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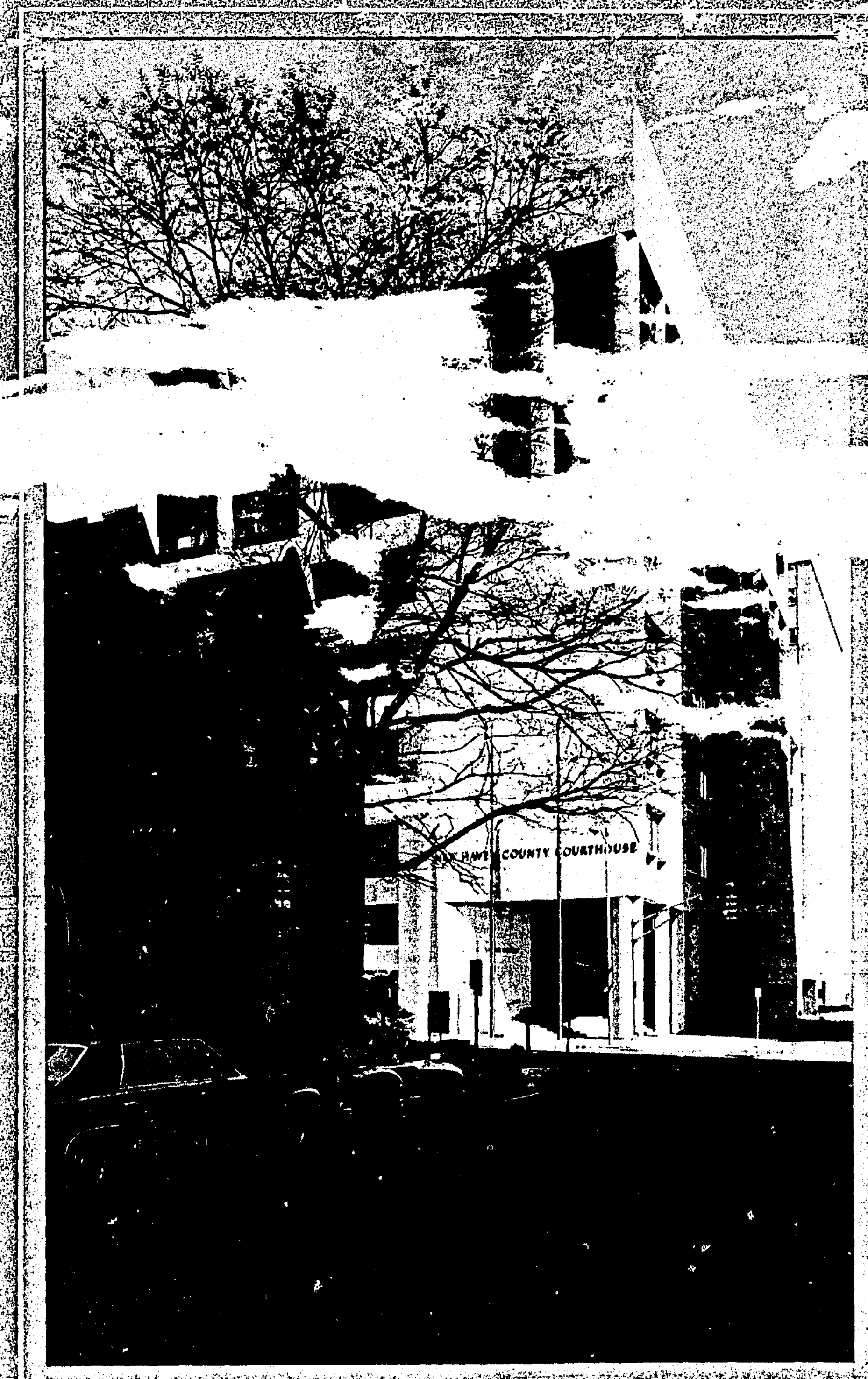

