

Improving – and Bypassing – the Court System

John McClaughry

When state revenues tank, the Governor and legislature begin by carving out fat. They leave vacancies unfilled, freeze new hires, curtail travel, and cancel publications. Then they stretch out programs, freeze salaries, push expenditures over into the next fiscal year, give employees unpaid furloughs, shortchange pension fund contributions, and – occasionally – make entitlements less generous.

Then comes the day when all the politically acceptable spending savings have been implemented. Revenues are still far behind earlier budget projections. Huge deficits loom. Something Radical Has To Be Done.

At this point well-managed state governments turn to recommendations from a Performance Review. It's a process that asks of every state function: Privatize, Eliminate, Retain, or Modify?

The Democratic Party's 2004 platform called for just such a process. In 2005 Gov. Douglas made what proved to be a feeble run at the same goal. Since then, the concept has lain fallow. Now is the time that the state very badly needs to act upon PERM recommendations – that of course it doesn't have.

But there's one bright spot here. The Judiciary Branch has set out on the performance review path. Pursuant to a 2008 statute, Chief Justice Paul Reiber created a Commission on Judicial Operation to examine the efficient and effective delivery of judicial services and the allocation of judicial branch resources.

Last June, in the special session, the legislature protected the judiciary from any new budget rescissions until the Commission's final report in 2010 – but announced that the Commission would be expected to identify \$1 million in savings in the FY2011 budget.

The Constitution, as amended in 1974, requires the state to have a “unified judicial system”. Following ratification of that amendment, the Supreme Court created an Advisory Committee on Court Unification. The Committee found that the “system” was far from unified. It featured fragmented court jurisdiction, inflexibility in using courthouses, untrained personnel, variation of practices in different areas, excessive traveling, poorly controlled calendars, and much more.

A bill based on the Committee's report passed the house in 1975, but stalled in the Senate. Since then elected assistant judges and their county clerks have blocked any thoroughgoing reform.

Today we have what the Commission on Judicial Operation describes as a “balkanized” “non-unified system” that not only defeats flexibility and efficiency, but also spends too much for what it does. There is a constitutionally defined Supreme Court, constitutionally-mandated Superior Courts and Probate Courts, and legislatively-created district, family and environmental courts. There is no unified budget, and the Supreme Court has little control over the county courthouses and county clerks.

The current prospect of huge general fund shortfalls has spurred renewed interest in making our judicial non-system more flexible and efficient, with uniform rules governing procedure and case management in all courtrooms. In particular, modern technology can simplify court procedures, but there has to be a single standard under the control of one administrator.

It seems likely that the Committee will recommend constitutional change, to bring the Superior and Probate Courts into the unified system and break the 18th century linkage with counties that have never been functional.

Notably omitted in the legislative charge to the Committee is an important part of the PERM process: keeping as many disputes as possible out of the formal – and expensive - judicial system.

Judges and lawyers can certainly find ways to make the judicial system more unified, efficient and flexible. But when it comes to expanding the use of dispute resolution methods that operate less formally and largely without lawyers, they are not likely to exhibit a lot of enthusiasm. No one is eager to promote proposals that might shrink their own importance and financial rewards.

Alternative dispute resolution (ADR) is a rapidly growing field. It includes conciliation, mediation, arbitration and even private courts. None of the first three processes requires lawyers. They do require training, which is offered by Woodbury College and Vermont Law School.

Vermont courts are increasingly turning to ADR to avoid costly and time-consuming jury trials. ADR can be used to settle family squabbles and juvenile, workers comp, personal injury, environmental, zoning, landlord-tenant, civil rights, work rules, truancy, small claims, business contract, product liability, medical malpractice, and vehicle warranty disputes.

Leading such programs requires wisdom, experience, knowledge of the community, and public respect more than formal legal expertise. With training, Vermont's elected assistant judges could play an important role in managing ADR programs.

Making the court system unified, efficient, and flexible is long overdue. But the more cases that never turn up in the court system, the better off we'll all be.

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