Fair and Effective Courts for all People

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The Case for Recording Devices in Cook County Eviction Courts

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I. Background

The United States has seen a surprisingly large number of pro se litigants in recent years. From September 2011 to September 2012, more than 75,000 federal cases were filed by pro se litigants, accounting for more than a quarter of all federal cases filed during that time.[1] Pro se litigants were responsible for 51 percent of appeals filed in federal court during the same period.[2] The data for state courts is somewhat fragmented, but anecdotally, a similar trend is taking place in Cook County.[3] The vast majority of defendants in Cook County forcible courtrooms are low-income tenants, most of whom appear in court without representation because they cannot afford an attorney and do not know about organizations that provide legal assistance for free or at a reduced cost.

Located in northeastern Illinois, Cook County is the second most populous county in the nation, with a population of over 5 million. Within the county, Chicago has an estimated population of nearly 3 million, making it the most densely inhabited city in the state, and the third largest in the country. The Circuit Court of Cook County is the largest of the 24 judicial circuits in Illinois, and one of the largest unified court systems in the world. It has more than 400 judges who serve the residents of Cook County within the City of Chicago and its 126 surrounding suburbs. More than 1.5 million cases are filed each year.

Thirty years ago, court reporters sat in every forcible courtroom in the First Municipal District. Therefore, if one needed to challenge a trial decision, either through a motion to reconsider and vacate or through an appeal, one could order a transcript of the proceedings and easily document the alleged errors. More importantly, if a forcible defendant sought out a legal aid organization after appearing in court pro se and losing at trial, the organization did not have to rely solely on the defendant's account of what happened in court. The organization could order and review the transcript and make an informed decision regarding the defendant's request for assistance. That is no longer the case.

As a result of a significant budget deficit, Cook County is providing fewer court reporters to transcribe the proceedings in its courtrooms. Many parties have turned to hiring their own private court reporters. Unfortunately, for the majority of pro se litigants, hiring a privately-paid court reporter is not an option. Major legal organizations and both legal aid and private sector attorneys have expressed their deep concerns over the lack of court records in certain Cook County courtrooms. Such organizations must attempt to discern what happened through nothing more than the client's version of events, a task that is made especially difficult by the fact that many, if not most, low-income tenants are confused by courtroom procedures and proceedings, by the legal terminology that judges and plaintiffs' attorneys use, and by the speed with which cases are handled in the high-volume forcible courtrooms.

This presents an "access to justice" issue, particularly for pro se litigants: without an acceptable record, pro se litigants have no means of verifying their understanding of prior hearings and no means of drawing the court's attention to what happened at earlier court dates. Most importantly, without an official record, pro se litigants may be precluded from making an appeal. Without a record of proceedings, the appellate court cannot review the trial court's actions. When, despite these obstacles, attorneys are able to reconstruct what happened in the trial court and identify reversible errors, they are forced to present a summary of the proceeding through the client's affidavit (which, unlike a trial transcript, can be dismissed as inaccurate if contested by opposing counsel or by the judge). And if attorneys decide to appeal without a transcript of proceedings, they are often required to produce a bystander's report pursuant to S. Ct. Rule 323(c). Many pro se litigants, however, are unaware of this rather complicated option until it is too late, effectively precluding their appellate rights on procedural grounds.[4]

Most often, the harm created by a lack of court reporting or recording is felt most directly by lower-income individuals who represent themselves pro se. The issues stemming from a lack of court reporters are particularly salient in eviction courts, where many tenants lack the financial means for legal representation.

There is a straightforward solution to this problem: audio recording devices. The use of such devices would 1) discourage intentional and unintentional bench bias, and 2) provide access to lower court proceedings for unrepresented litigants petitioning for appeals. Digital recording devices have already been installed in some Cook County courts. This effort began as a pilot program and has since expanded to juvenile justice and child protective courtrooms. More recording devices are needed to ensure access to justice for all parties, including pro se litigants, regardless of which court they appear in.