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Court Change Strategies

by Victoria S. Cashman

During the past decade courts have attracted a new interest and increased criticism. This concern has not only been voiced by judges and lawyers who daily conduct their business in the courts but increasingly by those members of the public who come in contact with the courts, including jurors, witnesses, litigants, defendants, or journalists. In response to the social upheavals of the late 60s and the consequent strains placed on the already overburdened court systems, several blue-ribbon commissions have developed recommendations for improving the administration of our court systems. Most notable among these are the American Bar Association Standards Relating to Judicial Administration and the National Advisory Commission on Standards and Goals' *Courts* volume.[1] A number of states have already accepted the challenge of court reform and have modernized their courts. Yet, there is a long way to go before these practical goals are fullfilled in all of our courts.[2]

The court change process is fraught with difficulty. Opposition and inertia frequently retard it. Some of the recently successful efforts, however, provide an opportunity to isolate strategies that have been used to accomplish court change. The purpose of this article is to review these strategies so that, to the extent that some tactics have proved to be better than others, they can be shared.

An assumption that is used throughout this paper is that many of the tactics used for a particular reform in one state are applicable to other court-related proposals in that or other states. For example, the "grandfather clause" has been used in numerous efforts to mollify opponents within the system who have a vested interest in the status quo. Thus, in an effort to require that all judges be law-trained, lay judges presently holding office can be "grandfathered" so that these specific individuals are eligible for judgeships, but all others must be lawyers. This same principle has been used in proposals dealing with a change from elected clerks to professionally trained court administrators.

A number of states have already accepted the challenge of court reform and modernized their courts.

This article does not attempt to describe the political procedures that are required to change the courts in a particular jurisdiction, i.e., court rule, legislative act, or constitutional amendment. Neither is this an analysis of the environments (political, social, and demographic) in which various court reform efforts were mounted, although it is certainly recognized that these factors are important.[3] Rather, it is wished to highlight those tactics that appear to be worthy of serious consideration by anyone trying to change a court system.

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This review is based on available literature and personal contacts and as such does not pretend to have any guarantees as to the conditions under which a technique will or will not work. Nevertheless, a cataloguing of these techniques can make the would-be reformer aware of a variety of strategies that have been used successfully.

The tactics are presented within a rough scheme of processes that would most likely obtain in a court reform effort. In actual reform efforts, however, these elements may be combined in a variety of ways depending on the variables unique to a particular jurisdiction.

Setting the Stage

The role of a broad-based study committee or task force is critical. The purpose of the court study is to identify problems, consider alternatives, and then to recommend the most appropriate reforms. The court study group should produce new perspectives and mobilize political resources not usually involved in policymaking about courts. Otherwise, no basis is created to break the neglect of courts, common in many states, by executive and legislative branches.

Just as in any other reform effort, the support and guidance of a strong leader is a definite advantage.

Of course, the proposals of many study committees have been ignored. The element that seems to characterize the successful efforts is the representation of diverse points of view. Apparently the broad representation provides several facets of support that, when taken together, work toward success:

1. The resultant proposals are more likely to be viewed by the public as promoting the general welfare rather than the interests of a particular group.
2. Opposition may be diluted by making compromises at the proposal stage; more feasible proposals are thereby advanced.
3. The constituencies represented by the commission members are more likely to support a proposal developed with their interest represented from the beginning.
4. Key legislators are more likely to respond to reform proposals.

The interest groups that should be represented in a particular state are as varied as the demographic characteristics of the state, but the involvement of the bench, the bar, and the League of Women Voters has been essential to numerous state study efforts.

The Minnesota Select Committee on the State Judicial System proposed an improved court system through a manageable structure, a sound administrative system, and adequate funding with a timetable suggesting the steps necessary to realize these goals. In 1977 the legislature enacted a bill that provided essentially the broad administrative changes that this group had recommended. The Minnesota Committee included representatives of the bench, the bar, the League of Women Voters, prosecutors, public defenders, labor unions, law enforcement agencies, a citizens' court reform group, and the State Department of Agriculture. Two legislators were included as *ex officio* members.[4] The Select Committee was appointed by the Chief Justice under the auspices of the Judicial Council. Staff and other support were provided through a grant from the Governor's Commission on Crime Prevention and Control with matching funds from the Judicial Council and the legislature.

