



## MINUTES

### October 22, 2015 Civil Justice Committee Meeting Duke University Law School

**Present:** David Levi, A.P. Carlton, Shelia Eley, E.D. Gaskins, Rob Harrington, George Hausen, Calvin Hill, Anne Lloyd, Julian Mann, Darrell Miller, Michel Mitchell, Osmond Smith

**Absent:** Janet Black, Robert Ingram

**Attending ex officio:** Jim Gale, Jennifer Lechner, Amanda Lacoff, Will Robinson, Danielle Seale, McKinley Wooten

**Meeting began at 10:30**

Levi led introductions for new attendees.

Levi raised issue about matters that may be trans-substantive. D. Levi reported that many of those issues are going to Brad Wilson's committee: i.e. courthouse facilities, judicial tenure, judicial selection, trans-substantive issues going to the Public Confidence Committee.

Tom Thornburg made his presentation on NC Court system: "Basics of the NC Court System"

Thorn. talked about jurisdiction and special characteristics of the NC System. District Court, Magistrate's Jurisdiction, (noted that duties have expanded in the last 20 years), District Court Jurisdiction and Issues (guilty pleas/no contest in certain felony cases new in last few years)

Carlton asked about self-represented and small claims.

Thorn. answered that self-representation happens all through the state system, and that small claims is an issue with regard to magistrates who aren't lawyers with persons represented that are lawyers. Noted a lot of landlord and tenant matters in front of magistrates.

Mitchell asked whether there was de novo appeal from magistrate to district court.

Smith noted that there was de novo appeal and that losing party that can be assessed court costs.

Thorn. commented on the fact that trial level in the NC system has the most experience with specialized courts, like family court.

Hill says family court very successful in Buncombe County.

Thorn. Drug court about trying to keep people on straight and narrow. Identified veterans and mental health courts as community resource courts, idea is that someone knows there's someone to help the person in the system.

Wooten noted that Buncombe has just added a vets court.

Levi asked how vets court works.

Hill responded that in his court, they deal with misdemeanor charges, or felony charges, minor or serious charge, but no violent charges. Criminal case can either be pled into vet court or can be removed by defendant to vet court, with approval of the district attorney.

Hausen observed that the court is run like boot camp in some counties. The programs are run as if the person were still in the military.

Levi asked whether there was civil jurisdiction in vet court.

Hill observed that jurisdiction goes all the way through disposition. If completed then DA has option to dismiss. If not completed through Vet Court, then the defendant is subject to be activated in regular criminal court. Hill noted this is how it is done in Buncombe County.

Harrington asked about the allocation of judges.

Hill said that the judge handles other matters, but hears Vet Court cases about two times per month.

Levi asked about the mental health court.

Wooten said that the DA has to agree to mental health court. For example, if person had been on meds wouldn't have caused the crime, as long as defendant stays on the treatment regimen then the DA has the option to dismiss the charge once the defendant graduates from court.

Levi asked if family court is a civil court.

Eley said that the domestic violence "docket" is civil

Levi asked about magistrates and how they are selected.

Thorn. Said that magistrates are nominated by the clerk of the superior court, appointed by the senior resident superior court judge, supervised by chief district court judge, on an initial 2 year term and then 4 year term.

Levi asked if people try to collect debts with the magistrates? Explained that his question was motivated by a NY Times article about magistrates being debt collectors.

Hill: Doesn't think that's happening in his county.

Smith: Magistrates are not a rubber stamp, but lots of collections, landlord tenant, in front of magistrates. Said that some magistrates are on call for 24 hours like a fireman, and some have other jobs but with approval approved by the judge. Noted the hybrid nature of the magistrates who are nominated and supervised by different people.

Hill suggested that no one likes the current selection system

Smith: But system does avoid some personality battles.

Hill: Lots of complaints because clerk nominates and the chief judge supervises.

Smith: Chief District Judge is in on the selection process informally in some districts.

Carlton: Education for magistrates?

Thorn. Yes, continuing education, but maybe not adequate.

Mann: Can magistrates practice law too?

Smith: Initially yes, but not now. There were problems.

Hausen: Legal aid perspective is that there is a tendency to lean toward the landlord at the magistrate level. Part was because of misunderstanding of rights by renters. Sees training as a way to eliminate injustice there. Legal aid usually sees the case after a magistrate ruled on the case and it is now up for de novo review in the court system.

Levi: Summarized a sense that magistrate is an asset, but with some reservations. Appeal sounds duplicative.

