A.B. 64 LEGISLATIVE TESTIMONY

Submitted by
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MR. CHAIRMAN. Due to the length of my remarks today and the number of speakers on this bill, I request that the chair insert the full text of my remarks into the record of these proceedings. My remarks include two attachments: the first is an article I submitted to the Nevada Lawyer in May, 2008 entitled "Dragging Our Family Courts into the 21st Century" and the second is a draft of my thesis for the Master of Judicial Studies Program at UNR entitled "LEGISLATING THE PARADIGM SHIFT: How State Legislatures Can Fundamentally Change Family Law."

Having served as a Family Court Judge for six years, having performed strategic planning services for the courts and having done extensive research on the future of our courts, I have acquired significant expertise in this area and I wish to share some of that with this committee in conjunction with AB 64.

Due to the severe economic downturn that our nation and our state is presently experiencing, the Legislature openly asked the public for ideas on how the state can save money. Although the judiciary's share of the state budget is minuscule overall, the real impact of the proposed increase in the number of new judges for Clark County will have a huge impact on the county budget.

I am answering your call for new ideas. The ideas I am presenting today have the potential to save money for the State of Nevada and could actually save millions of dollars for Clark County. Every idea I espouse today is tested, proven, practical and certainly not theoretical or experimental. Every idea is being done elsewhere often with great effectiveness.

In A.B. 64, the judiciary is asking for 7 more judges for Clark County, two in Family Court and five in the civil/criminal division. The reasons to be given are in the caseload demands and that more resources are needed to meet the demand. Having served as a judge, I personally know the incredible amount of work that a judge must do to keep calendars current and cases moving along. If you don't have a strong work ethic, you have no business being a judge.

I partially oppose A.B. 64 for several reasons. First, neither courthouse in Las Vegas actually has room for more judges. This Legislature approved five new judges for Family Court in 2007. The District Court is just now getting around to remodeling Family Court to build out new courtrooms for the new judges. In the meantime, the new judges have to play "musical courtrooms" and shuttle around to a different existing courtroom 4 days a week. This is inconvenient for the public and lawyers to figure out where their cases are on any given day.

Since the opening of the Family Court building around 1995, all Family Court judges and staff were housed in the same building. Family Court was physically separate from the civil/criminal division and was a self-contained unit.

Starting in 2007, two Family Court Judges were relocated downtown to the Regional Justice Center. This has played havoc with attorneys who had multiple court appearances on the same

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day. Before this happened, a lawyer could easily move from courtroom to courtroom since it was all in the same building.

In order to accommodate all the new judges, the court moved the clerk's office out of the first floor and relocated them to other buildings away from the Family Court building. Family Court more and more resembles an ad hoc "Rube Goldberg" contraption.

Furthermore, the parking around both courthouses is atrocious. There is now LESS parking than ever. For members of the public going to either courthouse for business, the trip is an arduous ordeal. Parking enforcement agents circle the RJC like vultures looking for the next parking miscreant.
The RJC opened up nearly four years late. It was at or near full capacity the day it opened for business and there was little room for future expansion. There is no real room for five new judges now and just where the court plans on putting them is still something of a state secret.

My second reason is that Clark County can't afford the millions of dollars needed to remodel the courthouses to accommodate new judges. In the past, it has cost the county about $1 million per new courtroom. In flusher financial times, this may not have been a big deal but it is today.

The Eighth Judicial District Court has not been a good steward of the taxpayers money. Clark County lost the arbitration wars with the general contractor over the RJC and detention center disputes. That has cost the county some $80 million when all the legal fees and costs are totaled up with the arbitration award. The RJC project was not fully designed when it was let out to bid and when the county demanded changes, its representatives would not sign the change orders.

The construction project was mismanaged and has been plagued with structural problems to this very day. That has cost the county undisclosed amounts of money for more repairs and inconvenienced the public.

Adding new judges at this time will cost the county untold millions of dollars, money that Clark County does not have to spare for that purpose. In the very recent past, Clark County was forced to spend money to significantly increase the number of child protective service caseworkers. The Nevada Supreme Court is pushing the counties hard for major increases in indigent defense services. With all the layoffs and unemployment in our state, the number of indigent defendants has increased.

