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Four Essential Elements Required to Deliver Justice in Limited Jurisdiction Courts in the 21st Century

COSCA
Conference of State Court Administrators

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Introduction

Most states have one or more levels of limited jurisdiction courts that adjudicate traffic offenses, misdemeanor crimes, and civil cases with a limited amount in controversy. Known by many titles, this paper will refer to these as limited jurisdiction courts.[1] A state or a county may have several types of limited jurisdiction courts with each organized differently. This paper focuses on recommendations for the structure and administration of limited jurisdiction courts that best promote fair and impartial justice, including 1) qualified judges, 2) timely disposition of cases that are on the record, 3) judicial independence fostered by disinterested methods for appointment or election of judges along with funding that is adequate and independent from case outcomes, and 4) professional court governance. COSCA recognizes that numerous limited jurisdiction courts already include these elements. Where they do not, COSCA encourages adoption of the measures recommended in this paper in all limited jurisdiction courts.

Part I. A Brief History of Limited Jurisdiction Courts

Limited jurisdiction courts in the United States grew out of the development of Justices of the Peace over several centuries in England. The pattern of western settlement strongly influenced the way limited jurisdiction courts operate in America. A brief review of this history can provide a context appropriate to consideration of how these courts should be structured in the 21st century.

A. King's Justice and the Rise of Limited Jurisdiction Courts

In the original Magna Carta in June 1215, King John promised "[w]e will not make men justices, constables, sheriffs, or bailiffs, except of such as knows the laws of the land."[2] More than seven centuries later in 1976, Mr. Justice Stewart (in dissent) asserted this promise remained unfulfilled in American limited jurisdiction courts presided over by non-lawyers and with *de novo* appeals from non-record dispositions.[3]

In the century following the king's execution of the Magna Carta, a tradition arose of dispensing justice through the justice of the peace, a non-lawyer respected in the community. The Justice of the Peace Act of 1361 codified the authority of these lay judicial officers to resolve a broad range of offenses without a jury.[4] The Justice of the Peace model worked for several centuries as an accommodation in rural areas because of the need to resolve daily disputes. When the United States adopted the common law system, the concept of the non-lawyer judge presiding over misdemeanor and small claims cases took root. By 1915 the constitutions of 47 states included Justice of the Peace courts.[5]

B. In the United States – the People's Court

The concept of a non-lawyer Justice of the Peace to resolve community disputes flourished in colonial America and spread westward with the expansion of the United

States. "[A] short supply of legally-trained individuals necessitated courts headed by laymen, many of whom were paid from the fees they collected" and the community expected these courts to "dispense with technical forms and pleadings, and require cases to be disposed of with as little delay as possible."[6]

Apart from the practical challenge of finding lawyers to serve as judges in the era of westward American expansion, "using non-lawyer judges was more consistent with democratic ideals, such as the public's belief that the law should be understandable, and thus applicable, by lay persons."[7] Most Americans at the time believed a non-lawyer Justice of the Peace would be "more likely to reflect the community's sense of justice."[8]

Part II. The Current State of Limited Jurisdiction Courts in the States

A. Types, Number, and Locations of Limited Jurisdiction Courts

Four states (California, Illinois, Iowa and Minnesota), as well as the District of Columbia and Puerto Rico, have established a unified trial court where the same lawyer judges preside over criminal felonies and misdemeanors, and where the jurisdiction of civil judges is consolidated in a single trial court regardless of the amount in controversy.[9] The remaining 46 states have at least one type of limited jurisdiction court, ranging from 14 states with a single type of limited jurisdiction court to one state with eight types of such courts.[10] Across the country, limited jurisdiction courts resolve 66 percent of all cases in all state courts, or about 70 million of the 106 million cases that enter the state court systems annually.[11] In addition to adjudication of traffic citations and misdemeanors, limited jurisdiction courts usually have jurisdiction over civil cases up to a defined dollar amount in controversy. Small claims limits vary widely with upper limits ranging from $2500 to $15,000, while the upper limits on civil cases in limited jurisdiction courts can be as low as $3,000 or as high as $15,000.[12]

There are at least 30 different titles for courts of limited jurisdiction.[13] Common titles include "magistrate court," "justice court," "justice of the peace," and "municipal court." As noted above, this paper uses limited jurisdiction court as a generic term for all courts with jurisdiction more limited than the court of general jurisdiction. A limited jurisdiction court's criminal jurisdiction may extend to all or a limited range of misdemeanors and usually includes some jurisdiction over civil cases up to a maximum amount in controversy. In some states at least some of the limited jurisdiction courts are not state courts, but instead are locally funded and operated by a municipality or county.