Mitchell: Asked to quantify how much district court saves relative wuperior court, with regard to one having no court reporters.

Thorn: Doesn't know.

Thorn. moved on to Superior Court in presentation: Superior Court and Clerk of Superior Court

Clerk primary decision maker in some circumstances. Discussed civil jurisdiction include appeals from clerk of superior court, Office of Admin. Hearings, discussed Criminal jurisdiction Superior Court, discussed rotation and assignment (Const. Art. IV, Sect 11)

Thorn. noted that NC has gone from 4 to 8 divisions. Chief Justice assigns judges for 6 month terms of court. The master calendar is maintained by assistant director of AOC

Levi: Why rotation? Independence?

Thorn. Yes. Superior court oldest office of NC trial system. Rotation means it is less likely to create problems regarding local pressures and “home cooking”

Smith: Minimizes cronyism, prevents local custom becoming rules, improves administration of justices by variety of the kind of cases. Acknowledge that there are inefficiencies, but note this has been the way NC has organized its system since 1777.

Hausen: Forum shopping?

Smith: Easy to do from perspective of plaintiff and defendant. Lawyers know who the eligible judges are, but actual judge on the case may change from week to week. Noted some forum shopping in district court as well.

Mitchell: Length of term flexibility?

Thorn. Nothing in the constitutional language speaks on length of term.

Robinson: Noted 2 sessions in each county per year in each county.

Smith commented that the concept of the salutary effect of rotation is in constitution

Mitchell: Rotation length undefined, flexibility to get out of inefficiency?

Thorn. Cases aren't assigned to judges, they're assigned to terms, commissions come from assistant director of AOC, the term is 6 months (no constitutional requirement for 6 months), “session” 1 week assignment within the term, significant attention to authority to act in case during session and terms, statutory provision for “in chambers jurisdiction” may allow a judge to hear and decide matters from home district, no matter his or her assignment.

Levi asked for more information on home district concept.

Smith: Judge can hear home county cases in home county during the entire term. Authority to deal with matters in home county without having commission assign.

Levi: Sentiment for change?

Gaskins: Have to get the Superior court judges to agree, no chance to change constitution if superior judges are against the change. With regard to case assignment system to superior judges, Gaskins noted the inequities as compared to complex cases. In ordinary Superior Court cases may have reeducate the judge on a motion that is pending because no consistency in judicial staffing because of rotation.

Smith: Why the rotation? Worried about “home cooking.” Correct about inefficiencies.

Carlton: Rotation policy puts burden on practicing bar

Miller: Law of the case?

Smith: Law of the case applies, a superior court judge can't overrule a previous ruling in the case by another superior court judge.

Harrington: Noted the problems of no clerks in the judicial system.

Tom: Confirmed that there are no clerks or staff to help with judicial research. Judges can consult with others, but no full time clerk staff

Mitchell: Would it be more efficient to change rotation system where Judge Smith gets assigned randomly but individual judge stays with the case?

Gaskins: Rule allows the Chief Justice to attach a judge to a case, and also can be done by local rule. With consent of opposing counsel have assignment to a single judge. Practice is the exception not the rule.

Smith: Concurred.

Mitchell: Judges want to do that way?

Smith: “Pick a judge” may reek of abuse. Likes idea of judges assigned to one case for significant cases. Less hotels, less driving.

Mitchell: Recent superior court judge said there's something about leaving home district, feel more like a federal court judge, feels different. Don't feel the pressures outside the district as inside the district.

Smith: Helps with experience to rotate, lot more kinds of cases. At one time, there was a \$7000 allowance plus mileage. Done away with now. Now get mileage reimbursement outside of county and \$67 per diem for hotel/travel.

Thorn.: Continued presentation regarding 2.1 “exceptional” or “complex business” case (“complex business” goes to business court) 2014 legislation requiring three judge panel to hear facial constitutional challenges to law. Clerk of Superior Court record keeping and judicial responsibilities, noted that Superior Court Clerk does not require a law degree. Clerk can hear

cases of probate, incompetency and guardianship, partition of land, foreclosures (appeal to the Superior court, some de novo, some on the record), and adoptions (appeal district court)

Carlton: Asked about how much Supreme Court docket is discretionary

Robinson noted business court cases can go straight to the Supreme Court.