The third reason for opposing this bill in principle is the abject failure of the District Court and, to a lesser degree, the Nevada Supreme Court to engage in serious strategic planning for the future growth of our courts and for that, both deserve a resounding "F." Both have refused to perform the deep studies needed for genuine strategic planning for our courts.

Several other states and countries have done so but in Nevada, nobody in the courts wants to study anything. The judges in this state won't go to the conferences where the new ideas are presented and discussed, they won't read the studies and reports from other jurisdictions and they won't talk to their counterparts in other states and countries who are dramatically remodeling their court systems and using different approaches to dispute resolution.

The only answer our judges propose when the caseloads grow is "more judges, more

courtrooms." This is the mantra they have chanted as long as I have been in this state, now some 34 years. When our courthouses reached their capacity to absorb new judges, our counties built new courthouses. We can no longer afford the luxury of new, very expensive buildings.

My approach is very different. I contend that we should remodel our courtsystems instead of our courthouses. Our courts should broaden their public service mandates from adjudication services only to a broad based system of dispute resolution services.

The linchpin for the newly remodeled system is mandatory mediation for all domestic cases and for all civil cases in Clark and Washoe Counties. This is neither a novel nor an experimental idea. Mediation has proven itself as a viable, cost saving and satisfactory alternative to traditional litigation, especially so in domestic cases. There is no longer any serious academic debate about the efficacy of mediation. That debate is over and the mediation proponents have won.

The only question remaining is whether we have the visionary leadership and the will to make it happen. Those are the only missing ingredients.

I submitted 17 pages of written testimony to this committee in 2007 in support of AB 571. In that testimony I pointed out that mandatory mediation is now required in Utah and North Carolina and have proven effective in settling well over half the cases in mediation with another 10-14% resulting in partial settlements. Even if mediation fails, it is not unusual for cases to ultimately settle close to what was proposed in medition.

Since that testimony in 2007, Australia has completed its overall of the family courts and mediation is now mandatory. Subject to some exceptions, parties cannot even file a divorce case unless they have a certificate from a certified mediator that mediation was tried and failed.

British Columbia, Canada is now circulating new rules for its family courts and mediation will also be mandatory. It is being used with greater frequency and again is producing solid results.

In Nevada, we have had mandatory mediation since 1997, NRS 3.475 and 3.500, for child custody and visitation issues. In Clark County, the Family Mediation Center routinely resolves close to 80% of their cases with full or partial settlements. I am told that Washoe County is about the same.

Mediation takes place in ordinary conference rooms and does not need a million dollar courtroom. There are hundreds of conference rooms spread throughout the Las Vegas valley in business, government and professional offices.

The published academic studies were referred to in my 2007 printed testimony and will not be repeated here.

CIVIL MEDIATION

My 2007 testimony did not include information about mediation in civil cases. However, the research results are still the same. The efficacy of civil mediation has been established through several different research studies conducted with the past 15 years. An excellent survey of

these studies can be found in Thomas J. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution," 1 Journal of Empirical Legal Studies 843 (Nov. 2004). He was then the president and CEO of the CPR Institute for Dispute Resolution.

He concluded in part:

> "There is substantial evidence that mediation and other ADR approaches can result in enhanced satisfaction, reduced dispute resolution costs, shorter disposition times, improved compliance with a settlement, and other benefits in some contexts. Much, however, hinges on the nature of the program and the participants, and there is still much to learn – and decide – about the role of ADR in the public justice system." (Id at 911)

While there are several good studies to look as noted in the above article, one from our neighboring state of California bears special mention. The decision was made a few years ago to study mandatory civil mediation in a pilot program. Mandatory mediation was established in the Superior Courts in San Diego, Los Angeles and Fresno. Two other Superior Courts, Contra Costa and Sonoma Counties, voluntarily elected to also do mandatory mediation.

