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DOING JUSTICE IN A BUREAUCRACY: THE NEED TO RECONCILE CONTEMPORARY JUDICIAL ROLES IN LIGHT OF ETHICAL AND ADMINISTRATIVE IMPERATIVES

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Among the most significant changes in the contemporary judicial scene have been those relating to a judge's managerial and administrative responsibilities. Written commentaries by and for judges have stressed the need for judges to become active administrators to cope with burgeoning caseloads and the increasing complexity of modern litigation.[1] Some have

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Unreported determinations and orders of state judicial conduct commissions cited in part II of this Article are on file with the author and the Center for Judicial Conduct Organizations of the American Judicature Society in Chicago.

1. *See, e.g.*, S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS (1977); Berg, *Judicial Interest in Administration: The Critical Variable*, 57 JUDICATURE 251 (1974); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). The writings of Arthur Vanderbilt (*e.g.*, A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949)) and the judicial reforms effected in New Jersey following the adoption of its new constitution in 1947 while Vanderbilt was Chief Justice of the Supreme Court of New Jersey are often cited as among the more prominent influences in bringing about acceptance of, and increased attention to, the managerial role. The Supreme Court of New Jersey recently had occasion to explain the significance of Chief Justice Vanderbilt's requirement that weekly reports be filed by each trial judge: "symbolically it signified that there was another dimension to judging, a dimension of administrative responsibility imposed on every judge; he or she was not only to judge well but to work well, and to do whatever was necessary to assure that the entire system was functioning properly." *In re* Alvino, 100 N.J. 92, 99, 494 A.2d 1014, 1017 (1985).

criticized this increased prominence accorded to the managerial role,[2] and others have characterized it as an inevitable, though troublesome, consequence of judicial bureaucratization.[3] To date, this commentary on judicial bureaucratization and managerial judging has centered on the federal judiciary and has discussed problems and pathologies resulting from bureaucratization at different levels of the federal judicial system.[4]

This Article focuses on state judicial bureaucracies and argues that bureaucratization of the state judiciaries may result in a pathology—judicial role strain—that the debate over the bureaucratization of the federal judiciary has not identified. Part I will illustrate that, unlike the federal judicial bureaucracy, the state judicial bureaucracies are generally characterized by strong hierarchical relationships and a sanctioning system to enforce administrative imperatives. Through an analysis of the emerging body of caselaw charging judges with violations of relevant ethics provisions, part II will show that such a bureaucratic setting gives emphasis and prominence to managerial and administrative roles. Pathologies and dysfunctions resulting from the contemporary emphasis on these multiple judicial roles are explored in part III, leading to the conclusion in part IV that state high courts have not taken advantage of the opportunities that these cases provide to clarify role ambiguities and resolve role conflicts. Part IV further suggests that state judicial heirarchies should take affirmative steps to address the role strain problem through the establishment of case production limits.

I. STATE AND FEDERAL JUDICIAL BUREAUCRACIES

In his comprehensive analysis of judicial bureaucratization, Owen Fiss argues that the modern judiciary must be viewed as a large-scale, highly complex organization with a number of hierarchical relationships.[5] Focusing on the federal judicial system, he identifies three hierarchical relationships: judge-judge, judge-staff, and judge-subjudge. Fiss' analysis seeks to de-

2. *See, e.g.*, Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). *But see* Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984).

3. Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981); Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Higginbotham, *Bureaucracy—The Carcinoma of the Judiciary*, 31 ALA. L. REV. 261 (1980); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH L. REV. 248 (1981); Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478 (1983).

4. *E.g.*, Resnik, *supra* note 2; Flanders, *supra* note 2; Higginbotham, *supra* note 3 (attention on the federal trial judiciary). *Cf.* Vining, *supra* note 3 (analysis limited to the Supreme Court of the United States).

5. Fiss, *supra* note 3.

termine whether these bureaucratic relationships lead to dysfunctions or pathologies that threaten the judicial process. After concluding that the judge-judge relationship is the least salient and therefore poses less of a threat, Fiss focuses on the judge-staff and judge-subjudge relationships. Drawing primarily on the writings of Hannah Arendt,[6] Fiss finds that these relationships may result in two bureaucratic pathologies: insulation of the judge from critical educational experiences that are vital to the adjudicative process and diffusion of responsibility for judicial decision making.[7]

Application of the Fiss analysis to state judicial bureaucracies yields somewhat different results. Although the state judiciary theoretically may be subject to the same pathologies as the federal judiciary, the judge-staff and judge-subjudge relationships are not nearly as significant in state judicial systems, particularly at the trial level, as they are in the federal judicial system. Most state trial judges, unlike federal district court judges, do not have elbow clerks, nor are they able to delegate judging responsibilities to subjudges whose authority parallels that of the federal magistrates. On the other hand, the judge-judge relationship tends to be much stronger in state judiciaries than it is in the federal judiciary. Indeed, the hierarchical relationships among state court judges, particularly in matters relating to a judge's managerial responsibilities, are so powerful that they should be given primary attention in an analysis of state judicial bureaucracies.

Of particular significance in creating and strengthening hierarchical relationships among judges in state judicial systems has been the court unification movement. Initially proposed by Roscoe Pound in a now famous address at the 1906 annual convention of the American Bar Association, the unified court system concept calls for consolidation of all state trial and appellate courts into a single hierarchical organization with an administrator at the top of the judicial hierarchy who has the power to direct the court's agencies and personnel for speedy case disposition and to make

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6. *See, e.g.*, H. ARENDT, ON VIOLENCE IN CRISES OF THE REPUBLIC 103, 137-38 (1972); H. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1965); H. ARENDT, THE HUMAN CONDITION 40, 44-45 (1958). In choosing Arendt's approach, Fiss dismisses the model of bureaucracy advanced by Max Weber as having "little import for the judicial bureaucracy." Fiss, *supra* note 3, at 1450. Weber emphasized the prevalence of rule-governed behavior in a bureaucracy. M. WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H. Gerth & C. Mills eds. 1946) (chap. entitled *Bureaucracy*). Thus, the bureaucratic pathology that would be associated with the Weberian model would be excessively rigid, rule-bound behavior. Fiss points out that Weber described the legal method of England and America as "empirical justice" rather than bureaucratic. Fiss, *supra* note 3, at 1450.

7. Fiss, *supra* note 3, at 1454-58, finds the relationships between the federal judge and the judge's elbow clerks (staff) and the federal judge and the federal magistrate (subjudge) most troubling.

necessary organizational adjustments to meet current workloads.[8] Pound believed that such organizational arrangements would permit the courts to become more efficient and businesslike and thus better able to adjust to the needs of a rapidly urbanizing society.[9] It was not until after World War II, however, that many state judiciaries, largely through adoption of new judicial articles in state constitutions, were reorganized in keeping with Pound's unified court idea.[10]

Among the most salient features of a unified state court system are centralized management through the vesting of ultimate administrative authority for the entire judicial system in the chief justice of the state's court of last resort and the granting of procedural and administrative rule-making authority to the high court.[11] The chief justice and high court preside over a hierarchy comprised of chief judges of trial and intermediate appellate courts, who in turn exercise administrative authority over individual judges with regard to their day-to-day case management and administrative responsibilities.[12]

The case management and administrative responsibilities of individual state court judges are codified in Canon 3 of the American Bar Association's

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8. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in* 46 J. AM. JUD. SOC'Y 55 (1962). Pound developed the court unification concept in greater detail in Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUD. SOC'Y 225 (1940). Court unification has been recommended and promoted in various national standards, most notably and consistently by the American Bar Association in its *Report of the Section of Judicial Administration*, 63 A.B.A. REP. 522 (1938); *Model State Judicial Article*, 87 A.B.A. REP. 392-99 (1962); and COURT ORGANIZATION STANDARDS (1974). For a detailed explanation of the court unification concept and its history, see Ashman & Parness, *The Concept of a Unified Court System*, 24 DE PAUL L. REV. 1 (1974).

9. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

10. For accounts of these developments and analyses of the extent to which various state court systems have achieved unification, see L. BERKSON & S. CARBON, COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION (1978); Berkson *Unified Court Systems: A Ranking of the States*, 3 JUST. SYS. J. 264 (1978); Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 J. AM. JUD. SOC'Y 316 (1973).

11. Carbon, Berkson & Rosenbaum, *Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy*, 27 EMORY L.J. 559 (1978). Although the centralized management concept has been opposed by some commentators and state court administrators, the opposition has largely centered on systemic concerns rather than concerns over the effect of bureaucratization on judicial decision-making and behavior. *Id.* at 578-86. *See also* Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35 (1976); Saari, *Modern Court Management: Trends in Court Organization Concepts-1976*, 2 JUST. SYS. J. 19 (1976); Comment, *Trial Court Administration in California*, 21 UCLA L. REV. 1081 (1974).

12. *See generally* COURT ORGANIZATION STANDARDS, *supra* note 8, at §§ 1.10-.12.

Code of Judicial Conduct, which calls upon a judge to "perform the duties of his office impartially and *diligently*".[13] Canons 3A(5)[14] and 3B particularize this diligence requirement.[15] Canon 3A(5) requires judges to dispose promptly of their court's business, while Canon 3B imposes on judges a diligence requirement not only with regard to their own administrative responsibilities, but also with regard to those of other court officials and staff who are subject to their direction and control.

Although these managerial and administrative imperatives apply to the federal judiciary as well as almost all state judiciaries,[16] they have more force in the state judicial systems. This is so not only because of their stronger judge-judge hierarchical administrative relationships, but also because state judges (unlike federal judges) can be sanctioned with some severity for failure to adhere to these ethics provisions. All fifty states and the District of Columbia have mechanisms other than impeachment for sanctioning judges for misconduct.[17] The basis of these sanctioning systems is a body—generally referred to as a judicial conduct commission—with the authority to receive and investigate complaints against judges and conduct initial hearings.

A relatively recent development, the first modern judicial conduct commission was established in California in 1961.[18] Although some of these

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13. CODE OF JUDICIAL CONDUCT, Canon 3 (1972) [hereinafter CODE] (emphasis added).

14. "A judge should dispose promptly of the business of the court." *Id.* at 3A(5).

15. Canon 3B provides:

> (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
>
> (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.
>
> (3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.
>
> (4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve of compensation of appointees beyond the fair value of services rendered.

Id. at 3B.

16. The Code has been adopted in whole or in part by 47 states, the District of Columbia and the Federal Judicial Conference. The three non-Code states are Montana, Rhode Island and Wisconsin. Shaman, *Two States Adopt ABA Model Code of Judicial Conduct*, 8 JUD. CONDUCT REP. 1 (1987).

17. I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS (1980).

18. For a general history of the movement to establish judicial conduct commissions, see Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.[-] KENT L. REV. 1 (1977).

bodies have the authority to issue sanctions, most recommend sanctions to a final reviewing authority, usually the state's highest appellate court.[19] In most states, the high court has the authority not only to apply sanctions such as the reprimand, censure, or suspension of a judge, but also to order the retirement or removal of a judge from office.[20]

In contrast to the state judicial systems, Fiss cites "the absence of any sanctioning system" in the federal judicial bureaucracy to support his contention that the hierarchical relationships among federal judges are weak.[21] Although a mechanism for sanctioning federal judges for *Code* violations has existed since 1980,[22] the range of available penalties does not include removal from office and Fiss sees it as a "symbol of the weakness of the controls of one [federal] judge over another."[23]

Because the judge-judge hierarchical relationships in the state judiciaries are considerably stronger than they are in the federal system, the likelihood of bureaucratic dysfunctions or pathologies that adversely affect the states' judicial processes is greater. The analysis in part II of this Article of the emerging caselaw applying and interpreting state judicial administrative and ethical imperatives demonstrates the increasing importance accorded to administrative and managerial roles. Such an analysis also provides a microscope for examining the bureaucratic pathologies that may develop in the state judiciaries and their potential effect on the judicial role.

