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### Trends in Judicial Reform

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## A P P E N D I X

### TRENDS IN JUDICIAL REFORM

#### A. CREATION OF A SINGLE LEVEL TRIAL COURT AND ABOLITION OF JUSTICES OF THE PEACE

The constitutions of thirty states now contain no provision vesting judicial power in justices of the peace.<sup>1</sup> The direction of change is clear, and if the last few years are indicative, the rate of change is accelerating. Since 1965, constitutional protection of justices of the peace has been removed in eleven states.<sup>2</sup>

Some states have retained justices of the peace, but are attempting to upgrade them with reform of fees, rules, administration, and required training.<sup>3</sup> Four states have made constitutional amendments that specifically provide that the legislature may abolish justices of the peace.<sup>4</sup> Two states are now considering proposals that would abolish justices of the peace.<sup>5</sup>

A variety of means are used to provide substitutions for justice courts, but the predominant method involves a magistrate or commissioner system as an integral part of the general trial level court.<sup>6</sup> Some states create or continue small claims divisions, municipal and county courts,<sup>7</sup> and some simply place former justice court jurisdiction in the general trial court.<sup>8</sup>

Finally, the overall effect of nearly every constitutional change is to reduce the number of courts of limited jurisdiction, and to move toward a single level of trial court in the state.<sup>9</sup>

The Consensus of the Citizens' Conference on the Montana Judicial System, held in Great Falls, September 29-30, October 1, 1966 was:

The Montana courts of limited and special jurisdiction in existence, that is, the Justice of the Peace and Police Courts, on the other hand, with some exceptions, are generally not satisfactory in that they are not uniformly providing the quality of justice desired by Montana citizens. This inability to provide a satisfactory quality of justice is directly related to the following conditions: 1. the failure of our laws to require adequate qualifications for the judges of these courts, 2. the use of the fee system in the compensation of many of the judges, 3. inadequate salaries, 4. the political and commercial pressures to which these judges are sometimes subjected by virtue of the method of their selection, 5. the failure to restrict their extra-judicial activities, and 6. the lack of adequate courtroom facilities. It is recognized that owing to the sparse population and remote location of many Montana communities, these problems are difficult of solution.

and further:

The type and quality of justice presently being provided in these courts could be materially improved by adoption of a unified court system which would provide a district court level of judicial quality for all legal proceedings. This unified court system might be materially implemented by incorporating within it a provision whereby, where needed, district court judges might select persons to act as deputy judges or magistrates to assist the district court in supplying continuous court representation in remote areas of the state.

The United States District Courts utilize a magistrate system,<sup>10</sup> adopted in 1968 to replace a nearly identical system of District Court Commissioners. While that system is analogous to what might be implemented in Montana, there are some differences: the Montana plan would permit magistrates to try cases, while federal magistrates, except for minor criminal offenses, cannot;<sup>11</sup> there is no term certain for appointment in the Montana plan, while

there is for federal magistrates;<sup>12</sup> jurisdiction of magistrates under the Montana plan is that of the district court, while jurisdiction of federal magistrates is limited.<sup>13</sup> In both, however, appointment is by the district judge, or judges, according to local needs, with provision for either full or part time positions.<sup>14</sup> Both require that a magistrate be admitted to practice before the appropriate bar, except in certain specific circumstances.<sup>15</sup>

## B. MERIT SELECTION OF JUDGES

The merit selection of judges involves four basic elements: a nominating commission of diverse membership; appointment of judges from nominees submitted by the commission; approval or rejection of the judge at election; and a method of removal of judges. These elements are present in some form in every state that has adopted all, or some portion of the merit system, for all, or some of their courts.

Fourteen states now use some part of the system for some of their courts. The first state to utilize the plan was Missouri in 1945.<sup>1</sup>

At least one nominating commission is currently a constitutionally created body in nine states,<sup>2</sup> and is proposed in Indiana.<sup>3</sup> Idaho, Utah, and Vermont have statutory commissions.<sup>4</sup> Membership of the commissions vary considerably in size,<sup>5</sup> composition and method of selection.<sup>6</sup> Some states utilize separate commissions for each court<sup>7</sup> while others have but one statewide commission.<sup>8</sup> Most, however, include representation from the judiciary, the bar, and the general public.

