

American Bar Association

House of Delegates

Remarks of Chief Justice Christine M. Durham
President of the Conference of Chief Justices

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Last year the then-President of the Conference of Chief Justices (CCJ) addressed this body for the first time in the history of our two organizations, and I am pleased to continue this important tradition of collaboration and communication between the state judiciary and the legal profession. At our mid-year meeting last week, Carolyn Lamm made substantive remarks concerning the priorities of the American Bar Association and the goals and initiatives you are pursuing, many of which have immediate significance for us in our role as the leaders of state judicial branches. In turn, I would like to talk to you about our concerns and current focus.

The overall mission of the Conference of Chief Justices is to improve the administration of justice in the states and territories of the United States. We address this mission by:

- promoting the vitality, independence and effectiveness of state judicial systems
- developing and advancing policies supporting our common interests and values
- educating leaders to become effective managers of state judicial systems
- exchanging information of value to state judicial systems
- supporting the provision of adequate resources for the operation of state courts

Historically, most state courts functioned as relatively small, independent units, dependent on local funding and without a need for strong, centralized administration. Those days have disappeared, and state courts have increasingly emerged as complex organizations requiring sophisticated management and good governance models. The ability to be efficient and effective in the administration of justice has become as much

of a necessity as the ability to be fair and impartial in the resolution of disputes. In fact, we believe that there is a correlation between the decisional independence of the state courts and their institutional independence. Institutional independence includes the ability to manage resources, develop procedures, and establish policies and priorities for the essential functions of the courts: access to justice, prompt resolution of disputes, effective use of and accountability for public resources, alternatives to litigation, and a whole host of other concerns that are part of the administration of the courts. Modern court systems require the ability to secure necessary funding, provide transparency and accountability regarding the use of that funding, implement the best policies and management practices for effective operation of the courts, enjoy the flexibility to cope with a constantly and rapidly changing environment, and “speak with a single voice” to the other branches of government and to the public on issues that concern the judiciary’s status as a co-equal branch of government, including decisional independence.

In the context of these concerns, the Conference of Chief Justices has exercised a national leadership role, one which has been recognized in the organizational structure and the work of other court-related organizations. For example, the Board of the State Justice Institute (SJI), an entity created and funded by Congress for the purpose of supporting the work of the state courts, has traditionally been chaired by a state chief justice and the President has selected Board members from among persons recommended by the Conference. As an aside, a much-needed increase in SJI’s appropriation, which has been dramatically reduced in recent years, is an issue which

we hope the ABA will address and support. Other examples include the presence of a CCJ member on the governing board of the Council of State Governments, the requirement by Congress that a CCJ member sit on the National Commission on Judicial Discipline and Removal and on the Federal Courts Study Committee. The Conference also maintains numerous formal and informal liaisons with other organizations working for the improvement of law and justice, including many ABA projects like the Central and Eastern European Law Initiative and the Ethics 2020 Commission.

In short, the Conference of Chief Justices, in addition to our focus on improving the administration of justice in our own states, clearly understands and acts on the belief that the state courts require a national institutional voice to educate policy makers, including Congress and federal agencies that make decisions affecting our institutions, about our needs and concerns. Recently, the United States Supreme Court decided Caperton v. Massey Coal, considering the impact of state judicial campaign contributions on the perception of fairness and impartiality in court decisions.

129 S. Ct. 2262 (2009). The Conference of Chief Justices filed an amicus curiae brief, which took no position on the merits of the case but offered perspectives on the problem. The Court, to judge by the fact that the brief was cited numerous times, and by both the majority and the dissent, found the observations and the perspective of the Conference helpful. Id. at 2266, 2273

Our role in national discussions of state court issues is greatly enhanced by our work with our partner Conference - the Conference of State Court Administrators

(COSCA). COSCA regularly undertakes studies of difficult and ground-breaking reform efforts in the courts, and produces thoughtful and detailed position papers. When the Conference of Chief Justices considers and endorses such policy documents, they become blueprints for action and implementation around the country. Given that state courts decide more than ninety-five percent of all the claims filed in the United States, this matters - it matters a lot.

The need for good policy and good leadership in state courts has never been greater. I recently re-read Chief Justice Margaret Marshall's remarks to you from last year, in which she highlighted three major challenges to the quality of the American system of justice: the decimation of state court budgets, the related lack of access to justice, and what she termed "perhaps the most toxic element of all," the politicization of state judiciaries through the judicial selection and retention process. I wish I could report that in the intervening year great progress has been made and that things are getting better. Unfortunately, I cannot.

