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REFLECTIONS OF A LITIGATOR: *SERRANO V.*  
*PRIEST*  
GOALS AND STRATEGIES

Sid Wolinsky<sup>1</sup>

It is a special privilege to be present at the beginning of something significant. I was fortunate to be able to head up the litigation team in *Serrano*, from the drafting of the initial complaint in 1968 through the argument in the California Supreme Court in *Serrano III* in 1977.

In this article, I intend to describe what we hoped to achieve at that time and the strategies we used, and then to circle back and offer some observations about what we might learn from the litigation.

I. THE BEGINNING

In 1968, I was a young attorney with a business litigation firm in Beverly Hills. I also served as a volunteer attorney at the Western Center on Law and Poverty, a government funded program that had been established just the year before. One sunny afternoon, Derrick Bell, the director of the Center, asked me if I might be interested in heading up a litigation effort to

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challenge the inequality of the public school financing system in California. I was 31 years old, insufficiently cautious, and clearly did not know what I was getting into. What ensued was over a decade of intensive and challenging litigation, including three separate appearances before the California Supreme Court and the longest trial of my 57-year professional life.

We assembled a small team of public interest lawyers, as well as several law professors who had been writing about the deficiencies of the school financing system. Multiple discussions resulted in us formulating three sequential objectives.

The first was to define and establish, for the first time, the legal right to equal educational opportunity in the public school system (in legal jargon, to establish a cause of action). The second objective was to gather and put on record overwhelming evidence about the school financing system in California which would establish, beyond any reasonable dispute, the wealth-based inequity in educational opportunity. The final goal was to provide a framework for a remedial and alternative financing system to replace the existing structure.

If Mrs. Chambers, my sixth-grade teacher, were still around, I am quite confident that she would have given us an “A” on the first two objectives and probably no more than a “C” on the last one. Pursuit of each of the three objectives required multiple strategic and procedural choices. Several of the most important of these are described below.

## II. ESTABLISHING THE CAUSE OF ACTION.

### A. Developing the Theory

The legal team made the decision to focus on the California court system (rather than the Federal system) in its attempt to create the legal right to a more equitable

school finance system. The seventeen-page complaint was filed August 23, 1968, in Los Angeles County Superior Court. It named John Serrano Jr., a psychiatric social worker for the City of Los Angeles and the parent of a child in the Baldwin Park school district, as the lead plaintiff, along with the parents of twenty-six other Los Angeles County school children. In formulating the legal basis for the complaint, we relied heavily on the legal theory that had been developed primarily by professors Jack Coons and Steve Sugarman at Boalt Hall (now U.C. Berkeley School of Law).

As expected, the trial court dismissed the complaint. Plaintiffs appealed and the California Supreme Court reversed the trial court and held that the plaintiffs had stated a cause of action. 5 Cal. 3d 584; 487 p. 2d 1241; 96 Cal. Rptr. 601 (1971). The Court reasoned that under both the state and federal equal protection clauses, education is a “fundamental interest,” and that wealth-based discrimination is a “suspect classification.” As such, the school financing system, resting heavily upon the local property tax, could not survive a “strict scrutiny” standard of review. *Serrano I* has been cited in 670 law review articles. The case was remanded to the trial court to determine whether the substantial inequality in a school district ability to tax and spend resulted in inequality of educational opportunity.

### III. STEPS NOT TAKEN

To have a complete picture of this early phase of the litigation, it is important to note what plaintiffs’ counsel did not do, as well as the affirmative steps which we did take. Plaintiffs’ lawyers did not file in federal court. Plaintiffs did not move to certify the case as a class action. We did not name the governor or the legislature as defendants. We did not raise any issues concerning discrimination of the finance system against racial minority groups.

Plausible arguments could be made for and against each of these decisions. Taken together, however, the choices do appear to have contributed to the ultimate success of the case and to have kept it from being bogging down in needless procedural bickering. For example, a case of this complexity and magnitude would usually be brought as a class action. However, plaintiffs' attorneys concluded that this was not technically necessary in the *Serrano* litigation because they had named Ivy Baker Priest, the Treasurer of California as a defendant, thus giving the court jurisdiction to mandate statewide relief. By not pursuing the case as a class action, the plaintiffs' lawyers saved an estimated six months of time that would have been required to brief and certify the class, not including a possible appeal of the issue.

By not naming the governor or legislature as defendants, we avoided the additional briefing, complexity, and additional time required when further parties are involved.

Perhaps the most significant strategy choice was the decision to avoid federal court and to file in the California court system. The decision was a fortunate one, given the fact that the *Serrano* plaintiffs prevailed in the California state court even though, in the very similar case of *San Antonio Independent School District v. Rodriguez*, U.S. (1972), the United States Supreme Court reached the opposite result.

