Without Fear or Favor

A Report by DRI's Judicial Task Force

DRI™
The Voice of the Defense Bar

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EXECUTIVE SUMMARY

In 2005 the leadership of DRI decided to examine the state of the judiciary in the United States. It formed a ten (10)-member Judicial Task Force for this purpose, chaired by Board member John C. Trimble; the members are practicing defense lawyers from all parts of the nation who belong to DRI and to a state or local defense organization.

The mission of the Task Force was, first, to learn about the current status and broad issues facing state courts at all levels. Second, the Task Force was to identify and conduct in-depth research on particular issues that threaten the independence of the state judges. Third, it was to determine whether DRI, as the largest organization of defense lawyers, could or should play a role in ensuring that independence. Fourth, the Task Force was to create a plan or model approach that DRI and state and local defense organizations ("SLDOs") could use in addressing the identified issues at the state level.

The Task Force identified five (5) major areas of concern: (1) public funding of judicial systems in the states, (2) compensation paid to state judges, (3) courthouse security, (4) the judiciary's institutional legitimacy including its independence and accountability to the rule of law, and (5) the variety of procedures followed by states in selecting judges.

The Task Force found a wealth of information about the judiciary prepared by other organizations, a widespread concern about issues involving the judiciary's role in effectuating the rule of law, and a need for better education of the public on the role of the judiciary. It surveyed and interviewed individual judges, practicing lawyers, and laypersons. The members met as a group several times to discuss their findings, refine their recommendations, and draft this report to the DRI Board of Directors.

The Task Force first listed sixteen (16) general findings that focus on matters such as: (1) a lack of awareness in some segments of the American legal profession regarding the problems faced by judges, (2) a need for individual defense lawyers and defense organizations to become more involved with efforts to solve these problems, (3) a need to educate the public about the role of the judiciary including the importance of judicial independence and judicial accountability to preservation of the judiciary's institutional legitimacy and ability to implement the rule of law, (4) the public impact of reports—often negative—in the mass media discussing judges' controversial decisions without placing them adequately within the context of our system of justice and the rule of law, (5) the desirability of increasing merit selection of judges, decreasing divisive battles over who will take the bench, whether elective or appointive, and avoiding any process that creates an appearance that judges do

not make impartial decisions under law, and (6) adequate personal compensation as a factor in attracting and keeping the best judges.

Each major section of the report concludes with an extensive list of recommended actions that DRI, the SLDOs, individual defense lawyers, and the organized bar generally may consider for each state. These include (1) working toward formation of reasonably non-partisan judicial nominating committees, (2) assisting in the preparation and distribution of information to voters through traditional, non-partisan voting guides, or through websites, which offer voters a significant amount of valuable information about candidates for judicial positions, (3) setting up training programs for new judges, (4) forming independent committees of judges, lawyers, and the private sector—outside of the state legislature—to set or recommend judges' salaries, and (5) forming committees to examine and then respond to unwarranted attacks on judges.

The Task Force believes that DRI can work with SLDOs interested in setting up committees and study groups to examine judicial matters in their state by providing a national clearing house of information and ideas and by offering support in these efforts.

FOREWORD

The DRI Judicial Task Force was formed in June 2005 to examine issues and problems facing American judges and to determine whether DRI might have a role in addressing these matters. Its purpose was spelled out in its Mission Statement: "to research and identify issues in the states that threaten to disrupt the independence of the judiciary. Information gleaned from such research will be used to create a standardized plan that may be utilized by DRI and/or the SLDOs in addressing particular areas of judicial crisis."

The DRI President at that time, Richard T. Boyette, appointed John C. Trimble, an Indianapolis defense lawyer and member of the DRI Board of Directors, as Chair of the Task Force. The other members were appointed by Presidents Boyette and David E. Dukes in consultation with Mr. Trimble and DRI Executive Director John R. Kouris. President-Elect Patrick A. Long served as Liaison to the DRI Board of Directors, and Tyler M. Howes and Meg Connolly provided staff support. Other DRI members serving on the Task Force were Martin J. Buckley of St. Louis, Randall J. Dean of Los Angeles, Richard L. Edwards of Boston, Jeffrey G. Frank of Seattle, Keith E. Fruehling of Urbana, Denise A. Holzka of New York City, Anne M. Kindling of Topeka, Lynn M. Roberson of Atlanta, Mary Massaron Ross of Detroit, and Michael S. Ryan of St. Paul.

The Task Force has collected and studied much of the voluminous material produced by many other groups. It has conducted surveys and interviews of DRI members, judges, the media and business leaders to gain an understanding of the problems and challenges faced by state judiciaries. The Task Force met formally as a group in November 2005, March 2006, and October 2006. The product of its efforts is this report.

Throughout this report the reader will see frequent reference to the term "SLDO." SLDO is the acronym utilized by DRI to refer to the sixty-four (64) independent state and local defense organizations that exist in the United States and Canada.

A NOTE FROM THE CHAIR

Serving as Chair of the DRI Judicial Task Force has been an eye-opening experience. Although I considered myself to be reasonably well informed on issues affecting lawyers in America, the scope and magnitude of the whole issue of judicial independence had escaped my notice. I realized almost immediately that each of our views about the state of the judiciary is shaped by our own local judicial issues and that we tend to take our judges for granted.

In my home state of Indiana, the issue for years has been judicial salaries. However, my fellow Task Force members came to the table concerned about out-of-control special interest spending on judicial elections in one state and postponement of civil jury trials due to lack of funding for juries and court staffs in another.

It became apparent to all of us that our individual views may be shaped by our local issues, but the public's view is affected by television, talk radio, and political rhetoric. A local judicial matter can easily become a national issue when it has been picked up by the media. Thus, we realized that the public's view of judges in our respective states was being colored by issues from elsewhere that may not be our own local concern.

As we conducted our research, surveying, and interviewing, we learned four (4) very important things. First, we learned that there is a wealth of excellent research, polling, and writing that has been done by legal scholars, judicial groups, bar associations, and not-for-profits, and that it could be useful to defense lawyers for DRI to serve as a clearinghouse for information.

Second, we learned that the public has limited understanding of the role of judges in our system. Much public education is going to be needed, and defense lawyers can be a catalyst in bringing coalitions together to provide it or join in existing coalitions.

Third, we learned that this is a long-term problem. Public views about the judiciary have been shaped over a long time, and the effort to bring about change will require patience and perseverance.

Lastly, we learned that organized defense lawyer groups have been involved on occasion in issues affecting judges, but few groups have a structure in place to address judicial independence on an ongoing basis. DRI can play a significant role in helping defense lawyers develop a voice on this important issue.

John C. Trimble

METHODOLOGY

To supplement its research and draft meaningful recommendations, the DRI Judicial Task Force surveyed state and local defense leaders in addition to the many DRI leadership groups to identify the threats perceived to be the greatest at the state level and also to determine what, if any, processes are in place to deal with the issues.

The Task Force came up with eleven (11) questions, the majority of which allowed for open-ended responses. Questions ranged from "How can local defense organizations and/or defense lawyers have an impact on addressing threats to the judiciary?" to "Does your SLDO have an established court and/or judiciary committee?" The survey was sent to a group of two hundred, seventeen (217) individuals, which consisted of the DRI State Representatives, DRI Board of Directors, and the presidents and officers from approximately sixty-four (64) SLDOs. Seventy responses were received, which is nearly a thirty-two (32 percent) percent response rate.

Fifty-eight (58 percent) percent of respondents classified "politicization of judicial elections and selection" to be a serious threat to judicial independence in their jurisdiction and inadequate court funding is also deemed a serious threat by fifty-two (52 percent) percent of the survey group. When asked what DRI can do to assist individual SLDOs in addressing judicial independence threats, eighty-seven (87 percent) percent either strongly agreed or agreed that providing information from other jurisdictions facing similar threats would be beneficial and sixty-nine (69 percent) percent also strongly agreed or agreed that DRI should provide a draft policy that can be used by the SLDOs to respond to the various issues. Overall, the respondents are largely in favor of any assistance DRI might provide especially if it involves educational resources that could be used by the organizations to educate the public on the various issues. Only fourteen (14) respondents replied "yes" when asked if their SLDO has an established court and/or judiciary committee and twenty-two (22) answered "yes" to "Has your SLDO been involved in any judicial independence issues?"

A final question on the survey asked for names of individuals the Task Force might contact for interviews. During the research phase we spoke to a number of judges, journalists, elected officials, business leaders, educators, and others. Not surprisingly, the majority of current and retired judges who agreed to speak with the Task Force did not want their answers attributed to them. The Task Force relied heavily on information gleaned from the interviews when determining recommendations.

