



JUDICIAL FORM TRANSCRIPT

Q&A Session (Marin Judicial Forum Part II)

September 27, 2006

I believe there is no question in anybody's mind that when a lawyer contributes \$5000 dollars to a judge's campaign, he's not doing it because the judge is hungry. He's doing it because he expects a quid pro quo, something back. And I believe that we are going to have to take the bullet and stop lawyers and judges from supporting and contributing the campaign of other judges. And I think it's got to be done. It's just as strong as daylight that when the lawyers contribute to the judges they expect to get it back and they do.

Carl Shapiro, Marin County Civil Rights Attorney

It would be naïve to think that a lawyer who makes a huge contribution isn't expecting something back.

Alameda County Superior Court Judge Kevin Murphy

1. Batterers getting custody / preferential treatment? Mary Ann Maggiore

Murphy- Domestic violence cases are taken very seriously in Alameda County.

Kauffman- In general, court mediators treat allegations of abuse as a family matter rather than a legal matter. There needs to be better communication about this issue for the mediators. It is a problem in Marin County.

Henley- There was a report by the attorney general this year indicating there are significant problems in terms of domestic violence. The day it was released, the attorney general held a press conference to talk about those results. With him was the chief justice, and I think the chief justice was well aware the report was highly critical. Immediately the legislature introduced various things to make certain kinds of training mandatory. I think this really did catch the judiciary kind of unaware, but it does appear that the chief justice was quite aware of it and tried to put some things in play. We'll have to see how it goes.

2. Elder law- Are there methods to overturn a Marin court settlement regarding an estate / elder coercion allegation that was presided over by a Marin court commissioner? What relevance does the mental/ emotional state of the defendant, who was under the care of a Marin psychiatrist before during and after the settlement agreement have on the validity or legality of such a settlement which was imposed initially to be a mediation discussion? (too specific)

3. Complaints have been filed with the Commission on Judicial Performance against Judge Dufficy. Previously Marin residents attempted to recall Dufficy but were unsuccessful. An FBI probe was conducted about how Dufficy ran in his last election uncontested and is still presiding as a Superior Court Judge. How does the

panel advise concerned citizens to take action in removing unethical judges and / or commissioners?

Kauffman- Dufficy didn't run unopposed, he had 2 contenders. Actually it was pretty significant because Judge Dufficy's war chest was massive, and he had touted that he had all living Marin Bar Association presidents and past presidents supporting him, all the sitting bench supporting him. He had a massive war chest. And his 2 contenders were complete unknowns and who really had very little to do with Marin County [and] for obvious reasons don't run against Judge Dufficy. They lost, but they walked away with a combined vote of 43%. That's a lot for unknown judges. So here's what you can do: go out and vote, pay attention to who's on the ballot, and support people who are running against the judges. And educate yourself on what's going on and support those people who are brave enough to run against the judges. You gotta go out and vote, get your friends to vote; go out and do it. Make your voice heard.

4. What information does CJE have as to the steps the court has taken to correct or meet the recommendations of audits?

Fogg- At this point, unfortunately the only information we have is what I shared in the presentation. We do know the legal self-help center has been implemented. We do also know that Judge Duryee has taken steps to try to clear the backlog of family court cases. We have corresponded pretty extensively with the courts, trying to find out more information about what has been implemented and how we can support them and help make more progress toward doing what's been recommended and making positive change in the courts.

5. For Henley- Have there been any disciplinary actions against Marin judges in the last ten years?

Henley- I can't comment about any discipline; that's private, but I am not aware of disciplinary actions against Marin County judges in the last ten years.