This emerging body of caselaw enforcing the administrative imperatives imposed on state judges underscores the emphasis that state judicial bureaucracies are placing on judges' managerial and administrative roles. Although the conduct of the judges in most of the cases decided to date has been egregious, the opinions of the judicial conduct commissions and

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19. I. TESITOR & D. SINKS, *supra* note 17, at 12-18.

20. *Id.* at 44-46.

21. Fiss, *supra* note 3, at 1445.

22. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2036 (1980). Under this statute, the judicial councils of the federal circuits have the power to investigate complaints against federal judges and take "action as is appropriate to assure the effective and expeditious administration of the business of the courts," including certifying a judge's disability, requesting that a judge retire, ordering that no further cases be assigned to the judge as a temporary measure, and censuring or reprimanding the judge publicly or privately. 28 U.S.C. § 372(c)(6)(B) (1986). The judicial council may also refer a complaint to the Judicial Conference of the United States to consider whether the matter should be referred to the House of Representatives for impeachment proceedings. 28 U.S.C. § 372(c)(7). One case that reached the House of Representatives after going through these steps is that of Judge Alcee Hastings. N.Y. Times, July 27, 1988, at 11, col. 1. For a fuller description of the process as it relates to the *Hastings* case and a thoughtful defense of current federal impeachment procedures, see Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1987).

23. Fiss, *supra* note 3, at 1445.

state high courts in sanctioning these judges sends a clear message: the managerial and administrative responsibilities of judges are not to be taken lightly. Judges are to approach these roles with the same degree of seriousness as they approach their adjudicatory role.

II. Managerial and Administrative Roles In State Judicial Bureaucracies

A. The Judge as Case Manager

Much of the caselaw charging judges with violations of administrative imperatives reflects the increased emphasis accorded to the case management role. Requirements such as time standards for processing cases are becoming increasingly prominent in cases alleging judicial misconduct. The following analysis of this caselaw demonstrates that judicial conduct commissions and reviewing courts have not addressed, head on, the general problem resulting from the tension between managerial and adjudicatory roles that such requirements pose for the judge in an overburdened court. Although the commissions and courts have shown some sympathy for defenses such as heavy workload and physical or mental disability, they have merely characterized such circumstances as mitigating factors and failed to acknowledge that the problem may be endemic in their judicial system. Thus, the cases offer little guidance to judges facing this problem.

The administrative requirement that has most frequently been cited in state judicial disciplinary proceedings is the command of Canon 3A(5) to "dispose promptly of the business of the court."[24] This provision takes aim at the twin evils of neglect and delay and is much more forceful and directive in addressing these problems than its counterpart provisions in the old ABA Canons.[25] Indeed, the Reporter of the ABA Special Committee on Standards of Judicial Conduct, the drafters of the Code, explained:

> The Committee received reports about judges who procrastinated in deciding proceedings that were ripe for decision, judges with heavy dockets who were very irregular in their court appearances, and judges who regularly caused loss of time to jurors, witnesses, parties, lawyers, and other persons by lack of punctuality in attending court.[26]

As indicated below, reported cases alleging violations of Canon 3(A)5 have reflected these concerns and then some.

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24. Code, *supra* note 13, at Canon 3A(5).

25. Canons of Judicial Ethics, Canons 2, 7, 15 & 18 (1924) [hereinafter Canons].

26. E.W. Thode, Reporter's Notes to Code of Judicial Conduct 54 (1973).

1. Time Standards

In recent years, a number of state legislatures and high courts have sought to assure prompt case disposition through case processing time standards.[27] Some of these standards require that a judge issue periodic reports (usually monthly or quarterly) on cases that the judge has had under advisement for longer than a prescribed period (usually sixty days).[28]

Although most jurisdictions do not make the consequences of noncompliance with the time standards explicit,[29] some states condition payment of all or a portion of the judge's salary on adherence to the time standards.[30] In other states, instances of noncompliance with the reporting requirements[31] or the time standards themselves[32] automatically results in a report to the state's judicial conduct commission. The North Dakota rule explicitly states that the reporting of an "overdue" case to the Judicial Qualifications Commission "must be treated as a complaint against the judge assigned to the case."[33]

Legislative attempts to condition payment of judicial salaries on adherence to case processing time standards have been successfully challenged on constitutional grounds in Montana, Nevada, and Wisconsin.[34] In all three jurisdictions, the state high courts have ruled that such legislative attempts to require judicial action within a specified time period were unconstitutional intrusions into judicial branch prerogatives and thus violative of the doctrine of separation of powers. But, the Supreme Court of Wisconsin in *In re Grady*,[35] announcing its decision to strike down such

27. Such standards are now encouraged at the national level. *See, e.g.*, American Bar Association, STANDARDS RELATING TO COURT DELAY REDUCTION (1984); American Bar Asociation, STANDARDS RELATING TO APPELLATE DELAY REDUCTION (1988) (prescribed time standards for case disposition in the trial and appellate courts recommended).

28. *See, e.g.*, ARIZ. R. CIV. P. 39(j), 77(i); ARK. CT. R. 146; FLA. JUD. ADMIN. R. 2.085(e); KAN. SUP. CT. R. 166; N.Y. UNIFORM JUST. CT. ACT § 1304; OHIO RULES OF CT. 6; S.D. CODIFIED LAWS ANN. § 16-2-20.1; TEXAS RULES OF CT. 297; UTAH CODE ANN. § 78-7-25 & 26; WASH. CONST. art. IV, § 20; WISC. SUP. CT. R. 70.36.

29. The mere fact of having to report "overdue" cases (in some jurisdictions with reasons) evidently is considered to be a sufficient sanction.

30. ARIZ. REV. STAT. ANN. § 11-424.02; CAL. CONST. art. 6, § 19; IDAHO CONST. art. 5, § 17; MINN. STAT. ANN. § 546.27; OR. REV. STAT. § 1.050.

31. S.D. CODIFIED LAWS ANN. § 16-2-20.1; WIS. SUP. CT. R. 70.36.

32. N.D. SUP. CT. ADMIN. R. 4(j).

33. *Id.*

34. Coate v. Omholt, 203 Mont. 488, 662 P.2d 591 (1983); State *ex rel.* Watson v. Merialdo, 70 Nev. 322, 268 P.2d 922 (1952); *In re* Grady, 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

35. 118 Wis. 2d at 762, 348 N.W.2d at 559. The rule provides for the following "remedial measures" for noncompliance: change of assignment; referral of the matter to the supreme court for initiation of contempt proceedings; and referral to the judicial conduct commission for investigation of possible misconduct. WIS. SUP. CT. R. 70.36.

a statute, used the occasion to adopt a rule of judicial administration that is similar to the offending statute, except that the rule does not include the withholding of the judge's salary as a possible sanction.

Moreover, the Supreme Court of Wisconsin found that the behavior of the judge who had been charged with violating the statute constituted misconduct. The court held that the judge's general failure to promptly perform his duties and to organize his court and supervise his staff so that the court's business could be promptly dispatched did constitute misconduct under the state's Code of Judicial Ethics, thus warranting a public reprimand.[36] The court also found that, under the state's code, the judge's repeatedly filing affidavit forms (pursuant to the unconstitutional statute) that misrepresented the status of his cases constituted conduct prejudicial to the administration of justice and brought the judicial office into disrepute.[37]

Nowhere in its opinion in *Grady* did the Supreme Court of Wisconsin acknowledge that the judge's managerial role might be in conflict with his adjudicatory role. Although the court found that the judge had "earned the reputation of being a hardworking fair and honorable judge" and had had "a heavy workload assignment" during much of the period in question, it merely characterized these circumstances as "mitigating factors".[38]

The filing of erroneous salary affidavits pursuant to similar statutes in Arizona,[39] California,[40] Idaho,[41] and Minnesota[42] has resulted in the discipline of judges in a number of cases.[43] In one of these cases, the fact that the judge apparently did not "knowingly" falsify the salary affidavits appeared to mitigate, but not entirely excuse, the judge's offense in the

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36. *In re* Grady, 118 Wis. 2d at 785, 348 N.W.2d at 571.

37. *Id. See also In re* Reeves, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984). In *Reeves*, the New York Court of Appeals removed a family court judge for falsifying pending case reports by directing his clerk to cross off the 60 oldest cases.

38. *In re* Grady, 118 Wis. 2d at 770-71, 348 N.W.2d at 564.

39. ARIZ. REV. STAT. ANN. § 11-424.02 (1988).

40. CAL. GOV'T CODE § 68210 (West 1976). Unlike the statutes that were successfully challenged in Montana, Nevada and Wisconsin, the California statute was enacted pursuant to a constitutional provision, CAL. CONST. art. 6, § 18, which prohibits receipt of salary by a judge while a cause remains pending and undetermined for 90 days after submittal for decision.

41. IDAHO CODE § 59-502 (1988). The Idaho statute was also enacted pursuant to a constitutional provision. *See* IDAHO CONST. art. 5, § 17.

42. MINN. STAT. ANN. § 546.27 (West 1988).

43. *In re* Weeks, 658 P.2d 174 (Ariz. 1983); *In re* McCullough, 43 Cal. 3d 534, 734 P.2d 987, 236 Cal. Rptr. 151 (1987); *In re* Creede, 42 Cal. 3d 1098, 729 P.2d 79, 233 Cal. Rptr. 1 (1986); Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 709 P.2d 852, 220 Cal. Rptr. 883 (1985); *In re* Jensen, 24 Cal. 3d 72, 593 P.2d 200, 154 Cal. Rptr. 503 (1978); Inquiry Concerning Judge Anonymous, No. 1975-1 (Idaho Sup. Ct. Jan. 20, 1976); *In re* Anderson, 312 Minn. 442, 252 N.W.2d 592 (1977).

eyes of the Supreme Court of California.[44] In another case, the court refused to condone a judge's routine practice of issuing resubmission orders in overdue cases, thus effectively starting the ninety day period over again, on the grounds that such a practice "would make a mockery of the constitutional mandate."[45] In none of these cases did the state high courts acknowledge that such statutes might be in conflict with a judge's adjudicatory role and offer guidance as to how these administrative imperatives might be reconciled with the adjudicatory role.

The falsification of salary affidavits decisions are somewhat unclear as to whether (or to what extent) the judge would have been sanctioned, absent the falsification, solely for exceeding officially prescribed time standards. In time standards cases in states that do not impose a withholding of salary sanction, such decisions have turned largely on the nature and frequency of the rule infractions. They have offered no policy guidance to the overburdened judge who is finding it difficult to comply with the time standards.[46] In perhaps the most strongly worded decision to date, *In re Carstensen*,[47] the Supreme Court of Iowa suspended a judge for thirty days without pay for repeatedly failing to comply with Iowa Supreme Court Rule 200. The rule required judges to file monthly reports with the state court administrator on all cases under advisement for over sixty days, giving reasons for the delay and an expected decision date.[48] If a judge had no matters pending over sixty days, the rule still required that a report (stating "none") be filed.[49]

Judge Carstensen failed to comply with the rule's reporting requirements during twenty-eight of the first thirty-seven months of the rule's operation, by failing to submit five reports and by submitting twenty-three reports late.[50] The state court administrator and the chief justice both had sent

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44. *In re* Creede, 42 Cal. 3d at 1098, 729 P.2d at 200, 233 Cal. Rptr. at 1. Unfortunately, the court did not explain as a matter of either law or policy why the judge was held accountable even though he did not *knowingly* falsify the salary affidavits. Apparently the judge's general failure to monitor his caseload was enough even though the record revealed the judge to be "diligent, hardworking and highly respected" and the delays at least "partially attributable to an excessive workload and inadequate support staff." *Id.*

45. Mardikian v. Commission on Judicial Performance, 40 Cal. 3d at 485, 709 P.2d at 859, 220 Cal. Rptr. at 840.

46. *See, e.g.*, *In re* Carstensen, 316 N.W.2d 889 (Iowa 1982); *In re* Johnson, 355 N.W.2d 305 (Minn. 1984); *In re* Reeves, 63 N.Y.2d 105, 469 N.E.2d 1321, N.Y.S.2d 463 (1984); *In re* Vincent, Unreported Determination, N.Y. Comm'n (1986); *In re* Cote, Unreported Determination, N.Y. Comm'n (1985); *In re* Leonard, Unreported Determination, N.Y. Comm'n (1985); Office of Disciplinary Counsel v. Capers, 15 Ohio St. 3d 122, 472 N.E.2d 1073 (1984); *In re* Van Susteren, 118 Wis. 2d 806, 348 N.W.2d 579 (1984).