The interview questions were much more targeted than the survey questions as the Task Force was looking for answers to critical questions such as "What is your opinion as to the cause(s) of the public's tendency to mistrust the judiciary?" and "In the education effort, how do we promote the idea that judges should be free from any outside influence such as political, financial or the threat of removal from office?"

GENERAL FINDINGS

The DRI Judicial Task Force began its work with a goal of learning as much as possible about issues facing the judiciary. The Task Force sought to determine whether it could assist its members and the SLDOs in efforts to the support our judiciary and to help preserve its critical role in effectuating the Rule of law. We quickly learned that DRI is not alone in its concerns about the state of the judiciary. Many other people and organizations have already begun to research and propose solutions to some of the most pressing issues.

Research and discussions revealed a number of pressing issues facing the judiciary and imperiling its long-term integrity. The Task Force focused its attention on judicial salaries, court funding, court security, the institutional legitimacy of the judiciary, and judicial selection.

The Task Force reached some conclusions and offers them as part of the General Findings section. These conclusions and observations have been largely gleaned from the Task Force's research, surveys, and interviews. The Task Force believes its findings present the "big picture" concerning the problems facing our judiciary and the role that defense lawyers can play in addressing the problems.

1 Defense lawyers are well-qualified to be involved in efforts to protect the judiciary.

Defense lawyers are well qualified to take an active role in efforts to protect the judiciary and preserve the rule of law that is so key to our system of government and commerce:

- As defense lawyers, we are involved in a broad array of substantive and procedural issues at all levels of the state and federal courts.
- As defense lawyers, our experience can illuminate discussion of the problems and needs of the judiciary.
- As officers of the court, we owe an obligation to assist in preserving and protecting the rule or law.
- As consumers of judicial services, we and our clients are directly impacted by the issues facing the judiciary.
- We have a 22,000-member-strong DRI, which can serve as a national umbrella organization.
- We have sufficient resources to make a difference.
- We work with sixty-four (64) state and local defense associations across America, each of which is well-positioned to evaluate the issues as they present

themselves in that state or locality and to embark upon an appropriate cause of action.
- We have members throughout the country, many of whom are involved as members and leaders of other bar associations, civic and trade groups, school groups, and political parties.
- We have sister organizations and other groups with whom we can partner.
- The skills of our profession give us the ability to persuasively inform our members, the public, the media, and elected officials about the issues judges face.
- Because of the focus that DRI and the state and local defense organizations have long placed on education, we know how to organize and present worthwhile educational programs.

2 Current efforts to educate the public about the role of judges in our society and how our court systems operate are insufficient.

The Task Force heard repeatedly that better public education about the judiciary's role is needed. In conducting its research, the Task Force found that many people cannot accurately describe anything about the local, state, and federal court systems. Significant numbers do not vote for judicial candidates, cannot name a single judge, and have little or no interest in or support for judicial pay raises, court budgets, or courthouse building projects. There are many reasons why better public education about the role of judges is needed. The following is a partial list of such reasons:

- Our public schools find it difficult to provide sufficient information on the role of judges in our democratic system.
- The average citizen has insufficient contact with the judicial system during his or her lifetime to fully appreciate the role of judges.
- The nature of the judiciary's role prevents judges from pursuing the level of public attention that is attained by members of the executive and legislative branches.
- While the media reports on high-profile legal cases, the day-to-day workings of the court system are not reported as thoroughly as those of the other two branches of government.
- Members of the media may lack sufficient knowledge and training in legal process or substance to accurately explain the legal news about which they write.

Given the varying degrees of public understanding of the role of judges, it should come as no surprise that some members of the public may not appreciate the dangers to the judiciary from attacks on judicial independence and may not fully understand the manner in which judges are justly held accountable.

The responses to Task Force surveys and interviews demonstrated that defense lawyers are well aware of issues that are important in their respective jurisdictions. But many defense lawyers expressed a sense that they did not understand issues involving the judiciary's institutional legitimacy, judicial independence, and judicial accountability as they exist throughout the country.

3

Although bar associations are engaged in working to address various issues facing the judiciary, there is a generally held perception that they are not doing enough to respond to current problems. The defense bar in particular is not sufficiently engaged in working to address issues involving the judiciary.

The American Bar Association has been addressing the issue of judicial independence for several years through an assortment of task forces and committees. At the urging of the ABA, there seems to be a growing awareness among state bar associations of the need for lawyer involvement. As the Task Force conducted its research, we found that a number of general state and city bar associations had participated in varying aspects of the judicial independence movement. But their activities were generally focused on single issues such as judicial selection, judicial salaries, or unwarranted criticism of judicial opinions. Few state or city bar associations have been engaged in a holistic approach to supporting judicial independence and accountability.

Our interviews and surveys of defense bar leaders demonstrated that very few state or local defense lawyer associations have been involved in efforts to speak out regarding issues affecting the judiciary. Some state or local defense organizations have weighed in on local issues, but very few SLDOs have standing committees that examine court or judicial issues and engage in any activities related to these issues.

4

Lawyers are the first line of defense for our legal system including the judiciary, and therefore, lawyer groups must be a catalyst to bring judicial, lawyer, civic, and business groups together to provide information to the public, the media, and other branches of government.

Because lawyers are the day-to-day observers of judicial activity, the legal profession is uniquely qualified to speak knowledgeably to the public on issues facing the judiciary. If lawyers are to be the first line of defense, we need to take measures to ensure that we all are aware of the issues facing the judiciary because, as mentioned above, many defense lawyers are unaware of these problems.

While there are organized associations of judges in every state and nationally, efforts by judges to promote judicial independence may be viewed by some as self-serving. Equally important, the ethical restrictions upon judges prevent individual judges from speaking out as forcefully on important issues as elected officials from the other branches of government.

Because of the position of lawyers in our judicial system, and because of the prevalence of bar associations and professional organizations, DRI has the resources and experience to bring people together for educational purposes.

5 Protecting the place of the judiciary in our society will require a long-term, significant commitment by the defense bar to educate the public.

The issues facing the judiciary are not new. For example, the American Judicature Society has been addressing the issue of judicial independence since 1997 and has been addressing aspects of judicial independence since AJS was founded in 1913. Likewise, the American Bar Association has been addressing judicial independence for many years. Despite their efforts, not all lawyers are aware of the problems facing judges; a better informed public is also needed.

Against this backdrop, we see growing sensationalism in the public discourse about controversial judicial opinions. Thus, efforts to educate the public concerning the role of judges in our society may be overshadowed by the "noise" created by media coverage. An educational effort will require changes in what is being taught in public schools and will require a grassroots public education program. The effort to provide education is not going to be short term. Bar associations will have to make public education a part of their regular missions.

6 Although judicial funding and selection issues are very local in nature, the public's perception is increasingly shaped by judicial opinions that receive national attention.

The reasonableness of judicial selection procedures, the adequacy of judicial salaries, court funding, and courtroom security are all matters that are decided by local legislatures and elected officials. Nevertheless, bar leaders and judges told the Task Force that public perceptions concerning their local judges are heavily influenced by media reports about high-profile judicial opinions. More than one of the judges who responded to our survey told us that controversial decisions given attention in the national media play a huge role in how the public feels about their own local judges.

7 Public attitudes toward the judiciary are influenced by media coverage as well as criticism from elected officials and community leaders.

One consistent theme of bar leaders and judges was the belief that public attitudes toward the judiciary are shaped by the media, elected officials, and interest groups. Several people cited the Terri Schiavo case as an example. Many persons we interviewed were also aware of strong words from former House majority leader Tom DeLay and other members of Congress in which the suggestion was made that judges who consistently rule against popular public opinion should be removed from office.

Media coverage was of particular concern. The prevalence of cable news networks, radio talk shows, and internet blogs has given disgruntled litigants, politicians, and special interest groups high profile opportunities to criticize judicial opinions. The "sound bite" nature of the commentary has caused many to question whether a balanced and complete picture is being presented to the public. A thorough and accurate discussion of the legal issues and facts underlying controversial judicial decisions is often lacking.

8 The judiciary's institutional legitimacy depends upon independence and accountability to the rule of law so that judicial decisions are made under law, like cases are treated alike, and the outcome does not depend on whether the parties to a dispute are favored or disfavored on irrelevant grounds.

Some critics of the judicial independence movement have equated the term "independent" with "unaccountable." This allegation of unaccountability has been leveled in particular against members of the federal judiciary who are appointed for life. Similar arguments have been made against state supreme and appellate court judges who are elected or appointed and then stand for retention votes that are uncontested.