Thus, the diversity of representation existed both in the membership of the group and its sponsorship.

Some reform leaders regard legislative sponsorship of a study group as vital to its success. In an article on the court study process, Harry Lawson stresses the importance of legislative involvement in any study group that will generate proposals that require legislative action.[5] This is a point well taken. Legislative involvement, however, may only be forthcoming after a broad-based study group has established court reform on the public agenda.

The Lawson article may lead one to the conclusion that such studies will not significantly advance court reform unless and until the legislature is ready to be involved. Lawson contends that "a noninvolved legislature will either disregard the study or decide to do one of its own."[6] This conclusion seems to undervalue the role played by such studies in getting legislatures interested and involved in court reform. For example, the Wisconsin Citizens Study Committee on Judicial Organization was established in 1971 and issued its report in 1973. The recommendations of this group were not immediately accepted by the legislature. Many of that group's proposals were, however, eventually embodied in the constitutional amendments passed by the legislature and subsequently approved by the voters in April 1977. It is doubtful that the legislature would have approved such major changes without the prior work of the Study Committee. Though the court study group alone is not sufficient to achieve court reform, the group may be a necessity for court reform to become a possibility.

The need for several stages of effort is reflected in the often lengthy time period needed to achieve change in a state court system. In many of the states that have achieved significant court modernization—Connecticut, Florida, Kansas, Missouri, New York, Wisconsin—the results were not immediate but rather required several attempts during a period of years.

In addition to the composition and sponsorship of the study committee, the methodology of the study should be designed to allow consideration of diverse points of view. The Kansas Judicial Study Advisory Committee (authorized by the legislature and appointed by the supreme court) held public hearings in all parts of the state, mailed questionnaires, and interviewed the judges in all of the courts.[7] These activities also increased the visibility of the study.

In order to assure support for reforms, certain trade-offs have been effective. . .

The Minnesota Select Committee reviewed studies on topics such as jurisdictional and administrative structure, judicial and nonjudicial personnel systems and funding. The committee also invited testimony from numerous experts and utilized questionnaires on court administration to elicit responses from judges, administrators, and other court personnel. After the responses had been collected, on-site interviews were conducted with key leaders of each group.[8]

The techniques used by Kansas and Minnesota provided data on caseload, personnel, and funding that documented the need for change. These techniques also increased citizen participation in making decisions about the courts and enhanced the validity of the study committee as a democratically based agent of change.

Organizing the Effort

After a reform proposal has been

developed, an organization must coordinate the court reform "campaign." Organizational embodiment of the reform drive at a time when it can easily become fragmented or sidetracked by opposition is absolutely necessary. If a constitutional question is involved, the coordinating organization must function much like a campaign committee — raising funds, disseminating materials, advocating change, enlisting endorsements, and providing speakers. In short, the organization must be capable of managing a public education campaign.

In addition to the leadership of one organization, the active support of a variety of interest groups is also critical to the campaign. During the successful effort to revise the Alabama Judicial Article in 1973, active support from the state bar, the judges, a citizen's conference organization, legislators, news media, and from organizations such as the League of Women Voters and the PTA contributed a great deal to the success. Former Chief Justice Howell Heflin has estimated that 50 groups and organizations endorsed the proposed judicial article in Alabama.[9] Such breadth of support provides an impressive legislative rationale for action.

To develop the support of these interest groups, materials explaining the reforms and the problems they address should be supplied to groups who are most likely to be concerned with the issue. In Tennessee, for example, the Young Lawyers Section of the Bar Association worked successfully for the defeat of a proposed revision to the judicial article of the constitution that went before the voters in March 1978. The Young Lawyers put together a speakers packet and established a network of lawyers who were prepared to address groups throughout the state. With the help of these packets, presentations were made at local bar meetings and meetings of business, civic, and religious groups.