47. 316 N.W.2d 889 (Iowa 1982).

48. IOWA S. CT. R. 200.

49. *Id.*

50. *In re* Carstensen, 316 N.W.2d at 894.

letters, reminding the judge of his reporting responsibilities.[51] After the letters apparently did not induce compliance, the chief justice and state court administrator travelled to Judge Carstensen's court to discuss his noncompliance with him and his chief judge.[52] Although the report due immediately following their visit was on time, the reports for each of the next eleven months were late.[53] In addition, eight overdue cases were completely omitted from the reports and seven cases were reported late.[54]

The Supreme Court of Iowa found that the judge "blatantly, flagrantly, and persistently disregarded the requirements of rule 200,"[55] constituting a violation of the Canon 3B(1) requirement to "diligently discharge his administrative responsibilities."[56] Interestingly enough, the court did not address the question of whether there was a violation of the Canon 3A(5) prompt disposition requirement in light of the fact that Judge Carstensen apparently had at least twenty-seven overdue cases pending at various times during this period. Rather, the court decided the case solely on the grounds that failure to comply with their rule constituted a 3B(1) violation. The court explained the rationale for the administrative rule and the need for compliance: "Rule 200 reports are vital to the efficient administration of our judicial system, and, as such, they are a necessary duty, which we expect to be followed and will enforce."[57] The court explained that the rule was promulgated because of burgeoning trial court caseloads and that the rule's reporting system allowed those responsible for case assignments to provide relief or assistance to judges who have fallen behind.

The *Carstensen* case stands in contrast to the Supreme Court of New Jersey's *In re Alvino*[58] decision. In *Alvino*, the judge had failed to list "reserved" matters (cases in which all that remains for disposition is the judge's decision) in weekly reports for eighteen years. Although the Supreme Court of New Jersey explained the importance of the reporting requirement

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. IOWA CODE OF JUDICIAL CONDUCT Canon 3B(1) (same wording as CJC Canon 3B(1)).
57. *In re* Carstensen, 316 N.W.2d at 893.
58. 100 N.J. 92, 494 A.2d 1014 (1985). *See also* Office of Disciplinary Counsel v. Capers, 15 Ohio St. 3d 122, 472 N.E.2d 1073 (1984). In *Capers*, the Supreme Court of Ohio declined to find that a judge's filing of erroneous docket reports constituted a violation of the state's code of judicial conduct. The supreme court's administrative rule required the filing of quarterly docket status reports indicating the number of cases pending over 90 days. Although Judge Capers had failed to report two cases that had been pending for well over 90 days, the court accepted the board's conclusion that the failure to report was due to confusion and carelessness and did not constitute a violation of Canon 3A(5). *Id.* at 124, 472 N.E.2d at 1074.

and pointed out that the judge knew that he was required to include the information in his weekly reports, the court dismissed the complaint.[59] The court found that the judge did not display the requisite degree of wilfulness to disobey the rules. The judge simply never thought that the reserve matter reporting requirement was important and no one during the eighteen year period had brought the omission to his attention. Apparently believing that it was estopped from complaining at this late date, the court ruled that it would be unfair under these circumstances to discipline a judge whose record was otherwise spotless.[60]

2. Neglect

In the absence of official case processing time standards or other specific work-related requirements, alleged violations of the diligence and administrative requirements of the Code are difficult to assess. Particularly difficult to evaluate is conduct that reflects an apparent neglect of official duties. For example, how many days may a judge be inexcusably absent from office or tardy before the judge may be charged with neglect? Although such a question suggests an answer in quantifiable terms (*e.g.*, "y" days of absence from office constitutes neglect), cases dealing with these matters generally involve time periods that are so clearly excessive that reviewing courts have tended to avoid developing a quantitative approach to the issue of what constitutes neglect.[61] While courts sometimes comment on actual or potential negative consequences of the alleged neglect, they usually leave the issue of whether a finding of such consequences is a necessary precondition to an ethics violation unclear. Many reviewing courts focus on the apparent causes of the neglect in determining the extent to which they will excuse it.

This tendency to focus attention on the apparent cause of the alleged ethics violation, rather than on the violation itself, is exaggerated where the cause brings the judge's overall ability to perform the duties of the judicial office into question. The clearest examples of this tendency are found in neglect cases where an underlying mental or physical disability is cited as the reason for the apparent neglect of duties.[62] These cases'

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59. *Id.*

60. *Alvino*, 100 N.J. at 102, 494 A.2d at 1015.

61. *See, e.g.*, Starnes v. Judicial Retirement & Removal Comm'n, 680 S.W.2d 922, 923 (Ky. 1984) ("The fact that a judge is late or absent on occasion does not warrant a reprimand let alone anything so serious as removal from office. But the conduct here was chronic and pervasive. It was extreme. It seriously disrupted the administration of justice . . ."). *See also In re* Garcia, No. 16,974 (N.M. 1987).

62. *In re* Sobotka, No. 73651 (Mich. 1985); *In re* Corning, 538 S.W.2d 46 (Mo. 1976); Stark County Bar Ass'n v. Weber, 175 Ohio St. 13, 190 N.E.2d 918 (1963); *In re* Clements, Unreported Determination, Pa. Bd. (1975); *In re* Williamson, 270 S.C. 313, 242 S.E.2d 221 (1978).

outcomes turn largely on the disciplinary bodies' views of the impairment and the bodies' willingness to view the neglect as excusable or its cause as treatable. These cases are analyzed separately below.

On the other hand, where the cause of the repeated absence or tardiness involves a more clearly voluntary choice on the part of the judge to pursue nonjudicial activities in lieu of the judge's official duties, reviewing courts have been more willing to speculate on the negative consequences of the purported neglect. This has been particularly true in cases involving outside activities undertaken for personal gain where such activities were not in and of themselves illegal or unethical. In *In re Troy*,[63] for example, the Supreme Judicial Court of Massachusetts found that the judge's tardiness and absence from court due to his supervision of a marina construction project in which he had a personal interest violated the Canons of Judicial Ethics.[64] The court condemned the conduct as doing: "a grave disservice not only to the people and to the judicial system but to the vast majority of judges who maintain regular court hours and perform as judges should, not leaving the court house until their judicial business has been properly disposed of."[65] The court cited evidence of summarily conducted, (or outright denials of) fair hearings on bail matters and the need to recruit special judges to perform the judge's work as negative consequences of the tardiness and absenteeism.[66]

Similarly, in *In re Gardner*,[67] the Supreme Court of Pennsylvania cited a district justice's failure to insure that arresting officers signed criminal complaints, his unlawful delegation of judicial authority, and his lack of supervision of nonjudicial personnel as some of the negative effects of the justice's failure to devote adequate time to his judicial duties. The judge was unavailable during his posted hours at the magisterial office for an average of over 300 hours per year for six consecutive years, due to his employment as a steel company foreman. The court ruled that the judge's failure to give his judicial duties priority over his steel company employment violated provisions of the Rules Governing the Standards of Conduct of Justices of the Peace.[68] The court found that it was immaterial that the

63. 364 Mass. 15, 306 N.E.2d 203 (1973).

64. CANONS, *supra* note 25, at Canons 6, 7 & 24. Because the Code had been adopted in Massachusetts at the time of the decision in *In re* Troy, but subsequent to the reported conduct, the court also cited CJC provisions, particularly Canon 5C(1) ("A judge should refrain from financial and business dealings that tend to reflect adversely on his impartibility, interfere with the proper performance of his judicial duties . . .").

65. *In re* Troy, 364 Mass at 68, 306 N.E.2d at 233.

66. *Id.*

67. Unreported order, 1977.

68. PENNSYLVANIA RULES GOVERNING STANDARDS OF CONDUCT OF JUSTICES OF THE PEACE, Rule 3-A.

justice was on call to perform judicial duties during his hours at the steel company and that he conducted judicial business in the evenings and on weekends. The court suspended the judge for four months and ordered that the disciplinary body recommend new sanctions if the judge did not properly perform his duties following the suspension.[69]

Under somewhat similar circumstances, the Supreme Court of Missouri held that a magistrate had violated the administrative and diligence requirements of Canons 3B(1) and 3B(2) by virtue of his infrequent attendance in court. In *In re Briggs*,[70] the court found that the judge was regularly present in court only on Wednesdays and infrequently on other occasions, resulting in numerous administrative shortcomings, including inadequate supervision of court staff, improper maintenance of court records, and unprofessional conduct of court proceedings. Although there was no indication that moonlighting caused the judge's absence, there was some suggestion that the neglect of judicial duties was tied to "excessive involvement in partisan political activities," which the court found in itself mandated the judge's removal from office.[71]

In cases where reviewing courts are unable to find negative consequences resulting from a judge's absence from office, courts have been reluctant to find that the absence in and of itself constitutes misconduct. In a case where there was "no convincing evidence that harm ever resulted from his occasional absences" the Supreme Court of Minnesota characterized a charge that a judge had violated Canon 3B(1) as "purely technical."[72] Even in a case where the absences apparently were much more frequent, the Supreme Court of Texas ruled that a judge did not neglect his judicial duties to such a degree as to warrant disciplinary action.[73] In the Texas case, the judge had been absent from court for at least forty-seven days during a two year period to serve as a paid federal arbitrator.[74] In refusing to find that this constituted an ethics violation, the court cited the favorable testimony of local attorneys to demonstrate that in terms of the judge's availability to the bar, industriousness, and ability to keep up with his

69. The supreme court rejected the portion of the recommendation of the Pennsylvania Judicial Inquiry and Review Board that called for the judge's removal from office following the suspension unless the judge submitted proof that he had arranged his steel company employment to give priority to his judicial duties. Pennsylvania District Justices are now prohibited from holding other jobs. *See also* CODE, *supra* note 13, at Canons 5A and 5B ("distraction from duties" provisions).

70. 595 S.W.2d 270 (Mo. 1980).

71. *Id.* at 277.

72. *In re* McDonough, 296 N.W.2d 648 (Minn. 1980).

73. *In re* Brown, 512 S.W.2d 317 (Tex. 1974).

74. The dissent cited the judge's testimony that he received pay (at the rate of $100 per day) for 206 days during 1969. *Id.* at 330. At the time, serving as an arbitrator was not a per se ethics violation. *But see* CODE, *supra* note 13, at Canon 5E.

docket, apparently no negative consequences resulted from the judge's absences.[75]

3. Dilatoriness and Inefficiency

When a judge delays rendering judgment in a case or cases, the negative consequences on the administration of justice are more apparent and direct than they are in the usual neglect scenario. In addition to depriving quick and certain justice to the litigants in those cases, a judge reinforces the negative images of the judicial system reflected in such aphorisms as "justice delayed is justice denied." The Reporter of the Code of Judicial Conduct stated in his notes to Canon 3A(5): "Failure of a judge to dispose promptly of the business of the court when there is no justifiable reason for delay reflects adversely on the entire judicial system."[76] As the caseloads in American courts have grown, concerns over case delays and concomitant complaints against the judges presiding over these cases have increased.