Thorn.: Administrative office of the courts (since 1965) Paying for system. State and local governments fund state wide system. State pays salaries, equipment, fee paid to jurors and witnesses; local government (usually county) physical facility, sheriff, county official provides courthouse and courtroom security. Partially funded by state appropriation and partially court system, has been clashes about facilities.

Hausen: Noted impact on access to justice here. AOC has state wide case management system, and many counties opted out, have to deal with every county. Couldn't overcome this speed bump. Some local counties won't allow someone to come in with ipad or iphone. Different authorities affects needs of poor.

Thorn.: Non uniform facilities.

Smith: \$465 million of state contributions to judicial branch less than 2.2 percent of budget in state.

Thorn.: 55% payment by user fees, used to be half as much.

Smith: Court costs higher and prevents litigants from using court system.

Thorn.: Fines and penalties or forfeitures go to the public school in county where collected. This was to avoid entity making money off its own enforcement.

Smith: Drug forfeitures and federal forfeiture may be distributed back to local law enforcement.

Mitchell: "Shall be open" provision of the state constitution. High fees defying the "shall be open" provision?

Levi: Usually talking about time open when talking about open courts.

Carlton: Thinks committee can really make an impact on the funding.

Levi: We can talk to Chief Justice Martin about that and which committee.

Judge Gale makes his presentation: 1994, Business court originated as an idea with the business community, not with the court. Issue was judges without experience in complex issues, wanted to make NC an attractive place for business. Not like court of chancery, loser to enter into a

game to compete with Delaware. Strength is adjudicating matters that are the result of doing business, rather than chancery work.

Competing systems (Chancery in DE (know all the business law and finance), NY Commercial Division, Cook County At this point no state wide business court when NC started. NC cut the business court from whole cloth in some sense.

Gale notes that now, more states have business courts than don't. Myth is just for business. Complex class actions can go to business court. Concept initially was get a judge that acquires expertise on business matters, now has changed more to trial expertise, and create a body of precedent.

Court of appeals say that business court opinions have no precedential effect.

Gale: For his law clerks, they do about 50% administration, 50% law clerk work. Noted the non-standardization of e-filing within and throughout the system. Comprehensive local rules of business court were once a model for business courts around the country but becoming stale. Modernized local rule hopefully by the end of this year. Gale spoke of some need for a distinction for how to select a business court judge so the judge had training and experience. Mandatory designation, new designation of "mandatory mandatory" cases.

Gaskins: Mandatory Mandatory is jurisdictional

Gale: Quite a bit of uncertainty now, uncertainty about where interlocutory decisions go, only applies to Oct. 1, 2014 designation.

Gaskin: What happens if there is a mandatory mandatory case, but it involves a constitutional issue with 3 judge panel?

Gale: Not certain. Lots of complications with jurisdiction now. Wake, Guilford, Mecklenburg County the largest share number of cases. Opinions by year are increasing. Opinions aren't just an order, but something that is a published opinions.

Gaskins: Quality of the opinions is high.

Carlton: Remember the clerks.

Gale: Opinions are publicly accessible, lexis picks up the opinions.

Gale: Median age of the case is 352 now.

Mitchell: Still have requirement to do opinion in dispositive motion?

Gale: Must write opinion on summary judgment or motion to dismiss.

Mitchell: Inefficiency on mandatory opinion writing?

Gale: Some modification where there's a matter of unsettled law to give discretion to write opinions. Opinions take time to write.

Harrington: Which online database picks up the opinions?

Gale: Lexis. Business court doesn't have access to Westlaw.

Smith: Optimal case load for a judge?

Gale: Not certain. Right now at breaking point. That's where Bar pays the price. It is a mistake to expand the court without figuring out who to put on the court.

Smith: Future appointments approved by legislature?

Gale: Very few counties haven't had case in front of business court.

Gale: What working well: usefulness of opinions, case management flexibility is a success, e-filing was a plus, but it is feeling the age, old technology, system gets locked up. Biggest thing what to do with judges on business court. Expanded from 3 judge to 5. Debate about who needs to be on court, and who should have input. Process now is governor has authority to nominate, subject to approval of joint session of the legislature. 5 year term. Present system is not a separate system, but chosen from the superior court. Change to 8 year term? Want business court to be a pilot for true e-filing. Need to maintain the reputation and workload does not allow it at present. No particular metrics to measure success. Georgia has tried to be a court for international arbitration.

Hill: Expansion?

Gale: Not certain on physical size or number of judges. Depends on what trying to accomplish. If want equal access geographically, then put one out west and east. If purpose is where caseload is coming from, then putting a judge out east and west doesn't justify that. Workload distribution, put the judges in major metro area. If looking for least expensive, exiting chambers in Raleigh or Greensboro.