The Administrative Office of the Courts conducted an in depth study of the pilot programs and the full report was published in February, 2004. Here are the combined results:

1. More than 6,500 unlimited cases and almost 1,600 limited cases participated in the pilot programs.
2. 58% of the unlimited cases and 71% of the limited cases settled in mediation.
3. In San Diego and Los Angeles, the study found that mediation reduced the proportion of cases going to trial by a substantial 24 to 30%.
4. In San Diego, the potential time saving due to the mediation program was an estimated 521 trial days per year with an estimated monetary value of $1.6 million.
5. In Los Angeles, the potential time saving was estimated at 670 trial days with an estimated monetary value of $2 million.
6. In all five pilot programs, both parties and attorneys expressed high satisfaction with the mediation services provided by the court.
7. Litigation costs and attorney hours incurred were greatly reduced in those cases that settled in mediation, often cutting costs and time spent on cases by more than half.
8. In 4 of the 5 pilot programs, the study found a reduction in the number of motions filed in court from 18% to 48% and from 11% to 32% for pretrial hearings. The Fresno pilot program required special case management conferences. Reducing the number of motions and pretrial hearings saved the court hundreds of judge days per year allowing the court to focus on other cases requiring judicial attention.

The California experiment was very successful. They are similar to what other well crafted studies have found. Those studies are noted in the Stipanowich article cited above.

In 2007, the Resolution Systems Institute (formerly known as the Center for Analysis of Alternative Dispute Resolution Systems) published a Bibliographic Summary of Cost, Pace and Satisfaction Studies of Court-Related Mediation Programs (2d Ed.) which summarized the results of numerous mediation studies. The Bibliography itself does not state any conclusions.

The United States government is the single largest civil litigant in the United States today. Its

civil litigation is conducted by the Department of Justice. The DOJ commissioned a major study of the use of ADR methods in its civil litigation. Their study, "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes" was released in 2008. The conclusions were overall positive in both the percentage of cases settled, the reduction of time to final disposition, the savings of costs and fees and the reductions of court time.

Civil mediation has been mandatory in the Ontario and Saskatchewan provinces for over ten years and has proven effective in settlement rates, reduced costs and positive impact on court dockets. Canadian law profession Julie

McFarlane, a recognized expert in ADR methods, studied the satisfaction rates with the process and observed that as the mandatory mediation programs matured and lawyers adapted to them, the satisfaction levels rose. McFarlane, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program," 42 Alberta L. Rev. 677 (2005).

The settlement statistics from other jurisdictions such as Alabama, Virginia, Florida, etc. further support the argument that mandatory civil mediation in the Second and Eighth Judicial District Courts will be an enormous benefit to the public, the bar, and to the taxpayers of each county and the State of Nevada.

As I said earlier, the only ingredient we lack is the visionary leadership and the determination to make it happen. Our judges work very hard and are well intentioned but we cannot afford to remain stuck in the last century with our antiquated, expensive, ponderous and often unsatisfactory civil justice systems based on the traditional adversary model.

We need a complete "bottoms up" of our court adjudication systems conducted largely by outside experts and a fresh look at the delivery of dispute resolution systems for Nevada's citizens. Our judges certainly are working hard but they are not necessarily working as smart as they could be for the benefit of the public.

Mediation has proven to be an enormous benefit to the courts in reducing caseloads and resolving cases. It is not only logically wrong to refuse serious consideration of mandatory mediation but it would definitely be fiscally irresponsible to continuously ask for new judges from the Legislature.

DRAGGING OUR FAMILY COURTS INTO THE 21ST CENTURY

By Robert W. Lueck, Esq.

> "The very essence of leadership is that you have a vision. It's got to be a vision that you articulate clearly and forcefully on every occasion. You can't blow an uncertain trumpet."
>
> President Theodore Hesburgh (Ret.) University of Notre Dame

The 2007 Nevada Legislature created five new Family Court judgeships for Clark County and two for Washoe County. Neither county had any place to put the new judges and both counties will have to spend millions of scarce taxpayer dollars for new courtrooms and court personnel staffing.

The twin pressures of unrelenting population growth and tightening budgets is combining to create the "perfect storm" of hand wringing dilemmas for which there are seemingly no good answers and little money for future growth. So far, the usual judicial mantra is "more judges, more courtrooms."