As much as possible, topics to be covered in such presentations should address issues of concern to the audience. Since the proponents of change are often judges or bar leaders, the matters of concern to business or civic leaders are not always easily identified. The input of a study commission can be helpful here. At a recent meeting of bench, bar, civic, and business leaders to discuss court improvement, the question of juror management was raised. The head of a small industrial firm indicated that he had identifiable losses when jurors' time is badly managed. Like many other firms, his policy is to pay employees their regular salary when they are on jury duty with the fee received for the jury duty being turned back to the firm. The jury service, including legitimate waiting periods, is welcomed as fulfilling a civic duty. When these employees wait day after day, however, with little or no likelihood that they will be utilized, the business leaders justifiably wonder why court resources can't be better managed. Assuming a proposal for court modernization will address improved administration and consequent juror management, this example and others like it should be cited as ways in which the public will benefit from the proposed reforms.

Outlines of the proposals and the issues they address should be supplied to potential backers to encourage endorsements. These outlines will serve as a ready guide to important points to be covered in endorsement statements. In the successful effort to modernize West Virginia's courts in 1974, most organizations contacted endorsed the effort. Usually these organizations used the stock endorsement statement provided by the proponents.[10] Also in West Virginia, workers were reached through their organization's newspaper with an article discussing the amendment. The proponents had prepared both a partisan and a nonpartisan article. Thus, to the extent that potential backers do not lend support because of lack of information or inertia, a well-run campaign can generate this support.[11]

Leadership

Just as in any other reform effort, the support and guidance of a strong leader is a definite advantage. In Alabama, then Chief Justice Heflin coordinated the reform effort and served as its spokesman; as such, he was involved in speaking engagements and interviews throughout the state.[12]

The judicial amendment to Kentucky's constitution, which appeared on the November 1975 ballot, received endorsement from both gubernatorial candidates running in that election. After the amendment passed, Governor Carroll convened a special session of legislature to consider enabling legislation for the new judicial article and then shepherded it through to passage.[13]

In several court reform efforts, leaders who hold key positions of authority in a state have let pressures build so as to adversely affect those who oppose a particular reform. The assumption of the proponents is that when the adverse effects become personally menacing, the opposition will weaken. Although the application of such pressure is undoubtedly a common political strategy for accomplishing change in a variety of areas, few applications to court issues have been publicized.

One example is the action of the Wisconsin governor in the recent push for passage of sweeping court reform. One political scientist noted that, "While the battle over this package was being fought in the legislature, he declined to budget pay increases for judges or to provide additional courts, thus putting pressure on trial court judges who opposed the reform package."[14]

An earlier example was provided by the action of Chief Justice Arthur T. Vanderbilt during a 1955 attempt in New Jersey to gain passage of legislation. The bill in question would transfer accident cases from the superior court to the county courts whenever it appeared at the pretrial conference that the damages would be within the jurisdictional limits of the county court. The supreme court recommended this action to relieve the court calendars, but lawyers opposed it because they were fighting to make pretrial conferences voluntary rather than mandatory in automobile accident cases. When Vanderbilt learned that the bar opposed this transfer, he threatened to clear the backlogs by holding court six days a week with Saturday as motions day. The lawyers' opposition quickly diminished and the legislature enacted the transfer legislation.[15]

Media Coverage

The role of media coverage is just as critical to a court reform effort as it is to any other "campaign." The methods of maximizing media coverage have included providing journalists' notebooks, participating in televised interview forums, and setting up news conferences. Materials in the notebooks should include a statement of the following:

— brief description of the present court system
— the problems that exist
— how the proposals will correct problems
— possible story lines
— persons to contact for more information.

A media conference held in Alabama attracted almost a hundred reporters, editors, and news commentators and generated considerable editorial comment.[16]

During the recent referendum in New York (which successfully amended the constitution to provide appointment of court of appeals judges and which streamlined statewide administration and judicial discipline) press conferences were called to coincide with many of the speeches.[17] Thus, a press conference would be held to brief the press and answer any questions about the proposals on the occasion of a speech to a local PTA or civic group. Through this process, the message that would otherwise have been heard only by a relatively small number received print or electronic media coverage as well. When scheduling a news conference or issuing a news release, one should be mindful of media deadlines. For example, a news conference held before an 8 P.M. PTA meeting might yield an item on the late TV news; held afterward it might be too late for inclusion that night and considered stale by the next day for evening news.