Hill: Would business court in Asheville generate the cases?

Gale: Regularly go to Charlotte or New Hanover county to decide cases.

Mitchell: Requirement to write an opinion statutory?

Gale: Yes.

Hausen: Merit selection?

Levi: No. Selection issues probably for another committee.

- Carlton: Raised issue of other sources than government for updating system.
- Gale: Preference would be for legislature to put down money.
- Smith: Speaking for self, opposed to expanding to outside funding. Becoming state of haves and have nots. Gets away from uniformity of the state system.
- Gale: Can't attract business with underfunded regular court and well-funded business court.
- Carlton: System wide efilng?
- Levi: Justice Jackson's committee on technology.
- Gale: Combined initiative business and judicial, now, several states use business court as part of business development.
- Hausen: Save a lot with e filing.
- Mitchell: Some ideas of the committee will have to go to legislature. Are there things that don't have to go through legislature, or will all recommendations have to be statutory?
- Gale: Local rules initiative, appellate rules committee, even there, NC not given authority to write the rules of Civ Procedure.
- Levi: Rules Enabling Act for state of North Carolina?
- Gale: Adam Dorr's article useful in terms of compressing multiple issues.

**Broke for lunch 12:30**

**Reconvened at 1:00**

Minutes from September were adopted unanimously.

- Levi: What metrics to use? Some have motions under submission, track?
- Gale: Yes, but difficult statistics because full briefing may be in the fifth month. Have tried to minimize cases under submission.
- Levi: Jurisdiction of business court? Just business, others?

Gale: Can be two individuals, non-profit, Legal Aid have been in bus court. All law governing corporations and internal governance, typical LLC disputes regarding fiduciary duties. Lots of lawsuits between individuals and corporation, trade secrets, IP, licensing disputes, biosciences, crop seed cases, high percentage involve a business party as opposed to two individuals, but can be two individuals in business court litigating over a business interest.

Hill: Corporations should have lawyer?

Gale: Yes, corporations cannot proceed pro-se; in house counsel can represent the corporation

Levi: If took business court model and part that resonates with that court is that there's expertise, and a judge that stays with case, lawyers like continuity. Can build model in effective way.

Smith: Legislature did not go anywhere with reform.

Hill: Family court model built on that, case comes in, one judge, child custody, sees the matter all the way through.

Gale: Practical reality, workload among superior court judges may depend on what county assigned to. Some judge's workload is not equivalent to others.

Smith: Civil filings down and trials down, feast or famine. True across the state, not unusual for civil calendar to be done on Monday in some counties.

Gale: Business court does it different from superior court, because Gale has control over the docket, in absence of efilings, judge doesn't have access to filing

Levi: Cases that don't fit within jurisdiction, a superior court judge . . .

Gale: Need access to the court file same as the business case.

Smith: But also flexibility in ability to manage own docket.

Carlton: How many 2.1?

Smith: 4

Smith: Expand 2.1 concept, but with ability to manage time?

Gaskins: Scheduling issues, trial calendar is extremely inefficient. Fed court time is okay. In state court, may get trial ready twice, but may not actually get tried.

Gale: Vast majority of civil superior court cases, don't have a Rule 16 order.

Harrington: Is same conversation happening on civil side or also criminal?

Smiths: Terms of ratio, 75% criminal and 25% civil

Carlton: If expand 2.1 so upset apple cart and get ahold of the scheduling, also need to get the scheduling part and where the files are, not carrying them around in the trunk.

Smith: Some things we may recommend without statutory change

Gale: efilings will facilitate and help in those ways.

Levi: Efilings, law clerk assistance

Smith: Maybe local rules.

Mitchell: 2.1 concerns because creates a have and have not system, if big enough case get to choose your judge. Worried about the texture of the whole system, supposed to be narrow. Question for Smith, difference between urban and less populated counties. Urban counties think work load is higher, heard some discussion of capacity in judges in home counties and help with workload elsewhere. Statutory change?

Smith: Difficulty is that judge may get calendar done on Tuesday, come back, but nothing teed up when come back. Lots of judges will offer to help informally with other dockets within the district, can't do that across districts without Chief Justice's approval.

Gale: But it happens with a call to David Hoke.

Carlton: Not sure have and have nots. Chief justice gives who is available.

Smith: 2 of 4 were not the recommended judge.

