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The Power of Suggestion: Can a Judicial Standing Order Disrupt a Norm?

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THE POWER OF SUGGESTION: CAN A JUDICIAL STANDING ORDER DISRUPT A NORM?

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Visualize a judge. Is she donning a black robe? Is she sitting on the bench in her courtroom? Is she rendering her decision in an important case?

Historically, the study of the judicial role has been almost universally centered on this sort of "in-court" behavior. And rightly so. The top judicial function is to adjudicate disputes. But that is not all they do. Increasingly, attention is being paid to judges' extrajudicial expressions or their messaging. One very important way in which judges express preferences—and, at times, requirements—concerning how cases proceed before them is through judicial standing orders. Standing orders range from the mundane, like page limits for briefs,[1] to the extraordinary, like offering sentencing credit to inmates in exchange for their sterilization.[2] The proliferation of standing orders cannot be overstated. They have become a fixture in nearly every courthouse across the country. Yet, they remain under the radar. Indeed, little case law has developed regarding their boundaries, and even less has been done to study their effects.

This Article considers the impact, if any, of a particular judicial standing order that encourages behavior by simply expressing a preference. The results of the study have implications for how judges themselves should think about their standing orders and how we all understand judicial power.

And, even more generally, this Article presents the question of whether the bald expression of a judicial preference can disrupt a norm. For decades, legal scholars like Cass Sunstein, Lawrence Lessig, and Richard McAdams all—in their own ways—have argued that law has an expressive function and, through that expression, law has power.[3] Over

* United States Magistrate Judge for the Southern District of Ohio. This Article, in its original form, was submitted as a requirement for the degree of Masters of Law in Judicial Studies at Duke University. I thank my advisor, Professor Mitu Gulati, for his guidance and inspiration. I also thank Matt Jolson for his consummate support and fortuitous understanding of statistics.

1. *See, e.g.*, Judge Eric F. Melgren, United States District Court for the District of Kansas, Standing Order regarding page Limitations for Memorandums and Briefs, *available at* http://ksd.uscourts.gov/index.php/guideline-order/standing-order-regarding-page-limitations-for-memorandums-and-briefs-melgren/ (last visited July 31, 2019).

2. Colin Dwyer, *Judge Promises Reduced Jail Time if Tennessee Inmates Get Vasectomies*, NPR (Jul. 21, 2017), https://www.npr.org/sections/thetwo-way/2017/07/21/538598008/judge-promises-reduced-jail-time-if-tennessee-inmates-get-vasectomies.

3. *See, e.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 673 (1998); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Richard H. McAdams,

twenty years ago, Sunstein posited that norms, defined as "social attitudes of approval or disapproval, specifying what ought to be done and what ought not to be done," can be government managed. In support, he declared that laws "make a statement about how much, and how, a good or bad should be valued[.]" More recently, McAdams built upon this work and deeply analyzed two of law's expressive powers: the ability to coordinate and to inform, which, McAdams asserts, supplements law's force.[4] As this Article will show, judicial standing orders are a useful tool to analyze these concepts.

This Article proceeds as follows. To begin, Section I reviews norm literature at a very high level and explains the norm of sending more senior lawyers to court. Section II gives to an overview of what standing orders are and how they operate. This section also summarizes the relatively sparse case law governing standing orders and explores the legal limits judges face in enforcing standing orders.

Section III provides the background of the particular standing order under study. Recently, the American Bar Association ("ABA") resolved to urge courts to implement plans that welcome opportunities for newer lawyers in the courtroom.[5] Section III provides this history and also offers examples of the different standing orders at work in this area. Importantly, Section III notes the feeling, at least among some judges, that the bench has a responsibility to ensure that the younger generation of lawyers is ready to lead. This Section lays the groundwork for the question of whether a court's practices impact party choices and lawyer behavior—an important concept this Article seeks to study. At a more granular level, this Section identifies and compares four types of new-lawyer participation standing orders: (1) a standing order that simply encourages new-lawyer participation;[6] (2) one that makes opportunities available for new lawyers because the judge hears arguments when she otherwise wouldn't;[7] (3) a hybrid—it encourages new-lawyer participation and also notes a willingness to hear from more than one lawyer if that enhances new-lawyer participation;[8] and (4) an ad hoc

An Attitudinal Theory of Expressive Law, 79 OR. L. REV. 1 (2000); *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW 1 (1991).

4. RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW 4-5 (2015).

5. A.B.A. Resolution 116 (adopted August 14-15, 2017).

6. McAdams, *supra* note 4.

7. *See, e.g.*, Judge Christopher Burke, United States District Court for the District of Delaware, Standing Order Regarding Courtroom Opportunities for Newer Attorneys (Jan. 23, 2016), *available at* https://www.ded.uscourts.gov/sites/ded/files/StandingOrder2017.pdf.

8. Judge Gray H. Miller, United States District Court for the Southern District of Texas, Court Procedures (Sept. 16, 2015), *available at https://www.txs.uscourts.gov/sites/txs/files/procedures%20with%20att%20forms.pdf*("In those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing.").

approach whereby a judge, in a particular case, makes her expectation clear that less-experienced lawyers will be seen and heard in the courtroom.[9] Relying on Section II's analysis, Section III explores potential legal concerns of the different variations of the standing orders.[10] Most critically, it explains why an order encouraging, rather than mandating, is preferable under current case law and why it is useful for studying the broader question of societal compliance. It is also a way to examine law's expressive powers.

Section IV is the heart of the Article. It examines the effects of the order that simply encourages participation. The United States District Court for the District of Massachusetts is noteworthy because more than half of the active District Judges have implemented the standing order encouraging new-lawyer participation. I have collected six data sets. The first two sets are a comparison of the experience level of lawyers appearing at initial scheduling conferences during the six months before and the sixth months after implementation of the order by two District Judges. The next data set is a comparison of the experience level of lawyers appearing before a District Judge to argue civil motions during the six months before and the six months after implementation of the standing order. The next three data sets include data about the lawyers appearing before these District Judges for the first half of 2019.

Section V summarizes the findings, makes suggestions for how to craft standing orders, and advocates for more study.

II. NORMS AND COURTROOM PARTICIPATION

Precisely defining a "norm"—what it is and whether it exists—is perilous business. Thoughtful scholars have offered related definitions, but most would agree with McAdams's description that norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-

9. *See, e.g., In re* Generic Digoxin and Doxycycline Antitrust Litig.222 F. Supp. 3d 1341 (J.P.M.L. 2017), (noting, in a price-fixing multidistrict litigation, that "the Court expect[ed] that the leadership [would] provide opportunities for attorneys not named to the PSC, ***particularly less-senior attorneys,*** to participa[te] meaningfully and efficiently in the MDL, including through participation in any committees within the [Plaintiffs' Steering Committee] and in determining which counsel will argue any motions before the Court."); *see also* Case Specific Order Re: Oral Argument, GSI Technology Inc. v. United Memories, Inc., Case No. 5:13-cv-01081-PSG(Mar. 9, 2016) ("[T]he court expects that each party will allow associates to present its arguments on at least two of the six motions to be heard. If any party elects not to do this, the court will take its positions on all six motions on the papers and without oral argument.").

10. Some of the criticism of the orders relates to the use of the orders to increase women and minority participation in courtroom. Although an interesting issue, this paper does not explore those questions.

legal sanctions, or both."[11] For his part, Lawrence Lessig has explained that norms "regulate": They "frown on the racist's joke," "they tell the stranger to tip a waiter at a highway diner," and they "constrain" behavior "not through the centralized enforcement of a state," but "because of the enforcement of a community." In other words, norms lean on people to behave in a certain way, and the thread among this scholarship is that a norm is more than just a behavioral regularity—a norm brings with it a sense of what ought to be done.

For the past half-century, legal scholars have explored norms in numerous and disparate contexts. Robert Ellickson (now) famously studied Shasta County ranchers' informal dispute resolution process.[12] Cass Sunstein and others investigated the dueling culture of early America,[13] and Mark West delved into the informal structures governing sumo wrestling in Japan.[14] As part of this field of study, scholars also ask how norms change. Sunstein has observed that criticism plays an important role in norm change, and opinion leaders who aim to shape norms—whom he calls "norm entrepreneurs"—can bring about sudden change.[15]

This leads to the question this Article presents. The expectation that the wet-behind-the ears lawyer is *not* the one standing up in court—especially federal court—fits many of the definitions of a norm. This is so not only because it is what regularly happens, but also because it is what people believe ought to happen. Indeed, it is expected that the gray-haired lawyer addresses the judge and argues the case. Can a judicial standing order that baldly expresses a preference, without threat of sanction, lead to norm change in this space? In Sunstein's words, can judges act as "norm entrepreneurs" via their standing orders and effect change?