In some states all judges in limited jurisdiction courts are lawyers with at least a minimum number of years of legal experience and are selected by the same process as the judges in the state's general jurisdiction courts. Some limited jurisdiction courts make a record of all proceedings that can be reviewed on appeal. Some limited jurisdiction courts are funded and governed as suggested in this paper. For example, in Kentucky limited jurisdiction judges are lawyers elected in a non-partisan election and cases are heard on the record.[14] Maine requires limited jurisdiction judges to be lawyers and cases are heard on the record.[15] However, there are many limited jurisdiction courts where the court's structure, funding and governance make it more difficult to deliver fair and impartial justice.

B. Efforts to Change Limited Jurisdiction Courts

Roscoe Pound criticized limited jurisdiction courts and non-lawyer judges in a 1906 speech to the American Bar Association, a criticism that he repeated in a 1912 article.[16] In 1927 and 1928 the United States Supreme Court decided two cases that made it clear that a limited jurisdiction court could not adjudicate a case in which the limited jurisdiction judge had a direct pecuniary interest, although an indirect monetary interest was constitutionally tolerable.[17] In the last few decades of the twentieth century, other litigation raised issues about the structure of limited jurisdiction courts.

Legislative changes to the structure of limited jurisdiction courts proved difficult to accomplish. For example, following in-depth studies with recommended changes to the limited jurisdiction courts in 1952, 1974, 1989, and 1995, no legislative changes were enacted in Arizona.[18] One author concluded the result in Arizona was "the justice court system remains highly decentralized, subject to inefficient administration, and retains outdated qualification requirements for its judges."[19] Similar criticisms of the unsuccessful efforts to change the limited jurisdiction system in Utah are found in a series of reviews by different authors over the past decade.[20]

New York's efforts to reform their Justice Court system began with the Tweed Commission, which concluded in 1958 that even if its recommendations were adopted by the legislature, the voters would defeat them in the required constitutional referendum.[21] New York saw similar recommendations by various commissions and other groups in 1967, 1973, 1979, and 2006. In September 2008 the Special Commission on the Future of the New York State Courts recommended the following for limited jurisdiction courts: combining local courts to reduce overlap and inefficiency; elevating judge qualifications from 18 years of age and local residence to at least age 25; requiring a two-year undergraduate degree and successful completion of a rigorous exam after every election; initial training of two weeks in person and five weeks at home; improved infrastructure; increased judicial compensation; and court financing independent from collection of fines and fees.[22]

The Commission considered recommending that all limited jurisdiction judges should be lawyers. However, the Commission ultimately recommended elevated qualifications and training requirements because "even if we were to agree that non-attorney justices should be ineligible to preside in Justice Courts, we believe that such a proposal would be virtually impossible to implement throughout our state" largely because the Commission believed lawyers would not be available for or interested in serving in these courts.[23]

In November 2009, the Vermont Commission on Judicial Operations recommended that the state legislature eliminate non-lawyer "assistant judges" in small claims cases because "the use of assistant judges in these cases means that no one in the equation is law-trained. The legal issues in small claims cases include all of the complex, civil legal issues that are decided in Superior Court; only the amount in controversy is less. Not surprisingly, when assistant judges sit in small claims, some use a disproportionate amount of law clerk time relative to the trial judges, raising concerns about whether they have the necessary skill and training to perform these

functions."[24] The Vermont Commission also recommended that all probate judges, with jurisdiction over adoptions, wills, and guardianships, be required to be lawyers.[25] As of this writing Vermont continues to have non-lawyer assistant judges and non-lawyer probate judges.[26]

Those advocating for lawyer judges stress the increased complexity of legal issues in misdemeanor cases as well as the weighty collateral consequences of what were once minor crimes. The increased complexity of cases in limited jurisdiction courts led one author in 1975 to predict, "the time may soon be at hand to write an appropriate epitaph for this office. . . It is likely that all the states will have replaced the institution before the end of the 20th century.[27]

The predicted death of courts of limited jurisdiction proved unfounded. In many varied forms, the institution of courts of limited jurisdiction continues in many states. To promote fair and equal justice in such courts, COSCA supports the implementation or maintenance of four essential elements in courts of limited jurisdiction. These include a qualified judge, dispositions that are reviewable on the record, processes for judicial selection and court funding that promote court independence, and professional court governance.