Levi: Leadership role of the Chief Judge?

Smith: Chief Justice makes the decision, but delegates to David Hoke.

Levi: Too much at chief justice level, why not delegate to chief judge in division or district?

Smith: Every district has someone to suggest to Chief Justice. Some power by senior judge in the district. Comes down from Chief Justice.

Gale: Chief Justice is not setting calendar, that's being done locally.

Smith: Wake, 6 judges assigned to regular scheduled who to which court room, civil calendar break down because of settlement, etc.

Levi: Showing up twice to try a case shouldn't happen.

Smith: What to do when the matter settles and now there's nothing to do.

Levi: When running own docket, a federal judge can manage that. If all cases assigned to you, your clerk says you going to trial on day x and need 5 days notice. And pay for those jurors.

Smith: Coordinator in each county, but not clerk.

Mitchell: Difference between federal system and state. Fed has a calendar.

Gale: 6 month ready calendar.

Mitchell: State court, if didn't get reached, gets bumped another 6 month. Fed calendar may bump for a week. If change that, then have to reach that case and not bump out 6 month.

Levi: Cost cuts when judges set firm trial date.

Gale: Question is when to impose that date.

Levi: Who do we want to hear from? Categories?

Smith: Trial court administrators (urban county)

Carlton: AOC Mary Warren or John Williams, chief of budget chief, scheduling,

Gale: David Hoke, trial court administrator

Hauser: All the legal services and the alliance could help in committee sessions, and put something together.

Carlson: Someone from the legislature.

Smith: Talk about funding for business court, etc. We'd like to seek outside sources of the whole court system, what can it do lobby the legislature about how important courts are to the economic viability of the state. Not one judge assigned to cases, don't know who it's going to be, bad for the business climate of the state.

Hauser: Raising bar for the business and superior courts helps every level of court.

Carlton: Brad Wilson on public confidence, L. Jenkins can help.

Mann: AOC and Directors and Ralph Walker can speak to their experience in dealing with the legislature. Those AOC folks that need to go down to the legislature.

Hauser: Daughtrey big support of legal aid.

Mitchell: Hear from National Center for State Courts, what are best practices for reforming a court system. We're constrained by what other states have found successful.

Robinson: National Center will likely say each state is different.

Levi: A few months time, lets identify five things for national center.

Rob: If there's other states where that's happened, someone from those states, how that support for the courts was generated.

Hauser: Capable 2L or 3L could serve as a clerk.

Levi: Law student is different than a law graduate. May want someone more seasoned.

Smith: Volunteers interns.

Robinson: Committee chairs, have asked to reach out to stakeholders. As invitation to see what they think we need to look at, and prioritize topics and then input on this topic, at recommendation stage, in the process now of having that information brought in.

Mann: Office of administrative systems, law clerks and paralegals, one assistant has LLM, MBA and JD, and other has JD. Market supply of types of persons for these positions. Demand to be with a judge is out of there. Some want these kinds of positions. Campbell Law School says will forgive debt going into these positions.

Miller: Told a little about loan forgiveness

Gale: Elon entering class 2.5 year graduation cycle. 1 or 2 mandatory periods. Unpaid basis.

Smith: Campbell's program offers credit.

Smith: DAs etc get the help before the court system.

Miller: Bridging population of law students and need for legal service with state.

Gale: Different for students in NC and planning to stay in NC.

Hauser: Raises the issue because students can litigate cases. Training better for legal research.

Mitchell: Should rotation system be different, and bring the case to the judge rather than the judge to the case?

Gale: If legislature loves business court, need to make sure that a business qualified judge is in charge.

Rob: Asked whether makes sense to have someone in from South Carolina come and talk where it has worked in South Carolina, if someone could tell that story.

Robinson: Early stage is getting ideas and issues on the table, and weeding those out and evaluating those that have merit and may bring change. At early stage invite ideas.

Carlton: Among this group where withal and ask for things.

Lloyd: Get the coalition together and continue to ask the legislature, putting the facts in front of the legislature, confidence in the court system helps the state.

Smith: When judiciary speaks, no one understands or listens. But, business community likely to have more sway with the legislature.

Mann: Chief Justice made his state of judiciary address, legislature listened, formed this commissions to make recommendations, and belief the Chief will be able to advocate for the judiciary.

Wooten: Need discussions with legislature. Killer of court programs like drug courts is that they're not state wide, etc.

**Meeting adjourned at 1:52**