Although official case processing time standards of the type reviewed above have, for good or ill, provided a convenient means for identifying case delay in many jurisdictions,[77] conduct commissions and reviewing courts still must answer important questions relating to whether and when case delays reach the level of sanctionable conduct. To date, courts reviewing alleged instances of case delay have addressed two general questions: (1) Does delay in one or two cases constitute sanctionable conduct or must a pattern of delay be established?; and (2) Does the apparent cause or reason for the delay either aggravate or excuse the delay? As we shall see, answers to the second question often influence a court's response to the first.

Numerous jurisdictions have disciplined judges for the general failure to dispose promptly of the business of their court as Canon 3A(5) and similar ethics provisions require.[78] Each judge had allowed excessive delays

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75. *In re* Brown, 512 S.W.2d at 322.

76. W. THODE, *supra* note 26, at 54-55.

77. Although the question of when case delays (in a quantifiable sense) run afoul of the prompt disposition requirement of Canon 3A(5) is by no means an easy one in jurisdictions that do not have official case processing time standards, case processing time standards recently adopted by the American Bar Association may offer some guidance to judicial disciplinary bodies and reviewing courts in jurisdictions that have not adopted their own standards. *See supra* note 27.

78. *See In re* Weeks, 134 Ariz. 521, 658 P.2d 174 (1983); *In re* Creede, 42 Cal. 3d 1098, 729 P.2d 79, 233 Cal. Rptr. 1 (1986); Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 709 P.2d 852, 220 Cal. Rptr. 833 (1985); *In re* Jensen, 24 Cal. 3d 72, 593 P.2d 200, 154 Cal. Rptr. 503 (1978); *In re* Municipal Court of Cedar Rapids, 188 N.W.2d 354 (Iowa 1971); Starnes v. Judicial Retirement & Removal Comm'n, 680 S.W.2d 922 (Ky. 1984); *In re* Heideman, 387 Mich. 630, 198 N.W.2d 291 (1972); *In re* Anderson, 312 Minn. 442, 252 N.W.2d

in numerous cases over significant time periods, thus establishing a pattern of misconduct in failing to adhere to the prompt disposition standard. Reviewing courts have characterized these patterns of misconduct in broad terms such as "unreasonable delay,"[79] "habitually dilatory in disposing of cases,"[80] "unnecessary delay in disposition of cases,"[81] and "persistent failure promptly to process, try and dispose of cases."[82]

The more difficult cases involving the prompt disposition requirement have been those in which the judge is charged with allowing excessive delay in only one or two cases. Generally, reviewing courts have excused the delay absent a showing of aggravating causes or circumstances.[83]

In cases where the reviewing court disciplines the judge charged with delay in one or two cases, aggravating circumstances that themselves bordered on misconduct have usually been present that rendered the failure to adhere to the prompt disposition requirement much more egregious. For example, courts have sanctioned judges for intentionally delaying the disposition of cases in retaliation against attorneys who signed a disciplinary complaint against the judge[84] or to benefit a member of the judge's family.[85] Courts have also disciplined judges where the delay was clearly not an oversight and thus reflected a higher degree of wilfulness or negligence on the judge's part. In these delayed cases, the litigants' attorneys had regularly inquired of the judge concerning case disposition and the judicial disciplinary

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592 (1977); *In re* Steinle, 653 S.W.2d 201 (Mo. 1983); *In re* Corning, 538 S.W.2d 46 (Mo. 1976); *In re* Robbins, Unreported Determination, N.Y. Comm'n (1985); *In re* Cote, Unreported Determination, N.Y. Comm'n (1985); *In re* Leonard, Unreported Determination, N.Y. Comm'n (1985); *In re* MacDowell, 393 N.Y.S.2d 748 (1977); *In re* Van Susteren, 118 Wis. 2d 806, 348 N.W.2d 579 (1984).

79. *Weeks*, 134 Ariz. at 525, 658 P.2d at 178.

80. *Corning*, 538 S.W.2d at 51.

81. *Starnes*, 680 S.W.2d at 923.

82. *Heideman*, 387 Mich. at 631, 198 N.W.2d at 354.

83. *See In re* Alvino, 100 N.J. 92, 494 A.2d 1014 (1985), where the Supreme Court of New Jersey, in passing on a judge's failure to handle two cases expeditiously, ruled that "atypical violations of *this kind* were not intended to, and do not, constitute judicial misconduct." *Id.* at 97, 494 A.2d at 1016. In one of the few reported cases dealing with charges of judicial misconduct in the federal system, the court adopted an even more "hands off" posture. The Chief Judge of the United States Court of Appeals for the Ninth Circuit rejected a complaint against a federal district court judge for failing to render judgment in timely fashion in a single matter. *In re* Charge of Judicial Misconduct, 593 F.2d 879, 881 (9th Cir. 1979). The Chief Judge ruled that neither he nor the Judicial Council had the power to deal with such a situation, "absent any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." *Id.* at 881.

84. *In re* Terry, 262 Ind. 667, 674-75, 323 N.E.2d 192, 196 (1975), *cert. denied*, 423 U.S. 867 (1975).

85. *In re* Tschirhart, 420 Mich. 1201, 362 N.W.2d 235 (1984).

body had admonished or reprimanded the judge concerning the delay in the subject case[86] or another case.[87]

Perhaps the most celebrated charges of intentional case delay were those implicating Chief Justice Rose Bird and other justices of the Supreme Court of California. The justices initially were charged in a 1978 newspaper story with having delayed issuance of a controversial ruling until after an election in which the confirmation of Bird's appointment to the court and those of three other justices were to have been before the voters. After a series of widely publicized events—including the Chief Justice's denial of the charges, her calling for a full investigation by the state's judicial conduct commission and the decision by an *ad hoc* Supreme Court that a rule permitting public (televised) commission hearings was unconstitutional—the commission declined to file formal charges against any justice.[88]

Some of the more difficult cases applying the prompt disposition requirement have been those where the judge intentionally delays disposing of a case out of a belief that delaying the case will serve the ends of justice. Reviewing courts generally have not been willing to view the judge's good intentions in this regard as enough of a mitigating factor to excuse the delay.[89] Indeed, the Supreme Judicial Court of Maine suggested that such apparent good intentions may actually be an aggravating rather than a mitigating factor. In ruling on charges that a judge had violated the prompt disposition requirement in two cases, the court found that the judge had deliberately interfered with the parties "right to prompt disposition" and had "determinedly administered his own personal brand of justice, in plain and direct violation of the standards governing a judge's performance of his high responsibilities."[90]

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86. *In re* McCullough, 43 Cal. 3d 534, 534, 734 P.2d 987, 987, 236 Cal. Rptr. 151, 151 (1987).

87. *In re* Jones, 728 P.2d 311 (Colo. 1986).

88. For a detailed account of this matter, see P. STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981).

89. *See, e.g., In re* Kohn, 568 S.W.2d 255 (Mo. 1978), where a Missouri judge, in responding to a complaint concerning a four year delay in a case, explained that he delayed the case to avoid disrupting the relationship between the beneficiary of a will and her executrix aunt in the hope that the case would settle. *Id.* at 261. In censuring the judge for this and other misconduct, the Supreme Court of Missouri suggested that it might have considered the judge's apparent good intentions in mitigation of a portion of the delay, but not for the entire four years. *Id. See also* Judicial Qualifications Comm'n v. Cieminski, 326 N.W.2d 883 (N.D. 1982). In *Cieminski*, the judge had delayed rendering judgment in numerous small claims cases apparently to accommodate informal case disposition procedures developed by the judge. *Id.* at 888. Although the Supreme Court of North Dakota commented that the judge's "unorthodox handling of the business of the small claims court appears to be motivated by a strong sense of morals and a gentle heart," the court found that the judge's conduct constituted an unexcused violation of Rule 3A(5). *Id.*

90. *In re* Barrett, 512 A.2d 1030, 1034 (Me. 1986). In one case, the judge

More difficult still is the case of the overly conscientious judge whose abiding concern to do justice in individual cases causes inefficiency in disposing promptly of the court's business. Although no judicial conduct case has as yet posed this dilemma in precisely such terms, the Supreme Court of California faced the issue indirectly in *McCartney v. Commission on Judicial Qualifications*.[91] In *McCartney*, a municipal court judge had been charged with numerous instances of intemperate and injudicious conduct in dealing with court personnel, criminal case defendants, and attorneys.[92] In addition, the judge was charged with "chronic delays" in processing what generally are considered to be routine or summary matters, particularly small claims cases.[93] Trials in these cases frequently ran into the evening and as late as midnight.[94] Although the court noted that the judge's inefficiency in processing cases appeared "to stem from an effort to attain a degree of diligence and studiousness in the application of the law which was unrealistic and frequently unjustified," the court found that "this pattern of delay stemmed from no dereliction of duty."[95] In declining to rule on the inefficiency and delay charges as a disciplinary matter, the court characterized it as a problem more properly handled through local court administration. In so doing, the court sidestepped the opportunity to address the tension between the managerial and adjudicatory roles as a policy matter to be addressed by those at the highest level of the state judicial bureaucracy.

4. Heavy Workload Defense

The most prominent cases in which state high courts have refused to deal with the tension between the managerial and adjudicatory roles as a policy matter are those in which the press of heavy caseloads in understaffed, high volume courts have been raised as a defense by judges charged with violating the prompt disposition requirement. While reviewing courts have shown some sympathy to the pressures heavy workloads and inadequate staffing arrangements cause, sometimes even suggesting that they might have considered workload as a mitigating factor even if it was not raised

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had delayed ruling for seven years on a petition to dispose of a portion of the principal of a trust in the belief that in thus preserving the *status quo* the judge was fulfilling an obligation he believed he owed the testator to insure that the trust was administered for the sister-beneficiary's happiness. *Id.* at 1032. In the other case, the judge delayed ruling on six different petitions seeking the guardianship of an infant whose parents were killed in a murder-suicide. *Id.* at 1033. The judge explained that he delayed ruling on the petitions in the hope that the paternal and maternal branches of the infant's family would repair their relationships. *Id.*

91. 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).
92. *Id.* at 522-23, 526 P.2d at 275-76, 116 Cal. Rptr. at 267.
93. *Id.*
94. *Id.*
95. *Id.*

in the judge's defense,[96] heavy workload has been considered only in mitigation in the case at hand and not as a general problem to be addressed as a matter of policy.[97]

In considering the heavy workload defense in *Mardikian v. Commission on Judicial Performance*,[98] the Supreme Court of California may have aggravated the problem as a policy matter. In *Mardikian*, the judge was charged with failure to promptly dispose of fourteen cases in one of the state's highest volume courts whose staffing the supreme court itself characterized as "woefully inadequate."[99] The court pointed out, however, that eight of the fourteen cases involved matters such as child custody and were thus particularly deserving of prompt resolution. The judge's apparent failure to minimize the impact of delay by assigning caseload priorities based upon the effect of delay on the parties in individual cases rendered the heavy workload defense much less compelling in the court's eyes. The court thereby imposed on judges confronted with heavy caseloads the responsibility for developing a means of ranking cases in priority order to decide which cases are most deserving of a judge's immediate attention. Not only was this the first time such a requirement had been enunciated for California judges, as the dissent noted,[100] but the court failed to provide trial judges with any guidance as to which cases should be given highest priority. Rather than clarifying the dictates of the managerial role, the opinion made it more ambiguous.

5. Disability

In *Mardikian* and other cases charging judges with neglect or delay, reviewing courts also considered disabling physical or mental conditions in

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96. *See, e.g.*, *In re* Barrett, 512 A.2d 1030, 1034 (Me. 1986).