#### IV. ESTABLISHING THE FACTUAL RECORD OF INEQUALITY

##### A. The Trial

Having determined that the plaintiffs had stated a valid cause of action under the equal protection clause of the California State Constitution, the California Supreme

Court, in *Serrano I*, remanded the case to the state Superior Court for trial of the facts. This included the key question of whether substantial inequality in the ability of school districts to levy taxes and to spend equaled inequality of educational opportunity (sometimes referred to as the “cost-quality” issue).

Preparation for the trial presented major challenges. The case involved some 6,000,000 students in over 1,000 school districts. To complicate matters further, after the California Supreme Court decision but before the trial, the legislature had responded to *Serrano I* with legislation known as SB 90.

SB 90, enacted in 1972, moved California in the direction of greater educational financing equality, allocating substantial additional funds to poor school districts. For example, it raised the minimum level (known as the “foundation level”) of spending in high school districts from \$488 to \$750 per pupil in average daily attendance. Similarly, the foundation level for elementary school districts was almost doubled. However, the basic structure of school finance that existed before the *Serrano I* decision was not changed, which led the trial court to ultimately determine that even after implementation of SB 90, the California school financing system could not meet California constitutional standards.

Because plaintiffs’ counsel were concerned about the complexity and size of the case, we made a special request that an experienced judge be specially assigned for the trial. Judge Bernard S. Jefferson was given the assignment. Jefferson, a renowned legal scholar, was an acknowledged master of the law of evidence, and his book on the subject was used by virtually every judge in the state.

Trial began on December 26, 1972. It consumed 60 days of trial over a period of six months, with multiple briefings and arguments between trial days. Total

briefings were hundreds of pages long and the trial transcript was over 6,000 pages.

This was a formidable undertaking at a time when there was no internet or cellular communication, no computers, no faxes, no internet research, no high-speed copiers, nor other technology which trial lawyers now routinely rely upon.

## B. The Evidence

Plaintiffs' counsel elected to use several different types of evidence. This primarily consisted of (1) purely statistical and financial data, with heavy reliance on comparisons between high-wealth and low-wealth school districts in terms of both money spent and educational outputs, (2) the testimony of school district superintendents and other educators, and (3) the testimony of researchers and other experts in education. In an effort to bring the voluminous but dry statistical data to life, we frequently focused on the comparison between Baldwin Park and Beverly Hills school districts. This provided a dramatic contrast, which the media, politicians and the public could immediately grasp.

Driving from Baldwin Park west on the San Bernardino Freeway to Beverly Hills only took twenty-five minutes, but in many respects the two communities might as well have been on different planets. The public perception of Beverly Hills was largely an accurate one; it consisted of multi-million-dollar mansions surrounded by manicured grounds, swimming pools, and multi-car garages. This enviable tax base was augmented by the banks, insurance companies, high end department stores, and office buildings along Wilshire Boulevard and the surrounding streets.

Nearby Baldwin Park presented a different picture – drab one-story stucco homes interspersed with mom-and-pop grocery and liquor stores, gas stations, and burrito stands. The result of this contrast was that with two and one-half times as many students as Beverly

Hills, Baldwin Park had about \$1 million less each year to spend on education. The visual image of the oil wells on the Beverly Hills High School grounds highlighted the contrast.

A second type of evidence that we presented consisted of the testimony of school superintendents and other supervisorial personnel. These were selected from both high-and-low wealth districts. These witnesses gave detailed accounts their educational offerings as well as their needs and resources. Trial lawyers for plaintiffs would normally have hesitated to have put on superintendents from school districts with a strong tax base; they were predictably unsympathetic to plaintiffs' objectives. However, wealthy districts had to argue that they would be badly hurt in their educational offerings if they had to cut back on spending. Thus, they were in effect forced to be plaintiffs' witnesses and to affirm the relationship between spending and quality of educational offering – the key question in the litigation.

### C. Rebuttal Evidence

An additional category of witnesses presented by plaintiffs at the trial were researchers and experts on education generally and school financing particularly. Plaintiffs made a strategic choice in presenting this social science testimony. They decided not to put on this evidence as part of their case-in-chief; instead, it was all presented as a part of plaintiffs' rebuttal case. This is not an unusual tactic in a lengthy case. Pushing evidence from the main case back to the rebuttal phase gives plaintiffs a stronger "last word." In *Serrano*, it served additional and important strategic purposes. By making this rebuttal testimony, plaintiffs intended to make the point that *defendants* had the burden to establish that higher spending did *not* equate with greater educational opportunity. Plaintiffs also took pains to emphasize this burden of proof argument in their reply briefing. The burden of proof was especially critical in *Serrano*, as it

is in almost all school financing cases, because it is actually impossible to definitively establish the spending/quality correlation.

Finally, rebuttal was used as an opportunity to present evidence which responded to defendants' argument that large sums of additional money had been allocated by the SB 90 legislation. In a nutshell, plaintiffs' response was that plaintiffs were alleging inequality of educational opportunity, not denial of an "adequate" education.