Appointment by the governor of the state from nominees submitted to him for each judicial vacancy is the second essential feature of merit selection. A check exists in some states, providing that the chief justice of the supreme court is to make the appointment if the governor has not done so in a specified time.<sup>9</sup> Commissions are usually required to submit three nominees for each vacancy on appellate courts, and two for trial level courts.

The third element requires the judge to submit to approval or rejection by the voters upon expiration of his term of office and declaration of his candidacy. Terms of office vary somewhat, as do the details of election, but most variations are not substantive.<sup>10</sup> Election is usually uncontested at general election under the merit system, except in Vermont where the general assembly elects Supreme Court justices from nominees submitted by a nominating commission,<sup>11</sup> and in Utah which allows a contested election.<sup>12</sup> The usual format of the ballot looks much like this:

"Shall Justice (Judge) \_\_\_\_\_ of the Supreme  
(or other) Court be retained in office? Yes \_\_\_\_\_ No \_\_\_\_\_"

The final element is a means of disciplining and removing judges. While the traditional method has been impeachment, a growing number of states have created a Judicial Qualifications Council, under various names, whose function is to investigate complaints or charges, and to bring action. This concept has been adopted in several states that utilize no other part of merit selection.<sup>13</sup>

Membership, terms, and method of selection varies considerably,<sup>14</sup> but the function and powers of each are relatively uniform.

The commissions are constitutionally created in fifteen states,<sup>15</sup> statutory in Connecticut and Oregon<sup>16</sup> and are being proposed as constitutional entities in three other states.<sup>17</sup>

The 1966 Montana Citizens' Conference on the Judiciary came to this consensus:

The non-partisan election system of selecting the judges has not succeeded in removing the Montana judiciary from political pressures

and uncertainties. To succeed in bringing the lawyers best qualified for judicial office to the bench of this state, selection of judges should be made by a system based entirely upon merit.

The selection system should include nomination of candidates by a commission composed of lay citizens as well as members of the bar. Appointment of the judges should be made by the Governor, reserving to the people the right to vote at reasonable intervals upon the issue of whether a particular judge should or should not be continued in office.

And further:

Impeachment as a means of removing judges from office has proven unworkable. A system must be adopted in Montana to provide a means whereby judges may be censured without removal, investigated without publicity, yet removed if necessary without the cumbersome, costly, and time consuming process of impeachment by the legislature. To this end it is our recommendation that study be given to the various plans now in effect in other states to determine which will be most adequate for Montana. Any plan to be adopted should contain provisions for the appointment of an investigative committee composed of judges appointed by the Supreme Court, lawyers appointed by the Montana Bar Association and laymen appointed by the Governor. The work of this committee will be to receive and confidentially investigate complaints, reporting, if necessary, to the Montana Supreme Court which will act as final arbiter. The standards for removal should be sufficiently broad so as to leave discretion in the hands of the committee and the Supreme Court.

#### C. VESTING ADMINISTRATIVE CONTROL IN THE STATE'S HIGHEST COURT

In probably no other area of judicial reform has there been so uniform a shift as that expressly vesting administrative power in the state's highest court, and providing for administrators of court systems.

Seventeen states have made the power constitutional.<sup>1</sup> Twenty more states have granted the power by statute.<sup>2</sup> Only thirteen states remain without the express grant of power of administrative control to their state's highest court, and two of those have proposals to do so.<sup>3</sup>

And in another three states, administrative power is vested in a judicial control group.<sup>4</sup> Many states do provide for an advisory body for administration, but their powers are confined to reports and recommendations.<sup>5</sup> A growing number - a total now of thirty-eight states - provide for administrative directors, or assistants to carry out the administrative function.<sup>6</sup>

A separate provision expressly granting power to the chief justice to assign judges is not unusual and presently exists in twenty-eight states.<sup>7</sup>

As for the power to redistrict the state, the Oklahoma constitution specifically provides that the Legislature "may at any time delegate authority to the Supreme Court to designate by court rule the division of the state into districts and the number of judges."<sup>8</sup> Most state legislatures have the power to re-district the state.<sup>9</sup>

In Montana, the Supreme Court presently has, and has exercised, administrative control in certain specific situations.<sup>10</sup> The proposed constitutional language is not a great expansion of power, but as pointed out in the comment, is designed to create a clear line of administrative control.