Part III. Four Elements Required to Foster Independent, Fair, Impartial and Just Limited Jurisdiction Courts

A. A Qualified Judge

The issue of non-lawyer judges is frequently addressed in legal literature. Although most agree that non-lawyer judges are constitutionally permitted, most authors of articles on the subject favor lawyer judges or at the very least considerable ethical and substantive training for non-lawyer judges.

Those who oppose the requirement of lawyer judges usually do so on the ground that it remains impractical to have a lawyer judge in every remote county of rural states. They also point to examples in well-functioning limited jurisdiction courts to demonstrate that limited jurisdiction judges can be well qualified through rigorous training and certification without a three-year law school education.

Historically "Americans, particularly in rural Western areas, disfavored judges with formal legal training. Lawyers were viewed as obfuscators and oppressors because of their ability to interpret a complex web of common law decisions. Frontier justices themselves eschewed legal training, believing that ordinary people were just as capable of resolving disputes as lawyers."[28]

As of this writing, qualifications for limited jurisdiction judges vary among states; however, many focus on age of majority, residence, and a minimum education of at least a high school diploma. For example, New Mexico requires magistrates in the state courts of limited jurisdiction to have a high school diploma and be eligible to vote in the county where the court is located, while in West Virginia magistrates in the state courts of limited jurisdiction must have a high school diploma, be a resident of the county where the court is located, and be at least age 21.[29]

By contrast with the age and experience requirements for limited jurisdiction judges, most states impose a minimum age of 30 or greater before a lawyer can serve as a judge in a court of general jurisdiction. For example, in New Mexico a district court judge must be

at least 35 years of age with at least 6 years' experience in the practice of law.[30] In West Virginia, general jurisdiction circuit court judges must have been a citizen for at least 5 years, be a resident in the circuit, be at least 30 years of age, and have at least 5 years' experience in the practice of law.[31]

The United States Supreme Court held it did not deny due process to have a non-lawyer judge decide criminal cases in North v. Russell, ("[w]e conclude that the Kentucky two-tier trial court system with lay judicial officers in the first tier in smaller cities and an appeal of right with a de novo trial before a traditionally law-trained judge in the second does not violate either the due process or equal protection guarantees of the Constitution of the United States").[32] In his dissent, Mr. Justice Stewart reasoned that trial before a non-lawyer judge that results in imprisonment is unconstitutional because the defendant may not know of his right to a trial *de novo*, the process requires multiple court appearances with attendant costs and delay, and the process makes a sham of the first trial.[33]

At the same time as the United States Supreme Court decided North, the Court also approved the two-tier system in Massachusetts where no jury was available to the defendant in the first court but would be provided in the *de novo* appeal trial.[34] Four justices dissented on the ground that this process deprived a defendant of the right to a jury trial in the first trial and that the *de novo* process did not cure the deprivation.[35]

A number of state courts interpret their state constitutions in accord with the majority of the United States Supreme Court: a non-lawyer judge with a *de novo* appeal is constitutional.[36]

By contrast, the California Supreme Court held it denied due process under the California state constitution to permit a non-attorney judge to preside over a criminal trial punishable by jail sentence.[37] The Tennessee Supreme Court also found the Tennessee state constitution required judges in limited jurisdiction courts to be lawyers in City of White House v. Whitley.[38] Wyoming permits non-lawyer judges to rule on probable cause in a felony preliminary hearing, distinguishing this context from having non-lawyer judges preside over criminal trials.[39]

This division of legal authority among the states is not mirrored in the writings of legal scholars, where the shared view is that limited jurisdiction court judges should be attorneys. This is true in civil cases: "If limited jurisdiction courts are expected to operate in civil matters as smaller versions of the rest of the court system, and to adjudicate matters involving technical statutory law and common law . . . the best training for this task is a law degree."[40] It is also true for criminal cases: "We must set minimum standards for our judges, and that standard should be to have lawyers serving in these positions."[41]