97. *In re* Creede, 42 Cal. 3d 1098, 1099, 729 P.2d 79, 79, 233 Cal. Rptr. 1, 1 (1986); Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 482-83, 709 P.2d 852, 857-58, 220 Cal. Rptr. 833, 839 (1985); *In re* Jones, 728 P.2d 311, 314 (Colo. 1986); *In re* Municipal Court of Cedar Rapids, 188 N.W.2d 354, 357-58 (Iowa 1971); *In re* Kohn, 568 S.W.2d 255, 261 (Mo. 1978); *In re* Steinle, 653 S.W.2d 201, 202 (Mo. 1973); *In re* Grady, 118 Wis. 2d 762, 771, 348 N.W.2d 559, 564 (1984); Office of Disciplinary Counsel v. Capers, 15 Ohio St. 3d 122, 124, 472 N.E.2d 1073, 1074 (1984).

98. 40 Cal. 3d at 479-81, 709 P.2d at 855-56, 220 Cal. Rptr. at 837.

99. *Id.* at 479, 709 P.2d at 856, 220 Cal. Rptr. at 837.

100. Justice Kaus, joined by Justice Reynoso, registered a strong dissent in *Mardikian*, stating that the judge was "being made the scapegoat for the twin plagues of judicial overload and backlog." *Id.* at 485, 709 P.2d at 860, 220 Cal. Rptr. at 841. He explained:

> [T]rial court judges currently have no rule to consult in determining how to deal with the problems resulting from an understaffed bench and an overcrowded docket. Although the adoption of an explicit schedule of priorities . . . may well be a sensible approach, before today's decision no authority made it clear that the failure to establish such a schedule would itself be grounds for discipline.

Id. at 487, 709 P.2d at 861, 220 Cal. Rptr. at 842 (Kaus, J., dissenting).

mitigation. Although courts reviewing charges of official judicial misconduct have been willing to consider the effect of disabling conditions, they have scrutinized such claims carefully and have required clear evidence of the disability's existence.[101]

Where the evidence clearly establishes the disabling condition and the condition appears to be an underlying cause of the neglect or delay, disciplinary bodies have taken widely varying approaches to considering the appropriateness of disciplinary measures. Although most have imposed sanctions short of removal from office if the condition is considered treatable (*e.g.*, alcoholism) and the judge indicates a willingness and ability to be permanently rehabilitated,[102] others have removed the judge without considering treatment.[103] This is particularly true where the disciplinary body has viewed the condition as voluntary,[104] or where the judge was capable of conforming to the prompt disposition requirement when under pressure to do so.[105] On the other hand, such disciplinary bodies have removed or retired judges where the disabling conditions seriously interfere with the performance of their judicial duties.[106]

Thus, even where a disabling condition is clearly involuntary, the tendency is to hold the judge to the same performance standards as judges who are not disabled.[107] Although some disciplinary bodies may offer judges

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101. *See, e.g., In re* Anderson, 312 Minn. 442, 445-46, 252 N.W.2d 592, 593 (1977) (the judge's contention that he was suffering from "a mental sickness of a nature which has impaired his judicial effectiveness" was unsupported by the evidence where the disability claim was based solely on the judge's testimony).

102. *See, e.g.*, Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 709 P.2d 852, 220 Cal. Rptr. 883 (1985); *In re* Sobotka, No. 73651 (Mich. 1985); Stark County Bar Ass'n v. Weber, 175 Ohio St. 13, 190 N.E.2d 918 (1963). In *Sobotka*, the judge's performance was supervised by the commission for six months following her apparently successful treatment for alcoholism. In *Weber*, the judge was given a reprimand after similarly completing a one year probationary period following a finding of alcohol abstention. 175 Ohio St. at 15-16, 190 N.E.2d at 919.

103. Starnes v. Judicial Retirement & Removal Comm'n, 680 S.W.2d 922 (Ky. 1984); *In re* Clements, Unreported Determination, Pa. Bd. (1975).

104. *See Starnes*, 680 S.W.2d at 923 (the judge's drug addiction was "a result of voluntary conduct" and did "not afford a valid defense to charges of misconduct").

105. *See In re* Corning, 538 S.W.2d 46 (Mo. 1976), where the Supreme Court of Missouri removed a judge from office who was suffering from an "[o]bsessive [c]ompulsive [n]eurosis" that allegedly accounted for his difficulty in reaching decisions. *Id.* at 52. The court noted that when the judge's dilatoriness had resulted in earlier warnings by the commission, he was able to clear up his backlog of cases. *Id.* Thus, the court refused to consider allowing the judge to resume his duties while under treatment for the mental infirmity. *Id.*

106. *See, e.g., In re* Williamson, 270 S.C. 313, 320, 242 S.E.2d 221, 224 (1978).

107. *See, e.g.*, Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 485, 709 P.2d 852, 859-60, 220 Cal. Rptr. 833, 841 (1985), where the

opportunities to correct the condition, in the first instance the judge has the "obligation to seek relief, even to the extent of withdrawing temporarily or permanently from the functions of his office if the circumstances require it."[108]

6. Management System

The Canon 3A(5) prompt disposition standard together with the administrative diligence standard of Canon 3B(1) establish a general duty to create and maintain an adequate case management system. This duty will vary depending upon the case scheduling system a judge's court employs. The judge in a court with an individual calendar, for example, should have greater case management responsibilities than one in a court with a master calendar.[109]

Complaints against judges for allegedly violating their case management responsibilities generally have been incidental to case neglect or delay charges, with the case management failures viewed as an underlying cause of the neglect or delay. Thus, judges charged with prompt disposition violations have also been charged with the failure to maintain complete case dockets,[110] to establish a tracking system for individual cases,[111] and to set case scheduling priorities.[112]

Arguably, a judge's strictness in docketing or scheduling cases could create as many dysfunctions as laxity in case management. An inflexible policy of refusing to grant continuances or adjournments once a case has been set for trial could unnecessarily disadvantage a party with a legitimate need for additional time to prepare his or her case. However, a New York appellate court has ruled that a judge's rigid adherence to his court's strict continuance policy did not constitute misconduct.[113]

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court stated that a judge's conduct "must be evaluated on the basis of objective criteria applicable to all judges similarly situated within the system." *Id.*

108. *Id.* at 485, 709 P.2d at 859-60, 220 Cal. Rptr. at 840-41.

109. For a description and analysis of calendaring systems and the case management responsibilities of trial judges, see M. SOLOMON & D. SOMERLOT, CASEFLOW MANAGEMENT IN THE TRIAL COURT (1987).

110. *In re* Vincent, Unreported Determination, N.Y. Comm'n (1986); *In re* Robbins, Unreported Determination, N.Y. Comm'n (1985); *In re* Jutkofsky, Unreported Determination, N.Y. Comm'n (1985).

111. *In re* Grady, 118 Wis. 2d 762, 348 N.W.2d 559 (1984). The Supreme Court of Wisconsin apparently considered as a mitigating factor the judge's establishment of a case tracking system after the filing of the disciplinary complaint.

112. Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 709 P.2d 852, 220 Cal. Rptr. 833 (1985).

113. *In re* Mertens, 56 A.D.2d 456, 392 N.Y.S.2d 860 (1977).

7. Assignment

Although a court using a master calendar burdens a judge less with case management responsibilities, the chief administrative judge in such a court has greater case assignment burdens than his or her counterpart in a court with an individual calendar system. Unnecessary delays in assigning cases to individual judges in a master calendar court can result in case backlogs with system-wide effects. Such behavior would also run counter to the Canon 3B(1) command to "facilitate the performance of the administrative responsibilities of other judges and court officials."[114]

Because administrative shortcomings of chief judges generally are considered better handled through corrective action within the judicial bureaucracy rather than through the disciplinary process, conduct commissions and reviewing courts have taken a cautious approach in such cases. In *McCartney v. Commission on Judicial Qualifications*, for example, the Supreme Court of California declined to discipline a master calendar judge who "habitually ran far behind the normal time schedule in assigning cases."[115] Even though the court found that the judge's slowness in assigning cases increased case backlogs throughout the judicial district, there was no evidence of dereliction of duty on the judge's part. On the contrary, the court found that a strong commitment to fairness and innovative procedural reform caused the judge's behavior. It applauded the judge's motivations, leaving correction of the administrative dysfunctions which the judge's behavior caused to local court administration rather than dealing with it as a policy matter at the highest level of the state judicial bureaucracy.[116]

B. The Judge as Personnel Manager and Judicial Subordinate

In addition to the role of case manager, most judges must also assume the role of personnel manager. Although the ethical and administrative imperatives governing the personnel management role are more straightforward than those governing the case management role, cases charging judges with misconduct in pursuing this role raise some unresolved policy issues.

Canon 3B(2) imposes on a judge the duty to require of the judge's "staff and court officials subject to his direction and control" the same standard of administrative diligence that applies to the judge.[117] A corollary

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114. CODE, *supra* note 13, at Canon 3B(1).

115. McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 536, 526 P.2d 268, 285, 116 Cal. Rptr. 260, 277 (1974) (en banc).

116. "This careful and dedicated approach to even the most minor traffic cases was an admirable contrast to the 'assembly-line justice' dispensed by some trial courts which is now drawing increasing public criticism." *Id.* at 540, 526 P.2d at 287-88, 116 Cal. Rptr. at 279-80 (citation omitted).

117. CODE, *supra* note 13, at Canon 3B(2).

to the judge's duty to require a high standard of performance of the judge's staff is that the judge will be held accountable for the administrative shortcomings of that staff. Disciplinary cases holding judges accountable for staff deficiencies may generally be grouped into four categories: (1) misuse of staff; (2) improper delegation of judicial responsibilities to staff; (3) undersupervision of staff; and (4) oversupervision of staff.

Disciplinary bodies and reviewing courts have tended to be most harsh with judges who misused their staff. In some of these cases the judges directed their staff to perform non-court-related functions. Thus, judges have been disciplined for directing staff members to neglect their judicial system duties to work on projects that accrued to the judge's financial benefit[118] or political benefit.[119]

A judge may also misuse his or her staff by directing them to perform their court-related duties in an improper manner. For example, judges have been disciplined for instructing staff to perform their administrative functions in ways that would favor[120] or disfavor[121] particular parties in cases before the court.

Judges have also been disciplined under Canon 3B(1) and 3B(2) for delegating judicial responsibilities to unauthorized court personnel. These unauthorized delegations of authority have included allowing court staff to sign the judge's name to warrants,[122] perform marriages,[123] reduce traffic tickets,[124] set bonds,[125] grant continuances,[126] and grant limited driving privileges.[127]

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118. *In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (1973). In *Troy*, a court officer who was qualified to operate heavy construction equipment operated a bulldozer during court hours on a marina project in which the judge had a financial interest. *Id.* at 63-64, 306 N.E.2d at 230.

119. *In re* Briggs, 595 S.W.2d 270 (Mo. 1980). In *Briggs*, the judge allegedly had court employees work on political matters during court hours, including the typing of political letters and making political phone calls. *Id.* at 271.

120. *In re* Pomante, Unreported Determination, Pa. Bd. (1978). In *Pomante*, the judge had instructed his staff to withhold blue copies of traffic citations to prevent the assessment of points against certain defendants. The judge had also instructed his staff to notify only the police officer of the hearing in certain speed check violation cases where a minimum of two witnessing police officers was required.

121. *Troy*, 364 Mass. at 15, 306 N.E.2d at 203. In *Troy*, the judge allegedly instructed probation office staff to automatically have criminal complaints issued in nonsupport cases involving public assistance complainants (contrary to the usual practice of the probation office).

122. *In re* Elder, Unreported Determination, N.M. Comm'n (1972).

123. *In re* Perea, 103 N.M. 617, 617, 711 P.2d 894, 894 (1986).

124. *In re* Briggs, 595 S.W.2d 270, 278 (Mo. 1980).