In New York opponents of merit selection and the other issues presented to the voters in 1977 quickly mounted media campaigns of their own. Proponents realized that they could not raise the money necessary for television time so they concentrated on radio coverage. The bar raised $200,000 for use in getting the message on the radio. During the last few days before the election, the message was heavily broadcast by radio stations throughout the state.[18]

Although in most cases an effort benefits from heavy exposure through the media, there have been instances when big media campaigns have been shunned. For example, one of the co-chairmen of the Kentuckians for Modern Courts referred to the constitutional amendment campaign in this way: "We didn't have any money and so it was a rather quiet thing that didn't stir up a lot of organized opposition. If we'd gotten out and made a big media campaign, we would have lost our shirts."[19] In that campaign, the reform group "spent about $12,000 for a few television ads, some newspaper advertising and some letters to the state's lawyers"[20]

In general, court efforts appear to benefit from heavy media coverage. But one should evaluate possible effects on the opposition before assuming that the effects will be positive.

Trade-Offs

In order to assure support for reforms, certain trade-offs have been effective in removing common sources of opposition without compromising the basic goals of the reform. One example is the grandfather clause discussed earlier. Also, local government units are often opposed to a unified, state-financed court system because they will lose the income from fines and fees generated by the courts. In Kentucky, the governor and some legislator advocates pledged to return net district court revenue to local governments to compensate for the loss of income to them when the courts became state funded.[21] In this manner, the reform became palatable to local officials who feared that local taxes would have to be raised if all court revenues went to the state, while the advantages of giving the state fiscal responsibility for the courts were enhanced.

One cautionary note that should be raised is that certain funding formula compromises have put the courts in a financial bind. For example, the compromise that was reached in Alabama specified that the courts would be funded on a statewide basis to the extent of revenues. When, in 1977, the revenues did not meet the operating expenses, there was some delay in issuing paychecks before the legislature enacted an emergency appropriations measure.

The concessions made in Kentucky appear to have done relatively little damage to the concept of unified funding for two reasons:

1. Funding of courts is by appropriation rather than by revenue produced.
2. The return is based on net revenue from district courts, thus only funds in excess of the cost of district court operations are returned. This provision may be eliminated by subsequent action of the general assembly, while the provision unifying the courts is constitutional.

Thus, by finding a formula that would not unduly burden the state in its funding of the courts, but also not deprive the local government units of a traditional source of income, an issue that has been a barrier to unified, state-funded courts in other states was overcome in Kentucky.

In Minnesota, one of the goals considered by the Select Committee was unification of the trial court. Although a one-tier trial court was not proposed or enacted, several steps were taken to remove impediments to such a system.[22] These steps included the following: the equalization of salary between judges of the general jurisdiction courts and those of the special courts; abolishing certain rules that kept district court judges from hearing cases for which that court shared concurrent jurisdiction with the county courts; providing for the administration of all courts on a district basis so that the chief judge of each district may assign all judges within the district to any court in the district. By having the same salary and similar assignments, the distinctions between the district, county, county municipal and probate court judges will become blurred. This is viewed by many as an effective interim step toward a unified one-tier trial court with a single class of judges.

Current Conditions

Recognizing current fiscal or social conditions that will be affected by court system change has been critical to the success or failure of reform efforts. An example of how such factors affected a reform effort can be seen in the 1976 passage of New York's Unified Budget Act. The unified budget act might have been pushed solely on the merits of improved administration of the budget. However, the growing fiscal crises of local governments, especially New York's, were recognized. Increased state support of the courts through a partial charge-back system was presented as a method by which the legislators could provide relief to the local governments.[23] The fact that many reform groups had recommended state funding of courts also made this position politically attractive.[24] The bill as enacted provides that all funds for the court system personnel are appropriated by the state, but there is a charge-back of 75

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percent to the localities during fiscal 1977 (local governments are still responsible for facilities and town and village courts). Under present law there will be no charge-back to local governments after 1980 and the state will assume full fiscal responsibility.