For our system to work, a judge must be free to make decisions based on the facts and law without undue influence or interference. This means that judges must maintain decisional independence. But judges are, and should be, accountable. They are accountable to the law and the Constitution; they are accountable through the election and retention process; they are accountable to judicial qualification committees; they are accountable to judicial misconduct commissions, and they are accountable to higher courts of appeal.

The ABA Commission on the Separation of Powers and Judicial Independence accurately concluded that the public does not understand that judges are given independence to enable them to make impartial decisions based on the Rule of law. The Task Force recommends that part of the process of public education should be to inform the public of the degree of accountability that judges already have, and to explain the nature of that accountability and how it differs from the accountability we can expect from our legislators. Therefore, the Task Force urges defense lawyers and judges to take part in establishing and promoting programs that foster increased public understanding of these ideas and that lend credibility to the process of evaluating, selecting, and retaining judges.

9 Criticism of all branches of government is important to the health of our democracy, but "unwarranted" criticism will quickly erode public confidence in our judiciary.

Criticism of all branches of government is a fundamental right of our Constitution. A government that receives fair criticism will better serve the people for a variety of reasons too numerous to discuss in this paper. But criticism of the judiciary is often framed in terms that fail to recognize its unique role, which differs from that of the two political branches. Critics attack the courts for the outcome of a lawsuit without attention to whether the outcome was consistent with or mandated by the rule of law. Judges cannot fight such battles alone because of the ethical restrictions on their public speech.

Forms of criticism that distort the law or the facts of the case, mislead the public, or attack the judge personally can be a threat to judicial independence and accountability. The strongest claim for judicial independence comes with a cause in which a clear legal rule exists but one of the litigants favored by the rule is unpopular or one of the litigants disfavored by the rule is powerful. To treat like cases alike, the rule should be applied regardless of who the litigant is. But public discourse about judicial decisions not infrequently focuses on the outcome and fails to include the essential backdrop of rule-of-law principles that should give context to the evaluation of any decision. Without this context, the discussion misses the point so important to preserving the judiciary's institutional legitimacy. Defense lawyers can play an important role in participating in these public discussions with the goal of offering to the public and to the media this backdrop of principles that are fundamental to the rule of Law. Chief Justice Roberts recently pointed out that attacks on the judiciary are bipartisan and emphasized that "[j]ust as attacks on judicial independence come from all parts of the political spectrum, so should the defense of judicial independence." The Task Force believes DRI should answer this call.

10 Significant financial contributions to judicial campaigns tend to undermine the public's confidence in the impartiality of judges.

It is an axiom of all judicial ethical rules that judges are supposed to be fair and impartial. This means that they must make their rulings without fear of intimidation by any political party or group. And they must make their rulings without feeling that they are indebted to any person or group.

When lawyers and litigants make sizeable financial contributions to judges, it can undermine the judiciary's institutional legitimacy. To the extent that the public is aware of such contributions, the research, polling, and interviewing done by the Task Force confirms that the public is less likely to have confidence in the impartiality of the judge. Furthermore, the existence of a political contribution provides the opportunity for critics of a judicial opinion to criticize the judge's motives after

an opinion has been issued on the basis that the judge was beholden to the contributor. Such criticism further undermines public confidence in the impartiality of the judge's opinion whether it is true or not.

11 Over the long term, our society will be better served by judicial selection methods that enhance merit selection and foster the existence of a balanced judiciary accountable to the rule of law.

The members of the Task Force are realists. We understand that judicial selection procedures are local in nature and that changes can be very controversial. But selection of judges according to the candidates' merit is key to ensuring that a judge will act impartially. For judges to satisfy this essential aspect of the rule of law, they must possess the appropriate temperament and character. The ABA Report, *Justice In Jeopardy*, explains that this means,

> They must be committed to the rule of law. They must be women and men of integrity, who are evenhanded, open-minded, and unyielding to the influence of personal bias. They must be strong-minded and tolerant of criticism, yet resistant to intimidation.

Justice In Jeopardy, Report of the American Bar Association Commission on the 21st Century Judiciary, p. 12 (2003). A selection system that focuses on other criteria such as political ties or support by various interest groups may well have a corrosive effect on public confidence in the judiciary. Survey data suggests that members of the public see judges as "political," and believe that they make decisions "more on politics and special interests" than on the facts and law. Campaign, *National Survey of American Voters*: http://faircourts.org/files/JASNationalsurveyresults.pdf. A selection process that accentuates political factors and de-emphasizes or entirely ignores merit criteria will further erode public confidence in the judiciary. Thus, DRI favors judicial selection methods that enhance merit selection and foster the existence of a balanced judiciary accountable to the rule of law.

12 Methods for selecting judges must be credible from the point of view of a broad spectrum of the public.

No judicial selection system is perfect. Individuals and groups observing judicial selection, by appointment or election, may see competing individuals or groups as having too much influence. The Task Force heard concerns from the defense and business community about the influence of the plaintiffs' bar in judicial selection; we heard about the influence of other interest groups; and, we heard about the influence of political parties.

It is the recommendation of the Task Force that defense lawyers study methods to select and retain judges that promote credibility from the point of view of as many

constituent groups as possible. Some of the tools that are being tried around the country include public financing of judicial campaigns, voter guides, judicial campaign conduct committees, voluntary limitations on political contributions, judicial qualification commissions, judicial retention qualification commissions, non-partisan elections, promulgation of ethical standards and training for judicial nominating commission members, and greater transparency of judicial selection procedures. Right now in many states there is little or no constituency for judicial moderates. Taking steps to foster a system that favors merit selection and emphasizes rule-of-law values might help restore such a constituency.

13 Inadequate funding of our courts is an increasingly serious threat to judicial independence.

The polling and interviewing by the Task Force revealed very substantial concern by defense bar leaders, other bar leaders, and judges about the threat that inadequate funding of courts poses to judicial independence. Every part of the country had some report of courts not being able to adequately do their work because of monetary issues. These included counties that could not conduct civil jury trials due to having to allocate funds for higher priority criminal trials, inadequate buildings and facilities, insufficient numbers of judges, insufficient funds for adequate court staffing, or little or no funding for judges to perform legal research. These deficiencies underscore the judiciary's institutional legitimacy by impeding its ability to do its job effectively and in a timely manner.

The causes of inadequate funding were varied. It was well understood that all branches of government are suffering these days from money shortages. Many observers of the courts were concerned that funding inadequacies are attributable to the fact that judges do not have the voice that legislators and the executive branch have. In addition, concern was expressed that funding for courts is flat or inadequate because of increasing hostility by the legislative and executive branches toward judges.

Our Task Force firmly believes that judges and lawyers can address these problems by working to form coalitions that include business and civic groups. This will help legislators understand the breadth of support and the need for adequate funding.

14 Judicial salaries and benefits must be sufficient to attract and retain qualified individuals to serve as judges.

The issue of the adequacy of pay for judges is probably the number one judicial independence issue that most lawyers knew about and agreed was important. While few state or local defense organizations have been involved in a wide ranging judicial independence project, many defense associations have actively supported judicial salary increases.

The Task Force found a great deal of research had been conducted on judicial salaries and heard anecdotes of all types. There are many states in which judges have not had pay raises for years, and there are others in which retaliatory legislators have threatened to reduce judicial salaries.

Some judges observed that the level of salaries has resulted in a much higher percentage of judges coming to the judiciary from prosecutorial or other public service positions.

The Task Force recommends that defense lawyers join with judges, business groups, civic groups, and others to encourage fair pay and benefits for judges including regular pay increases. The Task Force, likewise, encourages defense lawyers to examine the models for judicial salary commissions designed to reduce or minimize the role of politics in pay raises.

15 Recent events underscore the necessity of providing adequate security for judges, their families, and their staffs.

Hardly a month goes by that there is not a report of someone trying to take a weapon into a courthouse. Recent events in Atlanta, Chicago, and Reno demonstrate that judges, their staffs, and their families are increasingly at risk for violence. Furthermore, the high profile media attention attendant to courthouse violence creates the danger of "copycat" violence. Allowing judges to decide cases without a threat to their personal security or that of their family is fundamental to judicial independence and the rule of law.

The Task Force recommends that defense lawyers become actively involved in assuring that sufficient resources are made available to provide adequate security for courtrooms and, if necessary, for judges, their staffs, and their families outside of the courthouse.

THE IMPACT OF COURT FUNDING AND JUDICIAL SECURITY ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Introduction

For any judicial system to operate effectively, it must provide prompt and effective legal decisions and dispute resolution to all individuals and businesses. These services must be supported by tangible resources such as courthouses, modern technology, judges, and court personnel as well as those materials required to enable these personnel to perform their functions.

