The state of the FAMILY COURT JUDICIARY

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Editor's note: The following is the full text of the keynote address of Hennepin County Family Court Chief Judge Tanja K. Manrique. The address was delivered at the Academy of Matrimonial Lawyers Divorce Camp at Breezy Point Lodge in Brainerd on Sept. 18.

Thank you for this opportunity. When I first attended Divorce Camp five years ago, I had been on the family court bench less than 90 days, didn't really know any of you, took a seat in the back of the room and recall thinking during the keynote that I'd be lucky to keep my head above water during the family court learning curve. Well, now, after five years of a full-time family court docket, I stand before you even more humble about the subtleties of family law, the gravity of the proceedings for the parents and children, respectful of your dedication to this specialized field of law and mindful of what Confucius said about it all. Well, OK, maybe he didn't write about family law in particular. Maybe "truth" in the context of family dynamics even confounded Confucius, but he did say this:

By three methods we may learn wisdom: first, by reflection, which is the noblest; second, by imitation, which is easiest; and third, by experience, which is most bitter.

Isn't that the essence of why you came to Divorce Camp this year? To reflect on the use of ADR in family law cases, to imitate new ADR skills, and to apply what you learn through role-play experiences? Yes, once a year we gather, hoping to gain wisdom, and aware that even if the experience is not bitter, Joe Bluth's boxed wine will be.

Thank goodness for this time together. During our busy days as family law practitioners, we scarcely have time to reflect. Wouldn't it feel noble to have the luxury of spending however much time a case required to craft your clients' position perfect from every angle? Have you the time even to read all of Finance & Commerce each week? How much time do you allow each day to contemplate the options for addressing the to-do list on all the files you must touch to meet your billable goal? And at the end of your day, do you reflect more on how exhausted you feel than on what you learned along the way? I submit that few of us would answer, "I often take the time necessary to grow wise by reflection."

Let us reflect for a moment on the state of your judiciary from a few angles:

1. The move to state funding

As you know, a few years ago the judiciary became a state-funded operation. Previously, the majority of the District Court budget was funded by county boards and there were some significant disparities in the level of justice services available throughout the state. Of course the better reality is that there should be one standard of justice for all Minnesotans. In that respect, the move to state funding is positive; it should produce more level funding among the districts. However, now that the judiciary budget is beholden to the general fund, its appropriation is more susceptible to the peaks and valleys of the economy in general. This is problematic because the judiciary ought to have a stable source of funding so that citizens may rely on the availability of core government functions during all economic cycles. Ensuring matters of liberty, property and parental rights are fundamentally more central to our democracy than the duties delegated to many of the executive branch agencies. Yet, for too long, the Legislature and executive branch have become accustomed to this judiciary finding a way to finish more work with fewer resources. According to the National Center for State Courts, judges in this state carry caseloads which are 49 percent greater than judges in comparable jurisdictions. According to our own Minnesota Legislative Auditor, each District Court judge manages more than 7,400 cases annually — as compared to the median in Midwestern states of 5,274.

Filings have continued to increase since that report was issued earlier this decade. We must reframe the budgetary negotiations with the Legislature and the governor so as to ensure the necessary funding for our judiciary, reflecting its importance as a truly co-equal branch of government.

2. The current budget

The Minnesota judicial branch currently is underfunded by $19 million. Approximately 90 percent of our budget is allocated for employee costs; in other words, the court is mostly comprised of human capital. In order to maintain the current number of employees we have, we will need an additional $40 million appropriated during this upcoming legislative session to cover the branch through the 2010-11 biennium. That increase would merely cover known cost increases; it would not fund innovations or system upgrades. Unlike the private sector, we cannot cut a line of business or outsource work to less costly labor markets. We must handle all the business that comes in the door, and we must have a balanced budget at the end of every year. Indeed, you should expect nothing less from government. It bears noting that the time has long passed when significant cost savings could be realized readily. As a branch, we have made the easy cuts. Most districts have cut what they can from the non-personnel side of the budget and held open numerous positions to generate vacancy savings in order to balance the budget. In my district, for example, our response to the lack of adequate funding for base operations required us to cut approximately $800,000 from non-employee costs during 2007 and we operated with over 40 vacancies until the budget was balanced. Relying on vacancy savings essentially means that we are balancing the budget on the backs of our remaining employees who must do more to complete the work of the court. As one of four judges on our budget committee, I can tell you that our management decisions represented painful choices. We cut the supervised visitation contracts for family court because they are a social service which should be paid for by the county. We suspended training for all employees. We cut several positions from the Domestic Abuse Service Center, where citizens apply for Orders for Protection. We cut positions from the Self-Help Centers. We significantly decreased the book acquisitions available to judges. We closed the counters and telephone assistance lines to the public on Wednesday afternoons. We left a juvenile court referee position unfilled. We even analyzed whether office supply expenditures were out of line for any chambers. The list goes on and on, and this is only for one of the 10 judicial districts. The situation is just as dire in other districts. In fact, there is a Star Tribune reporter who is on a beat about the number of judges around the state who are working without law clerks.