6. What, if any, is the appeal process for decisions rendered in family law court?

Kauffman- It's the regular appeal process. This is the real problem, because appeals are so expensive. If you lose in family court, you have to take it up. This happens a lot. The judges will make a ruling, and they know that it's not right, but they say 'go appeal it.' And that can cost, for an appeal, \$20-25000 dollars. It's not just family court, it's really any court. It's the same problem: if the judge says I'm not going to apply the law, I'm not going to listen to the evidence, I'm going to exclude that witness (which can be deadly to your case if you have a key witness and he or she is excluded). Then the judge isn't going to consider it, and if you're in front of a jury the jury's never going to hear it, and you will then be stuck. You can complain about the judge, but they will say you have to appeal. So you have to shell out the money and go on up, and that's \$20-25000 dollars, easy. Then you win. If you win, and you come back down, [you] start all over again- in the same court. You can, maybe, get a different judge, but you're still in the same court system. It is a problem.

7. For Lagleva- Since harassment and unwarranted arrests arise in Marin to people who complain publicly or in court, how can complainants safely come forward?

Lagleva- That's actually a very good question, because it's something the Human Rights Commission has been grappling with for the last couple of years. When I first came on board as a Human Rights Commissioner, a large part of our concern was the privacy of these complainants. Because of the issue, whether it's perceived or real, around the issue of retaliation really needed to be put into the context of the issue of safety for these complainants. Now, as a

result of our difficulty, to really provide safety, privacy or protection to our complainants, what we often do is refer them for legal support and legal help. Some of the agencies that we work with, such as Legal Aid and other organizations ... might be able to at least give them some level of legal protection as they are going through a complaint procedure. Now, we also have done it in a way that is so direct, and that speaks about us really handling this in so many ways . . . Because the fears, whether they are perceived or real, is inarguable. Once again, our main issue as a Commission is for people to share their stories, but we are also totally aware that safety is an issue and protection is an issue. Because, especially in very disenfranchised communities in Marin, the issue of trust and safety is really something that is often compromised between residents and law enforcement.

Brisson- If there are issues of police misconduct, there are attorneys in Marin and San Francisco that are interested in hearing from a potential client in a case with violations of civil rights. So another remedy would be to go to a lawyer.

8. What can be done about judges assigning cases without a lawyer to attorneys? This practice creates unfairness when these attorneys are more loyal to the judges than their own client.

Murphy- What can happen in a criminal context is when an indigent defendant comes into court, they could be referred to the public defenders office, (speaking for Alameda County). They are referred to the Public Defender's office; they are not referred to a specific attorney. The office then decides how it's going to handle the case, or who it is going to be assigned to. There is also in Alameda County, I would imagine here too, a court appointed criminal bar, where if a conflict exists and the public defenders office cannot represent someone, then attorneys whose names do not appear on the court appointed list can be called by the Public Defender's office to communicate that there's a conflict. Then they come and represent. But I'm not aware of circumstances in which a judge says, 'We'll take this case and assign it to Attorney A.'

Shapiro- The judges appoint lawyers for people who do not have the resources to hire a lawyer. In criminal cases, in which case the public defender or the alternative public defender is appointed by the court, the judge also appoints a lawyer for a child who is in the middle of some legal proceedings, and occasionally will appoint a lawyer for the parent of the child. Let me put it this way: A lot of people come to me and they don't like the public defender. Every public defender is a dedicated, able lawyer overworked so that they can't do the job that he or she wants to. The area where the court fails to recognize the need for a lawyer is for instance in an eviction case, where a person is losing his home, his family, he's going to be on the street. Also there are cases where creditors are able to take the resources of a family, and the courts will not appoint a lawyer to represent that family which is trying to protect its life and its resources. I think that [we need] to get together and [set] an independent ombudsman, somebody who has the right to approach the judges and the lawyers and anyone else, who is completely independent and who we can consult as individuals when we have a complaint, we can make the system work at least a little bit better.

Henley- On the conflict council, which is perhaps what the question was directed to, I know in some smaller counties where they don't have a whole official conflict panel. Courts have been set up. I don't know if it was pressure from the Bar Association or what, so that you don't have judges making direct appointments of attorneys, and having a list and picking somebody off the list -- having an attorney that serves in that capacity and is responsible for making the appointments. They just refer it to the alternate panel, and that's handled by the panel itself, to avoid the appearance that judges are picking people off the list or that there's anything untoward happening.