II. UNDERSTANDING STANDING ORDERS

To appreciate whether standing orders have the ability to disrupt a norm—and whether the particular standing order under study in fact did—a few words about standing orders are first needed.

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11. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (offering this definition as a coalescence of the new school thought).

12. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 623 (1986).

13. C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805 (2001).

14. *See* Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997).

15. Sunstein, *supra* note 3, at 909.

A. Case Law

Although case law explaining the boundaries of standing orders in the federal system is relatively light, certain themes have emerged. First and foremost, standing orders (both by the district and by an individual judge) can be an appropriate exercise of a court's inherent authority over management of its cases and control of the courtroom.[16] In *United States v. Ray*, the United States argued that a standing order requiring the U.S. Attorney to assemble information required by the PROTECT Act to be submitted to the Sentencing Commission contravened Congress' intent under the statute and exceeded the district court's authority.[17] The Ninth Circuit disagreed. The Court found the standing order in line with the relevant statute but additionally concluded that the court's power derived from its "inherent authority to regulate the practice of litigants before it," which permitted the court to implement the standing order.[18]

Despite this inherent authority, standing orders may be found improper if they are inconsistent with statutes or the national rules, like federal procedural rules. The Second Circuit's decision in *Commercial Cleaning Services, L.L.C. v. Colin Servo Systems, Inc.*, provides an example of a standing order that, according to the Second Circuit, went too far.[19] The United States District Court for the District of Connecticut had adopted a standing order requiring a plaintiff in a RICO action to submit a case statement within 20 days of bringing the action. The case statement was to provide "in detail information" like "the names of the individuals, partnerships, or other legal entities constituting the RICO enterprise, the dates of the predicate acts with a description of the facts surrounding the predicate acts, and the identity of the alleged wrongdoers and victims."[20] The district court had relied on this standing order, at least in part, to dismiss the plaintiff's RICO claims because the plaintiff provided "insufficient information."[21] The Second Circuit found this troubling:

We consider first the theory of insufficient information. For at least two reasons, dismissal for insufficient information was not justified. First, the Standing Order calls for information far in excess of the essential

16. *See, e.g.*, United States v. Ray, 375 F.3d 980, 992 (9th Cir. 2004) (upholding standing order requiring U.S. Attorney to assemble information required by PROTECT Act to be submitted to the Sentencing Commission was upheld as a proper exercise of "the court's inherent authority to regulate the practice of litigants before it").

17. *Id.*

18. *Id.* at 993. ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." (citing In re Peterson, 253 U.S. 300, 312 (1920))).

19. 271 F.3d 374, 386 (2d Cir. 2001).

20. *Id.* at 385.

21. *Id.*

elements of a RICO claim. On a motion for summary judgment, or for judgment as a matter of law at the time of trial, a defendant would not be entitled to judgment because the plaintiff's evidence failed to include all the "individuals, partnerships, corporations, associations, or other legal entities [that constitute] the RICO enterprise," or the identities of all "wrongdoers" and "victims." To the extent the Standing Order called for presentation of information going beyond what a plaintiff needs to present to establish a legally sufficient case, plaintiff's inability to produce it could not justify the grant of judgment to defendant.

A standing order of this nature may appropriately require a plaintiff to set forth the information it possesses in helpfully categorized form, as an aide to the court and to the accused defendant. But it may not make the prosecution of the action dependent on the plaintiff's ability to furnish more information than is required, as a matter of law, to prove the essential elements of the claim.[22]

As an aside, the Second Circuit went on to criticize the district court for disallowing discovery.[23] But, important for this Article's purposes, the Second Circuit was clear that a judicial officer cannot use a standing order to expand substantive legal requirements beyond what the law requires.

In addition, courts have expressed concern about the lack of notice and public participation in the implementation of standing orders.[24] This concern is unsurprising. Of course, fairness requires litigants to know the rules governing them. And a preference for a notice-and-comment period allows for feedback.

Relatedly, standing orders may go a step too far if they impose inflexible standards that do not accommodate the particular needs of a case. The First Circuit addressed this issue in *In re Fidelity/Micron Securities Litigation*, concluding that the district court's standing order on allocation of costs "raises a core concern: it does not leave sufficient room for individualized consideration of expense requests." In that matter, the First Circuit considered a standing order stating that, as a matter of practice, prohibited reimbursement of certain categories of expenses absent "exceptional circumstances."[25] The First Circuit concluded that the standing order raised a "core concern" that it did not leave "sufficient

22. *Id.* at 385-86; *see also* United States v. Zingsheim, 384 F.3d 867, 871 (7th Cir. 2004) (application of standing order found to be improper because it was used to defer downward departure decisions when deferral was not authorized by Rule 35).

23. *Id.* at 386.

24. *See, e.g.*, *In re* Fidelity/Micron Sec. Litig., 167 F.3d 735, 737 n.1 (1st Cir. 1999) ("[W]e urge the district courts to avoid incipient problems of this type by incorporating standing orders into local rules, or, at least, making them readily available in the office of the Clerk of the district court.").

25. *Id.* at 736.

room for individualized consideration of expense requests."[26]

In sum, standing orders can be a permissible exercise of a court's inherent authority over the management of its docket and courtroom. But, predictably, standing orders that conflict with national rules or statutes are frowned upon. Similarly, the ways in which standing orders are adopted and implemented matter. Most importantly, notice to litigants is required, and a comment period is preferable.

B. Standing Orders In Context

Given these procedural and substantive limitations, standing orders occupy a unique space within the law—especially the type of standing order this Article studies. Here's why. As McAdams concisely summarizes, the two conventional accounts of legal compliance are deterrence and legitimacy.[27] The first account, which economists tend to favor, holds that legal sanctions change the cost of behavior by making compliance cheaper than noncompliance.[28] The second account is legitimacy.[29] In short, people are more likely to obey the law when the law is viewed as a legitimate moral authority.[30] The law's legitimacy is particularly important in the absence of a moral consensus. When that is the case, law might be able to leverage its legitimacy to persuade the public to change their moral view, and, in turn, their behavior.[31]

Although McAdams gives these accounts their due, he posits that while sanctions and legitimacy generate most of legal compliance, these theories cannot explain everything. McAdams' concern is the rest. He theorizes that "law has expressive powers independent of the legal sanctions threatened on violators and independent of the legitimacy the population perceives in the authority creating and enforcing the law."[32] He identifies two expressive mechanisms, coordination and information, which round out law's causal powers.[33] First, the law coordinates behavior by making a particular outcome salient.[34] Borrowing from game theory, McAdams calls this the "coordinating focal point" for behavior.[35] Second, law reveals information. In McAdams' words, law has informational content that reflects the values of the laws' creators. "These

26. *Id.* at 737.
27. McAdams *supra* note 4, at 2.
28. *Id.*
29. *Id.* at 3.
30. *Id.*
31. *Id.*
32. *Id.* at 6–7 (italics omitted).
33. *Id.* at 7.
34. *Id.* at 22.
35. *Id.*

new beliefs can change an individual's behavior, usually in the direction of greater compliance, though sometimes less compliance and sometimes in ways orthogonal to compliance. In short, law provides information; information changes beliefs; new beliefs change behavior."[36] These expressive mechanisms explain laws' ability to spur compliance when deterrence and legitimacy fail to account for it all. As an example, McAdams turns to "tribunals successfully resolving disputes despite lacking any power to sanction the disputing parties."[37] To demonstrate this, McAdams and Tom Ginsburg have studied compliance rates with International Court of Justice decisions.[38] Even without the ability to sanction noncompliance, ICJ decisions enjoy prompt compliance sixty-eight percent of the time.[39]

Back to standing orders. As explained above, judges are limited in how far they can reach with standing orders. Judges' ability to sanction noncompliance is limited—if not completely curtailed—in certain instances. So when judges foray into areas over which they have little power, they must rely on other forces to induce compliance. And while the judiciary generally is seen as legitimate,[40] its legitimacy is shakier when it acts beyond its authority. One, hopefully extreme, example will suffice. When Judge Sam Benningfield, a Tennessee general sessions judge for White County, Tennessee, issued a standing order offering reduced drug sentences to defendants in exchange for agreeing to long-term contraception, he received nearly universal criticism. The local district attorney, calling the long-term contraception decision "personal in nature," said that those decisions are "something the court system should not encourage or mandate."[41] A spokesperson for the American Civil Liberties Union stated "judges play an important role in our community—overseeing individuals' childbearing capacity should not be part of that role."[42] In other words, many stakeholders viewed the standing order as illegitimate. Given this, judges' legitimacy is at a low point when judges adopt standing orders that are seen as beyond their realm of authority. As such, legitimacy alone cannot explain why compliance occurs when judges issue standing orders that reach beyond their power to enforce.