3. The economic forecast

According to the State Economist, we can anticipate a deficit of at least $1 billion for the next biennium, and some experts are beginning to quietly talk of a number closer to $2 billion by the time of the February forecast. On the heels of this election year, the winning politicians will be eager to fund their campaign promises. Have you heard any candidates for elected office speak of judiciary funding as a priority? No. Unfortunately, it is far too likely that the judiciary will once again be in a position of planning for anticipated cuts as a result of the impending legislative session. It is important to note, however, that the judiciary already has stepped up efforts to persuade the governor of the base funding needs for our branch. There is a concerted effort underway to inform the legislators about the importance and breadth of the work done by this branch. Just last
week, 4th District Chief Judge James Swenson organized a bench presentation to the Minneapolis legislative delegation, and over a dozen senators and legislators attended. Each district has been charged with the responsibility of making sure its delegations understand exactly the breadth and importance of the court's work. In addition, Chief Justice Magnuson has established a Legislative Advisory Workgroup to assist with budget and policy development and legislative session strategy. Under his leadership, a broad coalition is coming together to advance a cohesive lobbying effort on behalf of the branch. The bar association is, of course, integral to that effort. It is imperative that each and every one of you contact your legislators and the governor during the upcoming session. You do not need to be an expert on budget matters to make a cogent argument, just tell them what you know: courts need to be open during working hours; criminal defendants need public defenders; judges need books and law clerks; and you shouldn't have to wait 2-3 months to secure a hearing date.

4. Redesigning the system

We need to redesign the way we do business as the Minnesota population changes. The Judicial Council recently received the final report of its Access and Service Delivery committee, which noted that:

Fundamental demographic shifts in the population present a long-term challenge for the courts that will extend well into the next decade. The baby boom generation is just now beginning to hit retirement age. Beginning in 2008 and extending into the next decade, Minnesota will see a 30 percent jump in workers reaching the average retirement age of 62. Seniors over the age of 65 will exceed the number of school age children for the first time in our history. The cost of government-funded social security, medical care, and public employee pensions for those aging baby boomers will put unprecedented financial pressures on local, state and federal governments. These pressures will shift government spending priorities to issues of aging and health and away from other state services, including the courts. … Over the next decade, the baby boomers will change government spending priorities and their retirement will result in less tax revenue, putting the squeeze on all traditional state government spending — including the courts. Thus, even in relatively strong economic times, the courts will face greater competition for tax dollars. …

Moreover, as the baby boomers are retiring, the relative number of new workers in the state will be shrinking, creating competition for employees. The state demographer estimates that the Minnesota workforce will continue to shrink over the next two decades and at a rate that exceeds the national average. … The courts face twin challenges in the future:

• significant budget constraints no matter how meritorious the needs of the judicial branch or how essential the government function we fulfill.

• Smaller available workforce with significant competition for a limited pool of workers.

To address these dual challenges and thereby create the next generation of our court system, the Access and Service Delivery Committee recommends four major strategies: staffing to the most efficient norm; re-engineering workflow in an electronic environment; legislative and court policy reform; and structural and governance change/redistricting. The detailed explanation of what those four strategies entail would comprise a speech for another day. Suffice it to say that leaders at the very top of the judicial branch will henceforth be engaged in considering how to realize economies of scale by maximizing the use of technology and the centralization of service delivery. In other words, the courts will provide an increasing proportion of their services using the telephone and Internet rather than providing employees to manage every case type at every courthouse location.