The unified budget and charge-back system provide alternative methods for gradual state funding of courts. Other alternatives include increments by funding specific items: judicial salaries and travel expenses or funding a percentage of costs; or all operating expenses of a general jurisdiction trial court but no state funds for limited jurisdiction courts.[25] These methods do not always assure success in achieving full state funding, since they necessitate many political contests to receive appropriations for any increments.[26]

CONCLUSION

The techniques reviewed in this article are not recommended as particularly appropriate to any one or all reform efforts. The would-be reformer must analyze the local political, social, and economic environment to determine which strategies might lead to success. This compilation only attempts to increase awareness of the strategies that have been used successfully.

The overall tone of this review probably appears more Machiavellian than is desirable. In discussing improvements in the administration of justice, however, it is not enough to discuss where we should be going. We also must find out how to get there. For better or worse, the courts do not exist in a vacuum. Rather they are a part of the political arena, and they are vulnerable to all of the political, social and economic influences that affect any other institution that is an integral part of the American system of government. □

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NOTES

[1]American Bar Association Commission on Standards of Judicial Administration. *Standards Relating to: Court Organization* (1974); *Trial Courts* (1976); *Appellate Courts* (1977).

[2]The National Center for State Courts, with the support of the American Bar Association and the Law Enforcement Assistance Administration, is conducting a study of the extent to which the American Bar Association Standards of Court Organization are met in all nonfederal courts. The results of these comparisons are presented in the *State Court Organization Profile Series.* This consists of 54 profiles, one for each of the state and territorial court systems.

[3]A major research effort on this topic will be reported in Larry Berkson and Susan Carbon, *Court Unification: Its History, Politics and Implementation* (American Judicature Society, expected Fall, 1978).

[4]Select Committee on the State Judicial System, *Final Report* (Minnesota, 1976).

[5]Harry O. Lawson, "Commentary on the Process of Change," 4 *Arizona State Law Journal,* 1974, p. 631.

[6]*Ibid.*, p. 634.

[7]Kansas Citizens for Court Improvement, *The Steps to a Modern Court System,* (1976), p. iii.

[8]Select Committee on the State Judicial System, *Final Report,* Minnesota. 1976. pp. 2, 3.

[9]Hon. Howell T. Heflin, "Alabama Judicial Article Passes with Ease." Lecture at joint meeting of American Judicature Society and the National Conference of Bar Presidents, August, 1974.

[10]Forest J. Bowman, "Constitutional Revision on a Shoestring in West Virginia," 59 *Judicature.* June-July 1975 pp. 31-32.

[11]*Ibid.*

[12]Heflin, *supra* note 9.

[13]*Louisville Courier-Journal,* Dec. 24, 1976.

[14]David Adamany, "The Implementation of Court Improvements." Paper prepared for *State Courts: A Blueprint for the Future* (Williamsburg: National Center for State Courts, 1978) p. 11.

[15]Arthur T. Vanderbilt, II, *Changing Law: A Biography of Arthur T. Vanderbilt* (New Brunswick, New Jersey: Rutgers University Press, 1976) pp. 219-220.

[16]Heflin, *supra* note 9.

[17]Remarks of Hon. Richard J. Bartlett, New York State Court Administrative Judge, at American Bar Association Young Lawyer Section Meeting, February, 1978.

[18]*Ibid.*

[19]Remarks of Judge Henry Meigs II in Pat Chapin, "Kentucky votes in new court, votes out non-lawyer judges," 59 *Judicature* January, 1976: p. 307.

[20]*Ibid.*, p. 306.

[21]*Louisville Courier-Journal,* December 3, 1976.

[22]Select Committee Report, *supra* note 8, pp. 6-9.

[23]Peter Gray (New York Deputy State Court Administrator), Comments at National Center for State Courts' Council of State Court Representatives Meeting, December, 1976.

[24]See for example, Temporary Commission on the New York State Court System, . . . *And Justice for All* (Albany, New York, January 1973).

[25]Carl Baar, *Separate but Subservient* (Lexington, Mass.: Lexington Books, 1975), pp. 5-9.

[26]Gray, *supra* note 23.

END