Kauffman- Certainly in the family law court, it's been known for years. This was the subject- the appointment of attorneys for the children. It comes from a very small group, a very favored group. I'm not saying that's every lawyer for the child, but there is a very well-known, favored group in Marin County. All you have to do is read the Winner Report, [and] you'll see all about who they are because they're still around. It was written about in 2000. It's called the Karen Winner Report, and she did an in-depth outside study on this exact issue of attorneys and therapists for the children who work in Marin County. It's a terrific report, and you should read it. Especially if you're going to be put into the system and have an attorney appointed for your child. You need to read about these attorneys, because they are all talked about in there, and you'll know a lot more.

9. How can citizens gain a big role in the ongoing monitoring of the courts?

Fogg- The first suggestion that I have is that you be here tonight. That you be part of the discussion that we're having and that you take action and be activated by the information that you've been learning here tonight. And seek out more information with us. As I mentioned before, we're learning about how the courts have changed, we're learning about what our options are. Right now, we at CJE don't have all the answers to that, but with your help and your support, and your own research, I think we can get there. We need to create a dialogue in which the community is engaged and interested in their judicial system. We need everyone to care, and I think at that point, we'll be able to establish something like what CJE was founded to eventually get to, like a citizen review commission, some sort of official involvement for the community with their courts.

-Are there any programs in other counties that you might site as a model for citizen participation?

Henley- The counties are all very different. There are 16 counties that only have 2 judges. Then you have Los Angeles that has one quarter of the state's judiciary, so there's a lot of diversity there. I think most of the efforts have been generally through Bar Associations. There is a number of Bar Associations that do set up committees that try to interface between people dissatisfied with the courts and judges, They'll do informal investigations and try to mediate these kinds of issues that occur. But I think those are primarily driven by the bar associations. I think a lot of the changes that have come about have sometimes been the result of changes generated within the courts, or generated by the courts. There is also the legislature, and a number of the changes in terms of the education requirements and various other models, changes in small claims court, everything grew out of some dissatisfaction with how the courts worked. Those have usually gone through the legislature, which has set up the main model to set up a different structure.

Shapiro- First, I think this meeting, with 150 people, will carry a message to the court. Perhaps the next meeting will have 300 people; that carries a better message. I think we should see whether we can have appointed somebody who can represent us as an ombudsman, somebody who is going to take our responsibilities, our complaints, and see if we can get them corrected. I think we should set up a group of people from this meeting who will go to the Marin Bar Association and set up a joint program. The lawyers might even do it, because they also, many of them have problems with the judicial system. I think that we should take a program of what we want to do to the Board of Supervisors- put them on the spot, make them perform. And I think, finally, we have a tool in the form of the Grand Jury. And I think that we should work with the Grand Jury, as they did at the last Grand Jury came up with a very sound suggestion about criminal law, and I think they will come up with a very sound suggestion if we present them with the problem and a sound solution.

Kauffman- I think that people who are concerned about this should go look at the judicial disclosures. Certainly if you find yourself in court, it's all up on the first floor of the court. You can go look at their financial disclosures; you can go look at who's donated to their campaign. You can find out if your opponent or your opponents' lawyer has donated. Educate yourself that way- when you get into court, ask the judge about it. I think demanding accountability as taxpayers and asking the hard questions 'Let us see where the money is going.' Transparency. They've invited us talk to them as taxpayers. Let's ask the questions and ask for the answers, because they've all said, 'We want to talk about it. We want to answer the tough questions.' Let's hold them to what they're saying. You can challenge- if you find out there's a conflict, you can challenge the judge. You can say it's a 170.1- it's that test Erin was talking about. **Would a reasonable person entertain a doubt that this judge could be impartial? It is the appearance of impropriety, you don't have to show actual bias. It's an objective test.** So you can talk about that with your lawyer if you have one, about challenging that judge. If you find this problem, you talk about it with the judge. [If the judge] won't take himself out of the case, this does start a process. You can challenge that judge. That challenge will usually be sent to an out of county judge to review. I have found that- in fact, I've never had one upheld and I've had some egregious cases. But it is a forum and what it does is it sends the problems here out to other judges. It spreads the word about what's going on here. One more thing, you can talk to the Administrative Office of the Court and perhaps ask for an audit, encourage an audit, just like they did on John Montgomery. Have them take a look at where the money is going.