II. Justification

In a court system that works best when both parties are represented by counsel, pro se litigants typically lose -- regardless of the merits of their positions -- even in the courtrooms of judges who "mean well."[5] Judges strive to give the appearance of a level playing field by refraining from addressing the pro se litigant's extremely limited access to legal assistance, thereby actually hurting the performance of self-represented parties.[6] Outright judicial mistreatment of unrepresented litigants is also a recurring issue across U.S. courts, with much of this behavior

apparently stemming from judicial frustration with pro se litigants' lack of familiarity with courtroom protocol. In one case, a judge cut a litigant off before allowing her time to present a testimony or evidence, and in many other cases, judges were reported to have needlessly belittled, upbraided, or scolded pro se litigants. In other instances, judicial misconduct was mostly unintentional, with the judge in question later admitting to inadvertent unprofessionalism.[7]

The disadvantages of representing oneself in a courtroom are most clearly felt in eviction courts, where studies have shown that a tenant can be up to nineteen times more successful when represented by an attorney.[8] An examination of eviction courts in Maricopa County, Arizona, revealed that 87% of landlords were represented, while none of the tenants in the study had counsel, and the resulting judgments were usually in the landlords' favor.[9] One unrepresented domestic violence victim faced eviction after calling the police on her abusive boyfriend; the landlord's attorney had no knowledge of the ordeal, and after the tenant filed an answer, the landlord prevailed and the tenant was required to pay for the opposing attorney's fees.[10] Conversely, studies have shown that tenants with legal representation have on average defaulted less often and prevailed more often.[11] While one could in part attribute this disparity in success to the pro se litigants' lack of experience with legal procedure, this consistently stark contrast between success rates indicates that there are more factors at play than unrepresented parties' inability to present their cases adequately.

Cook County statistics are overwhelmingly similar to the findings in Maricopa County and other jurisdictions; one study found that 53% of landlords and only 5% of tenants had legal representation. Landlords were usually not required to present every element of their prima facie cases for possession, and the involved parties were sworn to truth only 8% of the time.[12] Cases usually ended unfavorably for the tenants, towards whom judges were usually less accommodating.[13] Chicago Appleseed staff have interviewed attorneys who have documented a lack of fairness and possible violations of due process that cannot be exposed without a court record. While waiting for their own cases to be called, attorneys from LAF (formerly the Legal Assistance Foundation) have seen judges (1) award plaintiffs possession of the subject premises without requiring the plaintiff to establish a prima facie case, (2) allow a plaintiff's attorney to testify about facts outside the attorney's personal knowledge, (3) tell a *pro se* defendant that there is no defense to a joint forcible action, and (4) deny a *pro se* defendant an opportunity to speak. In one case, a public housing resident approached the bench when her case was called. The plaintiff's attorney handed the judge a termination notice alleging that the defendant had violated her lease. The judge then turned to the defendant and asked whether she had received the notice. When the defendant said "yes," the court said, "Judgment for plaintiff, stayed seven days." The judge, however, did not ask the defendant whether she had committed the alleged violation, whether she had any defenses, or even if she had anything to say at all. Apparently, the judge took the position that, because the defendant knew that the plaintiff wanted her to move, she had to move. This proceeding was not recorded, so there was no way to order a transcript, document the judge's error, or challenge this error through a post-judgment or by bringing it to the attention of the presiding judge of the municipal district. Similarly, an attorney at Cabrini Green Legal Aid observed that if attorneys from her organization want to ensure that the law is upheld, they must bring a court reporter, despite the fact that her agency faces great financial hurdles.

Many of these same issues arose in *Draper & Kramer v. King*, 388 III. App. 571,[14] a case in which LAF successfully challenged a forcible court's refusal to grant its motion to vacate an agreed order that its client, who was unrepresented when she signed the order, did not understand. Though the LAF brought a court reporter to the hearing on its post-judgment motion to vacate the order, there was no transcript of proceedings from the return date (when the purportedly agreed order was entered) and the plaintiff challenged the LAF's failure to provide the reviewing court with a bystander's report.