The 1966 Montana Citizens' Conference Consensus statement made their position clear:

In theory a unified court system is more desirable than the present autonomous system of courts in Montana today. Any unified system of courts to be capable



of working practically in Montana must take into account our sparsely populated and remote areas, yet avoid sacrificing ready accessibility of a forum to litigants.

Judicial business ought to be conducted in an efficient manner utilizing up to date techniques of administration, including analysis and assignment of judges to equalize case loads. The performance of minor non-judicial administrative details should not be left to the judges.

The chief administrative officer in a unified court system should be a judicial person, probably the Chief Justice of the Supreme Court, and he should have an administrative assistant. The powers and duties of the chief administrative officer should include the assignment of judges from one district to another, delegation of administrative authority, formulation of uniform procedures, and requirement of uniform and periodic reporting of all judges concerning the volume and status of cases in their respective courts. He should have assistance in such matters as preparation and presentation of budgets and compilation of statistical data.

#### D. VESTING RULE MAKING POWER IN THE STATE'S HIGHEST COURT

Recognized to be inherent in many state's highest courts, either by statute, case law, or both,<sup>1</sup> the power to make rules for the regulation of practice and procedure is granted by the constitution of fifteen states,<sup>2</sup> and by statute in twenty-two more.<sup>3</sup> An additional three states have proposals to make the power constitutional.<sup>4</sup> In California the power to make rules for the courts of the state is expressly granted to a judicial council<sup>5</sup> and in four states it is expressly reserved to the legislature by the constitution.<sup>6</sup> The Oregon legislature has expressly denied rule-making power to its Supreme Court.<sup>7</sup>

Advisory groups for rules of court are operative in twelve states<sup>8</sup> in addition to, or instead of, the general advisory council discussed in E, infra, which usually include a direction to conduct studies of practice and procedure.

In 1948 the United States Congress established a Judicial Conference of the United States.<sup>9</sup> By amendment in 1958, the Conference was provided with this instruction:<sup>10</sup>

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Under the authority of that paragraph, the United States Supreme Court has adopted the Federal Rules of Procedure, and has appointed an Advisory Committee on Rules of Evidence. That committee prepared and submitted Proposed Rules of Evidence for the United States District Courts and Magistrates<sup>11</sup> to the Committee on Rules and Practice for their submission to the Supreme Court.

Upon review, a second draft has been prepared for re-submission to the Supreme Court.<sup>12</sup>

Once federal rules of evidence are adopted state courts will find it much to their advantage, as they did with the Federal Rules of Civil Procedure, to adopt state rules of evidence similar to the federal rules. Utah has already granted to their Supreme Court the authority to make and promulgate rules of evidence.<sup>13</sup>

Montana, by statute in 1963, granted to the Supreme Court rule making power for civil procedure, and in 1967 did the same for criminal procedure. The grant of power to make rules for criminal procedure, however, expired on January 1, 1969,<sup>14</sup> and has not been extended. The power to make rules for civil procedure was not made subject to termination. The key provisions are below:

#### REVISED CODES OF MONTANA (1947)

Rule 83. Each district court, upon agreement of the judges or a majority thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules prescribed by the supreme court. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the supreme court of this state. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

#### Civil Procedure: Title 93 Civil Procedure

93-2801-1. The supreme court of this state shall have the power to regulate the pleading, practice, procedure, and the forms thereof in civil actions in all courts of this state, by rules promulgated by it from time to time, for the purpose of simplifying judicial proceedings, in the courts of Montana and for promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant and shall not be inconsistent with the constitution of the state of Montana.

93-2801-2. Before any rules are adopted the supreme court shall appoint an advisory committee consisting of eight members of the bar of the state and at least three judges of the district court to assist the court in considering and preparing such rules as it may adopt.

93-2801-3. Before any rule is adopted, the supreme court shall distribute copies of the proposed rule to the bench and bar of the state for their consideration and suggestions and give due consideration to such suggestions as they may submit to the court. The Montana Bar Association or the Association of Montana Judges may file with the supreme court a petition specifying their suggestions concerning any existing or proposed rule and requesting a hearing thereon within six (6) months after the filing of the petition.

93-2801-4. Any district court and the supreme court, may adopt rules of court governing its practice so long as such rules are not in conflict with the rules promulgated by the supreme court of the state of Montana, in accordance with this act.