One final point. The theory of laws' expressive powers as causal

36. *Id.* at 136 (italics omitted).

37. *Id.* at 7.

38. Id. at 91, 120–21.

39. *Id.* at 91.

40. This of course is not always true. *See, e.g.*, *Sheriff Joe Arpaio guilty of contempt for ignoring order to stop racial profiling*, THE GUARDIAN (July 31, 2017), https://www.theguardian.com/us-news/2017/jul/31/joe-arpaio-convicted-contempt-immigration-patrols.

41. Dwyer, *supra* note 2.

42. *Id.*

mechanisms are not set up to displace deterrence and legitimacy. McAdams instead advocated "theoretical pluralism" about compliance.[43] It is from this view that the paper proceeds. The paper seeks to answer whether laws' expressive powers of coordination and information might explain, in part, compliance with standing orders.

C. Will the Junior Lawyer Please Stand Up?: Attempts to Disrupt a Norm

As noted, the ABA resolved to urge courts, specifically judges, to implement plans that welcome opportunities for newer lawyers in the courtroom.[44] The resolution notes that "[i]n light of the diminishing opportunities available for newer lawyers to develop their litigation skills in a courtroom setting," the ABA "support[s] the proper development of the future generation of lawyers."[45] To that end, the ABA has called upon stakeholders to take action. With respect to the judiciary, the resolution expressly identifies judicial standing orders that promote newer lawyers' active involvement in litigation and, more specifically, in the courtroom.[46]

The ABA's resolution was years in the making. Beginning over a decade ago, several judges around the country began adopting some version of a "Young Lawyers in the Courtroom Program." In the past couple of years, more and more judges have adopted such orders.[47] At least among some judges, there is a feeling that the bench has a responsibility to ensure that the younger generation of lawyers is ready to lead.[48] The Honorable Rebecca Pallmeyer perhaps described this sentiment best:

> There's a general feeling on the bench that getting young lawyers comfortable and active in court is part of our responsibility. Our first goal always is to do justice, and whether that means granting a summary judgment motion or settlement, so be it. But we do recognize the need and desirability of having an experienced trial bar, and that includes younger lawyers to be bar leaders of the future.[49]

While they may not know it, the judges adopting these orders are

43. McAdams, *supra* note 4.

44. A.B.A. Resolution 116 (adopted August 14-15, 2017).

45. *Id.*

46. *Id.*

47. *See, e.g.*, *id.*; Judge James Donato, United States District Court for the Northern District of California, Standing Order for Civil Cases before Judge James Donato (Jan. 5, 2017), *available at* https://northerndistrictpracticeprogram.org/wp-content/uploads/2018/06/2017-01-05-Standing-Order-For-Civil-Cases-Befo.pdf. .

48. Erin Coe, *An Endangered Art: Can the Legal Industry Keep Trial Advocacy Alive?*, LAW360 IN-DEPTH (Mar. 13, 2017), https://www.law360.com/articles/899956.

49. *Id.*

attempting to disrupt a norm. Specifically, the judges are trying to redefine the role of junior lawyers. As Sunstein has said, "[o]ften law tries to redefine roles."[50] In 1996, he provided the examples of the law saying "that husbands may not rape their wives; that absent fathers owe duties of support to their children; that disabled people have certain rights of access to the workplace."[51] All of these measures," Sunstein explains, "can be seen as attempts to create new or better norms to define the relevant roles.[52] So too with judicial standing orders.

1. Types of Standing Orders to Encourage Junior-Lawyer Participation

The judicial standing orders targeting junior-lawyer participation take many forms, but their purpose is the same: to encourage junior lawyers (most often defined as having fewer than between four and seven years of experience) to have opportunities to be heard in court. Although only illustrative—and certainly not exhaustive—four different types of orders are described below.

The first type makes opportunities available for new lawyers because the judge is more amenable to hearing argument than she otherwise would be.[53] Judge Burke of the United States District Court for the District of Connecticut adopted a standing order that shows how this works.

The Court notes the "growing trend" of "fewer cases going to trial" and that, when they do, "there are generally fewer opportunities "in court for speaking or 'stand-up' engagements." The standing order goes on to state that the issue is particularly acute for newer lawyers, defined as attorneys practicing for seven years or less." Because of the importance of "the development of future generations of practitioners through courtroom opportunities," the standing order provides:

> (1) After a motion is fully briefed, either as a part of a Request for Oral Arguments, or in a separate Notice filed thereafter, a party may alert the Court that, if argument is granted, it intends to have a newer attorney argue the motion (or a portion of the motion).
> (2) If such notice is provided, the Court will:
>
> A. Grant the request for oral argument on the motion, if it is at all practicable to do so.
>
> B. Strongly consider allocating additional time for oral argument beyond what the Court may otherwise have allocated, were a newer attorney not arguing the motion.
>
> C. Permit other more experienced counsel of record the ability to

50. Sunstein, *supra* note 3, at 923.

51. *Id.*

52. *Id.*

53. *See, e.g.*, Burke *supra* note 7.

> provide some assistance to the newer attorney who is arguing the motion, where appropriate during oral argument.[54]

Of note, Judge Burke's standing order provides caveats. First, "[a]ll attorneys, including newer attorneys, will be held to the highest professional standards," and they must be "adequately prepared and thoroughly familiar with the factual record and the applicable law, and to have a degree of authority commensurate with the proceeding."[55] Second, the court notes that, at times, it may not be appropriate for a newer lawyer to argue a motion, and the Court "draws no inference from a party's decision not to have a newer attorney argue any particular motion before the Court."[56] Third, the Court "will draw no inference about the importance of a particular motion, or the merits of a party's argument regarding the motion, from the party's decision to have (or not to have) a newer attorney argue the motion."[57] Orders like Judge Burke's confer a benefit on the party for compliance, namely an increased chance to be heard.

The second type of standing order states that a judge will change her practices if a more junior lawyer participates in a case. For example, a judge may encourage junior-lawyer participation through a willingness to hear from more than one lawyer if that enhances junior-lawyer participation.[58] Judge William Alsup does just that by "relax[ing]" the one-lawyer-per-witness rule "to allow young lawyers a chance to perform."[59] Judge James Donato, Northern District of California, has a standing order that states that he will "extend motion argument time" for junior lawyers appearing before him.[60] Again, these types of standing orders confer a benefit.

The third approach is case specific. The judge makes her expectation clear, in a particular matter, that less-experienced lawyers will appear in the courtroom.[61] Judge Grewal took this option in *GSI Technology Inc.*

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Miller, *supra* note 8.("In those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing.").

59. Judge William Alsup, United States District Court for the Northern District of California, Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup (Jan. 11, 2016), *available at* www.cand.uscourts.gov/filelibrary/192/JuryTrials1.pdf.

60. Donato, *supra* note 47.

61. *See, e.g.*, *In re* Generic Digoxin and Doxycycline Antitrust Litig., 222 F. Supp. 3d 1341 (J.P.M.L. 2017), (noting, in a price-fixing multidistrict litigation, that "the Court expect[ed] that the leadership [would] provide opportunities for attorneys not named to the PSC, ***particularly less-senior attorneys,*** to participa[te] meaningfully and efficiently in the MDL, including through participation in any

v. United Memories, Inc.[62] In an entertaining order, he explained the current state of affairs. "In a technology community like ours that prizes youth—at times unfairly—there is one place where youth and inexperience seemingly comes with a cost: the courtroom."[63] Judge Grewal then posed the question, "[W]ho will try the technology cases of the future, when so few opportunities to develop courtroom skills appear?"[64] He decided to be part of the solution.[65] Six post-trial motions were set for argument at the point in the litigation, and Judge Grewal "expect[ed] that each party [would] allow associates to present its arguments on at least two of the six motions to be heard."[66] Failure to do so would forfeit the chance for oral argument.[67] Said plainly, the parties faced an adverse consequence for not allowing an associate to argue—oral argument would be cancelled.[68]

The fourth and final example simply expresses a judge's preference that more junior lawyers appear. The order provides neither a carrot nor a stick, but the judge "strongly encourages the participation of relatively inexperienced attorneys in all court proceedings. Such attorneys may

committees within the [Plaintiffs' Steering Committee] and in determining which counsel will argue any motions before the Court).

