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A Modest Proposal: Expanded Judicial Clerkships in Colorado by Brett R. Lilly

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Strains on judicial economy—as evidenced by rising caseloads, increasingly complex litigation, and proliferating *pro se* litigants—adversely affect all citizens of Colorado. The situation has become even more dire with the state's twenty-two judicial districts eliminating 320 positions, in addition to some sixty voluntary retirements, to meet a \$12.7 million budget cut in court funding.¹

In fiscal year 2003, there has been a 13 percent reduction in non-judicial staff, a hiring freeze on all vacancies, and eight annual furlough days have been mandated for all staff.² The stress this burden has placed on the staff of the State Judicial Department has increased the use of sick leave. Judicial districts are closing clerks' offices for an hour or more every day to permit the clerks to accomplish filings and other administrative tasks. Compounding the stress, there has been an increase of more than 45,000 case filings from 2002. Also, instances of domestic violence and driving under the influence ("DUIs") are increasing, affecting not only the court system, but public safety as well.

Expanding Judicial Clerkships

Traditionally, judges rely on judicial clerks to help manage the ever-expanding dockets they face. Unfortunately, in many districts, judges are now forced to share judicial clerks. To make matters worse, students leaving law school with an average debt of more than \$84,000 tend to choose higher paying private sector employment than the lower paying state judicial clerkship positions or other public and non-profit positions.³ Even fewer graduates tend to seek clerkships at the district court level due to the relatively lower salary.

As our civil justice system approaches crisis, these transactional costs are borne by all.⁴ Governor Owens's support of the Colorado Supreme Court's effort to create twenty-five new district court judgeships is an integral step toward responding to these conditions.⁵ However, just as important as expanding judgeships is the expansion of judicial clerkships.

Improving Judicial Economy

Expanding judicial clerkships is critical to the effective and efficient administration of justice,

especially given the rising caseload of complex cases and the growing number of *pro se* litigants. Creating more judicial clerkships will improve judicial economy on the "front end" by providing judges with the resources to handle, fairly and efficiently, each and every case on their docket. A good example of this is the assistance judicial clerks provide judges with *pro se* litigants, especially in dissolution of marriage cases. Additionally, judicial clerks help judges with legal research, communication with attorneys and/or parties, or in determining what is "really going on" in the case.

Creating more judicial clerkships also could improve judicial economy on the "back end" by educating lawyers to know the difference between a case that should settle and a case that can be resolved only by the judicial process. Lawyers also need to know whether to seek alternative dispute resolution.

Also, a judicial clerkship provides the future lawyer with the tools to be a better lawyer. For example, judicial clerkships can help lawyers learn how to research and write; manage a docket; differentiate between a good case and a bad case; understand what judges and juries look for; determine how to resolve disputes efficiently and what facts matter in a case; and know how to structure a case for appeal. These are invaluable lessons that can take years to learn in private practice, but can be assimilated more quickly during a judicial clerkship.⁶

Developing a Sense of Professionalism

Part of the crisis in the civil justice system is the conflict between law as a profession and law as a vocation.⁷ Dissolution of marriage cases illustrate this inherent conflict. Lawyers have a financial interest to litigate because, for one thing, the more time they spend litigating, the higher their legal fees and income. However, given the usually volatile and emotional nature of many divorces, litigation often is not in the clients' best interests. The adversarial system often perpetuates—or does little to resolve—conflict. If the conflict is resolved in divorce cases, it is usually expensive for both parties. This, in turn, places a strain on judicial economy by expending limited resources on a case that perhaps need not be litigated so aggressively or even litigated at all. Lawyers need to develop a professional ethic that serves the clients' best interests, which are not always in the lawyers' financial interests.⁸

Also, because litigation is so expensive, there has been an increasing proliferation of *pro se* litigants, who often have difficulty navigating the seemingly complex and Byzantine rules of the adversarial system. This places even more strain on limited judicial resources. Observing a judge dealing with a *pro se* litigant or a case driven by sensitive emotional or financial considerations in a neutral and professional manner provides a powerful and lasting lesson for judicial clerks. In this way, the mentorship between a judge and a clerk is perhaps one of the most effective ways to instill this sense of professionalism.

Expanded judicial clerkships may help encourage lawyers to develop the competence and integrity demanded by the legal profession.⁹ When judges are in chambers with their law clerks, they often elucidate with a certain candor, usually lacking between lawyers, on matters of ethics, competence, tactics, and professionalism. Also, judicial clerks who become members of the Bar often gain a certain insight into how judges think—they learn to understand the perspective of the "other side" of the bench.

One way to improve the judicial system is to focus on the character of those legal subjects (judges and lawyers) who comprise the system. In the end, providing an opportunity for lawyers to develop competence, character, and integrity through judicial clerkships can only help improve the judicial system as a whole.

Cost-Effective Dispute Resolution

Another key to providing a better judicial system is to ensure that lawyers and judges can provide cost-effective mechanisms to resolve disputes. Increasing the number of judicial clerks will serve this goal by improving the dispute resolution skills of both lawyers and judges.¹⁰ This might increase public access to the judicial system by raising the quality of service the public receives and by providing resources to more effectively assist *pro se* and low-income litigants.¹¹ By decreasing the transactional costs of the judicial system over the long run, this cost-effective dispute resolution could pay for itself.