The individuals who work in the judicial system must be highly capable and well-trained, and their workload must be maintained at a level which permits them to address and resolve matters in a timely and thoughtful manner. Equally vital is that citizens who seek justice, and those who work in the justice system, feel that their physical safety will not be jeopardized by being within the courthouse. A judicial system that fails to meet these basic requirements will lose the confidence of the citizens thereby weakening the basic fabric of society.

As mentioned in the General Findings section of this report, the Task Force learned that the greater effort is necessary to better educate the public about the operation of the judicial system. At the same time, rising criticism of judges by the media, special interests, and other elected officials has diminished the credibility of judges' efforts to attract funding increases. Judicial pleas for more money and the efforts of lawyers to support the judges have been viewed as self-serving. If this is not bad enough, the current anti-tax increase environment makes funding increases for courts an even tougher sell in front of already hostile legislative bodies.

Funding

According to our survey and interviews, reduced funding has resulted in erosion of the ability of state judicial systems to provide prompt and high quality judicial services, and the effect of inadequate funding is reportedly felt in a variety of ways:

- In some states, court funding is at such a low level that civil trials are discontinued before the end of the fiscal year. This increases case backlogs and requires civil litigants to either wait for their cases to be tried or seek private sources of dispute resolution.
- Courts are required to operate on reduced schedules due to insufficient personnel. As a result, case backlogs increase as do delays between the filing and resolution of cases.
- Reduced funding may cause judges to arbitrarily enforce strict limits on the duration of trials with the result in some instances being that parties do not

have an opportunity to present the full range of evidence which supports their claims or defenses.

- Lack of funding has prevented some jurisdictions from having an adequate number of judges to handle caseloads, and more cases are being managed by magistrates and other quasi-judicial officers.
- Many jurisdictions need basic maintenance or new courthouses and more courtrooms, conference rooms, technology upgrades, and separate prisoner waiting areas.
- In an attempt to avoid the problems of traditional litigation, wealthy litigants have begun hiring retired judges as alternatives to court. This practice differs from traditional arbitration or mediation because here the ruling cannot be appealed.[1]

In California for example, court funding is at the forefront of public debate. The state constitution does not presently ensure adequate funding for courts. This is especially problematic because the legislature as well as the public has historically been resistant to the idea of supplying more state resources to the court system. Indifference to the problem of inadequate funding is likely fueled by the fact that the public is unaware of the scope of existing problems and of the direct effect these problems will have on them when they find themselves with an issue that requires judicial intervention.

In addition, many state courthouses are woefully in need of maintenance. A good example of this problem is the present situation in California. In 2002 then Governor Gray Davis shifted ownership and management of California courthouses from the counties to the state. The goal of this legislation was to create a state-owned court system that would serve all Californians equally. However, funding problems emerged when it was discovered that most of the four hundred, fifty-one (451) courthouses required immediate and substantial repairs. According to the State Task Force on Court Facilities, more than ninety (90 percent) percent of all facilities in California are said to be in such a condition as to jeopardize public safety. In fact, two-thirds (2/3) of California's courthouses are seismically deficient; some are believed to contain toxic mold, and sixty-eight (68 percent) percent do not meet basic fire standards. Seventy-five (75 percent) percent do not provide adequate access to people with disabilities.[2]

Our Task Force's survey of defense bar leaders from a majority of states shows that an astonishing eighty-seven (87 percent) percent believe that inadequate funding of the state judicial institutions is a threat to the effectiveness of the judicial system in their state. The same sentiment was expressed by every one of the judges interviewed by the Task Force.

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[1] This has sparked the concern that soon only the wealthy will be afforded the opportunity for efficient justice. Proponents of the option assert that these private judges are able to devote more time to resolve cases more quickly than the regular court system is able to. Critics charge that these programs will stratify litigants by wealth, resulting in different levels of justice. The absence of appeals may also result in a lack of development of common law.

[2] Chief Justice Ronald M. George, State of the Judiciary (Feb. 28, 2006).

Security

In many states, funding has been dramatically reduced for court deputies and security. Little funding is available to provide courthouses with better designs that address security issues. In light of recent violent attacks in courthouses, now is the time to *increase* funding for security measures as well as implement more effective ways to reduce the risk of violence.[3]

Courthouse security is inextricably related to the overall lack of funding for the judiciary. The recent high profile acts of courthouse violence have spurred calls everywhere for greater security, but judges, their staffs, and citizens should not be exposed to such dangers when we already know that courtrooms can be the scene of great anger and emotion.

If citizens are unwilling to physically go to court, then a functioning judicial system becomes impossible to maintain. Citizens and their attorneys must feel confident that they can safely litigate their issues in our courthouses, and court personnel and judges must feel secure in their safety in order to run our judicial system efficiently.

Public awareness must be spread about the importance of an independent judiciary, which includes the immediate need for funding and increased security. Former California Senator Joseph Dunn, the leader of the state legislature's judicial committee, recently stated to the DRI Task Force, "We need to reach out to everyone, in the schools, in the workplaces, everywhere. The message is too important to present only in selected venues and groups. An independent judiciary is essential to protect everyone's rights and liberties."

As DRI Past President and Kansas defense lawyer William Sampson said in 2005, "DRI members have a special responsibility here. 'Free and Independent Courts for a Free and Independent People' is more than a nice phrase; one enables the other. An independent judiciary is a 'must have' for our country today just as it was for Hamilton and Madison and Adams before us. Imagine the outcome for Adams' red-coated clients following The Boston Massacre had the budget for jury trials already been spent! Imagine the outcome for DRI if the disdain for our courts that swirls in dust devils across the country comes together in one great storm!"[4]

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[3] A very recent example of the dangers facing judges is the sniper shooting in Reno, Nevada, of family court judge Chuck Weller who was allegedly shot by a disgruntled divorce litigant.

[4] William R. Sampson, *Judicial Independence in Kansas*, On The Record, in For The Defense (September 2005).

Recommendations

The American Bar Association has adopted a list of recommendations to remedy the growing problems of court funding.[5] The Task Force supports these recommendations:

- States should adopt judicial budgeting procedures to ensure efficient and effective use of public funds. A clearly delineated set of procedures would create a predicable funding stream that is not tied to fee generation.
- Courts should provide clear and detailed documentation for budget requests.
- Courts should engage in regular communication with the other branches of government to ensure that our tiered system of government is in healthy operation.
- Courts are encouraged to establish broad-based advisory bodies comprised of laypersons, lawyers, and representatives from all branches of the government. These diverse bodies could work together to ensure that courts are receiving the funding necessary to support efficient operation.

The Task Force further recommends that state and local defense organizations serve as leaders to bring coalitions of lawyers, laypersons, and business groups together to support more generous court funding. This will require a broad-based coalition. SLDOs should consider the following actions:

- Studying local judicial personnel, facility and security needs in order to become better informed.
- Hosting symposiums or public forums to address the topic.
- Writing letters to the editors of local newspapers.
- Meeting with and lobbying executives and legislative bodies for increased funding.
- Speaking at civic and school functions on this subject.
- Banding together with business, civic, and other bar groups to address local problems.

[5] ABA Commission on State Court Funding (August 2004).

THE IMPACT OF JUDICIAL SALARIES ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Introduction

A public discussion of judicial salaries can be a hard sell for a variety of reasons. Even comparatively low judicial salaries are substantially higher than that of the average wage earner, and the general public sometimes does not view public service as deserving of high compensation. Likewise, a segment of the public does not appreciate the hours and stresses experienced by most judges. Moreover, legislative bodies are historically reluctant to grant pay raises to any public servants unless those public servants have public sympathy such as teachers, firefighters, or police.

The Task Force finds that in some states judicial compensation is inadequate. This represents a challenge to the independence of the judiciary in those states. Judicial salaries should be increased in order to attract qualified candidates to the judiciary and to assure retention of existing judges.

Findings

The adequacy of judicial pay has been a significant issue for at least the last twenty (20) years. In December 1984 the American Bar Association urged Congress not to impose a freeze on judicial salaries and to enact a minimum three and one-half (3.5 percent) percent cost of living adjustment for the federal judiciary.[6] This followed an August 1980 resolution urging both federal and state governments to adjust judicial pay in order to compensate for the decline of living standards caused by the then-soaring inflation rate. More recently, in 1994 the ABA resolved that the salary levels of federal and state judges should be reviewed on a regular, periodic basis to ensure that judicial salaries were not diminished by increases in the cost of living.[7]

In the array of challenges facing the judiciary, however, judicial pay does not appear to be a nationwide crisis. Only thirty-two (32 percent) percent of those responding to the Task Force's survey felt that inadequate pay was a serious threat to judicial independence. This compares with fifty-two (52 percent) percent who felt that the decline in overall judicial funding was a serious threat.