62. Case Specific Order Re: Oral Argument, *GSI Tech. Inc. v. United Memories, Inc*., 5:13-cv-01081-PSG (Mar. 9, 2016) ("[T]he court expects that each party will allow associates to present its arguments on at least two of the six motions to be heard. If any party elects not to do this, the court will take its positions on all six motions on the papers and without oral argument.").

63. *Id.*

64. *Id.*

65. *Id.* (noting judicial promotion of junior-lawyer participation).

66. *Id.*

67. *Id.*

68. *Id.* This order has an interesting post-script. The parties forfeited argument—rather than allow associates to argue—and stipulated to have the motions decided on the briefs. *See* Case Specific Order Re: Parties' Stipulation to Vacate Hearing, GSI Tech. Inc. v. United Memories, Inc., 5:13-cv-01081-PSG (Mar. 11, 2016). Judge Gewal expressed his displeasure:

The day before last, I expressed my concerns about the lack of courtroom opportunities for law firm associates in intellectual property cases like this one. Recognizing the court's own important role in encouraging clients and partners to give up the podium once in a while, I asked that each party give associates the chance to argue just two of six motions set for hearing on Monday. This morning, the parties and their counsel responded. But rather than confirm their commitment to this exercise, the parties jointly stipulated simply to take all motions off calendar and submit them without any hearing. No explanation was given; perhaps associate preparation and travel costs were the issue. In any event, once again, another big intellectual property case will come and go, and the associates who toil on it will largely do so without ever being heard. I appreciate that my order acknowledged the possibility that the parties would decline this opportunity and simply submit their motions on the papers. But I would be remiss if I did not observe the irony of another missed opportunity to invest in our profession's future when two of the motions originally noticed for hearing seek massive fees and costs. To be clear, GSI asks for $6,810,686.69 in attorney's fees, $1,828,553.07 in non-taxable costs and $337,300.86 in taxable costs, while UMI asks for $6,694,562 in attorney's fees, $648,166 in expenses and $302,579.70 in taxable costs. That a few more dollars could not be spent is disappointing to me. My disappointment, however, is unlikely to compare to the disappointment of the associates, who were deprived yet again of an opportunity to argue in court.

handle not only relatively routine matters (such as scheduling conferences or discovery motions), but may also handle, where appropriate, more complex matters (such as motions for summary judgment or the examination of witnesses at trial)."[69] This Article studies an order of this sort. Interestingly, without sanction for noncompliance, we have a real-world test of whether expression is enough to disrupt a norm.

2. A Standing Order Without Teeth

As mentioned earlier, this Article studies the effect, if any, of a particular standing order that expresses a judicial preference for encouraging junior lawyer participation. As of this writing, over half of the District Judges of the United States District for the District of Massachusetts have adopted such an order, and the standing orders the judges have adopted are nearly identical. Given this uniformity, the District of Massachusetts was fertile ground to see if this standing order, which baldly expresses a preference, has had any impact. Of note, the studied standing order neither provides a benefit for compliance nor threatens sanctions for noncompliance. Instead, it does the exact opposite by making an appeal. It acknowledges the decline in courtroom opportunities, recognizes the importance of developing future generations of practitioners, and then calls upon counsel to join the court in effectuating this important policy.[70] Thus, the order is unequivocal in expressing a preference without sanctions for noncompliance. One of the judges' orders goes so far to say that she knows her "standing order is not self-executing."[71] But the order reveals information about the judge's preference. In McAdams' words, it signals an attitude. The basic claim of the attitudinal model is that law reveals attitudes.[72] And the standing order used by these judges reveals their attitude about the experience level of the lawyers whom they want to see appearing before them.

Turning to the United States District Court for the District of Massachusetts, some background information is useful. The District's territorial jurisdiction includes the Commonwealth of Massachusetts with

69. Judge F. Dennis Saylor IV, United States District Court for the District of Massachusetts, Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys (Aug. 12, 2014), *available at* https://www.mad.uscourts.gov/boston/pdf/saylor/StandingOrderReCourtroomOppor_Bostonupdate.pdf.

70. *See, e.g.*, Judge Indira Talwani, United States District Court for theDistrict of Massachusetts, Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys (Oct. 9, 2015), *available at* https://www.mad.uscourts.gov/boston/talwani.htm.

71. Judge Denise J. Casper, United States District Court for the District of Massachusetts, Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys (May 16, 2011), *available at* http://www.mad.uscourts.gov/boston/casper.htm.

72. McAdams, *supra* note 4.

three seats of court: Boston, Springfield, and Worcester. Eleven active District Judges serve the Court. Judge F. Dennis Saylor was one of the first judges in the country to adopt an order addressing junior-lawyer participation. He first did so in 2005 along with Magistrate Judge Charles B. Smartwood. Then, on November 2, 2006, Judge Saylor along with then-Magistrate Judge Timothy S. Hillman adopted a "Standing Order Regarding Courtroom Opportunities for Relatively Inexperienced Attorneys." The standing order provides in full:

> Courtroom opportunities for relatively inexperienced attorneys, particularly those who practice at larger firms, have declined precipitously across the nation in recent years. That decline is due to a variety of factors, but has been exacerbated by the proliferation of rules and orders requiring the appearance of "lead" counsel in many court proceedings.
>
> In an effort to counter that trend, the undersigned District Judge and Magistrate Judge, as a matter of policy, strongly encourage the participation of relatively inexperienced attorneys in all court proceedings. Such attorneys may handle not only relatively routine matters (such as scheduling conferences or discovery motions), but may also handle, where appropriate, more complex matters (such as motions for summary judgment or the examination of witnesses at trial). The following cautions, however, shall apply.
>
> First, even relatively inexperienced attorneys will be held to the highest professional standards with regard to any matter as to which experience is largely irrelevant. In particular, all attorneys appearing in court are expected to be appropriately prepared, regardless of experience. For example, any attorney who is arguing a motion for summary judgment is expected to be thoroughly familiar with the factual record and the applicable law.
>
> Second, all attorneys appearing in court should have a degree of authority commensurate with the proceeding that they are assigned to handle. For example, an attorney appearing at a scheduling conference ordinarily should have the authority to propose and agree to a discovery schedule and any other matters reasonably likely to arise at the conference.
>
> Third, relatively inexperienced attorneys who seek to participate in evidentiary hearings of substantial complexity, such as examining a witness at trial, should be accompanied and supervised by a more experienced attorney, unless leave of Court is granted otherwise. Counsel are encouraged to seek additional guidance from the Court in particular cases concerning the scope or application of this policy.

Other district judges in Massachusetts followed suit: Judge Denise J. Casper on May 16, 2011;[73] Judge Indira Talwani on October 9, 2015;[74]

73. Casper, *supra* note 71.

74. Talwani, *supra* note 70.

Judge Leo T. Sorokin on March 15, 2017;[75] and Judge Mark G. Mastroianni on May 3, 2017. And, unsurprisingly, Judge Hillman continued to use the standing order when he became a district judge in 2012.[76] Thus, as of May 2017, six of the eleven active district judges in the District of Massachusetts had adopted the order.[77]

To study the effect of the standing order, I used minute entries from the Federal Judiciary's Case Management/Electronic Case Files ("CM/ECF") system. A minute entry includes an abundance of useful data like the presiding judge, date of proceeding, proceeding type, proceeding summary, and (most of the time) attorneys present. Here is an example of a minute entry of a status conference that Judge Saylor held in a habeas matter:

Case Number/Title	Dates	Category/ Event	Docketed by	Notes
1:09-cv-12200-FDS Mathews v. Roden	*Entered:* 01/14/2019 16:46:12 *Filed:* 01/14/2019 *Reopened:* 09/20/2019	*Category:* minutes *Event:* Status Conference *Document:* 86	L. Pezzarossi *Type:* crt	*Cause:* 28:2254 Petition for Writ of Habeas Corpu (State) *NOS:* Habeas Corpus (General) *Office:* Boston *Presider:* F. Dennis Saylor, IV
	Electronic Clerk's Notes for proceedings held before Judge F. Dennis Saylor, IV: Status Conference held on 1/14/2019. Case called. Colloquy underlying matter in Barnstable. Court reviews the show cause deadline. No further status set at this time. COPY MAILED. (Court Reporter: Lee Marzilli at [redacted])(Attorneys present: L. Mathews (VC) E.			