125. *Id.*

126. *Id.*

127. *Id.*

Disciplinary bodies have also found Canon 3B(2) violations in cases charging judges with undersupervision of court staff. For example, courts have disciplined judges for failing to instruct court personnel on administrative procedures for ensuring that probate matters did not become delinquent[128] and for failing to instruct court staff on proper recordkeeping and financial accounting procedures.[129]

In a recent case, the supervision requirement was carried to an extreme. The Texas Commission on Judicial Conduct publicly admonished a justice of the Supreme Court of Texas because of the alleged unethical conduct of the judge's staff.[130] Two of the justice's briefing attorneys had accepted a free weekend trip to Las Vegas from a member of a law firm that had cases pending before the court. The justice explained that he did not know of the trip beforehand. However, the Commission found that the justice's general failure to instruct his staff that they were required to observe the same standards of fidelity and diligence that applied to him constituted a violation of Canon 3B(2).[131] Must one logically conclude from this case that the prudent Texas judge must henceforth supply his or her staff with copies of the Code of Judicial Conduct and explain its application to them? The decision offers no guidance on this matter.

Disciplinary bodies have been more reluctant to find ethics violations where a judge is charged with oversupervision of court staff. In *In re Kohn*,[132] for example, the judge allegedly kept his court staff on a very tight rein in refusing to allow them sufficient discretion to deal with minor deviations and technical violations of an elaborate set of procedural rules which the judge established.[133] Although the Supreme Court of Missouri characterized this conduct as administratively deficient, the court refused to find that the judge's oversupervision constituted misconduct. However, in strongly suggesting that the judge correct these "deficiencies,"[134] the

128. *In re* Van Susteren, 118 Wis. 2d 806, 810, 348 N.W.2d 579, 580 (1984).

129. *See, e.g.*, *In re* Jutkofsky, Unreported Determination, N.Y. Comm'n (1985).

130. The Texas Commission on Judicial Conduct may issue public reprimands and admonitions without a formal hearing and the sanctions are not appealable. For an account of the general controversy surrounding this matter, see Shaman, *Texas Supreme Court Justices Publicly Reprimanded, Admonished*, 9 JUD. CONDUCT REP. 1 (1987).

131. *Id.* at 9.

132. 568 S.W.2d 255 (Mo. 1978) (en banc).

133. *Id.* at 258.

134. In *Kohn*, the Missouri Supreme Court stated:

> [W]e cannot find that respondent's elaborate system of rules nor his staff's often unyielding and sometimes arrogant application of those rules merit a finding of misconduct. It nevertheless behooves respondent, who is now fully apprised of such complaints, to correct these deficiencies and be as zealous in fostering a spirit of courteous staff cooperation with the Bar as he is in promulgating rules for the conduct of the court's business.

Id. at 260.

court indicated disapproval of the judge's personnel practices but failed to offer any guidance, as a policy matter, as to the proper limits of judicial supervision of court staff.

In addition to personnel resources, a judge has equipment and facilities at his or her command. Among a judge's administrative responsibilities is the duty to insure that these resources are utilized primarily in connection with the judge's judicial responsibilities and secondarily in connection with peripheral matters related to the judicial function.[135] A judge runs afoul of this duty if the judge misuses these resources.

A judge may not use such public resources for personal financial gain[136] or political purposes.[137] Even if the judge is ostensibly using judicial staff and facilities for public purposes, those purposes should be related in some way to the functions of the judicial office.[138]

Just as judges are responsible for properly supervising and directing their staff, they are responsible for complying with the administrative directives of others within the judicial bureaucracy. As discussed in part I, the judicial articles of state constitutions generally establish an administrative hierarchy within the states' judicial systems which vests overall superintending authority in the state's highest appellate court, permits the high court to exercise its administrative authority through a state court administrator, and provides for a system of chief judicial officers within each geographical judicial district.[139] Judges have been charged with ethics violations and disciplined for refusing to comply with the directives of those in superior administrative positions within the judicial hierarchy.

Judges are required to comply with both general administrative rules and practices which the state high court establish and with particular directives and requests of its administrative officials. Thus, a judge may not refuse to comply with an administrative rule promulgated pursuant to

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135. *E.g.*, involvement in professional activities that would enhance the judge's performance or maintain his or her competence in judicial administration. *See* CODE, *supra* note 13, at Canon 3B(1).

136. *See, e.g.*, *In re* Gardner, Unreported Determination, Pa. Bd. (1977), where a justice of the peace advertised a tax return preparation business in the yellow pages of the telephone directory, giving as its address and telephone number that of his judicial office, and that he allowed certain aspects of the business to be conducted at his judicial office.

137. *In re* Briggs, 595 S.W.2d 270, 276-77 (Mo. 1980); *In re* Conda, 72 N.J. 229, 235, 370 A.2d 16, 19-20 (1977).

138. *See, e.g.*, *In re* Inquiry Concerning a Judge, 357 So. 2d 172 (Fla. 1978) (judge used judicial staff and facilities to investigate certain local officials).

139. Explicit constitutional grants of superintending authority are of relatively recent vintage and are generally considered to have resulted from the modern movement towards "court unification." *See supra* notes 8-11 and accompanying text.

the high court's rulemaking authority.[140] A judge must also comply with the directives and requests of administrative officials to whom the high court has constitutionally delegated administrative responsibilities.[141]

At the local level, judges must comply with the administrative rules, practices and directives of the chief judicial official of the geographical district in which the judge sits. A judge's refusal to obey legitimate orders of local judicial officials may be grounds for charging the judge with an ethics violation.[142]

C. *The Judge as Fiscal and Records Manager*

A judge's Canon 3B(1) duty to "diligently discharge his administrative responsibilities"[143] extends to the handling of court monies (acquired through the assessment of fees, fines, and other costs). Statutes and administrative regulations normally set forth financial recordkeeping and remittance requirements for these funds, thus establishing basic standards for determining whether the Canon 3B(1) administrative diligence requirement has been violated. Courts have disciplined judges for violating such standards in failing to deposit funds in court accounts in timely fashion,[144] failing to remit funds

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140. *In re* Kading, 70 Wis. 2d 508, 235 N.W.2d 409 (1975). In *Kading*, the Supreme Court of Wisconsin upheld the validity of a Judicial Code of Ethics rule requiring each state judge to file an annual financial disclosure statement. *Id.* at 533-34, 235 N.W.2d at 421.

141. Fisher v. Thompson, Unreported Determination, Delaware Court on the Judiciary (1974); *In re* Anderson, 312 Minn. 442, 252 N.W.2d 592 (1977). In *Fisher*, a justice of the peace was disciplined for refusing to perform judicial services under a work schedule established by a deputy state court administrator; and in *Anderson*, the judge was disciplined for failing to comply with informational requests of Minnesota's state court administrator.

142. *In re* Dennis, Unreported Determination, Pa. Bd. (1976); *In re* Getty, Unreported Determination, Pa. Bd. (1972). In *Dennis*, a judge was charged with an ethics violation by the Pennsylvania Judicial Inquiry and Review Board for failing to comply with a standing local practice of seeking the permission of the chief judicial officer of the judge's county if the judge expected to be absent from the judicial office. The Supreme Court of Pennsylvania rendered the case moot because the judge's term of office had expired by the time the case came before the court. In *Getty*, the Supreme Court of Pennsylvania removed a justice of the peace for refusing to comply with an order of his chief judge temporarily assigning the judge to another magisterial district.

143. CODE, *supra* note 13, at Canon 3B(1).

144. Bartlett v. Flynn, 50 A.D.2d 401, 378 N.Y.S.2d 145 (1976); *In re* Rater, Unreported Determination, N.Y. Comm'n (1986); *In re* Sandburg, Unreported Determination, N.Y. Comm'n (1985); *In re* Cote, Unreported Determination, N.Y. Comm'n (1985); *In re* Robbins, Unreported Determination, N.Y. Comm'n (1985).

to state comptrollers or similar officials within prescribed time periods,[145] and failing to adequately maintain or reconcile official accounts.[146]

As guardians of these public funds, judges are also held to standards similar to others who act in a fiduciary capacity. Thus, judges may not commingle court funds with other public funds[147] or with personal funds.[148] Nor may judges act in violation of applicable laws[149] or engage in self-dealing by, for example, switching court funds from one bank to another for personal reasons[150].

Judges also have a general duty to collect and deposit in court accounts all court fees, fines and costs. They have been disciplined where their handling of the funds gives the appearance that the funds have been diverted or converted to the judge's personal use.[151] Judges have also been disciplined where their failure to collect and deposit required fines and costs suggests that they favored certain parties.[152] General negligence in the handling of court funds also has prompted reviewing courts to discipline judges.[153] Because high volume, lower criminal courts generate most court revenues (*e.g.*, fines and costs in traffic cases), many judges charged with mishandling court funds have been nonlawyers who have sought to use their nonlawyer status to excuse their conduct on the grounds that they were ignorant of, or not fully competent in, the law. But disciplinary bodies have been unsympathetic to defenses such as ignorance or incompetence.[154] On the

145. *In re* Serrano, No. 10968 (Sup. Ct. of N.M. 1976); Rogers v. State Comm'n on Judicial Conduct, 51 N.Y.2d 224, 414 N.E.2d 382 (1980); Bartlett v. Flynn, 50 A.D.2d 401, 378 N.Y.S. 145 (1976); *In re* Vincent, Unreported Determination, N.Y. Comm'n (1986); *In re* Rater, Unreported Determination, N.Y. Comm'n (1986); *In re* Jutkofsky, Unreported Determination, N.Y. Comm'n (1985); *In re* Sandburg, Unreported Determination, N.Y. Comm'n (1985); *In re* Cote, Unreported Determination, N.Y. Comm'n (1985); *In re* Gardner, Unreported Determination, Pa. Bd. (1977).

146. *In re* Vincent, Unreported Determination, N.Y. Comm'n (1886); *In re* Jutkofsky, Unreported Determination, N.Y. Comm'n (1985); Judicial Qualifications Comm'n v. Cieminski, 326 N.W.2d 883 (N.D. 1982).

147. *Bartlett*, 50 A.D.2d at 401, 378 N.Y.S. at 145.

148. Lavan v. State Bar of Michigan, 384 Mich. 624, 186 N.W.2d 331 (1971).

149. *In re* Conda, 72 N.J. 229, 370 A.2d 16 (1977).

150. *In re* Tschirhart, 420 Mich. 1201, 362 N.W.2d 235 (1984).

151. *Lavan*, 384 Mich. at 624, 186 N.W.2d at 331; *In re* Garner, 466 So. 2d 884 (Miss. 1985); *In re* Serrano, No. 10968 (N.M. 1976); *In re* Montaneli, Unreported Determination, N.Y. Comm'n (1986); *In re* Sandburg, Unreported Determination, N.Y. Comm'n (1985).

152. *In re* Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); *In re* Gardner, Unreported Determination, Pa. Bd. (1977).

153. *In re* Clements, Unreported Determination, Pa. Bd. (1975).

154. *See, e.g.*, *In re* Garner, 466 So. 2d at 884, where the Supreme Court of Mississippi removed from office a nonlawyer justice of the peace who had received and failed to report at least 59 fines totaling $3,626.00. In *Garner*, the judge, a high school graduate with two years of college, apparently had established

other hand, conduct commissions and reviewing courts have been willing to consider in mitigation a judge's apparent good faith in cooperating with the disciplinary body and attempting to rectify the judge's shortcomings.[155]

In addition to being held to high standards in the maintenance of their courts' financial records, judges are also expected to maintain adequate records of the cases that come before their courts. They may not fail to maintain case files or dockets,[156] particularly where such conduct tends to favor certain litigants.[157] Similarly, judges may not favor or disfavor certain parties by maintaining secret files,[158] or by altering[159] or destroying[160] certain court records. They must also keep court records in a secure place.[161]

For some cases, such as those involving traffic violations, statutes or regulations may require the judge to report or transmit these cases to other state agencies. Failure to do so may result in disciplinary action.[162]

D. Roles Dictated by Other Bureaucratic Imperatives

A judge's critical position in the judicial bureaucracy requires the judge to insure that the integrity of the judicial system is preserved and maintained.

