Save the Court Save the Family

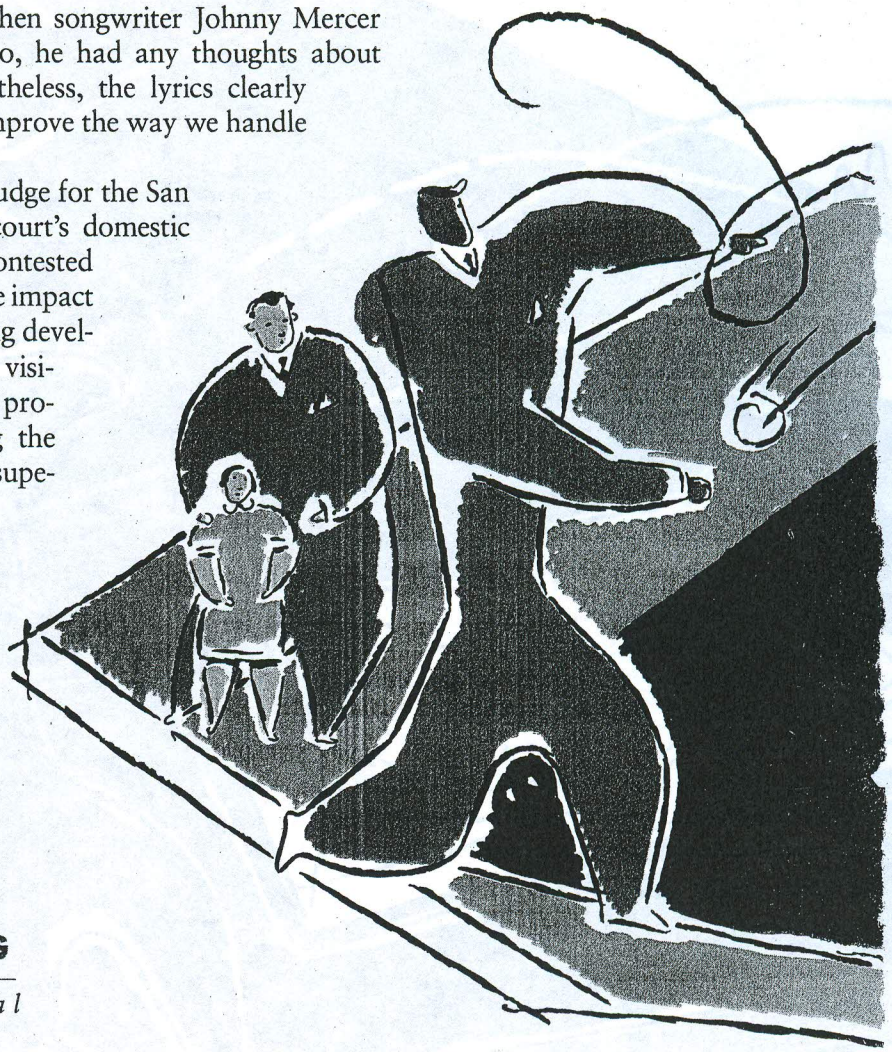
You've got to accentuate the positive ✦ eliminate the negative ✦ latch onto the affirmative ✦ don't mess with Mr. In-Between.

We have no reason to believe that when songwriter Johnny Mercer penned these lyrics more than 40 years ago, he had any thoughts about improving our family court system. Nevertheless, the lyrics clearly describe the approach we should follow to improve the way we handle marital dissolution cases.

For six years I was the domestic relations judge for the San Francisco Superior Court, hearing all the court's domestic relations law and motion matters and many contested trials. As a family law judge I had considerable impact in improving family law procedures, including developing mandatory mediation for custody and visitation disputes, initiating judicial education programs for family law judges and enacting the Uniform Domestic Relations Local Rules for superior courts in the San Francisco Bay area.