The minute entries that report which lawyers were present allow for tracking the experience levels of the lawyers appearing before the judges in the District of Massachusetts. The first point of investigation was to see if the adoption of the standing order had any immediate effect upon the experience level of the lawyers appearing before the court. Collecting

75. Judge Leo T. Sorokin, United States District Court for the District of Massachusetts, Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys (Mar. 15, 2017), *available at* http://www.mad.uscourts.gov/boston/sorokin.htm.

76. Judges Timothy S. Hillman & Leo T. Sorokin, United States District Court, for theDistrict of Massachusetts, Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys (Nov. 2, 2006), *available at* http://www.mad.uscourts.gov/worcester/hillman.htm.

77. At the time, that represented half of the district judges. Judge George O'Toole, Jr. took senior status on January 1, 2018, so now six of eleven district judges have adopted the standing order.

data from when Judge Saylor adopted his first order in 2005 proved difficult because the Federal Judiciary's CM/ECF system was in its infancy at that time. Minute entries from Judge Sorokin's proceedings were also unhelpful for my purposes because his docket entries generally do not include which attorneys were present. And Judge Hillman has no "before implementation" period because he has always used the order as a district judge.

Now the good news. The minute entries for proceedings before Judges Casper, Talwani, and Mastroianni for the six-month periods before and after implementation of the standing orders were accessible, complete, and useful. A review of the minute entries shows that Judges Casper and Talwani generally conduct their own initial scheduling conferences. Comparing who appeared at initial scheduling conferences before and after implementation of the standing order makes sense for three primary reasons. First, an initial scheduling conference is held in nearly every case and is fairly routine.[78]So it is as close as possible to comparing apples to apples. Second, the standing order expressly provides "scheduling conferences" as an example of a "routine matter[]" that a more junior lawyer could handle.[79] Third, it is rare for dispositive issues to be resolved at initial scheduling conferences so it is a proceeding that better lends itself to allowing a more junior lawyer to appear. Said more bluntly, it is a proceeding where a party or a more senior lawyer would be more willing take a risk and send a less experienced attorney. For these reasons, initial scheduling conferences seemed a like an appropriate proceeding to analyze. I thus complied the data for the lawyers appearing at initial scheduling conferences before Judges Casper and Talwani for six months before and six months after each judge adopted the standing order.

Judge Mastroianni is different in that he does not conduct initial scheduling conferences in his cases; he leaves that to the Magistrate Judge assigned to the case. So I complied information about the lawyers appearing before Judge Mastroianni in any civil proceeding for the six-month period before and the six-month period after implementation of the standing order.

III. THE DATA

Two sets of data are analyzed below. The first shows the immediate impact of the standing orders, and the second explores the orders' longer-term effects.

78. *See generally* Fed. R. Civ. Pro. 16 (permitting pretrial conference and requiring a scheduling order in every case unless exempted)

79. Hillman & Sorokin, *supra* note 76 ("Such attorneys may handle not only relatively routine matters (such as scheduling conferences or discovery motions) . . . ")

A. Immediate Effects?: The Data Six Months Before and Six Months After Implementation

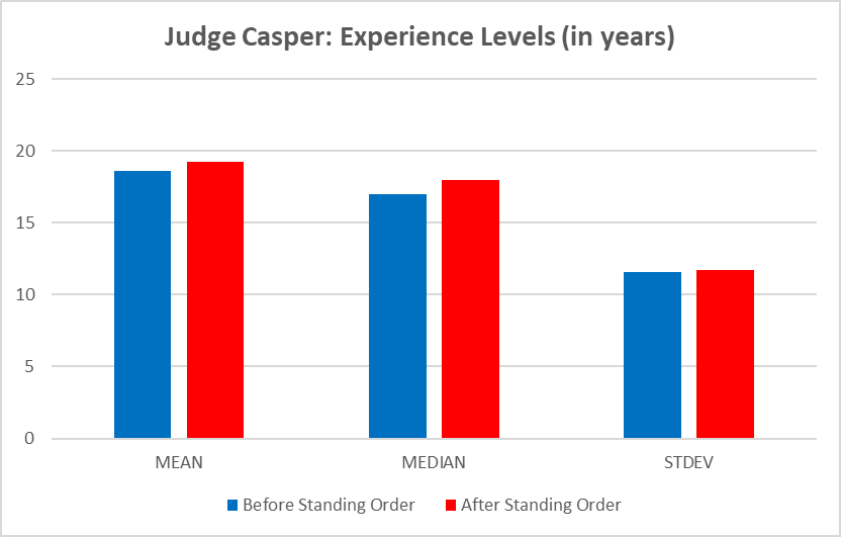
To begin, I wanted to see if the standing order had any immediate effects. Consequently, I investigated the six-month period before and the six-month period after implementation for each judge.

1. Judge Casper Data: Six Months Before and After Implementation

Judge Casper adopted the standing order on May 16, 2011. During the six months prior to implementation (December 20, 2010–May 15, 2011), 112 lawyers appeared before Judge Casper at initial scheduling conferences. Through the use of state bar and firm websites, I was able to determine when each lawyer who appeared before Judge Casper began practicing law. In turn, I was able to calculate the experience level, rounded to the closest year, of the lawyer appearing at the conference. The mean experience level of lawyers appearing at initial scheduling conferences before Judge Casper before implementation is 18.5893 years, and the median is 17 years. The standard deviation is 11.5955.

I repeated these calculations for the six-month period after implementation (May 16, 2011–November 16, 2019). During these six months, there were 89 lawyer appearances at initial scheduling conferences. The mean for this period is 19.2584 years of experience, and the median is 18 years. The standard deviation is 11.7364.

Here is a bar-graph comparison of the two periods:



As demonstrated, the mean and median increased slightly. So, these measurements do not show that experience level decreased before Judge

Casper post implementation. To the contrary, those measurements increased slightly. And the standard deviation remained roughly the same, meaning that that spread changed little.

Based on those measurements, the standing order seemed to have no effect in the direction of having more junior lawyers appear. But I also wanted to see whether there was an increase in how often lawyers who are in that "more junior" category were appearing. Foremost, I had to define a more "junior lawyer" because the standing order does not. I surveyed the orders across the country and, while there is some variation, nearly all of the orders define a more junior lawyer as an attorney with seven or fewer years of experience.[80] I too used that definition.

Of the 112 lawyers who appeared at initial scheduling conferences before implementation of the standing order, twenty of them had seven or fewer years of experience. So 17.857% of the time, a "more junior" lawyer appeared before Judge Casper. During the 89 proceedings post-implementation, a more junior lawyer appeared eighteen times. At 20.225%, this is a slight increase.

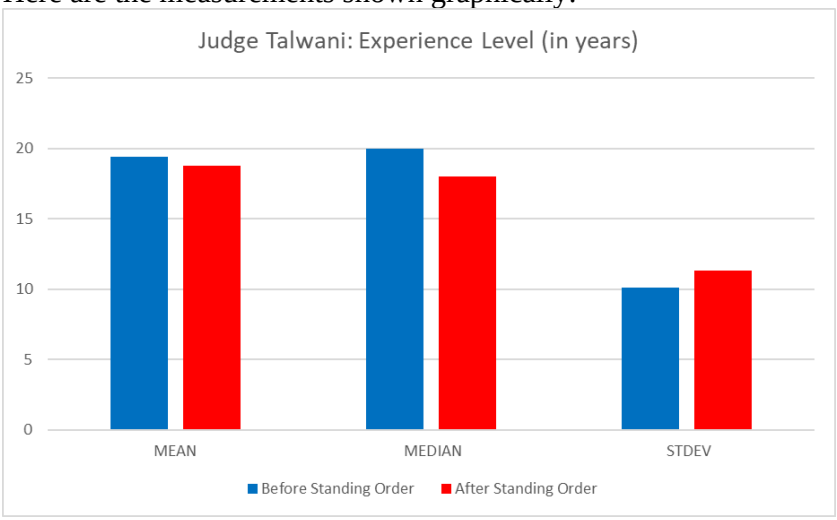
2. Judge Talwani Data: Six Months Before and After Implementation

I repeated the steps described above for Judge Talwani's initial scheduling conferences for the six-month pre-implementation period (April 9, 2019–October 8, 2015) and the six-month post-implementation period (October 9, 2015–March 9, 2019). The median, mean, and standard deviation results were similar to Judge Casper's. For the pre-implementation period, the mean is 19.41379 years of experience; for the six months after implementation, it is 18.8. As for the median, it went from 20 to 18 years of experience. And the standard deviation stayed

