

**Report to the ABA Task Force on
Preservation of the Justice System by the
ABA Task Force on Justice is the Business of Government**

On September 24, 2009 the Executive Committee of the ABA Board of Governors, at the request of the Standing Committee on Judicial Independence, approved the creation of the Justice is the Business of Government Task Force (“Jbiz”) to implement and carry forward the recommendations of the May 7-9, 2009 Summit on the Critical Role of Fair and Impartial Courts, which had addressed issues affecting the adequate funding of state courts. The membership on Jbiz is set forth in App. 1.

Jbiz has attempted to address the issue as to how the ABA can be most effective in aiding state judicial systems in receiving adequate resources with a budget that provides for appropriate facilities and equipment, security and just compensation for judges.

It had been earlier recognized that the National Center for State Courts (“NCSC”) is an indispensable colleague in this effort because of its relationship as the staffing body for the Conference on Chief Justices and the Conference of State Court Administrators, as well as its leadership and expertise in the administration of state court justice. It is noteworthy that the President of NCSC agreed to serve as one of the co-chairs of Jbiz.

There have been three prongs to the Jbiz initiative:

1. Consideration of feasibility and support for substantial additional federal funding for state courts.
2. Funding of the state courts at the state and local levels.
3. Development of Messages as to “Importance of State Courts and Dangers of Underfunding,” and collection and dissemination of data and information as to “best practices” as well as “adverse impacts” as would be helpful in advancing improved funding by all governmental levels.

Chronic inadequate funding of state court judicial systems recalls Alexander Hamilton's observation that the judiciary is "the least powerful branch...the weakest of the three branches of power" with "no influence over either the sword or the purse. . .". Fed. 78.¹

Concerns about inadequate funding for state courts are not new. In 1993 a report on a Conference sponsored by the Roscoe Pound Foundation found:

. . . The lack of sufficient resources to carry out constitutionally mandated judicial functions is increasingly seen both as a threat to the integrity of the court system and to the independence of the judiciary itself. During the past few years, budget cuts in a significant number of states have resulted in the suspension of civil trials and in criminal dockets so clogged that potentially dangerous defendants have had to be released on bail. Recent surveys have confirmed the perception of those working in state court systems across the country that the delivery of justice is endangered by the funding crises that afflict a growing number of states and that show few signs of abating in the future. . . (at 7)

The situation has worsened in the intervening years and the economic recession with continuing state and local government budgetary shortfalls have accelerated the threat to the ability of state courts to do their constitutional tasks in the administration of justice.

State courts are increasingly underfunded and undervalued. They have too few advocates and even fewer friends. Sadly, those who speak ill of the courts and of their decisions are never in short supply.²

There is an unfortunate lack of understanding of the importance and role of state courts in the business of government in which they serve vital core functions. Chief Justice Marshall's forceful statement in the 1830 Virginia constitutional debates should still resonate "...the Judicial Department comes home in its effect to every man's fireside; it passes on his

¹ With his footnoted reference to Montesquieu - "the judiciary is nothing."

² New Hampshire Chief Justice John T. Broderick, Jr., *Justice at Risk: Will the Profession Step Up?* Remarks at Syracuse University of Law, February 22, 2010.

property, his reputation, his life, his all”. Unfortunately the relative value of this core function of government has not been successfully advocated in the legislative and executive warrens of government from whence the lion’s share of resources for the courts must come.

Recognition of the economic stress and in many cases on-going budgeting deficits with which governmental entities are faced forces recognition by state courts to insure that their operations are as efficient and effective consistent with the performance of their mandated governmental functions--and suitably accountable for the funds they receive. Towards that end, NCSC has developed for consideration by the Conference of Chief Justices as well as the Court Administrators, a set of “re-engineering principles” directed to court operations, governance and funding. Jbiz coordinated comments on these principles by interested ABA entities, and believes they are worthy of serious consideration by each state. We await action on these principles by the Conference of Chief Justices before advancing them to the House of Delegates. The Court Funding principles are of particular note.

Principle I: The Judicial Branch should make budget requests based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models, identification of essential functions and application of appropriate performance measures.

Principle II: The Judicial Branch should adopt performance standards with corresponding, relevant performance measures.

Principle III: The Judicial Branch budget requests should be considered by the legislature as submitted by the judiciary.

Principle IV: The Judicial Branch should have the authority to allocate resources with a minimum of legislative and executive branch controls including budgets that have a minimal number of line items.

Principle V: The Judicial Branch should administer funds in accordance with sound, accepted financial management practices.

Principle VI: Courts should be funded so that cases can be resolved in accordance with recognized time standards by judges and court personnel functioning in accordance with adopted workload standards.