Despite all the bad economic times we have experienced over the last two years, it is becoming clear that the severity of this recession is only beginning to be felt in state government. According to the Center on Budget and Policy Priorities, state revenue deficits in the last recession (2003-2005) totaled \$247 billion. In the current recession (2008-2012), the forecast is for a combined shortfall of \$588 billion. Around the nation, state courts have been forced to lay off and furlough employees, including judges themselves in some states, reduce hours of service to the public, close courts or

shut down certain kinds of hearings, eliminate public service programs, and defer necessary maintenance and construction of court facilities. Some statistics of note, from the National Center for State Courts: 20 states have instituted hiring freezes, 11 have frozen salaries, another 11 have imposed furloughs, 5 have cut pay for staff and/or judges, and 4 have closed courts. To briefly translate these statistics into the perspective of real people with real cases, in one state it now takes up to 60 days to hold a hearing in a temporary custody case that used to take just a few weeks. In many states, spending cuts have led to fewer court dates available for hearing and trials, creating growing backlogs. With priority given to serious criminal cases, there is a looming threat to the civil justice system and its ability to vindicate people's rights, and to foster economic growth and stability by enforcing business contracts in a timely manner. And, of course, the major impact of budget cuts has been felt in the high-volume courts that hear family and juvenile matters, misdemeanors, and small claims disputes. Some of society's most vulnerable people, including victims of domestic violence, abused and neglected children or elders, and victims of vandalism, petty theft and fraud, look to these courts for protection and justice.

One would hope that the current cutbacks are temporary measures, but it is clear that state budgets will be bad for years to come due to structural deficits, demographic shifts, and rising health and education costs. Further, what little opportunity the courts have to contribute to state revenues in the form of increased court fees has already been tapped. Thirteen states have recently raised fees, but the general consensus is that they cannot go much higher without raising concerns about

access to justice.

In this environment, state courts are recognizing that the severity of this economic crisis may well mean that things will never return to “normal.” On the conceptual side, efforts to develop principles to guide the funding of state courts are being made. The Judicial Division of the ABA, together with your Standing Committee on Judicial Independence and the National Center for State Courts, the support organization for CCJ and COSCA, are working to develop a set of principles for funding of the justice system. The State Justice Institute has funded pilot projects in eight states, where the National Center is tracking how state courts are responding to shortfalls. The hope is to identify best practices for long-term strategies and the use of new technologies.

On the more immediate, practical side, many courts are taking sometimes quite dramatic actions to re-engineer their operations to reduce costs and increase efficiencies. A few examples from my own state are typical. We moved last July to eliminate live court reporters in the creation of the court record. The quality of digital recording is now such that some studies suggest it is equal to live transcription, if not in some ways superior. We undertook the move as a cost-cutting measure, but the result has been that our transcript preparation time statewide has dropped from 138 days to 18. Like many other states, we are moving rapidly to implement electronic filing of documents and payments of fees, fines, and restitution. We are relying increasingly on video and telephonic hearings in suitable cases, and we are increasing our court-based support for self-represented litigants and alternative dispute resolution

options. We have undertaken a system-wide reorganization of our clerical staffing models, relying on cross-training and team development to enable our staff to work more efficiently. If there is a silver lining to the damage this crisis is doing, it is that state courts are taking the opportunity to re-evaluate old ways of doing things and coming up with better approaches.

In all of these economic and funding challenges, it is heartening to realize that the public and the media often understand very clearly, first, that courts are the heart and soul of this country's commitment to fairness and justice for all and, second, that they are and must be part of the engine of economic recovery. In a survey conducted by the National Center for State Courts in connection with a conference last May, co-sponsored by the ABA and entitled "Justice is the Business of Government," we learned that:

- 74 percent of Americans have confidence in their state courts (a higher percentage of support than for the other two branches; and
- the public is wary of budget cuts for courts (66 percent oppose suspending jury trials to save money and only 27 percent say it is "generally acceptable" to raise court fees as a way to close budget gaps).

As the New York Times editorialized on November 25, 2009: "At some point, slashing state court financing jeopardizes something beyond basic fairness, public safety and even the rule of law. It weakens democracy itself." Editorial, State Courts at the Tipping Point, N.Y. Times, Nov. 24, 2009.