The appellate court rejected that challenge, finding that the uncontested information set forth in the affidavit that LAF attached to its client's motion provided a sufficient record to permit meaningful review. Nevertheless, the court confirmed that appellants are required to provide the reviewing court with a record sufficient to support his or her claims of error, and that any doubts and deficiencies arising from an insufficient record will be construed against the appellant. This holding underscores the importance of providing recording devices in all forcible courtrooms, where low-income and unrepresented defendants who are unsophisticated about legal procedures will struggle, even if they get a lawyer on appeal, to produce a sufficient record without a transcript from the trial court proceedings.

In *King*, the trial judge also admitted that he routinely enforces orders that he knows unrepresented tenants sign without understanding, and that will be used to evict these tenants from the only decent housing they can afford. The LAF was, in that case, able to capture the disturbing admission on the record, but over the years, forcible judges have made countless equally or even more troubling remarks, or commit errors of law, that were not recorded.

An LAF attorney recounted an instance in which having a court record noticeably altered the outcome of the proceedings. LAF hired a court reporter for a case in which the judge was reputed to deny motions to close records in forcible cases, unless they involved foreclosures. With a court reporter present, the judge granted the motion. In another case similar to *Draper & Kramer v. King*, an elderly woman with cognitive disabilities faced the court for eviction after failing to pay $750 in rent. Although the woman signed what she believed to be a "pay and stay" agreement, after paying the $750, it was revealed that the agreement was in actuality a "pay and move" order that granted the Chicago Housing Authority possession of the property. LAF, under the impression that CHA would require time to prepare a response to its motion to vacate the order. However, the CHA was able to promptly argue the motion, which the judge soon afterwards denied. Although CHA eventually granted LAF's request for reasonable accommodation, the judge did not come under appellate review.

In addition to a clear bias towards represented landlords, eviction courts are often guilty of carrying out speedy case hearings that usually only benefit the represented party. For example, a survey of Massachusetts housing courts found that courts usually reached a disposition within only 16 days after the landlord initially filed a complaint.[15] Steven McKenzie and Andrew Dougherty have likened Chicago's own eviction courts, with an average trial time of 1 minute and 44 seconds, to fast-food restaurants.[16] The short duration of court proceedings involving a represented landlord and unrepresented tenant exemplifies the low regard the current system has for pro se litigants, particularly in housing courts. In courtrooms without court reporters, judicial

bias and the steamrolling of cases are allowed to go unmonitored, and as a result, pro se litigants filing for appeal have limited means for obtaining evidence of unfair treatment. The presence of recording devices in forcible courtrooms, therefore, can act both as a preventative measure against inappropriate and biased conduct towards pro se litigants as well as provide them with better access to justice.

Audio recording has been in place in the federal courts for years, and many other jurisdictions have adopted audio recording in their state courtrooms as well. In Cook County, the model has been implemented in the domestic violence courthouse, the juvenile court center, and the traffic courts at the Daley Center. More broadly, nearly half the states in the U.S. are transitioning from stenographic court reporters to a system in which individuals who monitor digital audio recording devices produce the trial transcripts.[17] The technology used in these courtrooms helps to provide access to justice by creating a record which can be transcribed and used to support motions to challenge a decision, or to address inappropriate judicial behavior. One experiment in Massachusetts suggests the usefulness of court recording devices for prospective appellants: in 2010, the Massachusetts Superior Court had thirty-five audio recording devices installed in Suffolk County, Springfield, Martha's Vineyard, and Nantucket, later finding that no concerns were raised regarding the resulting tapes' accuracy. Further, the installed devices contributed to the timely transcription of courtroom proceedings.[18]

Every circuit in Florida currently uses both stenographic and digital court reporting service delivery models. Eight circuits also use analog recording. In FY 2005-06, approximately 190,000 proceeding hours were recorded by stenographers and approximately 400,000 proceeding hours were recorded by digital court reporters in Florida's trial courts at state expense. It should be noted that due to a lack of resources, technology—or both—all proceedings recorded at state expense in Florida's trial courts are not always actively monitored by a court reporter. Both analog and digital recording systems may be set-up to record multiple proceedings without the presence of a court reporter, though they typically require personnel to periodically "check-in" on the recording process.[19] Similarly, in Utah, all state courtrooms "are equipped with digital recording devices that store the audio and video record of proceedings on the court's computer network. A roster of certified transcribers, composed mostly of former court reporters, now prepares timely transcripts from the digital recordings."[20] In 2012, an independent Blue Ribbon Commission, formed by the Kansas Supreme Court, recommended that the Court "should…strongly encourage [district courts and counties] to use audio equipment in order to preserve a record in the event a court reporter is not available in the courtroom.[21]