Brisson- We have heard from Victoria Henley about the work that's done by the CJP, and that's one place that's a clear body to bring complaints about judicial conduct. That's their job, and they will conduct an investigation. So if it falls between the cracks where you can't perceive to get a remedy through the CJP, if it becomes an issue in the case itself, it's something you need to educate yourself more about. But conflicts of interest and conduct of judges that are a breach of ethical duties, that it can't quite be enough to get the commission to set a hearing and take the case, you could handle it politically or you could take an appeal up in the courts. Also, if you do make a timely challenge, and it is well grounded but it is not granted, there is an appeal process and the court of appeals can scrutinize it. You may win there.

Lagleva- First and foremost I want to acknowledge that the change process has already begun this evening, But for the mere fact that we're all here tonight, discussing and educating ourselves and each other about these issues is the first step in the right direction. I also want to acknowledge that within the context of any social or political movements, there are 3 basic guiding principles: **educate**, which we are here tonight, and then **agitate**, and **organize**. It's simply put. And I would really encourage that we continue the movement towards these efforts. There are a lot of channels, as these panelists have mentioned. There are channels where your voices can be heard, from top to bottom. And I believe that it's going to take a collective, organizing movement to really make these changes, because this is an institutional and systemic change that is not going to be addressed overnight. It's going to take some time.

9. How can we improve the fee arbitration system in Marin, where attorneys – somebody- assigns lawyers who are all in the Marin Bar and mostly buddies to arbitrate between lawyers and their clients?

Shapiro- The legislature and the State Bar Association have worked out a proceeding where if the client is dissatisfied with the bill, he has the right initiate an arbitration proceeding between two lawyers and a layperson, or 2 laypersons and a lawyer appointed by lot, by the local bar association, or in some cases by the state bar. The lawyer is bound by the decision. In other words, if it rules against him, he can't go over and want to go to court about his case or his claim. The client, if he's not satisfied with the decision, has the right to go to court and litigate the claim of the lawyer. This procedure is kind of bulky, and it doesn't always work out, but it is sure a lot better than it was 10 years ago when if you didn't like a fee you were bound to go to court,

and you had to get a lawyer to fight the other lawyer, and you lost everything. So it's not as bad as the question would want you to believe. The arbitrations are slow, but I've never seen an arbitrator who gave the lawyer everything he wanted. Because most lawyers, when they get in that bind, are pigs for money. And they do charge too much. And it's not a reasonable fee which would be acceptable. I believe that the arbitration system can work itself out, and if you have a dispute with the arbitration system, come and talk to me. I won't charge you, but I'll tell you whether it's a good result or not.

Henley- The situation certainly has gotten better. I don't know who the representative is to the State Bar in this district. There's no reason a letter couldn't go to the representative for the State Bar for this district, saying there are concerns with people involved in fee arbitration, that they should have an alternative if they don't wish to have it arbitrated by lawyers in your county, of having the option to travel somewhere else to have a fee arbitration. I don't know why the State Bar couldn't give that some consideration as to increase the option to have a greater appearance of fairness to resolve issues.

Brisson- When there is a dispute that you want to go into arbitration, the selection of the arbitrator is a careful process that everyone should participate in. There's a long list of potential arbitrators or other attorneys in the county. There are how many thousand of attorneys in Marin County. If you go carefully through the list and get information, you can find an arbitrator who you feel is fair and you've investigated, and your other party may; there are several you can pick. You find the ones you think are fair and then between the ones that you think are fair, you can find somebody who you've already checked out and who is not biased.