Consider this in the context of your family cases. More and more judges are offering to resolve discovery disputes and conduct brief pretrial or status conferences by telephone. That process conserves resources for citizens, often is more convenient for the bar and is more expeditious for the court docket than an in-court hearing. And consider this possibility — when a father has children who reside with mothers in several jurisdictions and those mothers receive public assistance, wouldn't it make sense to consolidate all the child support establishment or contempt proceedings initiated by the various county attorneys before one judicial officer and provide the parties the option of appearing by interactive television? These are merely two small ideas in the sea of change upon us. [On Sept. 22], a legislatively mandated group will convene to consider whether to recommend a statutory change so as to incorporate a presumption for joint physical custody. In addition, the proposed strategic plan for the judiciary for 2010-11 likely will call for a blue-ribbon commission to examine the state of family law in Minnesota in all respects. You should know that some judges are advancing the notion that the court should get out of the business of family law in whole or in part. I am not one of those judges. However, we all must take notice of what the Conference of State Court Administrators concluded in its 2002 white paper on family law reform nationally:

[T]he adversarial process of American jurisprudence may not produce the best results in some cases because it can accentuate differences and amplify the conflict. … In family cases the role of the judge — and therefore the court system — as adjudicator is compatible with being a convener, mediator, facilitator, service provider, and case manager.

Appellate mediation

Another example of the judiciary's willingness to consider new models for family cases is the appellate court family mediation project. Several of you have volunteered your time to develop and implement that process, and I commend you for that effort. We need more ADR for family cases and we need to be willing to implement pilots even if significant questions as to viability exist. Many of you have expressed your skepticism about the appellate project, and I have shared your concerns with a few colleagues on the appellate bench. Frankly, I have inquired as to why the resources are being allocated for this project given that family court appeals have decreased so significantly from 299 five years ago to the projected 177 this year? And if it is true that family filings comprise approximately 10 percent of the appellate workload, it would seem that an appellate mediation project in another substantive area might be more pressing. It is my understanding that the numbers of issues generally presented on appeal distinguish your filings from other substantive areas. I am not in the midst of the appellate project, by any means, but as a mere trial court judge it seems to me that it is good to have judges at all levels focusing on ADR in family cases. I only wish that the appellate court also would use the gravitas of its position to advance the cause of establishing more ADR at the District Court level. If more ADR were available in districts throughout the state, everyone would benefit and appeals likely would decrease further. Divorce Camp this year really is all about figuring out how to fill that need, and it is very good news that so many of you have turned out to address this challenge.

In summary, it is evident that a reform tide is developing in the area of family law. As many of you know, our current strategic plan already calls for implementation of a new model for family law cases in Minnesota, called Early Case Management and Early Neutral Evaluation. The results to date are undeni

ably significant. The settlement rate for custody and parenting time ENE's exceeds 70 percent and the average time to resolution is less than 6 hours. The settlement rate for Financial Early Neutral Evaluation of marital estate issues is 68 percent, the average time to resolution is less than six hours, and the average total cost for parties has been under $1,000 per case. Every family case is appropriate for an Early Case Management conference, but not every case should be referred to ENE. As you know, I live and breathe this initiative as its lead judge. However, this weekend is not focused on ENE. You need an ADR toolkit with many options. While ENE works for many cases, others require a fundamentally different form of ADR process. Nevertheless, it is fair to hold up ENE as an example of the bench and bar working together to make the most of the Rule 114 options, and crafting something truly innovative to meet the particular needs of families in transition. There must be more of such efforts. Indeed, that is the essence of Divorce Camp this year.

As we begin this move toward the new vision for our court system, our designs must ensure that the system is navigable for pro se litigants and people who do not speak English as their first language. The increase in pro se litigation is a nationwide phenomenon. Specifically, 71 percent of cases in urban trial courts have at least one pro se party. And here is a shocking fact. In San Diego, a fairly representative metropolitan area, 46 percent of divorce filings included at least one pro se litigant in 1992. By the year 2000, that number had skyrocketed to 77 percent. The increase in pro se litigation reflects the large number of working poor or moderate income people who cannot afford a lawyer or who believe they do not need a lawyer. The court, of course, must process all these cases and cannot turn people away. Sometimes their filings are in order, but most of the time they are not. We could just dismiss the actions, but the citizens will re-file — they need relief. So, we try our best to preserve the integrity of the process while accepting less than proper filings. That balancing act reflects our commitment to the judicial branch strategic plan, which has just three priorities. The first priority is Access to Justice. It is fair to say that we have flung open the doors to the courthouse. In my district, which processes 40 percent of all the statewide filings of every case type, we have established three Self-Help Centers. In 1997, the first year of service, our employees assisted 3,000 pro se citizens. Last year, a decade into the effort, our employees assisted 43,000 pro se citizens. Of that total, 50 percent sought help with family court issues. The need for free and low-cost legal assistance in family cases statewide cannot be overstated. Consider this letter received by the director of our Self-Help Center:

Responding to a Petition for Divorce when one cannot afford an attorney is a very taunting [sic] and intimating [sic] experience. I was in shock. I was afraid of making major mistakes and of losing my rights to parent my two teenagers. I came to your Center with many of the misgivings people say they have when approaching a "government" program. What a surprise! … [The help] gave me confidence to tackle what would have been an overwhelming task. … I met with the Court Referee and all was in order. A simple thank you is so inadequate.