Few of the people whom the Task Force interviewed identified inadequate judicial pay as a significant factor impacting judicial independence or judicial quality. Some expressed concerns that tensions between the legislative branch and judicial branch could lead to substandard salaries for judges mandated by legislators angry

[6] American Bar Association, *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence* (1997).

[7] *Id.*

about a particular ruling or class of rulings. This remains a threat. The legislatures in most states set the salaries of the judiciary. Of the persons interviewed by the Task Force, those from states where judicial pay has stagnated were naturally more concerned about the ability to attract and retain qualified judges.

Analysis

Lawyers who leave private practice to become judges leave behind the "equity" they have accumulated.

With very few exceptions,[8] lawyers practice law for years before seeking an appointment or election to the bench. A lawyer leaving private practice almost inevitably takes a reduction in pay to become a judge. In addition, he or she gives up a client base and recognized area of expertise. Leaving the bench to return to private practice requires the lawyer essentially to start all over again. Thus, in order to attract highly qualified candidates, those seeking to serve the public as judges should be able to expect long-term employment (in the absence of malfeasance) with pay and benefits commensurate with the expertise and experience necessary to become a judge. That compensation should increase over time and, at a minimum, keep up with inflation or increases in the cost of living.

As judicial salaries have stagnated, fewer lawyers are willing to leave private practice and more judges are coming from the public sector.

Judicial salaries have stagnated.[9] In even moderate-sized cities it is not unusual for a starting lawyer at one of the larger firms to have a salary significantly in excess of a trial judge and, in some cases, even of an appellate judge.[10] As judicial salaries fall relative to income for lawyers in the private sector, fewer lawyers from the private sector are likely to be willing to move into the judiciary. Financial pressures frequently make it difficult for states to attract or retain judges from among the most capable and motivated members of the bar.

This circumstance could cause the judiciary to be composed largely of those from the public sector, namely, former prosecutors, public defenders and even some legislators.[11] While many from the public sector make excellent judges, limiting the pool of those willing to seek judgeships may exclude highly qualified candidates. Moreover, it may narrow the overall background of the judiciary resulting in judges who

[8] A substantial majority of states have minimum years experience requirements for a lawyer to seek an appellate judge position. Many states also require some experience before a lawyer may seek to become a trial judge.

[9] *Survey of Judicial Salaries*, National Center for State Courts, October 2004.

[10] *Id.*

[11] A very significant percentage of the judges interviewed by the Task Force mentioned the growing trend of prosecutors becoming judges.

have no experience in the active practice of civil law. Judges who have real world experience in the private sector are likely to better understand the personal and corporate disputes of the civil law. It is important to have a balanced judiciary.

If fewer lawyers are willing to become judges due to lower salaries, the quality of the judiciary may suffer.

As judicial salaries fall in comparison to legal pay in the private sector, fewer lawyers may seek judgeships, and reduced competition for these positions can lead to less qualified persons being appointed as judges. The concept that fewer lawyers are seeking judgeships is not merely hypothetical. Missouri provides an illustrative case that is typical of many states. Judicial salaries were not increased from 2000 to 2006. While inflation was admittedly low during the period, that still meant that judges were economically losing ground every year. In April of 2006, Douglas A. Copeland, President of the Missouri Bar, sent an e-mail to all lawyers in the state asserting that Missouri was at or near a crisis point with regard to judicial salaries. In a related published article, Mr. Copeland noted that,

> The best and brightest lawyers are no longer waiting in large numbers to have a chance to become a judge. For a recent opening in the Kansas City area, only three—yes, just three—candidates applied for a trial court panel… Applications to the appellate bench have similarly declined—instead of the normal 30 or 40 candidates, some openings have attracted a mere 15.[12]

Pay stagnation coupled with climbing case loads may cause experienced judges to leave the bench and further dilute the quality of the judiciary.

Caseloads for judges are generally believed to be greater than they were even twenty (25) years ago. The increased caseload combined with decreased or stagnant pay may lead to dissatisfaction among those already on the bench. In recent years, a private judicial system has developed with the widespread use of arbitration and mediation. This private system needs qualified persons with judicial training and temperament. Thus, the judicial system has real competition for judges. The quality of the judiciary will inevitably suffer if judges with knowledge and experience leave the bench to pursue a more lucrative career in the arena of arbitration and mediation or other areas of practice.

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[12] Copeland, *Adequate Compensation for Judges and Clerks*, Journal of the Missouri Bar (March–April 2006).

Recommendations

- The Task Force recommends that SLDOs partner with judges and other lawyers, but primarily with the private sector, to lobby for increased judicial compensation. It is the partnership with the private sector—the constituents of the legislators—that will have the greatest effect.
  - Lawyers on their own, without the private sector, face a strategic disadvantage when supporting efforts for increased judicial pay because of a perception that they are simply catering to the judiciary.
  - Defense lawyers, because of their professional relationship with the judiciary, their representation of the business community, and their frequent involvement in community activities, are positioned to draw upon relationships in the private sector.
- The Task Force recommends that DRI and the SLDOs study the use of independent commissions to set state judges' salaries.
- The Task Force recommends that each SLDO form a judiciary committee to review judicial compensation and judicial support funding. This committee, or a subcommittee of it, can take a leading role in forming the partnership discussed in the first recommendation above.
- The Task Force recommends that SLDOs make a concerted effort in conjunction with judicial associations, other lawyers, and bar associations to educate the public and legislators about the duties and responsibilities of judges.

PROTECTING THE JUDICIARY'S INSTITUTIONAL LEGITIMACY FROM THE EFFECT OF UNWARRANTED ATTACKS

Fair vs. Unfair Criticism

The U.S. Constitution vests in the judiciary the power to decide all "cases and controversies" arising under the Constitution.[13] Consequently, the judiciary is charged with the responsibility to interpret the laws of this country as it concerns those fundamental rights enumerated (and not enumerated) in our Constitution guided by the rule of law and the principle of *stare decisis*. In upholding its constitutional mandate, the judiciary has decided cases addressing important human rights such as segregation, property ownership, and freedom of speech. As long ago as when Alexis de Tocqueville traveled the byways of our country, the judiciary's special role was apparent. De Tocqueville observed that there is no significant political dispute that does not sooner or later wind up in American courts. The unique position of the judiciary stems in part from the long-standing commitment of the American people to the rule of law and to constitutional government. But this unique place necessarily means that the judiciary must sometimes make decisions that are unpopular, as it did during the *Brown v Board of Education* era of civil rights litigation. And it means that judicial criticism or attacks on the judiciary may intensify at various points in history.

Informed criticism of judicial opinions serves an important function for the judiciary if it is based upon Constitutional provisions, statutes, case law, and a fair understanding of the facts of the case. The freedom of speech afforded to all citizens in the First Amendment is a right that is essential to any functioning democracy. Informed or responsible criticism as labeled by one author[14] is a constructive tool, because it offers the court an independent evaluation of a decision and can potentially point out any flaws in the court's decision making. As Benjamin Franklin once stated, "Our critics are our friends for they do show us our faults."[15]

As constructive and beneficial as responsible criticism can be, irresponsible attacks can erode public confidence and damage the court's institutional legitimacy. The last decade has seen a steady increase in extreme criticism of judges and their decisions. Much of the recent criticism is not focused on the creation of new legal

[13] Article III, Section 2.

[14] Judith S. Kaye, *Safeguarding a Crown Jewel: Independence and Lawyer Criticism of Courts*, 25 Hofstra L. Rev. 703, 724 (1997).

[15] *See* Bill Clinton's *Statement in the Rose Garden Before the Impeachment Vote by the House Judiciary Committee* (Dec. 11, 1998), quoting Benjamin Franklin.

standards or incorrect interpretations of existing law. Rather, the criticism has arisen because many simply do not agree with the decisions of a court.[16]

Not everyone will agree about when criticism is unwarranted, and a perfect definition of "unwarranted" criticism is not possible. But the organized bar in some areas has tried to create an appropriate definition and to set up programs to respond to it. The Evansville, Indiana Bar Association, for example, recently adopted a policy that lists recommended procedures for lawyers to respond to the unjust criticism of judges. What follows are the kinds of cases for which a response to unjust criticism is usually appropriate, according to the Evansville Bar Association:[17]

(a) When the unjust criticism is serious and will most likely have more than a passing or *de minimis* negative effect in the community;
(b) When the unjust criticism shows a lack of understanding of the legal system, the role or the bar, and/or the role of the judge, and is based at least partially on such misunderstanding;
(c) When the unjust criticism is materially inaccurate, and where the inaccuracy is a substantial part of the criticism, so that the response does not appear to be formalistic or "nitpicking."