80. *See, e.g.,* Burke, *supra* note 7; ; Leigh Martin May, United States District Court for the Northern District of Georgia, Standing Order Re: Civil Litigation (Sept. 5, 2020), *available at* http://www.gand.uscourts.gov/sites/default/files/CVStandingOrderLMM.pdf; Miller, *supra* note 8;; Magistrate Judge K. Nicole Mitchell, United States District Court for the Eastern District of Texas, Order (Jan. 18, 2017), *available at* https://nextgenlawyers.com/wp-content/uploads/2018/01/Jr-Lawyer-Order.pdf; Judge Michael J. McShane, United States District Court for the District of Oregon, Opportunities for Young Lawyers (Aug. 7, 2020), *available at* https://www.ord.uscourts.gov/index.php/court-info/our-judges/judge-mcshane; Judge Alfred H. Bennett, United States District Court for the Southern District of Texas, Court Procedures and Practices, *available at* https://www.txs.uscourts.gov/sites/txs/files/Bennett.pdf (last visited Sept.30, 2020); Judge Richard W. Story, United States District Court for the Northern District of Georgia, Standing Order Re: Civil Litigation (Mar. 1, 2017), *available at* http://www.gand.uscourts.gov/sites/default/files/RWS_Order_CV_Litigation.pdf; Judge Mark H. Cohen, United States District Court for the Northern District of Georgia, Standing Order Re: Civil Litigation (Sept. 5, 2018), *available at* http://www.gand.uscourts.gov/sites/default/files/MHC_Standing_Order.pdf; Gray Miller available at https://nextgenlawyers.com/files/Judge-Gary-Miller-Court-Procedures.pdf

relatively consistent, going from 10.010 to 11.28661.

Here are the measurements shown graphically:

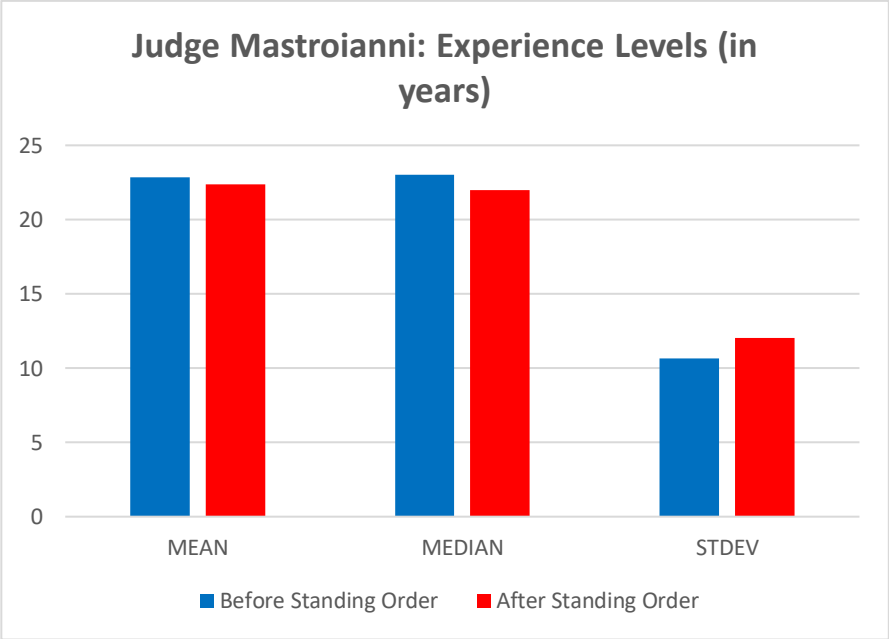


But again, I wanted to test the frequency with which "new lawyers" were appearing. That measurement shows a more meaningful difference. During the six months before implementation, there were 84 lawyer appearances at scheduling conferences before Judge Talwani. Only ten of those appearances were by more junior lawyers, for a percentage of 11.904%. During the post-implementation period, there were 177 lawyer appearances at initial scheduling conferences, and 37 of them were made by more junior lawyers. That means that a more junior lawyer appeared 20.90% of the time. The percentage nearly doubled.

3. Judge Mastrioanni Data: Six Months Before and After Implementation

As explained, I analyzed the data for the experience level of lawyer appearing before Judge Mastrioanni for all civil proceedings for the six months before and after he adopted the standing order. There is the concern that the proceedings during these two periods are dissimilar. However, a review of the minute entries shows that, at least at a high level of generality, they tended to be the same sorts of proceedings like arguments on discovery matters and dispositive motions.

As I predicted, the experience level of the lawyers appearing at these proceedings was higher than at the initial scheduling conferences before Judges Casper and Talwani. Before implementation, the mean was 23.12727 years of experience; for the six-month period after it was 22.22785. Pre-implementation the median was 23, and after it was 22 years. So neither the mean nor the median changed much. As for the standard deviation, it changed slightly, increasing from 10.65672 years to 11.97672 years.



The final question for this data is whether it shows a change in how often junior lawyers (seven years of experience or less) appear. Of the 55 lawyers who appeared before Judge Mastrioanni six months before the implementation of the standing order, only three were "newer lawyers"—for a percentage of 5.455. During the six months after implementation, there were 79 lawyer appearances with six by newer lawyers. So, newer lawyer appearances increased to 7.595%.

4. Summary of Data Six Months Before and Six Months After Implementation

In sum, the data shows that the mean, median, and standard deviation of attorney experience in years stayed relatively consistent during the six-month periods before and after implementation. But there appears to be a slightly higher frequency of junior lawyer appearances before these judges.

B. Longer Term Effects: The Data from January 2019–June 2019

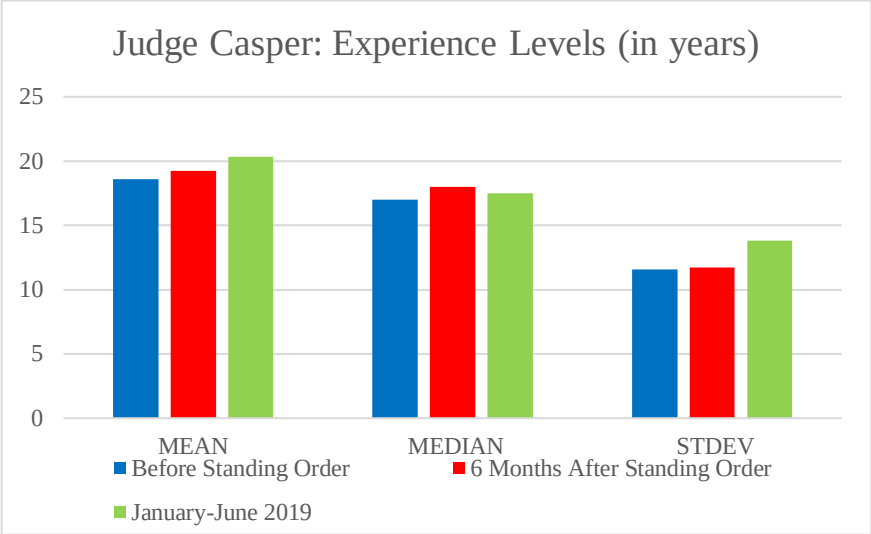
Given that any trend towards having a more junior lawyer appear was mild, at best, just after implementation, I wanted to investigate next whether two other factors could make a difference. The first is just the passage of time. Additional time of course allows for more behavior adjustment. This is so because counsel would need to become aware of the standing order, manage client expectations, and adjust case staffing. Second, by 2019, over half of the District Judges in the District of Massachusetts had adopted the order. This coordination among judges most likely increases the expressive powers of the order. Similarly, the adoption of various orders encouraging new-lawyer participation across the country have also enhanced the expressive force.[81]