#### D. Evidence on Remedy

Finally, the rebuttal phase of the case was also used by plaintiffs to present most of their evidence concerning a potential remedy. The most crucial tactic of plaintiffs, with respect to the remedy, was to assiduously avoid requesting that the court dictate how educational dollars should be allocated. The original complaint did include in its relief section a request for an order that the legislature reallocate school funds to bring the state within constitutional boundaries.

However, in the final round of briefing and arguments, the plaintiffs' attorneys were more modest in their requests. They recognized that the court was institutionally limited in its ability either to formulate the remedy for such a complex and political problem or to implement it effectively. We did present substantial testimony and evidence describing a variety of possible solutions to the educational inequality issue. However, we presented them only to demonstrate to the court that there were multiple ways in which the defendants could comply with an appropriate order, but not to argue that the court should dictate which remedial steps ultimately should be implemented.

The range of possible remedial systems which plaintiffs presented included "power equalizing." This was a plan proposed by Professors Coons and Sugarman. Under their system, school districts choosing the same

tax rate would spend at the same level. Other remedial proposals presented to the court included a plan under which the state would take over all property taxation and distribute proceeds to school districts in direct proportion to enrollment.

#### E. Findings of Fact and Conclusions of Law

As the trial neared its conclusion, we requested, and were granted, permission to draft proposed findings of fact and conclusions of law. Although this was not an unusual procedure, in this case it was of great importance. Having anticipated the court's affirmative response to the request, plaintiffs' attorneys started to draft proposed findings starting from the earliest days of the trial. Plaintiffs ultimately expended hundreds of hours in drafting the proposed findings and conclusions. These served multiple functions and the time was well spent.

Drafting the findings as the trial was in progress enabled us to tailor the evidence presented to our factual and legal arguments as we went along. Conversely, it enabled us to fine-tune the drafts of the findings and conclusions to closely mesh with the actual evidence presented.

When the trial ended, the findings and conclusions became an advocacy mechanism in their own right. They served as a review of all of plaintiffs' evidence – a review which was both extremely comprehensive and very detailed.

After the trial ended, the court adopted 357 findings of fact and conclusions of law. In doing so, Judge Jefferson found for plaintiffs on every important issue. These findings and conclusions, coupled with the 106-page opinion of the court filed in April 1974 and the lengthy trial record, made it extremely difficult for the defendants to attack the court's determinations on appeal.

In *Serrano II*, the California Supreme Court affirmed the trial court's decision, 18 Cal. 3d 728 (1976). The Supreme Court's actions included approval of both the timetable for relief set by the trial court and the trial court determination that the legislature's action in passing SB 90 was not sufficient to meet California constitutional standards.

## V. LESSONS LEARNED

What lessons might be learned from this lengthy and significant litigation? Several aspects of the case stand out as particularly noteworthy, for school financing litigation and for public interest advocacy in general.

First, *Serrano* serves as an excellent example of the importance and power of impact litigation as well as its limitations in trying to bring about social change. It is highly unlikely that substantial reform of school financing in California would have taken place without the litigation. On the other hand, given the institutional limits of the judicial system in fashioning or implementing an actual remedy for as complex an issue as school financing, the litigation alone was not sufficient. Only the sustained involvement and activism of educators, political figures, experts, academicians, and community groups, along with the litigation, made actual reform possible.

Second, teamwork counts. *Serrano* was, at every stage, a group effort. Every procedural step, every argument, every strategy, and every tactical move was discussed and debated at length with input sought out from multiple disciplines and viewpoints. For example, the extraordinary contribution to the litigation of academicians, including the brilliant work of professors Coons, Sugarman, and Horowitz, stands as a model of collaboration between academicians and legal practitioners.

Third, every detail counted. In a case like this, there is no such thing as overdoing the amount of work or attention or time spent. Now, years later, it is easy to forget that the case might well have been lost and that the successful California Supreme Court decision was decided by a 4 to 3 vote.

Fourth, success in a school financing case like *Serrano* requires a sustained effort over a substantial period of time. Those who covet instant gratification in their work should look elsewhere.

Finally, it is important to note the necessity for institutional support. Idealism, good intentions, and theory can go a long way to bring about change, but cases like this require a substantial commitment of funds, personnel, and other resources, often over many years. In the case of *Serrano*, the nonprofit law firm of Public Advocates, Inc. filled that role. The firm not only paid for all the expenses of the trial and the appeals, but expended many hundreds of hours of attorney, paralegal, and administrative support time in the effort. This was done with no assurance of ever recovering any of the expenditures or being compensated for the time spent. This was a very serious risk for Public Advocates, which had only started in 1971. In *Serrano III*, 20 Cal.3d 25; 41 Cal.Rptr. 315; 569 P.2d 1303 (1977), which has been cited in 1,088 cases and 122 law reviews, the California Supreme Court, in addition to affirming the trial court's response to *Serrano II* (including the six-year timetable for compliance), affirmed an attorney fee award of \$800,000 under the equitable "private attorney general" theory of fee-shifting. This concluded, on a distinctly happy note, my decade-long involvement with this significant litigation.