The common denominator in the various definitions of unjust criticism is that the critic is misrepresenting some aspect of the facts of the case, the law, or the purported motivation of the judge. Bar associations involved in these response projects have crafted guidelines requiring that the criticism must be substantial, unfair, and a threat to undermine the public's confidence in the judicial system; otherwise, no response will be issued.

Unwarranted attacks on judicial opinions can come from many directions. Elected officials, interest groups, talk show hosts, and the media have disseminated articles, given speeches, and attacked the judiciary without proper foundation for making such statements.[18] Not surprisingly, the onslaught on attacks has undermined public confidence in the judiciary. As of September 2005, a survey revealed that more than half of American households are angry and disappointed with the nation's judiciary and feel that "judicial activism" has reached crisis proportions.[19] As Indiana University constitutional law professor Charles Geyh states, "These

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[16] Martha Neil, *Cases and Controversies: Some Decisions are all the Rage—Literally*, ABA-Journal.com (Sept. 29, 2005).

[17] The Evansville policy is tailored according to a model guideline suggested by the ABA Commission on Separation of Powers and Judicial Independence and most state bar policies are very similar. (Visit http://www.abanet.org/govaffairs/judiciary/rbii.html for the ABA's model guidelines.) According to the ABA's 2005 Bar Activities Inventory, 67 percent of all state bars and 38 percent of all local bars have adopted some form of policy for responding to unjust criticism of judges. To date, few state or local defense organizations have adopted such a policy.

[18] Former Minnesota Supreme Court Chief Justice Kathleen A. Blatz made these statements in her 2005 State of the Minnesota Judiciary.

[19] This figure is the result of a survey of American households conducted by the ABA Journal e-Report.

results are simply scary."[20] Of course, such attacks may stem from conduct by the judiciary that does not measure up to the ideal of impartial justice under the rule of law. Our Constitution creates a tension between judicial independence and accountability. Maintaining a proper balance between these twin requirements of any system of justice based on the rule of law is essential.

Why Judges Remain Silent and Lawyers Must Act

Lawyers are uniquely positioned to respond to corrosive but unwarranted attacks on the judiciary. And it is essential that they do so because judicial ethics constrain the ability of the judiciary to respond.

The ABA's *Model Code of Judicial Conduct* mandates that judges should make independent decisions without fear of reprisal but also requires them to uphold the integrity of the judiciary by, among other things, refusing to engage in debates with those who question their decisions.[21] Due to the ethical limitations on a judge's ability to defend a decision, a judge has limited options in the face of unjust criticism.

A judge may do nothing, but this option is difficult, particularly if the attacks are made during an election campaign. Letting the criticism go unchecked erodes public confidence in the integrity of the judicial decision. Also, if judges are defeated in election campaigns on the basis of unfair criticism, it may have a chilling effect on the independence of other judges on the bench.

Some judges may simply quit the bench. This choice, if adopted by judges facing unwarranted attack, would severely weaken the judiciary. Well-qualified and experienced judges could become rare in the current judicial landscape.

Judges may protect themselves by writing well-reasoned opinions in language that the public can understand. A lucid decision tracing the outcome to accepted legal principles can be a powerful force in staving off unwarranted criticism. And it also provides ammunition for those who would defend the court if later unwarranted attacks are made.

The judge may also rely on the support of lawyers and the organized bar. It is this option that is widely supported by many judges and by this Task Force. Local and national bar associations possess far more resources than judges to fight unjust attacks. As "officers of the court," it is the role of lawyers to ensure that the independence of the judiciary is upheld and not subsumed by unwarranted attack.[22] As

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[20] Martha Neil, *Half of U.S. sees 'Judicial Activism Crisis': ABA Journal Survey Results Surprise Some Legal Experts*, ABAJournal.com, Sept. 30, 2005, available at http://www.abanet.org/journal/redesign/s30survey.html.

[21] ABA Model Code of Judicial Conduct, Canon 3.

[22] *See*, ABA Model Rule of Professional Conduct §8.2, Comment [3]: "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."

U.S. Supreme Court Justice Anthony Kennedy has stated, "The bar must support the judiciary in its cause when it is under attack. Judges do not have political clout. They need the bar."[23]

A Look at the Sources of Criticism

Robust criticism of the judiciary is protected by the First Amendment and the inevitable result of the judiciary's important role in our system of government. Sometimes, appropriate criticism is generated by the conduct of those on the bench that is inconsistent with the rule of law. Archibald Cox once said, "A judge whose decisions are influenced by politics is putting the independence of the judiciary at risk." But a judicial decision standing alone is not enough to rise to the level of an impeachable offense. And all too often, criticism stems from a disgruntled litigant, unhappy with the outcome of a case, or from those who disagree with the decision of a controversial issue. Public discourse benefits from a reasoned discussion of the sources and parameters of judicial reasoning, but it is harmed by emotional attacks on the courts by individuals or groups with a vested interest in an outcome that is inconsistent with the rule of law, but is in their personal or political interest.

The Role of the Media in Criticism of the Judiciary

The media plays an enormous role in the delivery of information to people every day. One component of the information they deliver is unjust criticism of the judiciary.[24] The media always has the power to choose how and when to report, investigate, amplify, downplay, explain, and/or discuss a court opinion or the criticism an opinion is receiving. Although less frequent, the media also possesses the power to initiate unjust criticism. The media plays a key role in fostering or impeding judicial independence by the quality of its reporting, and its impact on public perception may be increasing. Media outlets are no longer limited to newspaper, television, and radio news reporting. Cable networks, web logs, and talk news have transformed news into entertainment that frequently has a special interest slant. Talk show hosts and reporters have become celebrities with credibility among large segments of the public.

When covering an unwarranted attack, the media possesses the power to educate the public by exposing the attack and explaining why it is unwarranted. Conversely, they can broadcast the substance of the unwarranted attack without explanation. In the former case, the media serves a constructive function by providing the facts necessary to expose the true nature of the unwarranted attack.

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[23] Linda Greenhouse, *Judges Seek Aid in Effort to Remain Independent*, N.Y. Times, Dec. 10, 1998, at A. 16.

[24] *See* Gilbert S. Merritt, *Courts, Media, and the Press*, 41 St. Louis U. L.J. 505 (1997), which provides an extensive discussion of the relationship between media reports and the judiciary.

When the media occasionally fails to adequately cover judicial criticisms, this failure can be traced to a number of reasons. First, the writers, editors, and performers on radio and television outlets simply may not understand the issue(s) giving rise to the unwarranted attack. Deadline pressures, a lack of experience in the law, and/or the presence of particularly arcane or sophisticated issues all may contribute to the failure to fully grasp the substance of the issue.

Second, many media outlets need to capture an audience for profit. The unwarranted attack itself is titillating to an audience and serves as a "hook" for the audience to listen, watch, or read. Whether in the form of headline, or as the top radio or television story, the media source seeks to capitalize on the unwarranted attack to lure the greatest number of news consumers.

The third reason for disseminating unfair criticism is that a media source may attempt to promote its own biases and agendas. As the field of media sources continues to broaden with the ever-expanding population of cable television channels and internet outlets, these media sources must stay true to the core market for which they were established to serve. Cable television, talk radio, and the internet now feature programming for almost any political or special interest viewpoint. Depending on the nature of the unwarranted attack, it may behoove any number of media sources to perpetuate or further amplify the unwarranted attack to pander to their core market.

Recommendations

It is essential for those individuals who are concerned with the health of the judicial system to work collaboratively to educate the media on legal issues generally and to be available to respond to unwarranted attacks. Ensuring that the media is fully informed about any given issue and the role of the judiciary in that situation is essential for the public to be fully informed of the underlying issues and facts. For most media outlets, getting the story correct still remains the goal. Those interested in minimizing unwarranted attacks must capitalize on that desire.

- The Task Force recommends that state and local defense organizations create committees charged with the responsibility of responding to unjust judicial criticism.
- SLDOs can establish guidelines for identifying "unwarranted" criticism and encourage their members to report instances of questionable criticism.
- SLDOs are well-situated to act as catalysts to bring together bar groups, civic groups, the media, the judiciary, and other elected officials to discuss, reduce, and try to eliminate corrosive unwarranted criticism and to expand coverage of rule of law principles as they relate to legal news.
- SLDOs can also implement programs to educate their members, the media, and the general public on the importance of the rule of law, and judicial independence and accountability.