#### E. JUDICIAL ADVISORY COUNCIL

Two forms of advisory groups are present in modern judicial systems. The first is an internal group, composed of all the judges of a court, or a state, usually referred to as a judicial conference. The second is a more recent development for most states and is essentially an advisory group designed to provide diverse representation, usually created as a judicial council.

Three states now have a constitutionally created judicial council.<sup>1</sup> While the power to call a judicial conference of judges is recognized as within the rule-making power of most state's highest courts,<sup>2</sup> two states make constitutional provision for its meeting.<sup>3</sup>

Councils are created by statute in twenty-five states<sup>4</sup> and conferences in nineteen.<sup>5</sup> While structure, membership, method of selection, term of office, and other detail varies with

each state, most include representation of three groups - the judiciary, the bar and the public, and most require periodic reporting to the legislature or Supreme Court or both.

Both conferences and councils are granted only the power to recommend in most cases, and their functions and duties are often similar. California and New York, however, vest substantive power in their judicial councils.<sup>6</sup> Other states create advisory groups for temporary or limited purposes.<sup>7</sup>

The consensus of the 1966 Citizens' Conference on the Montana Judicial System concisely describes both the function and representation of most advisory councils, as well as recognizing the need:

A permanent citizen's steering committee should immediately be established to coordinate further study of action. This committee should be large enough to be representative of all areas and walks of life in Montana, yet small enough to be effective.

#### F. APPOINTMENT OF CLERKS OF COURT

The power of courts to appoint their own clerks has clearly become the predominant method of selection. Twenty-seven now constitutionally provide for appointive clerks in the state's highest court,<sup>1</sup> and sixteen more do so by statute.<sup>2</sup>

Rhode Island provides that the governor with the advice and consent of the senate, shall appoint the clerk of its Supreme Court.<sup>3</sup>

Only five states, including Montana, presently elect the clerk of the state's highest court.<sup>4</sup>

At the general trial level, however, most states still elect their clerks of court,<sup>5</sup> with ten states providing for appointment.<sup>6</sup>

But appointed clerks again predominate in courts of limited jurisdiction,<sup>7</sup> and in those states who have them, in courts of intermediate appellate jurisdiction.<sup>8</sup>

#### G. STATE FINANCED JUDICIARY

There is considerable variation in the methods used to finance state judicial systems. There are, however, some uniform characteristics: All states finance their court of last resort, and all but one their intermediate appellate courts.<sup>1</sup> Many, especially those without an intermediate appellate court, finance the trial level courts.<sup>2</sup>

Where there are multiple trial courts, or multiple courts of special or limited jurisdiction, a variety of financing arrangements occur. Some states share the costs of salaries and other expenses by paying a minimum salary and allowing or requiring salary supplements by the county or city.<sup>3</sup> Others begin with an even state/county division of cost.<sup>4</sup> Some apportion costs according to the population of counties served.<sup>5</sup> In addition, most counties are required to provide the facilities necessary for court-space, utilities, furnishings, supplies.<sup>6</sup>

Financing of local courts of limited jurisdiction is usually borne by the county or city served. The use of fees in lieu of or as a supplement to salary persists in a large number of states, but is confined to courts of limited jurisdiction, and is of decreasing frequency.<sup>7</sup>

More recent developments tend to simplify and centralize the financing by simply providing for a state funded judicial system,<sup>8</sup> either a result of or a concurrent change with simplification of the state's judicial system itself. Preparation of budgets under modern systems is recognized as an administrative function, and provided for as such.<sup>9</sup>

The Montana Constitution now provides that the salaries of the justices of the Supreme Court, and of the judges of the District Court are paid by the state.<sup>10</sup> Justices of the peace are paid by salary or fees;<sup>11</sup> space, furnishings and other expenses are provided by the state for the Supreme Court,<sup>12</sup> and by the counties for the district courts.<sup>13</sup> Salaries of clerks of District Courts are paid by the county.<sup>14</sup>

Fees and fines collected go to cities, counties, and the state, depending upon a variety of factors.<sup>15</sup>

Montana citizens recognized the need for reform of the financial system in 1966 in the consensus statement of the Citizens' Conference on the Judiciary: "The cost of operating the court system should be funded through the state legislature and budgeting should be taken from the hands of the county commissioners."