These and other improvements in family law, however, have failed to change the basic process for dissolving marriages. Neither litigants, attorneys nor judges are happy with our present system. I now realize that as a trial court judge, I was too close to the forest to see the trees, too inundated with the workload to perceive how the system fails the parties going through it.

After nine years on the court of appeal,



By JUSTICE DONALD B. KING

First District Court of Appeal

JUDICIAL CASE MANAGEMENT IS THE KEY TO SEPARATING COUPLES IN A MORE SENSITIVE AND LESS COSTLY WAY

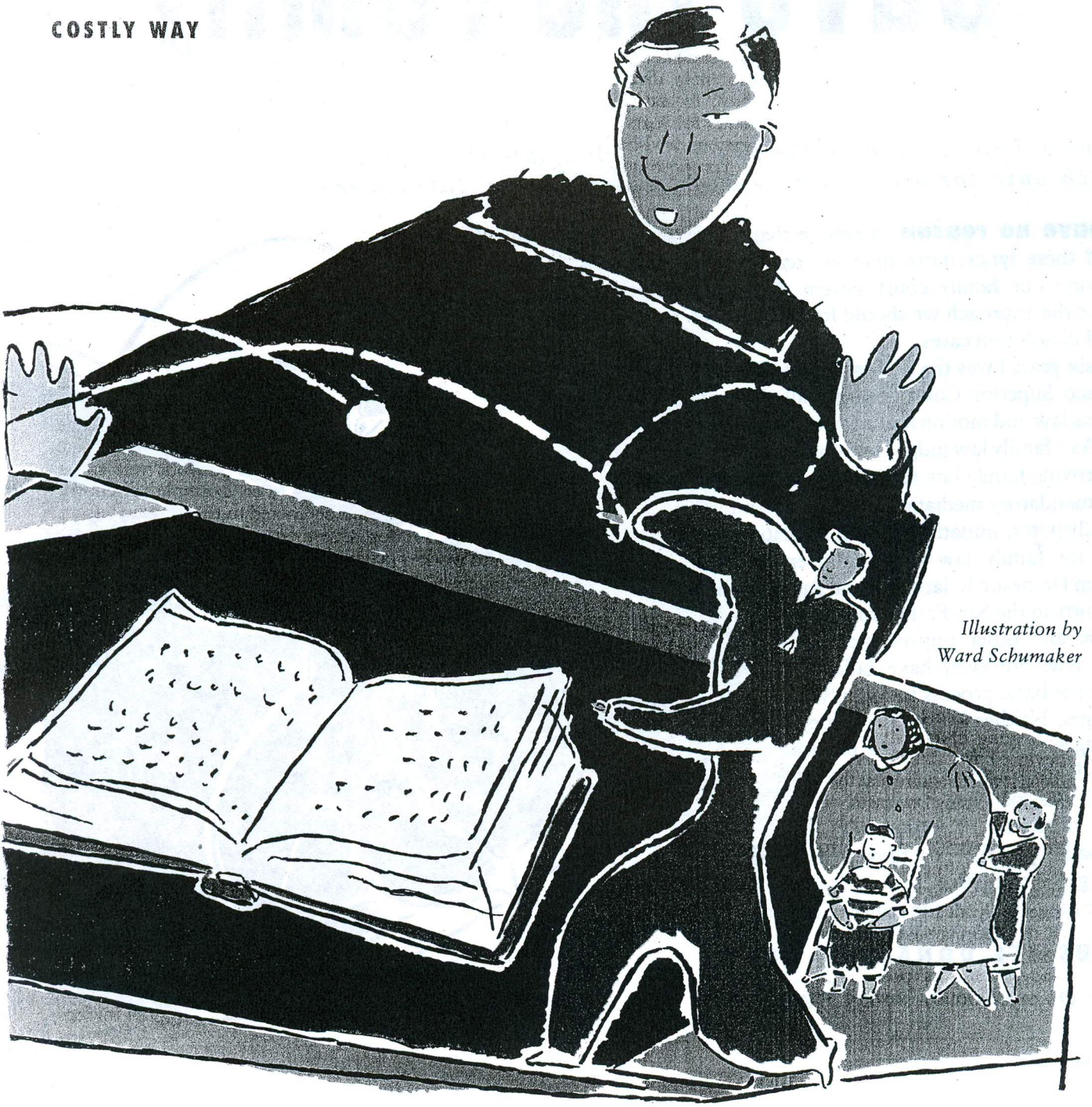


Illustration by Ward Schumaker

during which I authored more than 35 family law decisions, it has become clear to me that an entirely new process is necessary to handle these most difficult cases. Government has a duty to provide a system that helps its citizens—not one that leaves them worse off financially and emotionally than when they entered it, that costs so much only the wealthy can afford it, and that is so complex few lawyers, fewer judges and no legislators understand it. We must change from a system in which every case must fit the process to a system where the process has the flexibility to fit the case.

From 1987 to 1989, with the benefit of a blanket assignment from Chief Justice Malcolm M. Lucas, I returned to the San Francisco County Superior Court for two weeks every other month to try family law cases. I found most cases came to trial because the adversary process incited conflict and inhibited settlement. Cases were out of control, significantly increasing the parties' financial and emotional cost.

I decided to try a different approach when Presiding Judge Claude D. Perasso asked me to hear a case set for a two-day hearing on various motions. This case had been on file for less than six months; there had already been several hearings and the file was inches thick. But I concluded the hearing in 15 minutes.

Judge Perasso asked me if I would handle all aspects of the case in order to bring it under control. I accepted and began a program of intensive case management by telephone. No further court hearings occurred, and the next piece of paper filed in the case, about six months later, was a stipulated judgment.

Subsequent presiding judges have requested that I manage all aspects of other escalating cases. My experience has convinced me deficiencies within our judicial system require that the judge take charge of family law cases.

Let me be clear. I do not propose a trial delay reduction program. California's trial delay reduction program essentially deals with case flow through the court system. Family law cases need case *management* to remain as nonadversarial as possible while moving expeditiously toward settlement.