It's time for a different tune. Both counties are cash strapped and soon will likely have to invest considerable funds and personnel positions to provide adequate criminal defense services for indigents pursuant to a recent mandate from the Nevada Supreme Court. Clark County also has to create and fund many new caseworker positions for our child welfare system that was also buckling under unbearable caseloads. That plus the normal increases in the personnel and financial demands from other agencies has left both counties with an overabundance of service demands and a paucity of resources

THERE ARE ANSWERS

But, there are good answers and I found them. We should remodel our court system instead of our courthouses. We need bold, innovative thinking and forceful executive action. If we don't think "outside the box" now, we will be doomed to spending millions of taxpayer dollars for "big box" courthouses that we can ill afford.

I will even go out on a limb and declare that if our judicial leadership embraces and uses these new ideas and the Nevada Legislature gives us the necessary legal tools, we would NEVER need another Family Court judge in either Clark or Washoe County. You read it right: NEVER AGAIN.

How, you ask? Easy, I reply. We make mediation and collaborative divorce the primary means of resolving a divorce and the adversary trial becomes the alternative method, the choice of last resort. The entire system is fundamentally reversed. We call this a paradigm shift. 1/

The cutting edge in family law today recognizes that effective case management and dispute resolution is multi-disciplinary in nature and involves financial and mental health professionals working with attorneys in a variety of new models mostly outside of the courtroom context. 2/

The only ingredients in short supply are bold visions of the future and the forceful political will needed to make them happen. Now, more than ever, our judicial leaders need to boldly lead.

Minor tinkering with procedural rules doesn't cut it when we need major changes. Leadership by lethargy and "paralysis by analysis" are not acceptable management maxims.

HOW WE CAN DO THIS

My proposals take advantage of the hundreds of currently existing conference rooms in our government and professional offices. None of these methods needs a million dollar courtroom. There are five principal ways in which cases can be diverted out of the adversary system:

1. Mandatory mediation. It works. Mediation fully resolves roughly two-thirds or more of the cases sent to mediation; another 10% or more result in partial settlements. Those cases that do not settle in mediation often settle later on terms similar to what was proposed in mediation. 3/

2. Voluntary domestic relations arbitration. The American Academy of Matrimonial Lawyers put together a model domestic relations arbitration act for property, debt and financial issues. A handful of states now permit family law arbitration. 4/

3. Parenting Co-ordinators. In places where this has taken root, it has helped immensely to keep high conflict cases out of the court system. 5/

4. Collaborative divorce. This is an all negotiation, out of court model that is proving remarkably successful in several localities and countries. More courts are embracing it as a sensible alternative to the traditional adversary system. The success rate is between 78% and 94%, numbers which will likely increase as practitioners become more skillful in this process. 6/

5. Increased parent education and counseling programs. These are programs that go beyond a short presentation and work with medium to high conflict couples in a variety of counseling/therapeutic programs to aid parties in improving their communication skills and cooperation for the benefit of their children. 7/

WHY CHANGE IS NEEDED

That is the "how" and now here is "why." These newer ideas work when we recognize that a divorce is nothing more than a restructuring of the relationships between husband and wife and their children and a restructuring of their assets, debts and finances. The adversary system was designed for all manner of civil and criminal disputes. Family relationship matters are an ill fit for such a system.

There are other reasons for non-adversary simplicity:

1. The majority of our litigants are pro se. Asking them to understand court processes is asking too much. Mediation is aptly suited for these parties.

2, Divorce is much too stressful. It ranks right behind the death of a spouse, a child or a close family member. Too much chronic stress triggers cognitive and affective responses which, in turn, produces sympathetic nervous system and endocrine changes. These ultimately impair immune function. 8/

3. Divorce is much too expensive. Few people can afford full blown litigation and even many litigants with money shun lawyers since they feel they make things worse and run up bills.

4. The adversary system encourages conflict and pits people against each other and often makes their lives worse, not better. A "victory" in family court may feel good for one spouse but will wreck the relationships with the other former spouse and bodes ill for the children. 9/

5. The adversary system is way too stressful for lawyers and judges alike and leads to job

burnout, etc. 10/

So why aren't we doing this in Nevada? The blunt answer: our current judicial leadership fails to serve the public by not reaching out to understand and embrace these new ideas and implement them for the benefit of the public. Effective leadership means keeping an open mind, reading the many studies done on family courts, reading the professional literature and attending the "cutting edge" conferences on family courts, especially those done by the Association of Family and Conciliation Courts.