THE IMPACT OF JUDICIAL SELECTION METHODS ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Introduction

How we select our judges is of critical importance to the fair and impartial administration of justice. Courts maintain their legitimacy, not only by fairness in fact, but also by maintaining an appearance of fairness. Current and former members of our United States Supreme Court have expressed serious concerns about the increasing influence of money and special interests on our courts.[25] This influence is seen in both judicial election systems and commission appointment systems, which are also known as "appointed selection" systems.[26] The Task Force has studied elective and appointive selection systems, the political and practical challenges posing threats to each system, and our recommendations for how DRI and its members can meet these challenges.

Summary of Elective and Appointive Selection Systems

Our federal system provides little uniformity from state to state in how judges are selected. In some states all judges are appointed, and in some they are all elected. Other states appoint their appellate judges and elect their trial judges. Many states allow local option so that one county may have partisan elected judges, while the adjacent county has non-partisan elected judges, and another county has appointed judges. The following brief summary of the states is derived from the "fact sheet" of the American Bar Association's Standing Committee on Judicial Independence, which can be accessed at www.abanet.org/judind/jeopardy/fact/html.[27] The summary here deals only with the highest court in each state, most of which are called "supreme courts."

Currently, thirty-eight (38) states have some type of judicial election for judges on the supreme court. Seventeen (17) of those utilize a system of appointment to select judges.[28] In one approach, a judicial selection commission recommends three

[25] Adam Liptak, *Public Comments by Justices Veer Toward the Political*, N.Y. Times, Mar. 19, 2006. The article referred to speeches by Justices O'Connor and Ginsburg.

[26] Appointed systems may also be referred to as following the "Missouri Plan." It was adopted in Missouri by initiative in 1940 after several very contentious elections.

[27] *See also*, Jan Witold Baran, "Methods of Judicial Selection/Election," U.S. Chamber Institute for Legal Reform, June 2006.

[28] Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Utah, and Wyoming use this system. Tennessee uses a modified version of merit selection.

(3) candidates to the governor who then selects one (1) to fill the vacant position. Typically, after a year or two on the bench, the judge must face the electorate in a retention election. The judge is unopposed, so the only way he or she can lose the seat on the bench is if a majority of the electorate votes for removal. Following the initial retention election, these judges must face retention elections every few years. Of the remaining twenty-one (21) states that select judges through election, six (6) have partisan elections[29] and fifteen (15) have non-partisan elections.[30] Finally, in the twelve (12) states that do not elect, the governor appoints, after which the judge either enjoys life tenure or is re-appointed in some manner other than election.[31]

Regardless of whether states have partisan or non-partisan elections, maintaining a fair and impartial judiciary is still the goal. This has become increasingly difficult as voters struggle to find objective information about judicial candidates while at the same time judicial elections became increasingly expensive and politicized.

Concerns Regarding Election of Judges

Voters find it difficult to discern the best-qualified candidates.

One of the recurrent issues in states that elect their judges is the lack of voter participation in the process or their participation with inadequate knowledge about the candidates. It seems that voters either have a difficult time finding enough information about judicial candidates, or they simply do not have enough time to analyze the information they find. As one voter candidly told a study group in Washington State,[32] "I have absolutely no idea who any of them [judicial candidates] are. I'm embarrassed to say but I couldn't tell you a single name."

Pollsters in New York found that seventy-five (75 percent) percent of the voters surveyed could not remember the name of the judicial candidate they had voted for only minutes earlier.[33] In Pennsylvania's 1997 judicial elections, only three (3) out of

[29] Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. In Illinois and Pennsylvania, judges win their initial term through a contested partisan election, after which they run in uncontested retention elections.

[30] Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

[31] Connecticut, Delaware, Hawaii, Massachusetts, Maine, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Virginia, and South Carolina. The District of Columbia also falls into this category; in lieu of a governor, the President of the United States appoints judges to the local courts.

[32] The study group was the Walsh Commission, which conducted interviews in public hearings throughout Washington in September 1995. It reported that the falloff from the top of the ballot to the judicial candidates is as high as fifty (50 percent) percent—half as many people cast a vote for judicial candidates as vote for the highest offices on the ballot.

[33] Nathan Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 Marq. L. Rev. 1031, 1045 (1997).

ten (10) registered voters came to the polls,[34] and in Wisconsin less than one (1) in four (4) registered voters typically participate in judicial elections.[35] In some states, voters tend to support candidates with popular political names.

Expensive Campaigns and Political Influence

Given the difficulty of finding information about judicial candidates and the tendency for the electorate simply to ignore judicial races, campaign expenditures seem to have a greater impact on judicial elections than in other elections.[36] This makes judicial campaigns ripe for the type of sound bite attack ad that can sway uninformed voters toward or away from a particular candidate.

In 2003–2004, judicial candidates across the country combined to raise over $46.8 million, up from $29 million in 2002. In ten (10) races across the country, judicial candidate spending topped $1 million. Where state supreme court candidates ran head-to-head, the electorate endured TV ads by candidates, political parties, and interest groups of all kinds. A staggering $24.4 million was spent on TV ads in judicial elections in 2004.[37]

Some judicial elections have been turned into battlegrounds over tort reform, land use, and social issues. The Michigan Democratic Party ran ads pronouncing as fact that incumbent justices "ruled against families and for corporations eighty-two (82 percent) percent of the time." The *Detroit Free Press* thought this claim "border[ed] on bogus."[38]

This year in Alabama, political ads in one of the supreme court races may have hit a high in terms of spending. The June 6, 2006 primary featured five (5) contested, partisan elections for positions on the Alabama Supreme Court, all on the Republican ticket. Six (6) of the candidates and one (1) of the interest groups combined to spend nearly $2.7 million on television ads, which amounted to a fifty-nine (59 percent) percent increase over money spent in 2004 on Alabama judicial campaigns.[39]

At the same time as political parties run attack ads, judicial candidates can now become active participants in discussing political issues by virtue of relaxed standards

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[34] Lynn A. Marks & Ellen Mattleman Kaplan, *Appellate Judges Should Be Appointed, Not Elected*, Pa. L. Weekly, Dec. 8, 1997, at 4.

[35] Honorable Shirley S. Abrahamson (of the Wisconsin Supreme Court), *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 992 (2001).

[36] *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* (2003).

[37] *The New Politics of Judicial Elections 2004*, Justice at Stake Campaign (hereinafter *New Politics of Judicial Elections*).

[38] Thomas A.Gottschalk, *Justice Reform—To What End? By What Means?*, 9 Metropolitan Corp. Couns. No. 11, at 1, 6–8 (Nov. 2001).

[39] Brennan Center for Justice, *Candidates for Alabama's Supreme Court Raise More Money, Invest in TV Ads at Greater Rates Than in 2004* (June 14, 2006).

of political speech in judicial campaigns. These relaxed standards stem from a 2002 United States Supreme Court decision.[40]

> A recent ABA study noted the increasing politicization of the courts: In the latter half of the twentieth century, interest groups formed to promote a specific political issue have become increasingly prominent in American politics generally and more recently have begun to involve themselves in judicial politics… The potential for single-issue groups to influence judicial races may be heightened by the general absence of voter interest and participation, insofar as it may then be easier for a comparatively small, highly motivated block of voters to affect the results.[41]

A 2004 poll conducted by the Justice at Stake Campaign indicated that seventy-one (71 percent) percent of all Americans—and eighty-five (85 percent) percent of African-Americans—believe campaign contributions influence judicial decisions. Perhaps even more disturbing was the data collected by the same group from a poll of judges conducted in 2002. Forty-eight (48 percent) percent of the judges polled felt a "great deal" of pressure to raise money during election years. When asked how much influence contributions had on the decisions these judges render from the bench, four (4 percent) percent said "a great deal of influence," twenty-two (22 percent) percent said "some influence," and twenty (20 percent) percent said "just a little influence."

Concerns with Judicial Selection by Appointment

Selection of judges by appointment has its own problems. The Task Force heard about examples of increasing political influence in states using selection through commission appointments. "The most persistent finding that emerges from the research is that the forces and influences at work in the [commission appointment] process seem to have a way of making themselves felt irrespective of the specific selection mechanism."[42]

In Indiana, a state that has used an appointed selection system since 1970, Legislators recently attempted to change how members of the nominating commission are chosen in that state. They argued that the system has not worked fairly because in the last sixteen (16) years all twenty-one (21) judges appointed have been Democrats including five (5) supreme court judges and sixteen (16) appellate judges. During those years, Democrats controlled the governor's office and therefore the ultimate appointment. Two prior Republican governors had appointed nine judges, all Republicans.

In Missouri, Kansas, and Arizona attempts are underway to weaken or eliminate appointed selection altogether. In Missouri a campaign is underway to undo the

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[40] In Republican Party of Minnesota v. White, 536 U.S. 765 (2002), the Court invalidated on First Amendment grounds Minnesota's so-called "announce clause," which forbade candidates from announcing their views on disputed legal issues.