That is a shining example of how we want citizens to feel when they leave the court process. Unfortunately, we know that is probably not what most pro se litigants would say about their experience of not having legal counsel.

Changing demographics

Finally, on this reflective path to knowledge about the state of your judiciary, let's consider for a moment the dramatic pace at which our state is becoming more diverse. Minnesota's population will continue to become more racially and ethnically diverse, according to a report from the State Demographic Center at the Minnesota Department of Administration. Between 2005 and 2015, the nonwhite population is projected to grow 35 percent, compared to 7 percent for the white population. The Hispanic origin population is expected to increase 47 percent. The number of people identifying themselves as Latinos is expected to rise 98 percent. I believe firmly that we are in dire need of culturally specific ADR and providers who are aware of cultural differences in family systems and community norms.

Of course, we cannot equate increasing diversity on a 1:1 ratio with the increasing need for interpreter services, but the demographic data provides some context for the dramatic increase in such requests. Last year, there were 38,209 court hearings statewide which required interpreter services. The district-by-district comparative data is available for 2005-06, and reflects that the need for interpretation is substantial in most districts. Too often those of us in the metro area tend to think that we are the only ones at the forefront of quickly shifting demographics and needs, but that simply is not true. Here is the district breakdown of interpreter hearings:

1st District…….. 4,579

2nd District……. 4,042

3rd District…….. 4,023

4th District…….. 15,028

5th District…….. 1,839

6th District…… 46

7th District…… 1,138

8th District…… 679

9th District…… 108

10th District……. 3,232

Total…….. 34,714

Did you know, however, that funds from the interpreter line item in the court budget cannot be used to provide services in any setting other than a court hearing? Court interpreters cannot translate at court-ordered ADR proceedings. I once ran unwittingly afoul of that policy by scheduling a Financial Early Neutral Evaluation in the courthouse. The parties were elderly, fairly recent immigrants from the Himalayas, and each required interpreter services. It seemed to me that the 70 percent possibility of settlement by ADR with a few hours of interpreter services would be far more efficient than trial involving, you guessed it, more debt than assets. I was sternly reprimanded for the error of my ways — and thus began my quest to delve into the minutia of our court budget. But, I digress. The point is that there is a convergence of need for more family law ADR, free or low-cost legal representation, and interpreter services.

'Your work touches many'

So, against that backdrop, let us now reflect for a moment on the family case filing data statewide. It continues to be true that family filings comprise more than 50 percent of all civil filings, which means civil/probate/family case types. In other words, your work touches many, many people who come to the doors of the courthouses every year. (Another point to make to your legislators and the governor.) Last year, there were 45,619 family case filings of all types, and of that total 16,660 were dissolution filings. This year filings are up on a statewide basis by 6 percent, and if that trend holds in the 4th quarter we can expect approximately 48,300 family filings of all types. That number does not really describe the total volume of our caseloads, however, as it represents new case filings but not post-decree work. For example, if parents return to family court on custody, parenting time or support issues several times after their divorce, all proceedings are classified under the original divorce filing. That is a significant amount of work on top of the 48,000 new cases we expect this year. Two years ago, the Office
of State Court Administration reported that, approximately 43 percent of dissolutions with children require post-decree work, as do 34 percent of dissolutions without children.

Now, amidst all these dour numbers, the fact remains that the judiciary has managed to keep up fairly well according to some statistics. By sharing these with you, I do not mean to dilute the theme to this point. Rather, what I am about to show you may explain in part why there may be a disconnect between the level of attention the bench gives to your cases and the level of attention you would prefer. Here is the filing, clearance rate and disposition data for 2007 and projections for 2008. This is preliminary data — I must stress that. We are just now in the process of verifying the data. Do not cite to this data, it truly is preliminary, especially when taken in context of the conversion to the new MNCIS data system. The benefit of MNCIS is that we can generate statewide data; the downside of MNCIS is that it is a cumbersome entry system for clerks and (like FinPlan) prone to the old adage, Garbage In/Garbage Out.