The lawyers representing clients in conflict cannot be in charge of the case. Clients in the adversary system see their lawyer as their advocate, their champion; if opposing counsel work too cooperatively, each may find a new lawyer representing his or her client. And pressures on lawyers to satisfy clients, as well as the need for protection against possible malpractice claims, often lead lawyers to perform work that is not necessary to achieve settlement. Photocopy machines and word processors make that work very easy and add to the runaway costs of litigation.

In a sense, the adversary system is a monster with a life and a momentum of its own. It may work well for litigants who will never see each other again. But it is too slow, too expensive and too impersonal for family court, and it does not help divorcing spouses who will have to remain in contact with each other for years because of support obligations or visitation with children.

I propose judicial intervention in family law cases when the parties first come to court, usually to request orders pending the suit. At that time the judge would encourage the parties and their counsel to do everything possible to resolve issues by settlement, and to create an atmosphere in which settlement is everyone's expectation. Trials should be the last resort, not the first.

The parties would be asked to require their attorneys not to fight with one another but to work together, with the judge, as a team. The judge would preclude counsel from performing unnecessary or premature work and, to protect them against later malpractice claims, would provide counsel with a record of the limitations placed on their work.

The judge would offer alternative dispute resolution within and outside the judicial system; ADR is a necessity, not merely an option to the courts. If neither arbitration, mediation, nor private judging is feasible, the judge would take the lead in case planning for settlement. The parties would put issues ready to be resolved on the record at the initial meeting. After counsel and their clients have had an opportunity to confer privately, any unsettled issues requiring judicial orders would be heard.

The meeting would close with the judge and counsel agreeing on what should take place—usually an exchange of information and documents—within the next 30 days. A conference call among counsel and the judge would be scheduled for the end of that period. After that, judicial oversight would consist primarily of case management by conference call. The goal of the initial meeting and the follow-up calls would be for each side to obtain the information necessary to discuss settlement at the earliest possible time. Anything necessary for trial but unnecessary for settlement would not be pursued unless and until settlement could not be achieved.