[41] *Justice in Jeopardy*, *supra*, n.12, at 18.

[42] *The Case for Partisan Judicial Elections*, The Elections, The Federalist Society for Law and Public Policy Studies (2003)

nation's first appointed selection system.[43] In 2004 there was also a "Vote No" campaign aimed at defeating a sitting Missouri Supreme Court judge. Business and bar association groups are mobilizing in that state and have formed a non-profit group called the Missouri Law Institute to focus on public education about the court system and the role of fair and impartial judges.[44]

After several controversial decisions by the Kansas Supreme Court, special interest groups in that state targeted sitting justices for defeat in recent retention elections. The Kansas legislature also attempted to enact a statute that would return the state to judicial elections.[45]

Education and the Increasing Skepticism About the Judiciary

No matter the system used by a particular state to select their judges, the public's increasing skepticism of the judiciary must be addressed. The task of restoring confidence in the judiciary has started at the national level by the American Bar Association, which has focused in part on educating the public on our system of government with a specific focus on the judiciary. The need for such efforts became apparent given the findings of a recent poll conducted by the ABA in July of 2005. The poll showed that forty (40 percent) percent of respondents could not correctly identify the three (3) branches of government. The ABA President at that time, Michael Greco, thereafter appointed a Commission on Civic Education and the Separation of Powers. In addition to addressing basic information on civics because of an "alarming increase in rhetorical and physical attacks on the judiciary," he wanted a mechanism to educate the public on the importance of an independent judiciary.[46]

North Carolina—An Example of a New Selection Process

After experiencing its first multi-million dollar supreme court race in 2000, North Carolina, its bar association, legislature, and leaders within the press corps began examining alternatives to costly elections. In 2002 the legislature enacted a comprehensive Judicial Campaign Reform Act, which included a switch from partisan to non-partisan ballots, state funding of campaigns, and the production of voters' guides statewide. The Act also lowered campaign contribution limits for those candidates who choose to raise private money. Funding for the plan comes primarily from the state's taxpayers in the form of a voluntary check-off on the state income tax form.[47]

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Michael S. Greco, *President's Message*, 91 A.B.A.J. 6 (2005).
[47] *New Politics of Judicial Elections*, *supra* at 37–38.

Under the new North Carolina system, candidates are eligible to receive public funds for the general election by 1) limiting private fundraising in the year before the race to no more than $10,000 of seed money, 2) filing a declaration of intent with the state Board of Elections to participate in the public financing scheme, 3) collecting a total of at least $33,000, but not more than $69,000 in amounts ranging from $10 to $500, from at least 350 North Carolina registered voters (no PAC money is permitted), and 4) finishing first or second in the state's primary election, which would put them on the ballot for the general election in November. Candidates who achieve these benchmarks are eligible to receive lump sum payments to their campaigns from the state and are then prohibited from engaging in any further campaign fundraising.[48]

In 2004 the first election under the new system was held for seats on the North Carolina Supreme Court and the North Carolina Court of Appeals. Fourteen (14) of the sixteen (16) candidates who were eligible applied for public funds. Of the fourteen (14) who applied, twelve (12) met the benchmarks and received public funding. Two (2) supreme court candidates and two (2) court of appeals candidates won spots on the bench using public financing. One court of appeals candidate prevailed without using public funds because she was unable to qualify. No matching funds were needed. The winners included incumbents and challengers, men and women, African-Americans and whites, and candidates with a wide range of judicial philosophies. By all accounts, this was a successful election.[49] Even one of the losing candidates praised the system suggesting that North Carolina's electorate need not worry about judicial candidates who "risk falling victim to allegations of undue influence of large campaign or special interest contributors."[50]

Recommendations

From the extensive review of the voluminous written materials that already exist on the subject of selecting judges, it is apparent there is no 'one size fits all' system for every state. Nonetheless, certain themes and principles recur in those systems that appear to be working effectively. Those themes and principles include the following characteristics:

- The system should enhance public confidence in the administration of justice.
- The system should select judges who will be accountable to the laws and the constitutions of the United States and the applicable state.

[48] Candidates for the court of appeals receive $137,500 and supreme court candidates receive $201,300. If a publicly financed candidate is outspent by a privately financed candidate or by third-party independent expenditures, "rescue" matching funds up to two times the original grant are available for the publicly financed candidate. *New Politics of Judicial Elections*, *supra* at 38.

[49] *New Politics of Judicial Elections*, *supra*.

[50] Hon. John M. Tyson, *Judicial Election Campaigns: Free Speech, Public Dollars, and the Role of Judges* (a paper presented at the Conference on Public Service and the Law at the University of Virginia, Feb. 12, 2005).

- The system should select judges who reasonably reflect the diversity of the state including geographic, ethnic, gender, and racial diversity as well as diverse experience in legal practice.
- The system should ensure consideration of necessary and sufficient information for voters to select judges with desirable judicial characteristics. These should include integrity, impartiality, professionalism, legal ability, administrative skills, communication skills, social competence and awareness, dignity, ability to put aside ideological considerations, and independence.

Several steps that states can consider to meet the principles outlined above include the following:

- Disclosure—"Sunshine Acts" requiring disclosure of large contributions to smear campaigns will make anonymous donations to such efforts impractical.
- Voter Guides and Non-partisan Websites—Summaries containing information about the education, experience, and general backgrounds of judicial candidates have proven to be very valuable tools for those voters willing to take the time to review the information available. The voter guides and links to the websites can be published in the newspaper or can be distributed to all registered voters.
- Conduct Committees—Respected individuals in the community can become the arbiters of campaign tactics and ethics, which will hopefully encourage candidates to run clean campaigns.
- True Non-Partisan Nominating Commissions—Initiate whatever process is necessary to ensure the creation of credible, deliberative, non-partisan bodies to evaluate the qualifications of those seeking judicial office.
- Judicial Qualification Review Commissions—These commissions utilize surveys, interviews, and research to assess performance of appointed judges and make retention recommendations.
- Judicial Candidate Training—The state government or the bar association can support education for first-time judicial candidates on important judicial attributes such as impartiality, procedural knowledge, dignity, and court administration.
- Experience Requirements—Set minimum years as a lawyer for trial court, intermediate appellate, and supreme court judicial candidates.
- Judges as Leaders for Reform—State court judges should speak out on these important issues—as have United States Supreme Court Justice Ruth Ginsberg and recently retired Justice Sandra Day O'Connor.
- Public Financing of Judicial Elections—This issue is addressed below.

States that continue to use election systems seem to be gravitating toward public financing of judicial elections. According to a survey conducted by Justice at Stake, efforts are currently being undertaken in several states to determine how such a system can be implemented. Those states include Illinois, Ohio, California, Idaho, Michigan, New Mexico, West Virginia, and Wisconsin. Public financing helps to solve issues that arise from the need to fund costly campaigns, the perception of the public that campaign contributions influence judicial decision-making and the impact that fundraising may have on judicial independence.

To date the only state that has adopted public financing of elections is North Carolina. A further review of that experience may therefore be instructive.[51] At least one other state has begun studying the applicability of the North Carolina system.[52] For a comprehensive treatment of the subject, see the report of the ABA Commission on Public Financing of Judicial Campaigns (2001).

What Can DRI Members Do?

- Become involved. State and local defense organizations can join with and encourage other bar and civic groups to build coalitions to address the unique needs in their state. As defense lawyers, we are well-positioned to influence our client groups as well as our legislators. We understand the vital need for a fair and impartial judiciary and can speak to the threats we know exist.
- The Task Force encourages all defense lawyers to become involved in crafting judicial election and retention procedures that are transparent and credible from the perspective of every interested observer. Changing long-standing traditions for selecting and retaining judges will not come quickly or easily, and only a broad-based coalition of groups can make it happen.

[51] See Tyson, *Judicial Election Campaigns*, *supra*, note 28.

[52] See Charlie Wiggins, *Public Financing of Judicial Campaigns: Could the N.C. Model Work in Washington*, King County Bar Bulletin (August 2006), copy at http://kcba.org/.

CONCLUSION

The problems facing the judicial branch of government in America are real. We certainly cannot take for granted that elected officials will look out for judges. Indeed the trend seems to be moving in the other direction. Nor can we assume that judicial independence and accountability, which are the hallmarks of the rule of law in our system of government, will be forever in existence.

The DRI Judicial Task Force hopes that DRI and the SLDOs can use our considerable knowledge and resources to take a leadership role in shoring up the foundation of the branch of government with which we work everyday.

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