Nevertheless, even this preliminary data is instructive because in the broadest sense it is generally consistent with prior years in that the bench statewide is disposing of dissolution cases in a timely manner. Remember that the required time to disposition in 90 percent of dissolutions is one year. We are to complete 97 percent of dissolutions in 18 months, and 99 percent of such cases in two years. In other words, only 4 percent of dissolutions ever should require more than one year of litigation. The statewide time to disposition on a dissolution with children in 2007 was 196 days (or 6.5 months) and for a dissolution without children 85 days.

Although that data sounds promising, it is skewed because it includes administrative dissolutions — the cases you settle and send in merely for a signature or perfunctory default hearing. So, to really understand how we are doing on contested cases, the administrative dissolutions need to be backed out of the average. At this point in time, however, our dandy new computer system isn't programmed to run that report.

Clearance rates

So, let's consider another case management tool — clearance rates. That term essentially measures whether the system is closing as many files as are opened up on an annual basis. If that is happening, the clearance rate is 100 percent. If a court is closing less than 100 percent, it is generating a backlog. A clearance rate higher than 100 percent means a system is keeping up and also decreasing a backlog. The statewide clearance rate for all family law case types is over 100 percent; in other words, as a branch we are closing more cases than you and the county attorneys and pro se litigants are opening. While that is good, let us not forget that clearance rate and disposition data are quantitative indicators, not qualitative indicators. The final aspect of this data which I would like to bring your attention to is the total number of filings by family case type. If it is true that most of your practice is in the area of dissolution, you might be surprised to learn that as a branch most of our family work is not. Of the approximately 45,000 family filings last year, 16,500 were dissolution cases and 28,500 were of a different family type such as domestic abuse or child support. At some level, this data might explain why it is not always easy to persuade districts to implement blocking of all family cases and Early Case Management. While the family bar and AAML support implementation, the bench may fairly consider the disposition and clearance data and conclude that it is doing alright. As with all data, it can be used as a sword to advance the pace of progress or a shield to justify the status quo. One of my favorite quotes in this regard is that of John Jay, the first U.S. Supreme Court Chief Justice — "Next to doing right, the great object in the administration of justice should be to give public satisfaction."

A premium on efficiency

Now, if this exercise in reflection about the state of your judiciary has not left you feeling noble or wise, let us remember that Confucius elucidated two other paths. What are we to think of the easiest path, imitation? Well, I submit that in this era of high and rapid technology, in this profession where reward is measured in 1/10 of an hour increments, in this austere fiscal environment where even justice is underfunded, indeed it can be said that our profession and our court system places the premium on efficiency. We all know that imitation often is the means to efficiency. As we move from one urgent matter to the next, of course we draw upon the skills, strategies and cognitive frameworks which have served us well in the past. Our profession has become highly specialized precisely so that we may reap the financial rewards of applying imitative knowledge to fact patterns which are merely variants on a few narrow themes. But we must ask ourselves whether this specialization makes us truly wise? Is our expertise so narrow that we too often apply willful blindness to the nuances between fact patterns so that we may conveniently employ a technique or strategy which worked before, persuading ourselves that the modus operendi generated success previously and surely will again when coupled with the virtue of our sheer determination? At Camp this year, as always, you will learn from one another. You likely will take away perspectives and techniques to imitate as you see fit in your actual practice. That is good and worthwhile. However, the Divorce Camp steering committee is calling upon you to do more. There is a place for imitation, but the quality of knowledge gained through such efforts never will equate to the third path to wisdom – which is experience.

In closing, it strikes me that Confucius was only partly right about the bitterness of wisdom gained through experience. Undoubtedly, there will be frustration and embarrassment along the path of acquiring family law ADR experience. At times this weekend it may even seem as though Murphy's Law is more apropos than the words of Confucius.

However, with proper reflection about the task at hand, and careful attention to selecting the most suitable course of action, even an unsuccessful experience may be deemed more sweet than bitter. The inartful application of imitative efforts is what renders experience so bitter, not the mere effort of trying something new.

So, as we open Camp this year, know that you will be challenged to reflect about the important difference between interest-based and position-based negotiation. You will imitate new forms of ADR, even learning that, in fact, there is a difference between a Samoan Circle and the Divorce Camp theme song. And finally, you will be called upon to create a new ADR experience tailored to address some of the budgetary, demographic and caseload realities currently challenging the judiciary in this state. The bench and bar must partner in these austere times to expand the availability of high-quality, affordable, accessible and effective ADR for children and families in transition. I look forward to working with you. Thank you and good luck.