In most instances only one or two conference calls would be needed to resolve the case. More complex cases might require calls over several months. If problems arose that could not wait for the next scheduled conference call, counsel would be able to telephone the judge. This would be done by conference call unless the parties and both lawyers stipulated to ex parte telephone contact.

Working with the lawyers, the judge would schedule events and determine the extent to which work was to be carried out. For example, discovery would be limited to that only necessary for settlement. If settlement did not occur, further discovery could always take place. To increase efficiency and reduce costs, the judge would be involved in scheduling discovery and would determine the scope of the subject matter.

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The judge would also be available by telephone at the time of depositions. If an objection arose, the judge could rule via telephone, with the deposition reporter transcribing counsels' comments and the ruling. This would make it unnecessary to adjourn depositions for for-

mal motions and hearings on whether questions should be answered, thereby avoiding the need to reconvene weeks later to pursue proper questions. The availability of the judge would make it less likely problems would arise.

The judge would also encourage both counsel and the parties to reduce costs by agreeing to use neutral appraisers, accountants and actuaries for property valuation. Discovery costs could also be curtailed by judicial oversight.

When each side had sufficient information to discuss settlement seriously, a meeting would be scheduled with the judge, counsel and the parties. Counsel or the parties might feel uncomfortable having settlement discussions with the judge who would try the case if it did not settle. But it is important that the judge managing the case conduct these meetings, which are much more likely to lead to settlement because of the judge's familiarity with the case, the attorneys and the parties.

If an issue could not be settled, a date certain would be set, and trial preparation would be planned by the team and carried out under judicial supervision. Prior case management would allow judge and counsel to assess whether an issue would actually go to trial and how much time it would take. This would avoid the unnecessary costs incurred under our present system, where cases are set for trial only to be continued because no judge is available or the trial cannot be concluded within the time allotted. Team planning for trial would also allow the judge and counsel to determine whether there were pivotal issues that should be bifurcated and tried first, in hopes that their resolution would lead to settlement of the remaining issues.

This system would make family court a more difficult assignment. The judge would need not only to be a competent administrator but also to have a firm grasp of substantive family law. Mandatory judicial education would be essential for judges in the system I propose because of their greater responsibilities. However, in this new role judges would also have greater opportunities for satisfaction because they would have a direct role in helping the parties and counsel resolve the case.

Is judicial case management workable or is it pie in the sky? I submit that it is workable, since I used it successfully in the escalating cases I managed in the San Francisco County Superior Court and in a pilot project begun in March 1989. In that project I developed a stipulation granting me extensive case management powers. In each of 30 cases, I met in chambers with the parties and their counsel for five to 15 minutes to discuss the program and whether they wished to participate in it. The stipulation included provisions allowing the lawyers ex parte communication with me without notice to or knowledge of the other, and prohibiting them from filing motions or orders to show cause without calling me first. To avoid litigation to collect unpaid fees, which usually results in a cross-complaint for malpractice, the stipulation allowed me to resolve fee disputes.

The only commitment I asked from the parties was that they agree not to let their attorneys fight. My primary goal was to avoid an adversary approach, at least until settlement could not be achieved. This relieved pressure on the lawyers to posture for their clients. In return I guaranteed the parties their case would be concluded more rapidly at less financial and emotional cost, and that they would be happier with each other, their lawyers and the process than if they