The introduction of audio recording devices, therefore, increases self-represented litigants' opportunities for appeal by providing them with verbatim records of their court cases. Similarly, recording devices deter judicial misconduct. A judge who knows that a transcript of the proceedings in his or her courtroom will be available, and that his conduct is therefore subject to the "threat of discovery,"[22] will be much more likely to refrain from inappropriate conduct. Given the prevalence of judicial impropriety in cases involving pro se litigants, the presence of audio recording devices acts as an efficient means of providing court records to help self-represented litigants gain better chances of successfully petitioning for legal redress.

III. Overview of Policy

This proposal calls for three steps: (1) establishing procedures delineating responsibilities for support personnel to ensure the creation of a reliable record through the use of audio recording technology; (2) providing a means to have the recording transcribed; and (3) providing for the safekeeping of records.

The overarching purpose is to ensure the creation of a reliable record for complete and meaningful appellate review. In light of that purpose, a compelling argument can be made that the court should own the record and control access to and use of digital recordings. In terms of specific procedures, several possible options for audio recording technology and staffing models are outlined below.

A. Recording Technology

Digital recording instead of analog tape is the current state of the art technology. Digital court recording is the audio recording of a court proceeding using digital technology that may be saved to a CD, DVD, network drive, or server. With most digital court recording technology, microphones are strategically placed in areas of a courtroom where judges, attorneys, parties, witnesses, and juries are located.

There are three basic types of digital court recording operating technology. The first type is a portable device such as a laptop or handheld device. These allow for recording in one location at a time and are typically operated by a digital court reporter, judge, or magistrate. The second type is a non-portable stand-alone system or workstation that is permanently located in a courtroom or hearing room. These systems are typically operated by a digital court reporter. The third type is a remote system in which the audio/video is recorded to a server and monitored by a digital court reporter from another central control room located on or off-site.

Digital court reporters perform several critical tasks when monitoring proceedings. They "tag" the case number, participant names, and key events of the proceeding. These tags are digitally saved with the recording and act as an index for playback and for creating the transcript. The digital court reporter may also provide playback during a proceeding when directed to do so by the judge.

B. Staffing Models

There are generally three staffing models for digital court reporters. First, under the contract model, court reporters, whether employed by a firm or working individually, provide services on a fee basis. Hiring, firing, supervision, terms and conditions of employment and compensation are determined by contract and/or administrative order. Alternatively, under an entirely employee-operated system, all services are provided by court personnel. Finally, under a hybrid model, judicial circuits combine features of the contract model and the employee model to provide services. For instance, a circuit may use employees for digital court reporting in some divisions of the court and contract with stenographers to record proceedings in other divisions. Alternatively, a circuit may use contract digital court reporters and employee stenographers.

In some jurisdictions, clerks or court staff perform court reporting functions. The functions performed by clerk staff range from monitoring proceedings recorded using cassette tapes to operating digital recording equipment and tagging recordings. Some circuits contract for these services from the clerk's office, whereas in other circuits, clerks provide services free of charge.

For the majority of proceedings recorded, a transcript or copy of the recording is never requested. However, if a transcript is requested and the proceeding was recorded by a stenographer, he or she produces a transcript, as designated, typically for a fee.

In many jurisdictions, unedited digital recordings that may contain privileged attorney-client conversations and matters are made confidential by statute or rule, as well as matters extraneous to the judicial proceeding, are not the "final evidence of the knowledge to be recorded." Instead, digital recordings may be characterized as preliminary to the final record of a judicial proceeding, which in all instances is the official transcript.