I was the only Family Court Judge in Nevada, past or present, ever to join the AFCC and regularly attend their conferences. Sadly, not one sitting Family Court Judge in Nevada belongs to the AFCC. Sad because the AFCC is a treasure trove of new ideas, a chance to meet and hear from some of the top family law experts, and presentations on new programs and approaches.

The Nevada Supreme Court is not helping. It may foist a badly conceived new rule on the family courts that includes a more complicated financial affidavit form. Then judges are required to conduct early case management conferences. In Clark County, the judges struggle, often unsuccessfully, to keep their motion calendars current and set trials within a reasonable time. If they now have to conduct case management conferences, our system will grind to a slow crawl. A 20 or 30 minute meeting is not enough time to conduct a meaningful settlement conference.

The 2007 Legislature considered my Domestic Relations Dispute Resolution Act that provided for mandatory mediation, collaborative divorce, cooperative divorce, parent coordinators and domestic relations arbitration. AB 571 got a positive reception at the committee level but the pressures of the short legislative session and rapid deadlines kept the bill from progressing further in the legislature. The only judicial officials supporting this bill were former Family Court Judge Robert Gaston and myself.

This judicial inertia is especially glaring when considering what other judicial leaders and countries are doing:

– Chief Justice Judith Kaye of the New York Court of Appeals is aggressively pursuing substantial reforms of her state's domestic relations law and procedures and among the ideas she is promoting is the first publicly funded Collaborative Family Law Center for New York City. In order to get volunteer attorneys for the center, the courts offered free training for lawyers in exchange for their agreement to take some collaborative divorce cases for indigent litigants. 11/

– The family court judges and the leading family law attorneys in London informally agreed in October, 2007 that major family law cases are to be handled in the collaborative law model. 12/

– Australia completely revamped its family law system and is creating a nationwide network of 65 family relationship centers. Parties can obtain some counseling services and, if a divorce ensues, they must use either mediation or collaborative processes to first try for resolution. If that fails and a trial is needed, the courts employ a new process called the "less adversarial trial" in which the judge is actively involved in questioning the witnesses and is aided by a mental health professional. 13/

– A North Carolina statute mandates the courts to establish a "system of settlement events" for family law matters. North Carolina is the first state to have a comprehensive domestic relations arbitration act, a collaborative divorce statute, and mandatory mediation rules. 14/

– The Utah Legislature passed a mandatory divorce mediation statute effective May 1, 2005. The case statistics available to date indicate two thirds full settlements and 12-14% partial settlements for an 80% total. 15/

The newer models have been invented, tested, and implemented in other courts. The results so far have been quite positive in several ways. Court caseloads have been reduced, the stress levels of litigants and lawyers have been reduced, the fees for divorce have been significantly reduced, and the satisfaction levels of the parties is higher than for litigation. 16/

We don't have to look very far for empirical validation. The1997 Legislature mandated mediation for child custody and visitation. A decade of experience with this system is more than long enough to prove the premise. Close to 80% of the cases in mediation reach full or partial parenting agreements. 17/

NRS 3.475(5) expressly does not prohibit a judge from "referring a financial or other issue to a special master or other person for assistance in resolving the dispute." This statute alone gives a judge authority to refer a case for mandatory mediation.

LEGAL CHANGE IS HARD

So why aren't we doing mandatory mediation? Simple inertia. The legal system is resistant to change even when we know that there are cheaper, simpler and less stressful alternatives. It is easier to stay in the adversary system "rut" than to pave a new modern road. Some lawyers will undoubtedly object since they will earn less than they do now from contested divorces. Unfortunately, one of the main sources of resistance to legal reform comes from lawyers with a vested financial interest in a complicated system that forces litigants to need their navigational and advocacy skills. 18/

That is not a sound reason. The legal system exists for the benefit of the public and not for the financial benefit of a few lawyers who make money from the marital conflicts of the litigants.

Here's how we can truly change our family courts. First, divorcing parties should be required to attend a divorce orientation session by themselves, without their lawyers, so that they can learn the various divorce methods and how to get started. Participants can also learn about various services and other resources that can help them through the divorce process.