I would like to make just a brief reference to the idea I mentioned earlier of the

courts as central to the economic business and recovery of their states. In a study commissioned by the Florida State Bar and published a year ago, the following findings were made: (1) the backlog of real property and mortgage foreclosure cases alone directly results in an estimated \$9.9 billion in added costs and lost property values for Floridians every year. For other civil cases, backlogs created an additional \$200 million in added costs; (2) the aggregate of all quantifiable costs associated with court-related delays in civil cases resulted in direct economic impacts (that is, costs to the economy) approaching \$10.1 billion annually; (3) these added direct costs and burdens on the economy adversely impact employment, the generation of labor income, economic output and public resources throughout the state; and (4) an estimated 120,219 permanent Florida jobs are adversely impacted by civil delays resulting from inadequate funding for Florida's courts. The report concluded that the situation would continue to deteriorate until adequate funding for the court system is re-established.

There are significant challenges to state courts as institutions on other fronts as well, of course. On January 27th of this year, the Aspen Institute and Georgetown University Law School sponsored a conference examining the effects of Caperton v. Massey Coal and Citizen's United v. FEC on state judicial elections. In her keynote remarks, Justice Sandra Day O'Connor said that "these two cases should be a warning to states that still choose judges by popular elections, . . . The time is now for opponents of merit selection to do a little soul searching." She referenced what she described as "the mutually assured destruction" of the "funding arms race that has

made multi-million dollar judicial campaigns commonplace.” While the Supreme Court in Caperton established that the size of campaign contributions can create a sufficient question of bias as to require judicial recusal in a donor’s case, 129 S. Ct. 2263-64, Citizens United has opened the door for even larger corporate spending in state judicial elections, 2010 U.S. Lexis *69-70, 143-44, prompting concern that corporate special interests, which already play a role in those elections, will become even more significant players. The Conference of Chief Justices and the ABA are both addressing recusal rules, but the underlying potential for distortion of judicial campaigns and the potential impact on public trust and confidence in the fairness and impartiality of the courts will be untouched by the recusal remedy.

Justice O’Connor has been a leading proponent of reform for state judicial elections, and there are other voices addressing the issue. My colleague Chief Justice Tom Moyer of Ohio has suggested that there may be a “silver lining” in the Citizens United ruling “for those of us who have been trying to impress upon the public the deleterious effects of money in these election[s].” The Akron Beacon Journal declared in an editorial that the U. S. Supreme Court ruling “adds to the urgency of placing a constitutional amendment on the November ballot, otherwise Ohio risks becoming, once again, a poster child for the influence of big money in state Supreme Court campaigns.” Editorial, Price of Justice: Sandra Day O’Connor and Thomas Moyer share a good idea, Akron Beacon Journal, Feb. 3, 2010. In addition to Ohio, Minnesota and Nevada are considering proposals to move to merit selection for judges. In the meantime, states are going to have to look to disclosure requirements and

recusal rules to preserve the perception that the courts are not influenced by special interests with deep pockets. The public clearly cares about this issue. A national poll conducted a year ago by Harris Interactive found that 80 percent of the public believe judges should avoid cases involving major campaign contributors, and 81 percent believe that a disinterested judge, not the judge whose recusal is in question, should have the last word on recusal motions. Those of us committed to fairness - and the appearance of fairness - in the courts have our work cut out for us.

I would like to end my remarks with some comments on that work. Lawyers and judges properly understand their roles in society and their institutions as an integral part of the constitutional experiment that is the American system of justice. My colleagues in the Conference of Chief Justices rely greatly on the ideals, the insight, the dedication, and the hard work of the American Bar Association and its members and leaders. We acknowledge and appreciate the multitude of ways in which your work supports and complements ours. At the present I would note particularly the Ethics 2020 Commission, on which Chief Justice Gerry VandeWalle of North Dakota sits, and your project to update the 2007 Model Code. Our Conference is in the process of reviewing and working with the proposed new standards on judicial disqualification advanced by the ABA Standing Committee on Judicial Independence. I have appointed a special CCJ task force to focus on issues raised by the globalization of the practice of law, which has already benefitted greatly by the work done by the section on International Law and the section on Legal Education and Admissions to the Bar. One result of the recent conference I mentioned earlier, co-hosted by the

National Center for State Courts and the ABA, has been a collaborative task force on “Justice is the Business of Courts,” with Mary McQueen, the Center’s President, as co-chair.

Your leadership has been very supportive of our joint concerns, and we look forward to a future of productive efforts to maintain and improve the backbone of our justice system - the state courts. My hope would be that every lawyer in America would embrace the role of courts as critical institutions for democracy and lawyers’ own roles as protectors of and advocates for them. I thank the American Bar Association for furthering that mission.

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