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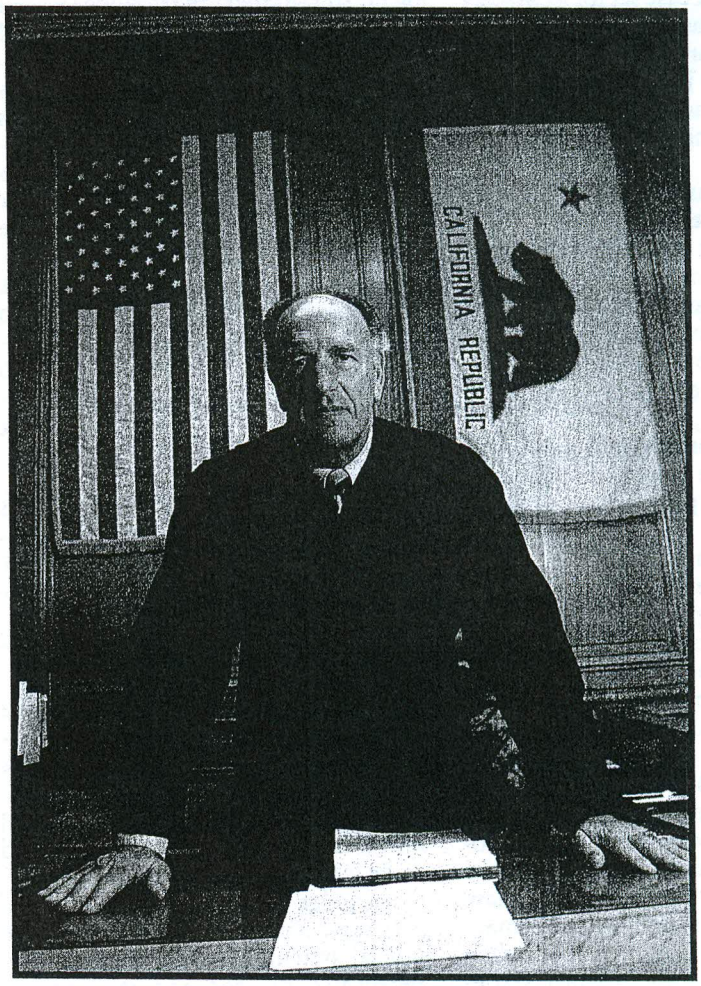

Court of Appeal Justice Donald B. King : No fighting and no biting.

MAX RAMIREZ

had gone through the regular system.

I told them the attorneys and I would act as a team, with me as the leader, doing only what was necessary to achieve settlement. To my surprise, I found that 59 of the 60 parties did not want to fight. They just wanted to put the divorce behind them and get on with their lives.

Although I was assigned only 30 cases, the variety among them was remarkable. They ranged from two cases in which the San Francisco Neighborhood Legal Assistance Foundation represented a party to three cases involving doctors and their spouses. I had several cases in which one party was in pro per.

One startling result of my approach was obvious immediately. Only three of the cases calendared for an initial order-to-show-cause hearing still required one after our first meeting. These hearings were not strongly adversarial, and the longest lasted only five minutes. The issues in the remaining 27 cases were resolved by agreement between the parties and their counsel after the initial meeting.

Several of the initial proceedings included disputes over temporary custody or visitation. These were referred to the court mediator, who, after meeting with the parties, met briefly with me, the parties and their counsel to discuss the issues. The meeting helped avoid future problems and resulted in the provisions of the mediated agreement being carried out.

In three of the cases every issue was resolved and a stipulated judgment placed on the record on the day of the order-to-show-cause appearance. In one other case the parties were interested in attempting reconciliation and asked that the case be held in abeyance for 90 days, at the end of which the attorneys reported by conference call that the reconciliation had been successful and a stipulated dismissal was filed.

One of my cases with a pro per litigant was not easily resolved. Indeed, this was the only real problem case in my project. It was the only case in which a motion or order to show cause was filed between the time I began managing the case and its conclusion.

Except for the three original pendente lite hearings and the pro per case, where an order to show cause regarding contempt was necessary because of nonpayment of child support, none of the cases had a single hearing from the time it was filed until entry of judgment. Only three of the cases required trials, and those

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Family Court

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involved single issues.

In just 13 of the cases was it necessary to hold a status conference, in which we discussed not only settlement but also trial preparation with its attendant costs and risks. In 10 of these cases the status conference resulted in a settlement of all issues. Another 13 cases were settled without direct judicial involvement except for conference calls.