A Modest Proposal

A modest proposal is to employ a system where each judge in the state court system (county, district, court of appeals, and supreme court) enjoys the services of at least two judicial clerks. Eventually, this program could be expanded to administrative law judges as well. How can this be accomplished?

The Colorado Supreme Court exercises jurisdiction over all matters involving the licensing of persons to practice law in the state of Colorado, including rules governing admission to the practice of law.¹² Pursuant to this power, law students should be required to engage in a judicial clerkship as a prerequisite to gaining admission to the Bar, similar to the experience factors required by other professions, such as certified public accountants.¹³

This program could be coordinated between the State Judicial Department and both state law schools in such a way that all law students would have an opportunity to rotate through a judicial clerkship position as part of the curriculum.¹⁴ This will help ensure that new lawyers—even non-litigators—have a defined familiarity with the court system and what is expected in the practice of law.

Such a requirement is not simply a reaction to the crisis facing the judiciary, but instead should be viewed as a critical component to help ensure the moral fitness and professional responsibility of the Bar.¹⁵ Because lawyers, "as guardians of the law, play a vital role in the preservation of our society, [they] must understand their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."¹⁶ Expanding judicial clerkships by requiring each applicant for admission to the Bar to perform a judicial clerkship as a condition for admission will help meet these critical goals.

NOTES

1. Pankratz, "Courts Statewide Told to Slash Staffs: Denver Among Hardest Hit; Officials Fear Safety Will be Affected," *The Denver Post* (April 24, 2003) at A-01.

2. See Mullarkey, "The Impact of Colorado's Fiscal Crisis on the Judicial Branch," 32 *The Colorado Lawyer* 79 (Oct. 2003).

3. Leef, "Why Law School Costs So Much," *Regulation* (Spring 2003) at 12-13.

4. Conway, "The Civil Justice System is Due for Help: Task Force Recommendations," 30 *The Colorado Lawyer* 23 (Dec. 2000).

5. "Selected Remarks of Governor Bill Owens to the Colorado State Judicial Conference," 30

The Colorado Lawyer (Dec. 2000) at 21-22.

6. Some even go so far as to make the argument that "very little of what lawyers need to know is learned in law school" and that almost "everything [a lawyer] needs to know" is learned on the job in a certain area of practice. See Leef, *supra*, note 3. For litigators, in particular, judicial clerkships provide extremely valuable knowledge and experience.

7. Colorado Rules of Professional Conduct (*hereafter*, "Colo.RPC") "Preamble: A Lawyer's Responsibilities": "In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."

8. Colo.RPC 1.7, "Conflicts of Interest: General Rule," Comment: ". . . a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." See also Colo.RPC 1.1, "Competence" and Colo.RPC 1.5, "Fees." See generally Fleischner and Rackham, "Ethical Considerations in Forming and Maintaining the Attorney-Client Relationship," 32 *The Colorado Lawyer* 31 (Oct. 2003); Rothrock, "Fee Arrangements for the MTV Generation," 32 *The Colorado Lawyer* 37 (Oct. 2003); and Morris and Hennessey, "Ethics and the Business Lawyer," 32 *The Colorado Lawyer* 43 (Oct. 2003).

9. See, e.g., Colo.RPC 1.1, "Competence"; Colo.RPC 8.1–8.4, "Maintaining the Integrity of the Profession"; Colorado Code of Judicial Conduct, Canon 1, "A judge should uphold the integrity and independence of the judiciary."

10. Leffert, "Cutbacks at Colorado Courts Will Hurt Us All," *The Denver Post* (July 10, 2003). "Unlike federal judges, state judges do not have law clerks available to conduct legal research and help administer cases. To make matters worse, each of the state courts has been asked to take on additional cases because appointments of new judges also have been delayed due to budget cuts. In effect, we are asking the judges to handle more cases with fewer staff and resources."

11. See, e.g., Butler, "Improving Access to Justice Through Local Committees and a Statewide Commission," 31 *The Colorado Lawyer* 77 (Oct. 2002); "Colorado Access to Justice Commission Formed," 32 *The Colorado Lawyer* 39 (Feb. 2003). "The Commission will address issues that affect meaningful access to the courts. . . ."

12. C.R.C.P. 201.1.

13. Alternatively, applicants could be given an incentive such as a lower total score required to pass the Bar if such applicant has been certified by a judge as having participated in a judicial clerkship. This need not, and indeed perhaps should not, be exclusive. For example, public interest, public sector, and non-profit positions could satisfy this internship/clerkship requirement, as well as federal judicial clerkships.

14. See, e.g., C.R.C.P. 201, Appendix, "Approval of Law Schools"; ABA Standards and Rules of Procedure 301(a); 302(a)(iii), (iv), and 306.

15. C.R.C.P. 201.6, "Moral and Ethical Qualifications"; C.R.C.P. 201.7, "Review of Applications" (providing for review of all "applications for information about the mental stability and ethical or moral qualifications of each applicant").

16. Colo.RPC: "Preamble: A Lawyer's Responsibilities."

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