Second, all parties, with some exceptions, must participate in mandatory mediation or the collaborative process in the very beginning of their case. In some instances, a motion for preliminary relief may need to be filed and heard. The court would then refer the parties to mandatory mediation as part of that proceeding.
I have personally handled divorces in every method from simple negotiations through litigated trials and appeals and in the mediation and collaborative models. The collaborative model is vastly superior. It is the only model that formally addresses the financial, legal and emotional issues in a coherent, non-adversarial teamwork approach using the professional services of a

lawyer, mental health professional and a financial specialist. The stress levels are lower, the clients are happier, and we get directly into a problem solving mode. All proceedings are private and confidential. Overall, fees are lower even with multiple professionals involved as compared to the litigation model. 19/

Roderic Duncan retired as a Family Court Judge and wrote a wonderful little book, "A Judge's Guide to Divorce: Uncommon Advice From the Bench". In his very first paragraph, he writes:

> "Unless you are very lucky, you probably won't be able to totally avoid having to go into divorce court in the process of getting divorced, but you should do your best to make as little contact as possible with this jungle of bickering people, long delays and sometimes uninterested judges. This may sound like strange advice coming from a judge who happily spent most of his judicial career sitting behind the bench in a divorce court, but it is the best advice I can give you. I loved the work but saw over and over again that the system stinks. Whatever you do, try to keep your case out of the divorce court." 20/

Amen, brother. Will our judicial leaders work to move Nevada forward or remain "missing in action?" Only time and their efforts will tell.

FOOTNOTES

1. A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force (May 2005) at pp. 6, 13. www.bcjusticereview.org/working___groups/family___justice/final__05__05.pdf
2. Gregory Firestone and Janet Weinstein, "IN THE BEST INTERESTS OF CHILDREN: A Proposal to Transform the Adversarial System", 42 Family Ct. Rev. 203 (April, 2004)
3. Joan Kelly, "Family Mediation Research: Is there Empirical Support for the Field", 22 Conflict Resolution Q. 3 (Fall-Winter 2004); Joan Kelly, "The United States Experience," Keynote Address to the International Forum on Family Relationships in Transition held in Australia and published by the Australian Institute of Family Studies in 2005.
4. Model Family Law Arbitration Act, approved by the American Academy of Matrimonial Lawyers Board of Governors on March 12, 2005. North Carolina passed the first comprehensive family law arbitration act; Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico have specific family law arbitration statutes. Some other states permit some arbitration of some family law issues under the Uniform Arbitration Act or the Revised Uniform Arbitration Act. .
5. Joan Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice," 10 Va. J. Soc. Policy and Law, 129, 146-7 (Fall, 2002). In one California county, one researcher found there was a 96% reduction in court appearances in the study sample cases in the year after a special master was appointed.
6. William M.Schwab, ""Collaborative Lawyering: A Closer Look at an Emerging Practice," 4 Pepp. Disp. Resol. L. J. 351, 375–6 (2004).
7. Footnote 2, supra; Kelly, Keynote Address; ANDREW I. SCHEPARD CHILDREN, COURTS AND CUSTODY 68-78 (Press Syndicate 2004)
8. GLASER, R. & KIECOLT-GLASER, J.K., HANDBOOK OF HUMAN STRESS AND IMMUNITY (San Diego Academic Press 1994).
9. Firestone and Weinstein, supra, footnote 1 at page 204.

