluded that in the last 10 years there has been very little progress in the diversity of the bench and bar, which makes it all the more critical that the courts' mediation program promotes inclusiveness and fairness.

A fair, inclusive and equal system would rely on a selection process that is totally random, where all the mediators would receive the same number of cases. This can easily be accomplished by expanding the random selection process already in place to all cases, whether they are limited or unlimited jurisdiction matters.

Certainly the court does not want to continue to promote a system that permits an attorney to select a mediator based on criteria that consciously or unconsciously discriminates against minority and women mediators.

As the commission recognized, 'Perceptions of unfairness are nearly as damaging to public trust and confidence in justice as the reality.' Having a random selection for all cases would enhance the court's inclusiveness and create interactions between the legal community and a diverse panel of mediators that would create an unequaled educational opportunity that spans gender, racial, ethnic and other lines.

Elizabeth A. Moreno is a Los Angeles mediator and arbitrator who is the former Diversity Chair of the ABA Dispute Resolution Section.