In most instances case management took place by telephone, without personal appearances at status or chambers conferences, court reporters or court hearings. If Rip Van Winkle were to awake in today's courtroom, he would think he had dozed off for only a few minutes; many of our courts operate as if the telephone had never been invented. In my experience conference calls were just as productive as personal meetings and took much less time.

All discovery was informal and voluntary, in the sense that no discovery requests or motions had to be filed. Since I was convinced that each case would be settled, and the parties and counsel were influenced by my belief, any needed information was provided by agreement.

Depositions were rarely taken, and then only of the parties. The subject matter was limited to what was necessary for settlement. I regularly specified and limited the issues, with the understanding that a deposition could be taken later if settlement did not occur. In all cases discovery was worked out with the agreement of counsel via conference calls.

I did not need a bailiff, a court reporter, a courtroom clerk or even a courtroom, although occasionally I did need access to these resources. I could have used an informal, comfortable room with a round table for meeting with the parties, a telephone and a computer to keep track of the planning arrangements for each case. In addition, I could have used a legal assistant to make many of the conference calls, which would have permitted me to devote more time to the cases requiring greater oversight.

So where do we go from here? Simplification of substantive and procedural family law must come from the Legislature—but in recent years it has seemed intent on making the law more complex, enacting law not on its merits but at the behest of special-interest groups. Family law has rapidly moved from a field where considerable discretion was available to achieve equity to one with the complexities, technicalities and arbitrariness of the Internal Revenue Code. Unless and until the Legislature perceives what a monster it has created, simplification and equity are unachievable dreams.

As a first step I recommend that the Legislature create pilot projects in three counties in which all new family law cases are handled as I have described. Records of pilot project cases should be compared to those processed in the old system to determine whether caseloads could be accommodated using existing resources.

For example, it would be important to compare the time spent in the initial meeting under the new system to that devoted to order-to-show-cause hearings. My experience indicated the meeting often eliminated the need for further hearings by keeping the parties from becoming mired in the adversary process.

The pilot projects would provide greater information if each court possessed maximum flexibility in designing and implementing its program. I recommend, however, the following minimal requirements for project counties:

- Pilot projects would be three years in duration.
- At least 10 percent of the court's judges would be assigned to the project. If a court had fewer than 10 judges, one would be assigned to devote 10 percent of the court's time to the project.
- Judges would commit to remaining in the project for its duration. Funding would be provided so that each project's judicial officer had a legal assistant.
- Each court would create a family law division, with separately numbered cases placed under the supervision of a single judge from filing through judgment.
- Each court would develop a panel of neutral experts and rules for its program in consultation with the local family law bar.
- Project courts would be empowered to adopt procedural rules in conflict with statutes and the California Rules of Court.
- Judicial officers would be required to participate in a specially designed educational program presented by the California Center for Judicial Education and Research.
- Funding would be provided for statistical comparisons of family law cases processed under the new and existing systems.
- The Administrative Office of the Courts would monitor the pilot projects and report to the Legislature on their operation.

I believe that once a judicial case management system is in place and the legal culture has adjusted to it, family courts can function successfully with existing resources. If so, California could enter a new era in which courts handle family law cases in a manner that helps the parties, allows the attorneys to practice law in a more civilized manner and provides the judge with a greater opportunity to help parties reach an early settlement of their disputes. Indeed, there is no reason the proposed system would not also apply to all civil cases.

Twenty years ago California became the first state to adopt no-fault divorce. In 1980 it was the first state to mandate mediation of custody and visitation disputes. The case management system I propose offers another opportunity for California to lead the nation to a better way of handling marital dissolution. If we accentuate the positive and eliminate the negative in modifying our family court processes, how can we lose? ❖

"A word to the wise, Mr. Brughof: If you don't break down and cry on the witness stand, no one on the jury will believe you're sincere."