10. SUSAN DAICOFF ,, LAWYER, KNOW THYSELF 141-3 (APA 2004)
Peter Jaffe, et al "Vicarious Trauma in Judges; The Personal Challenge of Dispensing Justice," 45 The Judges' Journal 45, no. 4 (Fall, 2006)
11. Danny Hakim, "Chief Judge Plans to Ease Divorce Process," New York Times, Feb. 27, 2007 nytimes.com; Pauline Tesler and others provided collaborative divorce training in November, 2007 and again in March, 2008. www.collaborativedivorcenews.com , postings by Pauline Tesler on November 19, 2007 and March 21, 2008.
12. Frances Gibb, "Family judges campaign to take the bitterness and costs out of divorce," Timesonline, October 4, 2007. The leading family lawyers in central London recently formed the Central London Collaborative Forum.
13. Australian Government, "A new family law system: Government Response to *Every Picture Tells a Story,"* June 2005; Family Law Council, "*Collaborative Practice in Family Law,"* (Commonwealth of Australia 2007); Family Court of Australia, "*Finding a Better Way,"*(April 2007)(describing the less adversarial trial process).
14. N.C. Gen. Stat. Section 7A–38.4A. Statistics provided to this author by the N.C. Dispute Resolution Commissioner for July 1, 2005 through June 30, 2006 indicate 64% full and partial settlements from mandatory mediation.
15. Utah passed a comprehensive mandatory mediation statute in 2005 effective May 1, 2005, Utah Code section 30-3-39. Case statistics provided to this author show two thirds full settlement and 12% to 16% partial settlements for 2005 and 2006.
16. Schwab, footnote 5 supra, at 355-8 (2004).
17. NRS 3.225 and 3.475. The 80% figure comes from the author's experience as a Family Court Judge from 1999–2004.
18. ALAN WATSON, SOCIETY AND LEGAL CHANGE, 121 (2d ed. Temple U. Press 2001)
19. Schwab, footnote 5, supra, 355-56, 376 (2004); Anthony J. Greco, "Professional Fees Associated With Collaborative Divorce Resolution: The Evidence to Date," 13 J. Legal Econ. 75 (2006)
20. RODERIC DUNCAN, A JUDGE'S GUIDE TO DIVORCE: UNCOMMON ADVICE FROM THE BENCH 6 (Nolo 2007)

LEGISLATING THE PARADIGM SHIFT: How State Legislatures Can Fundamentally Change Family Law

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In early 2009, the United States is in the throes of a deepening recession. State and local government budgets are being drastically cut. The courts are straining under the same budgetary woes. Many litigants are opting to represent themselves in court cases because they can't afford lawyers.

In other words, we have a golden opportunity to dramatically change our family law systems for the better. There is nothing better than a budgetary crisis to sharply focus our attention on how governments can furnish essential services to the public at a reduced cost to both the government and the litigants. It can be done and this is a roadmap to the future. It is possible now because of the outstanding work done by many others in developing newer models of family dispute resolution and bringing them into the public domain. The legislative program is based on their solid foundations hard work.

The public service mandate of our courts should expand to embrace a broad array of dispute resolution methodologies and not be limited solely to adjudication services. Sadly, too many families and children have been financially and emotionally wrecked by the adversary system and now is the time for change we can believe in.

IN THE BEGINNING THERE WAS ROSCOE POUND

It was just over 100 years ago in the evening of August 29, 1906 when Dean Roscoe Pound strode to the podium before the ABA convention in St. Paul, Minnesota and delivered what is arguably the most memorable presentation ever made to that assemblage of attorneys. His discourse that evening was "The Causes of Popular Dissatisfaction with the Administration of Justice." 1/

> His opening lines set the tone for what followed that evening:
> "Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree." 2/

Dean Pound's sole purpose that day was the diagnosis of the then perceived sources of dissatisfaction with justice in America. His critique was limited to civil justice because, in his words, "the true interest of the modern community is in the civil administration of justice." 3/ True to his stature as an intellectual giant of the legal profession, he had profound insights into what he perceived was wrong with the American legal system. The causes of dissatisfaction were grouped under four main headings: (1) dissatisfaction with any legal system; (2) dissatisfaction with the peculiarities of the Anglo-American legal system; (3) dissatisfaction with American judicial organization and procedure; and (4) causes lying in the environment of our judicial administration. 4/ The notion that there was one law for the rich and another for the poor has been an eternal complaint. 5/

From time immemorial, there has been a constant tension between the mechanical operation of legal rules and the need for flexibility and significant judicial discretion. The operation of law has been the eternal effort to strike a reasoned balance between wide discretion and overly technical applications of law. 6/

A closely related source of dissatisfaction with the administration of justice was "to be found in the inevitable difference in rate of progress between law and public opinion." 7/ Legal principles evolve, he argued, when public opinion becomes fixed and settled and won't change again until public opinion itself changes and this change becomes complete. He opined, "(I)n this sense, law is often in very truth a government of the living by the dead." 8/ Then he added:

> "But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess." 9/

Pound saved his harshest criticisms for the American legal system's penchant for contentiousness:

> "Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game and that parties should fight out their own game in their own way without judicial interference . We resent such interference as unfair, even when in the interest of justice. The idea that