IV. Funding and Efficiency

In light of Cook County budget restraints, funding by the Illinois Supreme Court, as supplemented if necessary by a public-private partnership could allow the installation of digital audio recording equipment in the Cook County court system on an as-needed basis. This program's expenses would presumably be limited to start-up costs, with no foreseeable need for ongoing expenditures. Using the public-private partnership model would allow the Cook County court system to make this capital investment without incurring any debt. In fact, there is some evidence that a project like this could provide the Cook County court system with long-term cost savings.

Following the installation of recording devices in Florida courtrooms, the National Center for State Courts estimated that individual courts may save up to $20,000 through the use of audio records as opposed to hiring paid court reporters.[23] Further, while some argue that the installation of audio recording equipment requires additional costly upkeep and transcription, Utah State Court Administrator Daniel J. Becker has reflected on the benefits of audio recording strategies, including the use of an automated transcription system; after installation, the state court system saved an estimated $1,350,000.[24] The Massachusetts Courts estimated that the average cost of audio recording equipment ranged from $7,000-$15,000 per courtroom. Should courts adopt the strategy of implementing devices monitored by court recording monitors, the typical salary for these monitors is approximately $32,219, as opposed to $42,058 for manual court reporters.[25]

Select courtrooms in the Northern District of Illinois use a moderate amount of hardware and software that totals at less than $5,000 per courtroom; because the magistrate judge's courtroom deputy creates digital recordings of all courtroom proceedings, additional staff are not employed for the management of recording technology. These recordings are accessible only to courtroom staff, while the resulting transcripts are made available upon request. If a courtroom already has a sound system installed, only a few additional items are required for the adoption of digital recording. As demonstrated in these examples, the use of simple audio recording systems in the courtroom has rather significant potential for savings.

V. Conclusion

With the number of pro se litigants both in Cook County and throughout the United States reaching unprecedented levels, the court system needs adequate procedures to provide unrepresented parties with better access to justice. Despite legal recognition that "bystanders' reports" are sufficient for purposes of appeal, this alternative has not proven to be adequate or effective. Many pro se litigants are unaware of the rule permitting bystanders' reports, or they don't understand the rule and do not know how to create such a report. For those individuals, appeals are unavailable, and the consequences are often severe.

Installing audio court recording devices in courtrooms lacking court reporters both mitigates the primary issue of judicial impropriety and, in the event of appeal, provides pro se litigants with a better chance of successfully petitioning for appeal. Rather than increasing reporter workloads, hiring additional court reporters to counteract the problem, or simply allowing courtrooms to continue operation without records, relatively low maintenance and low-cost court recording devices simultaneously provide previously disadvantaged parties with access to justice and increase the overall efficiency[26] of the court system. In recognizing the potential constitutional issue, the due process requirements, and the need for fairness, we request that you ensure that court recording equipment is available and used in every courtroom in Cook County that does not have a court reporter. We understand the budget crisis the court system is currently experiencing, but the legal aid and court reform community also recognize that the community wants and deserves a transparent and accountable judicial system. In light of the current budget constraints, we suggest that an emphasis be placed on eviction courtrooms. Expedited justice, justice at the hands of overtly biased judges, and lack of a proper means for appeal can hardly be called justice at all; the people the court system was designed to serve and protect deserve equal access to justice, and providing acceptable court records is one step towards making this ideal a reality.

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[1] See Administrative Office of the United States Courts, Table C-13: Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2012, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C13Sep12.pdf.

[2] *See* Administrative Office of The United States Courts, *Judicial Business 2012: U.S. Courts of Appeals, available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx.

[3] *See* Helen W. Gunnarsson, *A Judge's Perspective on Pro Se Litigants*, ILLINOIS BAR JOURNAL (June 2011), *available at* http://www.isba.org/ibj/2011/06/lawpulse/ajudgesperspectiveonproselitigants (quoting Judge E. Kenneth Wright, Jr., Presiding Judge of the First Municipal District of the Circuit Court of Cook County, as saying the number of pro se litigants is increasing).