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a "general fund" with unreported money to cover bad checks from law violators in other cases. She argued that her conduct was not wilful but neglectful, arising from ignorance and incompetence. The court responded: "Official integrity of our Justice Court Judges is vitally important, for it is on that level that many citizens have their only experience with the judiciary. We may not tolerate misconduct or misfeasance on any ground, particularly not on grounds of ignorance or incompetence." *Id.* at 887.

155. *See, e.g., In re* Sandburg, Unreported Determination, N.Y. Comm'n (1985), where the New York Commission on Judicial Conduct chose to censure rather than remove a nonlawyer, town justice under circumstances that the commission indicated would normally warrant removal. In *Sandburg*, the judge had failed to deposit funds totalling over $800 in his official court account and had permitted his wife (who served as court clerk) to cash personal checks from undeposited court funds. When the judge was notified of an audit, he deposited a surplus of funds, including personal funds, in the court account to clear up the deficiency and subsequently cooperated with the Commission investigation.

156. *In re* Cote, Unreported Determination, N.Y. Comm'n (1985); *In re* Robbins, Unreported Determination, N.Y. Comm'n (1985); *In re* Clements, Unreported Determination, Pa. Bd. (1975).

157. *See, e.g., In re* Odom, 444 So. 2d 835 (Miss. 1984), where a Mississippi justice of the peace failed to maintain docket entries or records in bad check cases, thus effectively operating a check collection service for local merchants. The court considered the fact that the judge cooperated in the commission's investigation and admitted his mistakes in mitigation and reprimanded the judge.

158. *In re* Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978). In *Peoples*, the Supreme Court of North Carolina removed a judge for maintaining "special files" for certain parties, thus effectively removing the disposition of cases from public view in open court by transacting the court's business in secrecy. *Id.* at 917.

159. *In re* Sterlinske, 123 Wis. 2d 245, 365 N.W.2d 876 (1985).

160. *In re* Pomante, Unreported Determination, Pa. Bd. (1978).

161. *In re* Elder, Unreported Determination, N.M. Comm'n (1972).

162. *In re* Johnson, 355 N.W.2d 305 (Minn. 1984); *In re* Cote, Unreported Determination, N.Y. Comm'n (1985).

Among the administrative responsibilities which impose Canon 3B on a judge, therefore, is that of taking or initiating "appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."[163] Thus, a judge exposes himself or herself to disciplinary action for failure to report the misconduct of other judges[164] or attorneys[165] to attorney disciplinary bodies and judicial conduct commissions.

Judicial conduct commissions are adjuncts of the modern judicial bureaucracy. Judges are required to comply with these bodies' directives and to cooperate fully with them in matters involving the legitimate exercise of their disciplinary functions. Judges may not, therefore, refuse to answer a commission subpoena,[166] make false statements to a commission,[167] or a commission member,[168] or otherwise seek to deceive a commission.[169] Nor may a judge interfere with commission investigations or proceedings through threats or acts of retaliation against attorneys[170] or others[171] who complained of the judge's conduct.[172]

The last of Canon 3B's enumerated "administrative responsibilities" deals with judicial powers of appointment. It requires that a judge "not make unnecessary appointments;" calls upon the judge to "exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism;" and mandates that a judge "not approve compensation of appointees beyond the fair value of services rendered."[173] Although judges'

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163. CODE, *supra* note 13, at Canon 3B(3).

164. *See, e.g.*, *In re* Gassman, Unreported Determination, N.Y. Comm'n (1986), where the New York Commission admonished a judge for failure to report an alleged attempt by another judge to engage him in an *ex parte* communication that was clearly intended to influence the judge's decision as to bail in a particular case.

165. *See, e.g.*, *In re* Laurie, No. 84 CC5 (Ill. Cts. Comm'n, 1985), where a judge was suspended for failing to report proffered gifts by attorneys.

166. *In re* Proceedings Before Comm'n on Judicial Tenure & Discipline, 499 A.2d 751 (R.I. 1985).

167. Temporary State Comm'n on Judicial Conduct v. Perry, 53 A.D.2d 882, 385 N.Y.S.2d 589 (1976).

168. *In re* Leon, 440 So. 2d 1267 (Fla. 1983).

169. *See, e.g.*, *In re* Myers, Unreported Determination, N.Y. Comm'n (1986), where a judge charged with having a personal interest in a case attempted to make it appear that he had intended to disqualify himself by producing a note to this effect to a fellow judge. However, neither the note nor the papers in the case were ever transmitted to the other judge.

170. *In re* Lopez-Alexander, Unreported Order, Mayor of Denver (Colo. 1985); *In re* Terry, 262 Ind. 667, 323 N.E.2d 192, *cert. denied sub nom.* Terry v. Indiana Supreme Court Disciplinary Comm'n, 423 U.S. 867 (1975).

171. *In re* Scott, Unreported Determination, Texas Comm'n (1985); *In re* Buchanan, No. J.D. (Wash. 1983).

172. *In re* Myers, Unreported Determination, N.Y. Comm'n (1986); *In re* Hill, Unreported Determination, N.Y. Comm'n (1985).

173. CODE, *supra* note 13, at Canon 3B(4).

appointive powers vary considerably across jurisdictions, these powers generally include the power to make temporary appointments in individual cases (trustees, receivers, administrators, guardians, attorneys for indigent criminal defendants, etc.) as well as permanent appointments to staff positions in the judge's court. Constitutional or statutory provisions, or court rules, establish the nature and scope of these appointive powers, constrained in their exercise by judicial ethics rules (Canon 3B(4) or its equivalent).

The prohibition of unnecessary appointments is largely directed toward the judge who is tempted to exercise the appointive power to benefit others. It thus overlaps the favoritism prohibition. In *Spruancev.Commissionon JudicialQualifications*,[174] for example, the judge had appointed two lawyer friends and political supporters to represent indigent criminal defendants even though a public defender would normally have been assigned to the cases. The Supreme Court of California found that the judge violated Canon 3B(4) in that he exceeded his authority in failing to follow statutory requirements in determining indigency and in failing to determine whether a public defender was available and able to represent the defendants.

A judge also violates Canon 3B(4) if the judge's appointments suggest favoritism. In *In re Bonin*,[175] the Chief Justice of the Superior Court of Massachusetts was held to have demonstrated favoritism in appointing certain secretaries in his office. The Supreme Judicial Court of Massachusetts ruled that the judge, in making the appointments, "created the impression that employment opportunities in the judicial branch of government were greater for persons and relatives of persons who had made gifts to, or done favors for, the appointing authority."[176]

While reviewing courts have tended to be strict in addressing violations of explicit provisions of Canon 3B(4), they have been more lenient where apparent violations involved matters of interpretation. The nepotism prohibition, for example, is straightforward. A judge may not exercise appointment powers in favor of relatives.[177] On the other hand, an error in

174. 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975).

175. 375 Mass. 680, 378 N.E.2d 669 (1978). *See also In re* Lawrence, 417 Mich. 248, 335 N.W.2d 456 (1983), where the judge appointed attorneys with whom he was formerly associated and had financial ties to represent indigent criminal defendants. Although the Supreme Court of Michigan held that the judge had violated various ethics provisions (specifically Canons 2, 3C, and 5C(1)), the court failed to specify a violation of Canon 3B(4).

176. *In re* Bonin, 375 Mass. at 680, 378 N.E.2d at 677.

177. *See In re* Jenkins, 244 Or. 554, 419 P.2d 618 (1966), where the judge appointed his wife as the administratrix of four different estates. *See also In re* Littell, 294 N.E.2d 126, 131 (Ind. 1973), where the judge appointed himself and his wife as agents of the state for the purpose of returning prisoners to the court from other jurisdictions. In *Littell*, however, the Supreme Court of Indiana, although disapproving of the judge's conduct, held that the judge was not guilty because the applicable canons of judicial ethics were not yet in effect in Indiana at the time of the violation.

interpreting the requirements for making an appointment might be forgiven. In *In re Ryman*,[178] for example, the Supreme Court of Michigan held that it was not appropriate to discipline a judge who had permitted a deputy clerk to act as a magistrate without lawful authority. The court noted that the judge had "apparently failed to read the statute carefully and erred in his interpretation of the requirements for making the appointment" and that it was therefore "not appropriate to discipline a judge for inadvertent, isolated error."[179]

III. Judicial Roles and Pathologies

This review of the caselaw enforcing administrative imperatives on state judges demonstrates the importance that state judicial bureaucracies accord to managerial and administrative roles. The increased prominence accorded to non-adjudicatory roles raises potential problems for state court judges. One potential problem is role overload. Has the modern judge been asked to assume so many roles—adjudicator, case manager, personnel manager, recordkeeper, financial manager, etc.—that the importance of the adjudicatory role will be downgraded? The ethics decisions suggest that such a problem is most likely to occur in limited jurisdiction courts and unlikely to occur in general jurisdiction trial courts and appellate courts where only the case management role appears to be in active competition with the adjudicatory role for the judge's attention.

Because the prominence now accorded to the case management role may bring it into direct conflict with the adjudicatory role, the remainder of this article is devoted primarily to an analysis of the interplay between these two roles. As we have seen, the dictates of these roles are not always clear and unambiguous. If the dictates of one of these roles come into conflict with the imperatives of the other, how should the judge resolve the dilemma? Role theory provides a helpful context in which to address such questions.

Role theory, as social scientists have developed it, is a very useful device for analyzing operating realities in modern organizations.[180] The role concept refers to expectations as to how a person holding a particular position in the organization should behave. Both the person in the position and those with whom he or she interacts, referred to as members of the person's "role-set," hold such expectations. Thus viewed, role theory has

178. 394 Mich. 637, 232 N.W.2d 178 (1975).

179. *Id.* at 651, 232 N.W.2d at 183.

180. This discussion of organizational roles is drawn primarily from C. Handy, Understanding Organizations (1985) and D. Katz & R. Kahn, The Social Psychology of Organizations (1978).

been shown to be particularly useful for identifying and analyzing dysfunctions and pathologies in complex organizations.[181]

If, as Fiss contends, we should view today's courts as large scale, highly complex organizations, role theory should have direct application to our analysis of judicial bureaucratization.[182] As a central figure in the judicial system, the judge interacts with many people who have varying expectations about the judge's behavior. For purposes of the bureaucratization analysis, members of the judge's role set may be divided into the following categories: (1) attorneys and litigants in cases before the judge; (2) other judges and non-judicial personnel in the judge's court; (3) chief judges and court administrators in the state judicial system hierarchy; and (4) government officials outside the judicial system.

Lawyers and litigants who bring cases before the judge see the judge primarily in his or her adjudicatory role. They expect the judge to render justice in their case through the thoughtful, impartial application of legal precedent. Thus, their expectations are that the judge will behave in ways that are consistent with traditional notions of the judge as case-decider or adjudicator. If the judge fails to live up to one or more parties' expectations in a particular case, the party may appeal and place the judge at risk of reversal on appeal.

The judges' judicial colleagues and the non-judicial staff of the judge's court, on the other hand, view the judge primarily in his or her managerial role. Although they may develop, secondhand, a sense of the judge's reputation as an adjudicator, they are less concerned with the judge's adjudicative ability than they are with the judge's managerial efficiency. They expect the judge to handle his or her share of the local judicial workload. Because the judge's ability to live up to their managerial expectations will influence their own case assignments and workloads, a sense of competition in efficient case processing may develop among the judges. Current caseflow management standards and commentaries encourage such a sense of competition or peer pressure, insofar as they call for active judicial control of the litigation process and associated statistical monitoring systems that permit case disposition rate comparisons among judges.[183] A judge's failure to live up to local standards of managerial efficiency may result not only in the judge's peers viewing the judge in a less favorable light but also local court administrative sanctions through such measures

181. Rizzo, House & Lirtzman, *Role Conflict and Ambiguity in Complex Organizations*, 15 ADMIN. SCI. Q. 150 (1970) [hereinafter Rizzo].