Principle VII: Responsible funding entities should ensure that courts have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facilities guidelines.

Principle VIII: Courts should be funded so as to provide for technologies comparable to those used in other governmental agencies and private businesses.

Principle IX: Courts should be funded at a level that allows their core dispute resolution functions to be provided through essential dispositional alternatives.

Principle X: Courts should be funded so that fees and fines are secondary to the general fund as a means of producing revenue for the courts and that the level of fees does not deny reasonable access to dispute resolution services provided by the courts.

A. **Federal Funding**

The concept of substantial federal funding for state courts is not new. During the 1970s there was a tremendous surge of federal grant money into justice agencies through the Law Enforcement Assistance Administration (“LEAA”). This concept fell into relative disrepair in the following decades and at present the main, but limited, source of federal grants for state courts comes through the State Justice Institute. Jbiz believes that a substantial increase in SJI funding is desirable and that together with NCSC and other interested agencies, the ABA, with approval by the Board of Governors, should participate in the implementation and support of strategy towards that end. Consideration of other sources of federal grant funding is on-going including re-allocation of funds from the Bureau of Justice Assistance of the Department of Justice, which grants have primarily been directed to law enforcement.

B. Funding of the State Courts at the State and Local Level.

There is, however, another realism -- funding by state and local legislatures of our courts is a “hardball” political process -- a battle among many interests to allocate inadequate revenues. Former Chief Justice Mike Wolff of Missouri described the problems:

In the political process, especially as it plays out in state capitols, there are three commodities: money for campaigns, blocs of votes, and information. Judges are poor lobbyists. In this political marketplace, courts have no interest group constituency, they do not contribute financially to political campaigns, and the only information they have is about how they operate.

As long as courts are subject to the political marketplace, they need supporters from across the political spectrum—even those ordinarily opposed to one another—who possess the commodities that are valuable in this political marketplace. It is a delicate balance, however; courts must provide information about the values of strong court systems to these political players while remaining free from any undue influence on the courts’ decision making process.

Judges do not have much influence in the halls of the capitol. They are most effective and essential at the local level. Many judges invite local legislators to their courthouses and show them how the courts operate. In this way, courts and judges can be seen as constituents and as fellow public servants working on behalf of the legislators’ other constituents. By contrast, when judges show up in the capitol, they are seen as supplicants—just one of many special interest pleaders. And in the political-governmental marketplace, judges have nothing they can ethically trade.³

The judiciary, an equal and independent branch of government, is too often seen “as another political player...to advance a preferred social, economic, or political agenda”.

California Chief Justice Ronald George. USA Today, October 17, 2010- Our View on Judicial Independence: Judges Face Reprisals for Unpopular Rulings.

³ Remarks by the Chief Justice Michael Wolff of Missouri.

As is evident from the NCSC's most recent State Budget Survey included by reference as App. 2⁴, there is not a uniform approach to funding state courts. Also evident are the various impacts of underfunding on the operations and administration of the courts and the efforts that are in progress to survive.

The responsibilities for design of the state courts budgets and the strategies for implementation are those of the Chief Judge and the Court Administrator. Even where there is "split" funding between the state and local entities some coordination is necessary. There are individual state and local issues that are either favorable or impediments to success in the budgeting process and the chief judges and court administrators are aware of what will or will not be helpful in the process, and what groups they believe would be helpful (or a hindrance) in the support of the budget. This calls for the closest possible cooperation among the appropriate bar associations – state, local and specialty -- and court representatives in coordinating a consistent support.

C. Development of Messages of Importance of State Courts as well as Dangers of Underfunding; collection and dissemination of data and information as to "best practices" and "adverse impacts" as would be helpful in advancing improved funding by all governmental levels.

Any messages should be rid of complaints about past underfunding premised on a commitment to improve service to the public at a lower cost over the long term with the intended to be a constructive contributor to finding solutions consistent with their role as a vital core function of government. Messages should be developed that emphasize the "value" of the courts in the business of government as well as to the citizens of the state.

⁴ The NCSC's State Budget Survey as of December 2010 is a page review of the budgetary impact on the court system in each state and is available at www.NCSC.org/budgetsurvey.

Messages are seen to have broad impact that reflect “best practices” in approaching funding as well as “adverse impacts” resulting from underfunding. The professional study prepared for the Florida Bar as to the adverse impact to the Florida economy from delays in the court’s ability to resolve civil disputes is a prime example of data that is of aid in the budgetary process

II. CONCLUSION

Jbiz is anxious to participate in the Preservation of the Justice System Initiative and stands ready to be of such assistance as requested.

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