[4] *See, e.g.*, *In re Marriage of Lazar & Sackman*, 2012 IL App (1st) 112254-U; *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, 978 N.E.2d 277, *reh'g denied* (Oct. 29, 2012).

[5] Goldschmidt, at 37.

[6] Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, FLORIDA LAW REVIEW at 1233 (2010), available at http://heinonline.org/HOL/Page?handle=hein.journals/uflr62&div=44&g_sent=1&collection=journals

[7] Gray, at 15.

[8] Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URBAN LAW JOURNAL at 48 (2010), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2321&context=ulj

[9] *Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts*, Morris Institute for Justice at 2 (2005), available at http://morrisinstituteforjustice.org/docs/254961finalevictionreport-p063.06.05.pdf
[10] Ibid., at 41.
[11] See Engler at 50.
[12] Lawyers' Committee for Better Housing, prepared by Chicago-Kent College of Law Class of 2004 Honors Scholars, *No Time For Justice: A Study of Chicago's Eviction Court* at 14 & 4, available at http://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf
[13] Ibid., at 5.
[14] 1st Dist. 2014.
[15] See Massachusetts Law Reform Institute, *2005 Summary Process Survey*, available at http://www.masslegalservices.org/system/files/library/2005_summary_process_survey.pdf
[16] See Steven Quaintance McKenzie and Andrew Dougherty citing *No Time For Justice: A Study of Chicago's Eviction Court* by Lawyer's Committee for Better Housing and Chicago-Kent College of Law Class of 2004 Honors Scholars, in *Fast Food Justice: The Denial of Tenants' Due Process Rights in Chicago's Eviction Courts*, Public Interest Law Reporter (2004), available at http://heinonline.org/HOL/Page?handle=hein.journals/pilr9&div=14&start_page=1&collection=journals&set_as_cursor=21&men_tab=srchresults
[17] *See* Nat'l Ctr. for State Courts, *COSCA Budget 2013 Final Analysis* at 26, *available at* http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/2013-COSCA-Budget-Survey-5-14-13.ashx (last visited June 9, 2014).
[18] Hon. Elizabeth M. Fahey, *Innovations in Recording Trials in Superior Court*, 54 BOSTON BAR JOURNAL 4-5 (2010). http://heinonline.org/HOL/Page?handle=hein.barjournals/bosbj0054&div=6&start_page=4&collection=barjournals&set_as_cursor=32&men_tab=srchresults
[19] http://www.flcourts.org/core/fileparse.php/260/urlt/TCPACtReportingFinalReport.pdf.
[20] Lee Suskin & Daniel J. Hall, *A Case Study: Reengineering Utah's Courts Through the Lens of the Principles for Judicial Administration* at 13 (2012), *available at* http://www.ncsc.org/services-and-experts/~/media/files/pdf/services%20and%20experts/court%20reengineering/utah%20case%C20study%C202%2027.ashx.
[21] Kan. Supreme Court's Blue Ribbon Comm'n, Recommendations for Improving the Kansas Judicial System at 80 (Jan. 3, 2012), *available at* http://www.kscourts.org/BRC-Report/BRC%20Report%20Hyperlinked%202.3.12.pdf.
[22] Lynn M. LoPucki, *Court-System Transparency* at 494 IOWA LAW REVIEW (2009), available at http://heinonline.org/HOL/Page?handle=hein.journals/ilr94&start_page=481&collection=journals&set_as_cursor=0&men_tab=srchresults&id=498
[23] Jim McMillan and Lee Suskin, *Digital Court Recording Makes the Record Effectively*, in TRENDS IN STATE COURTS: LEADERSHIP AND TECHNOLOGY at 47 (2015), *available at* www.ncsc.org/~/media/Microsites/Files/Trends%202015/DigitalCourtRecording_McMillan_Suskin.ashx
[24] Daniel J. Becker, *Reengineering: Utah's Experience in Centralizing Transcript Management* at 96 (2012), available at http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1885
[25] http://www.mass.gov/courts/docs/trialtransrep.pdf
[26] In Utah, the number of clerks in the court system decreased from 50 to 1.5, all while cutting transcription delivery time by 116 days for cases on appeal. Becker, at 96.