182. For an extensive discussion of the application of role theory to the state courts, see H. GLICK & K. VINES, STATE COURT SYSTEMS 52-69 (1973). A more focussed discussion of role theory to analyze the roles of court administrators can be found in Stott, *The Judicial Executive: Toward Greater Congruence in an Emerging Profession*, 7 JUS. SYS. J. 152 (1982).

183. *See, e.g.*, STANDARDS RELATING TO COURT DELAY REDUCTION, *supra* note 28; M. SOLOMON & D. SOMERLOT, *supra* note 109.

as being given less than desirable judicial assignments or even withholding the assignment of additional cases until the judge clears up his or her case backlog.[184]

Similarly, chief judges, court administrators and others occupying positions of administrative authority in the state judicial hierarchy tend to emphasize the judge's managerial role. Time standards, associated case reporting requirements, and other administrative imperatives establish definite expectations concerning a judge's managerial efficiency. Failure to live up to these expectations can result not only in the judge being compared unfavorably with his colleagues, but also with the judge being charged with ethics violations and even in the withholding of the judge's salary in a few jurisdictions.[185]

Finally, government officials outside the judicial branch view judges in some courts as managers of records or fiscal matters. Generally, these are judges in rural-area lower courts that generate considerable revenues in fees and fines, particularly in traffic cases. Failure to handle and properly transmit these funds to certain government officials or to keep and transmit traffic records to others may lead to charges of having violated certain ethical norms.

The present emphasis given to these multiple judicial roles may lead to certain pathologies or dysfunctions. Among the role problems and pathologies that social scientists have identified in other organizational contexts are role ambiguity, role conflict, and role strain.[186]

Because the emphasis on judicial managerial and administrative roles is relatively new, a judge's conception of these roles and associated expectations among members of a judge's role set may be unclear. Thus, there may be a degree of role ambiguity. Some of the cases discussed in this Article reflect such ambiguities. In *Mardikian v. Commission on Judicial Performance*,[187] for example, the Supreme Court of California stated that a judge in a court with a heavy workload is expected to arrange cases in priority order in fulfilling her managerial role.[188] However, as the dissenting justices pointed out, such a requirement had not been authoritatively imposed nor made a grounds for discipline before the Supreme Court's ruling

184. Such a "sanction" has even been formalized in at least one federal appellate court. The United States Court of Appeals for the D.C. Circuit has an internal rule (passed on April 7, 1981) referred to as the "September Rule":

> Any judge who has three or more assigned opinions that have been pending release for at least six months will not be assigned to sit on any new cases until such time as his or her backlog has been reduced to include no more then two cases pending six months.

185. *See* statutes cited *supra* note 31.

186. For a discussion of these problems, see, *e.g.*, C. HANDY, *supra* note 180, at 57-91.

187. 40 Cal. 3d 473, 709 P.2d 852, 220 Cal. Rptr. 833 (1985).

188. *Id.* at 483, 709 P.2d at 858, 220 Cal. Rptr. at 839.

in that case.[189] Another example of a case in which the requirements of an administrative imperative were similarly unclear involved the disciplining of the Texas Supreme Court justice who had failed to instruct his staff, as a general matter, that they were subject to the same standards of fidelity and diligence that applied to the justice.[190]

In addition to this ambiguity and lack of clarity as to individual judicial roles, the dictates of certain judicial roles may sometimes be in conflict. Perhaps the most obvious example is the potential conflict between the adjudicatory and the managerial roles. A judge's own expectations or self-concept may cause him to view the adjudicatory role as paramount, while important members of the judge's role set may emphasize the judge's managerial role. A judge in an overburdened court[191] may find it difficult to satisfy the dictates of the adjudicatory role and the judge's personal desire to process cases in a thoughtful, deliberate manner when the judge knows that important individuals in the judicial bureaucracy expect the judge to adhere to the production quotas which time standards and expected case disposition rates impose.

According to role theory, these kinds of ambiguity and conflict should increase the probability that the judge will experience anxiety and stress.[192] Although a certain amount of stress of this sort is to be expected in conjunction with professional roles in complex organizations and may actually enhance performance, such stress may be of a level or a kind that is harmful.[193] Harmful stress, in the organizational context, has been called role strain,[194] and may lead to lessened organizational effectiveness.[195]

A conscientious judge in an overburdened court is most likely to experience role strain. Faced, on the one hand, with a desire to satisfy the traditional, adjudicatory role by giving careful, thoughtful and deliberate attention to each case[196] and, on the other hand, with the need to satisfy ill-defined production quotas imposed by the judicial bureaucracy, the judge is caught on the horns of a dilemma. If the judge pursues the adjudicatory role and develops a case backlog, the judge risks, at best, incurring the

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189. *Id.* at 487, 709 P.2d at 861, 220 Cal. Rptr. at 842.

190. Shaman, *supra* note 130.

191. *See, e.g.*, *supra* notes 34-38, 91-95, 115-16 and accompanying text.

192. For a description of the effects of stress in other organizational settings, see C. HANDY, *supra* note 180, at 65-72; R. KAHN, D. WOLFE, R. QUINN, J. SNOEK, & R. ROSENTHAL, ORGANIZATIONAL STRESS (1964); Rizzo, *supra* note 181, at 151.

193. C. HANDY, *supra* note 180, at 65 ("Stress can be good. Stress can be bad. Most people need some form of stress to bring out their best performance, but if the stress is of the wrong form or too much, it becomes damaging.").

194. *Id.*

195. Rizzo, *supra* note 181, at 151.

196. For a lengthy description of one scholar's view of the traditional, adjudicatory role, see Resnik, *supra* note 2.

displeasure of important members of the judge's role set in the judicial hierarchy, and, at worst, sanctions for failure to process the caseload in a diligent fashion. If the judge pursues the managerial role and spends less time than the judge would otherwise devote to individual cases, the judge risks tarnishing his reputation with lawyers and litigants and lessening the judge's own self-concept as an adjudicator. The judge also risks making "bad," unwise, or unjust decisions. The role strain pathology this dilemma reflects poses a serious challenge for state judicial bureaucracies. It is, at least, an illness in need of careful examination.

IV. Conclusion: The Need For Case Production Limits

The relatively recent developments of unified state court systems, administrative imperatives such as time standards and directive codes of judicial conduct, and sanctioning mechanisms such as judicial conduct commissions have converged to create a bureaucratic setting conducive to the pathology of judicial role strain. In being forced to choose among ambiguous and conflicting judicial roles, state judges in overburdened courts may be less than effective in achieving the primary goal of the judicial organization—that of doing justice in individual cases.

Some commentators likely would assert that the dilemma role strain pathology poses is irreconcilable. Professor Resnik,[197] for example, discusses adjudicatory and managerial role behaviors as if one role is entirely inconsistent with the other. Yet, there is a need to develop a theory of the judicial role that would accommodate the operating realities of the modern judicial organization. The fact of the matter is that many of today's judges are faced with the reality of having to process burdensome caseloads with scarce resources in a bureaucratic setting that sends conflicting and ambiguous signals. Because state legislative and executive branch officials have been less than responsive to the need to increase judicial resources to keep pace with the volume and complexity of modern litigation,[198] the most feasible approach to addressing the role strain problem would appear to be that of changing or adjusting the signals sent to judges from within the judicial bureaucracy.

Given the ways in which the state judiciaries have become bureaucratized, it would seem that we should be looking to the judicial hierarchy itself to deal with the role strain pathology. Unified court system and judicial conduct reforms have imposed on many state high courts the key policymaking role in matters relating to the administration of justice. In their position as the ultimate administrative authority for their respective

197. *Id.*

198. For a discussion and analysis of one state's experiences in this regard, see D. Hensler, A. Lipson & E. Rolph, Judicial Arbitration in California 4-14 (1981).

court systems and the final authority in judicial conduct matters, many state high courts are in the best position to deal with the role strain pathology by clarifying ambiguities in managerial and administrative roles and resolving role conflicts.

As we have seen in our review of the ethics cases involving violations of administrative imperatives, however, the courts apparently have neither recognized nor considered the role ambiguities and conflicts facing today's state judiciaries. Rather, they have tended to decide judicial misconduct cases on narrow grounds and avoid broad statements of policy that would assist in clarifying role ambiguities and in resolving role conflicts. Although the egregious conduct reported in most of the judicial misconduct cases makes the avoidance of broad statements of policy easy, as Professor Lubet has pointed out, judicial opinions in ethics cases "[a]s a guide to future conduct . . . are maddeningly unsatisfying."[199] In his excellent critique of judicial ethics opinions, Lubet contends that the courts have failed to identify carefully and to analyze closely policy questions and legal principles in ethics cases, viewing them instead as "distasteful obligations" rather than "opportunities for helpful explication."[200]

In light of the pathology of role strain, the need for identification and deeper analysis of policy questions is particularly important in ethics cases involving violations of administrative imperatives. State high courts must begin to recognize that the bureaucratization of their judicial systems may cause judicial role dysfunctions and pathologies that should be addressed as a matter of policy by those occupying the highest administrative positions in the state judicial systems. Ethics cases provide one opportunity to clarify role ambiguities and to resolve role conflicts by addressing these policy issues head on.

There are limits, however, to what can be accomplished through explications of administrative policy in ethics decisions. Although the allegations of judicial misconduct in these cases may be symptomatic of a role strain pathology that is endemic in a particular judicial system, the policy guidance that case decisions can offer must, of necessity, be directed at the behavior of individual judges rather than systemic reform. A court may announce in deciding such a case, for example, that as a matter of policy judges will be expected to cope with burdensome caseloads through the rank ordering of cases for decisional purposes.[201] However, the systemic causes of the role strain problem—heavy workload coupled with draconian measures such as the withholding of judicial salaries for failure to process the workload in timely fashion—will still be there. Thus, a different, more comprehensive, approach to the problem is needed.

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199. Lubet, *The Search for Analysis in Judicial Ethics or Easy Cases Don't Make Much Law*, 66 NEB. L. REV. 430, 443 (1987).

200. *Id.* at 436.

201. *See, e.g., supra* notes 98-100 and accompanying text.

In court systems in which the role strain pathology is most acute, high courts should consider the establishment of case production limits through their rulemaking authority. There is a limit to the number of cases that an individual judge can handle over a given period of time and still be expected to do substantial justice in individual cases. Such optimum case production limits[202] will no doubt be difficult to calculate because the time needed to process individual cases necessarily will vary depending on the nature and complexity of cases. Yet, modern court administration should have the capacity to establish, at the very least, general estimates of optimal judicial workloads for particular courts.[203]

Most state high courts have not only the capacity but the authority,[204] to take such a positive approach in addressing the role strain problem. Once they establish production limits through the rulemaking process, state high courts can reassign judges in courts with less burdensome caseloads to assist in handling cases in courts in which judicial caseloads have exceeded production limits. Although the flexibility to adopt such measures to correct caseload imbalances was cited by early proponents of state court unification[205] and no doubt is currently employed by some unified state court systems, there have been no serious indications of attempts to do so in the context of previously established case production limits.

State high courts cannot adequately address the role strain problem unless they take affirmative action to reduce the strain through measures such as the establishment of case production limits. Although this would require many high courts to shift their perspective from that of enforcer of production *quotas*—as reflected in the cases analyzed in part II—to creator of production *limits*, no less is required to provide a bureaucratic setting in which the need to judge well is reconciled with the need to work well.

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202. A finite limit to the number of decisions that *appellate* judges can make without jeopardizing substantive justice is suggested in P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 143-47 (1976).

203. The development by courts of workload measures, such as a "weighted caseload system," is discussed in H. LAWSON & B. GLETNE, WORKLOAD MEASURES IN THE COURT 51-59 (1980).

204. *See supra* notes 8-12 and accompanying text.

205. *Id.*