10. In how many instances in the past 10 years did the commission discipline a judge?

Henley- Every year in our annual report, appendix 3 gives you 10 years of statistics so you can compare one commission to another from year to year. They have the number of complaints received, number of investigations, number of investigations closed without discipline, the number of judges given each level of discipline. (statistics unintelligible). . .

11. Do you think the system of judicial campaign contributions corrupts the process? What can be done?

Shapiro- The issue [was] raised by the US Supreme Court, who said that this is part of the constitutional right of an individual, to make a contribution and make a speech or express himself through the contribution, and that's why we've had such a hard time getting control over the elections in this country. In other countries it's entirely different. I believe there is no question in anybody's mind that when a lawyer contributes \$5000 dollars to a judge's campaign, he's not doing it because the judge is hungry. He's doing it because he expects a quid pro quo, something back. And I believe that we are going to have to take the bullet and stop lawyers and judges from supporting and contributing the campaign of other judges. And I think it's got to be done. It's just as strong as daylight that when the lawyers contribute to the judges they expect to get it back and they do.

Murphy- Alameda county has had very few contested elections as long as I've been around. I do as much as I can every day in my court. I see the same lawyers on a regular basis, as I have for the past 6 months. You will obviously get to know some of them ,when you see them on an everyday basis. Most of my contact with them is from the bench, and I do my best every day to simply make decisions based on what's before me. One reason I didn't want to be a judge in Marin County is that I've lived here all my life. I could see problems arising if I were sitting in cases in front of people I grew up with or went to school with, or things like that. That said, there are people in Alameda that I know, and have known for many years, but I do my best every day

to simply decide the case based on what's before me. I have already in the 6 months I've been there had many occasions to make difficult decisions involving people who I've known over the years. I think once you get comfortable with that concept and you get comfortable with the notion that my job as a judge is to decide a case based on the facts, based on the law, based on what is in front of me. I would not have wanted to become a judge if I didn't think I could do that or if I didn't feel comfortable with that. People could point to things that they might think are not consistent with that, but I simply would do my best if I ever had to run in a contested election and somebody contributed a large amount of money to my campaign. I do everything I can to make a decision based on the law and the facts. Mr. Shapiro is right. It would be naïve to think that a lawyer who makes a huge contribution isn't expecting something back. From my side of the fence, I would do as I do everyday, everything I can to make the best decision I can.

11. Is public financing the way to resolve this or the appearance of these conflicts of interest?

Murphy- That's a huge question. On a national level, I think that would go a long way toward eliminating any appearance of impropriety and it would certainly avoid some arguments that could be made if somebody writes a check for a large sum and then appears in that court on a regular basis.

Henley- This issue is a tough one. Every time an election comes up my whole family asks why'd we have to vote for these people, we don't know who they are or anything about them. So I always say, "Would you like to give up that right to vote for them?" Absolutely not. We have to have accountability; we have to vote. My concern is the way the elections are structured, people don't know enough about people to be either retained or denied. I personally don't like the contested election structure. I would prefer to see- there are a number of states that have retention elections for judges. They have commissions that are responsible for doing evaluations of judges. For example a year and a half prior to that retention election, they survey jurors, they survey litigants, they survey everybody; [and] they do a report. If the judge is not performing satisfactorily, they are given a period of time to correct. If they don't, the report is public and voters have it in time for the election. I don't think we find out enough accurate, helpful information about judges by having people running against them and all the campaign contributions. It's my personal view.

Shapiro- I just have one suggestion. We have a meeting on this one issue: namely, the influence or no influence of lawyer contributions to the judges. And then invite all the judges and invite the lawyers and let's see what they have to say about it. I think the objective is to stop it completely.

Lagleva- I cannot speak on behalf of the commission on this particular issue. However, it's my personal feeling that to even out the playing field around this issue, I do support limits on campaign spending. Period.