81. Indeed, this movement is real. A very quick and very incomplete survey of just 20 federal courts revealed that nearly 50 federal judges have adopted such orders. *See* Judge William Alsup, United States District Court for the Northern District of California, Guidelines for Trial and Final Pretrial Conference in Civil Jury Trials Before the Honorable William Alsup (May 8, 2017), *available at* https://www.cand.uscourts.gov/wp-content/uploads/judges/alsup-wha/WHA-Standing-Order-for-JuryTrials.pdf; Burke *supra* note 7; Judge Edward J. Davilla, Uited States District Court for the Northern District of California, Standing Order for Civil Cases (May 3, 2019), *available at* https://www.cand.uscourts.gov/wp-content/uploads/judges/davila-ejd/EJD_Civil-Standing-Order.pdf; Donato *supra* note 47; Judge Yvonne Gonzales Rogers, United States District Court for the Northern District of California, Standing Order in Civil Cases (Apr. 2, 2019), *available at* https://www.cand.uscourts.gov/wp-content/uploads/judges/gonzalez-rogers-ygr/YGR-Standing-Order-Civil_Apr-2019.pdf; Judge Andrew J. Guilford, United States District Court for the Central District of California, Scheduling Order Specifying Procedures, *available at* http://www.cacd.uscourts.gov/sites/default/files/documents/AG/AD/Scheduling%20Order%20Specifying%20Procedures.pdf (last visited Oct. 1, 2020); Judge Lucy H. Koh, United States District Court for the Northern District of California, Guidelines for Final Pretrial Conferences in Jury Trials Before District Judge Lucy H. Koh (Sept. 23, 2019), *available at* https://www.cand.uscourts.gov/wp-content/uploads/judges/koh-lhk/Judge-Kohs-Standing-Order-for-Jury-Trials.pdf; Judge Barbara Lynn, United States District Court for the Northern District of Texas, Judge Specific Requirements, *available at* http://www.txnd.uscourts.gov/judge/chief-district-judge-barbara-lynn (last visited Oct. 1, 2020); May, *supra* note 80 ; Miller *supra* note 8 ; Mitchell, *supra* note 80; Judge Kimberly J. Mueller, United States District Court for the Eastern District of California, Standing Orders, *available at* http://www.caed.uscourts.gov/caednew/index.cfm/judges/all-judges/5020/standing-orders; Judge Jon S. Tigar, United States District Court for the Northern District of California, Standing Order for Civil Jury Trials Before District Judge Jon S. Tigar (Aug. 26, 2019), *available at* https://www.cand.uscourts.gov/wp-content/uploads/judges/tigar-jst/JST-Jury-Trial-Standing-Order.pdf; Judge Barry Ted Moskowiz, United States District Court for the Southern District of California, Civil Chamber Rules (Sept. 13, 2017), *available at* https://www.casd.uscourts.gov/Judges/moskowitz/docs/Moskowitz%20Civil%20Chambers%20Rules.pdf; McShane, *supra* note 80; Bennett, *supra* note 80; Judge Travis McDonough, United States District Court for the Eastern District of Tennessee, Judicial Preferences, *available at* https://www.tned.uscourts.gov/content/travis-r-mcdonough-united-states-district-judge; Story, *supra* note 80 ;Cohen, *supra* note 80 ; Judge Timothy Batten, Sr., United States District Court for the Northern District of Georgia, Instructions to Parties and Counsel (Apr. 5, 2016), *available at* http://www.gand.uscourts.gov/sites/default/files/TCB_Instructions.pdf; Judge Ann Donnelly, United States District Court for the Eastern District of New York, Individual Practices and Rules (Oct. 11, 2016), *available at* https://nextgenlawyers.com/wp-content/uploads/2017/01/AMD-MLR.pdf; Judge Jack B. Weinstein, United States District Court for the Eastern District of New York, Individual Motion Practice

of Judge Jack B. Weinstein, *available at* https://img.nyed.uscourts.gov/rules/JBW-MLR.pdf; Judge Elizabeth A. Wolford, United States District Court for the Western District of New York, Junior Lawyers, *available at* https://www.nywd.uscourts.gov/content/hon-elizabeth-wolford; Judge Lorna G. Schofield, United States District Court for the Southern District of New York, Individual Rules and Procedures for Civil Cases (Nov. 12, 2019), *available at* https://www.nysd.uscourts.gov/sites/default/files/practice_documents/LGS%20Individual%20Rules%20Civil%20%28updated%2011.12.2019%29.pdf; Judge Cathy Seibel, United States District Court for the Southern District of New York, Individual Practices for Judge Cathy Seibel (Sept. 4, 2018), *available at* https://www.nysd.uscourts.gov/sites/default/files/practice_documents/CS%20individual%20practices%20v9%20090418.pdf ; Judge Analisa Torres, United States District Court for the Southern District of New York, Individual Practices in Civil Cases for Analisa Torres (Nov. 13, 2019), *available at* https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AT%20Individual%20Practices%20in%20Civil%20Cases%20-%20Final%2011.13.2019.pdf; Judge Kimba M. Wood, United States District Court for the Southern District of New York, Individual Rules & Practices of the Hon. Kimba M. Wood (Mar. 11, 2019), *available at* https://www.nysd.uscourts.gov/sites/default/files/practice_documents/Individual%20Rules%20of%20Practice%20-%20UPDATED%2003-11-19.pdf; Judge Gregory H. Woods, United States District Court for the Southern District of New York, Individual Rules of Practice in Civil Cases (Nov. 14, 2019), *available at*
https://www.nysd.uscourts.gov/sites/default/files/practice_documents/GHW%20Civil%20Practice%20Rules%20November%2014%202019%20DRAFT.pdf; Judge Gene EK Pratter, United States District Court for the Eastern District of Pennsylvania, General Pretrial and Trial Procedures (Jan. 2020), *available at* https://www.paed.uscourts.gov/documents/procedures/prapol2.pdf; Judge Mark A. Kearney, United States District Court for the Eastern District of Pennsylvania, Policies and Procedure (Mar. 2020), *available at* https://www.paed.uscourts.gov/documents/procedures/keapol.pdf; Judge Michael Baylson, United States District Court for the Eastern District of Pennsylvania, Judge Baylson's Pretrial and Trial Procedures—Civil Cases (May 1, 2019), *available at* https://www.paed.uscourts.gov/documents/procedures/baypol.pdf; Judge Pamela Chen, United States District Court for the Eastern District of New York, Individual Practice and Rules (June 14, 2020), *available at* https://img.nyed.uscourts.gov/rules/PKC-MLR.pdf; Judge Kiyo Mastumoto, United States District Court for the Eastern District of New York, Chambers Practices (Sept. 24, 2020), *available at* https://img.nyed.uscourts.gov/rules/KAM-MLR.pdf; Judge Sanket Bulsara, United States District Court for the Eastern District of New York, Individual Practices of Magistrate Judge Sanket J. Bulsara, *available at* https://img.nyed.uscourts.gov/rules/SJB-MLR.pdf; Judge James Orenstein, United States District Court for the Eastern District of New York, Individual Practices of Magistrate Judge James Orenstein (Aug. 24, 2017), *available at* https://img.nyed.uscourts.gov/rules/JO-MLR.pdf; Judge Ramon E. Reyes, Jr., United States District Court for the Eastern District of New York, Motion and Individual Practice Rules of Magistrate Judge Ramon E. Reyes (Sept. 30, 2020), *available at* https://img.nyed.uscourts.gov/rules/RER-MLR.pdf

1. Judge Casper Data: January–June 2019

For the first six months of 2019, the mean experience level of the lawyers appearing before Judge Casper at initial scheduling conferences is 20.3167 years; the median is 17.5 years; and the standard deviation is 13.81725. This graph shows a comparison of the three periods:

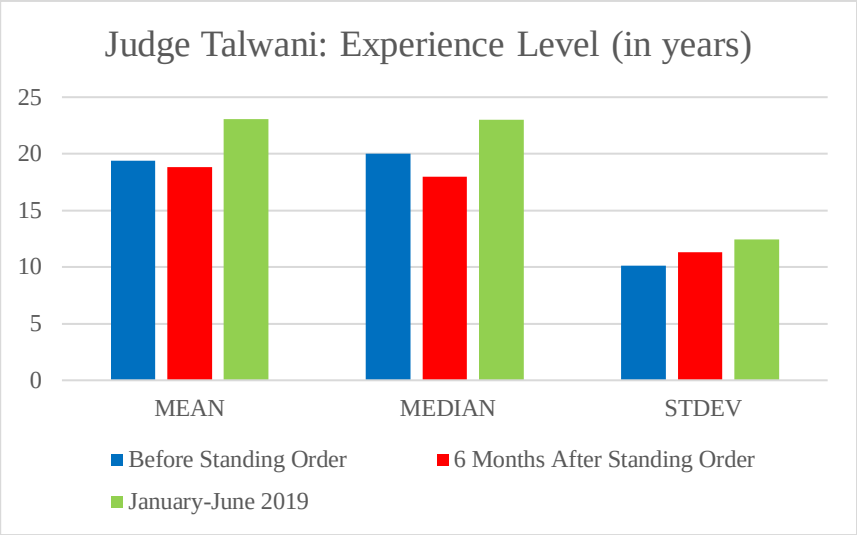


The graph shows that the mean and median changed little, but there does seem to be a change in the standard deviation. It has increased, which means there is a larger spread in 2019. But most interesting is that for the first six months of 2019, there were 60 lawyer appearances at initial scheduling conferences before Judge Casper. Seventeen of those were junior lawyers. This means that 28.3% of the lawyers fit the bill. Here is how this percentage increased for Judge Casper's data:

SIX MONTHS BEFORE	SIX MONTHS AFTER	2019
17.857%	20.225%	28.3%

2. Judge Talwani Data: January–June 2019

The 2019 data for Judge Talwani shows that the mean is 23.03846 years; the median is 23 years, and the standard deviation is 12.41426:



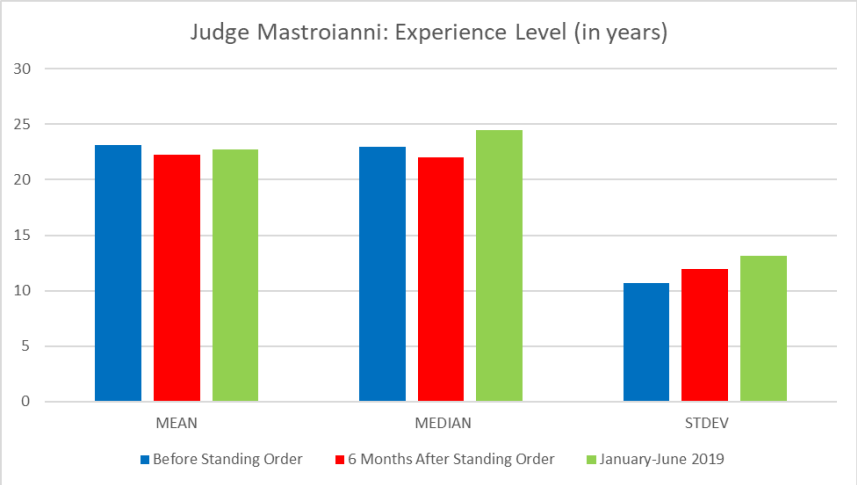
This is similar to Judge Casper's data in that the mean and median didn't fluctuate too much—and even increased during the first six months of 2019, but the standard deviation increased.

For this period, there were 52 lawyer appearances before Judge Talwani, with seven of them being by junior lawyers. That is a percentage of 13.46. Here are the percentages for the three periods:

SIX MONTHS BEFORE	SIX MONTHS AFTER	2019
11.904%	20.09%	13.46%

3. Judge Mastrioanni Data: January–June 2019

The data for Judge Mastrioanni shows the same trends. The mean and median stayed relatively consistent, and the standard deviation increased. Here are the changes shown graphically:



There were 60 lawyer appearances in the first half of 2019. Twelve of those appearances were by more junior lawyers. That means that 20% of the time, more junior lawyers appeared.

SIX MONTHS BEFORE	SIX MONTHS AFTER	2019
5.455%	7.595%	20%

4. Summary of Data and Statistical Significance

The above graphs show a few consistent trends. First, the medians and means changed little. But the standard deviations increased, as did the percentage of junior lawyers appearing.

Therefore, I wanted to see how the probability of a junior lawyer appearing before one of these judges changed from pre-implementation to the first half of 2019. During the pre-implementation era, the combined number of Rule 16 hearings for Judges Casper and Talwani and total hearings before Judge Mastrioanni was 251.[82] At those hearings, a more junior lawyer appeared thirty-three times, or roughly thirteen percent of the time. During the first half of 2019, the judges held 172 relevant hearings with junior lawyers appearing thirty-six times. That yields a percentage of almost twenty-one. So the percentage increased.

But is this increase meaningful? Statistical significance helps quantify whether a result is likely due to chance or to some other factor of interest. Said differently, measuring the statistical significance helps us determine

82. Recall that Judge Casper and Judge Talwani had other hearings as well, but for purposes of this analysis, only Rule 16 conferences are included.

if the change is merely random.

To measure statistical significance, I calculated the z-score to compare the frequency rate of junior lawyers appearing before implementation of the orders to the frequency rate of such lawyers appearing in the first half of 2019. A z-score measures a value's relationship to the mean of a group of values, measured in terms of standard deviations from the mean. Said differently, the z-score tells you the position of an observation in relation to the rest of its distribution.

Shown graphically, here is the relevant data:

Junior Lawyer Appearance?	Before Implementation	January–June 2019
Yes	33	36
No	218	136
Total	251	172

Here, the z value is -2.1281, and the value *p* is .03318. Applying a .05 significance level, which is the generally accepted level, the changes are in fact statistically significant, supporting the conclusion that the standing order has at least partially disrupted the norm of not sending junior lawyers to court. In other words, the increased frequency of junior lawyer participation is not simply by chance.

V. CONCLUSION

What does all this mean? To start, the data shows that judges have power aside from their ability to sanction. Again, to borrow from Cass Sunstein, judges are "norm entrepreneurs"—but not only when they are deciding questions of law or sanctioning parties. Their entrepreneurial power extends beyond that. In this particular circumstance, I suspect that the judicial standing orders provide cover to defect from the prevailing norm of sending senior lawyers to court. Scholars have shown the same was true in early American history when anti-dueling laws barred duelists from elective office.[83] Although it was gentlemanly to duel, it was also a gentleman's duty to serve as an elected official. So, says the gentleman, I will not duel so I can serve a higher calling of public office. Likewise, the one who decides whether to send a more junior lawyer to court has an escape valve from the norm: the judge has expressed a desire for junior lawyers to appear.

Some might say the judge's ability to disrupt a norm is unsurprising given the role judges play in society. But it is important to note that the increase in junior lawyer participation has not been earthshattering. To the contrary, even at Rule 16 conferences—where we might expect to see

83. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-73 (1995).

more junior lawyers—the percentage never topped 29%. And while Judge Talwani had a bump from just under 12% to over 20% during the first sixth months of implementation, that petered out to only 13.46% percent in 2019. In other words, simple expression of a judicial preference does not turn the tide overnight.

Next, in implementing standing orders, judges can and should learn from the literature on norms. This is so because the scholarship can teach judges how to make their messaging more impactful—or less so if the moment requires. The parallels between the scholarship on norms and standing orders work because both occupy the nebulous space where there is order but not law. As an example, judges could learn from Richard McAdams' work on esteem-based norms and the conditions necessary for their occurrence.[84] Generally, McAdams posits that consensus and publicity are required for norm creation.[85] The data above bears that out. Over time, more judges adopted the junior-lawyer preference (increased consensus) and presumably the bar grew increasingly aware of the preference (increased publicity). Consequently, there was more compliance as consensus and publicity went up. Formulating consensus and notifying the public also is consistent with the law. *Supra* II. Interestingly, McAdams also identifies risk of detection as an important feature of norm development. This is not an obvious aspect of the studied standing order.[86] But some judges employ a Notice of Argument by Junior Lawyer.[87] Such a notice would give counsel a sense that someone is monitoring compliance—the feature that McAdams says matters.

Finally, and perhaps most importantly, judicial messaging via standing orders deserves more attention and study. As the analysis above shows, even a standing order that is not mandatory has an effect. This type of study—and others that could be undertaken—has the ability to investigate whether laws and rules impact behavior not merely because of threat of sanction but because of their expressive powers. As for standing orders that in fact threaten sanction for noncompliance, those, too, need

84. McAdams, *supra* note 11, at 358. In this article, McAdams offers the idea that, under the right conditions, the desire for esteem produces a norm.

85. *Id.* at 358–59.

86. Of course a judge could review someone's biography online or guess at a lawyer's experience level, but there is no immediate mechanism for detection. Indeed, with the studied standing order, it's arguably impossible to measure compliance because "junior lawyer" is not defined. This of course is another way in which judges could enhance a standing order. Besides, lawyers generally like clear instructions and rules.

87. *See, e.g.*, Judge Sarah D. Morrison, United States District Court for the Southern District of Ohio, Standing Order, Re: Civil Cases, Opportunities for Newer Attorneys (Oct. 18, 2019), *available at* https://www.ohsd.uscourts.gov/standingordersJMorrison ("After a civil motion is fully briefed, any party may forthwith alert the Court by a docketed Notice that, if oral argument is granted, the noticing party intends to have a newer attorney (who has graduated from law school within the past six years) argue the motion (or a portion of the motion).

attention. For one thing, such study could show whether the addition of a sanction is impactful to changing outcomes. More generally, studying the power of judicial messaging complements our understanding of the judicial role. And judges and society need to appreciate the aspects of judicial power to assure that power is being used thoughtfully.