One reason to require limited jurisdiction judges to be lawyers is the increased complexity of the consequences associated with a misdemeanor conviction. Once it may have been true that these "minor" offenses resulted in a night in jail and a fine. That is not the case today. For example, in 2010 the United States Supreme Court held that in an era when deportation results from many misdemeanor convictions including any drug offense "except for the most trivial marijuana possession offenses," the constitutional right to the effective assistance of counsel requires a defendant be advised of the risk of deportation before entering a guilty plea.[42]

The Court limited an attorney's burden to advising a client that a guilty plea "may carry a risk of adverse immigration consequences" because the Court recognized that "[i]mmigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain."[43]

The complexities of immigration consequences present just one of many complicated collateral consequences from a misdemeanor conviction. For example, in many states a misdemeanor conviction for simple possession of marijuana or a single marijuana plant erects a bar to adoption of a child, eligibility for food stamps and temporary aid to needy families, ability to obtain or keep professional licensure, voting, and eligibility for public housing, while in seven states and the District of Columbia such a conviction results in a period of time, which can be for life, during which the individual is prohibited from possessing a firearm.[44] The American Bar Association (ABA) found this issue so critical that, through a grant awarded by the National Institute of Justice, the ABA now maintains a state-by-state database listing collateral consequences for all crimes, including misdemeanors.[45] The far-reaching and complex variety of consequences beyond time in jail or a fine make the task of adjudicating misdemeanor offenses challenging even for those with a law school education.

In some rural areas it is impractical to expect to attract attorneys to serve in limited jurisdiction courts. Some states or counties may prefer non-lawyer judges or it may be unlikely the political opposition to requiring lawyer judges can be overcome. Where limited jurisdiction judges continue to be non-attorneys, states should mandate training in judicial ethics and in the types of substantive law within the limited jurisdiction court's jurisdiction. A requirement to pass a certification test is recommended. The Special Commission on the Future of New York Courts concluded that after 50 years of failed efforts to require limited jurisdiction judges to be lawyers, the practical solution was to require seven weeks of training after election and successful completion of a "rigorous exam" within 18 months of election or appointment.[46]

At least 15 states require some initial and annual continuing legal training for limited jurisdiction non-lawyer judges.[47] For example, Montana requires non-lawyer limited jurisdiction judges to pass a qualifying exam every four years.[48] Texas requires new non-lawyer limited jurisdiction judges take an in-person course of 80 hours of legal training within the first year of taking office.[49] In Delaware candidates for non-lawyer magistrate positions are given an examination that consists of a "battery of written tests. These tests assess whether an applicant possesses qualities needed by a judge. Legal knowledge is not tested."[50]

Arizona requires a rigorous multi-tiered training for lawyer and non-lawyer limited jurisdiction state court judges. First, all new judges must complete eight computer-based, independent training modules on 1) the Arizona court system; 2) domestic violence for judges; 3) evidence; 4) initial appearances, arraignments and guilty pleas; 5) legal research; 6) legal technology; 7) restitution; and 8) victims' rights. Then all new judges must attend a three-week, in-person New

Judge Orientation training that addresses the topics above in more detail as well as a comprehensive series of general judicial subjects that includes all civil and criminal matters within the jurisdiction of the court and general procedural and administrative issues.[51] All limited jurisdiction judges are required to demonstrate their ability to conduct civil and criminal proceedings and must pass a series of three assessments during the three-week training with a score of at least 70 percent. New judges in Arizona are assigned mentors who often work with them throughout their career to observe, shadow on the bench, and remain available to answer questions.

COSCA recommends as best practice the requirement for limited jurisdiction judges to be lawyers. The complexity of misdemeanor criminal and "small claims" civil cases in the twenty-first century presents sophisticated legal issues. With the presence of self-represented parties in such cases and the possibility that "minor" crimes may be prosecuted by law enforcement officers, the justice system benefits when the judge has the benefit of a legal education. Still, as was found in New York, a shortage of lawyers in rural communities and political opposition to this requirement make it impractical in some states to require that all limited jurisdiction judges be lawyers. Where that is the case, states must require rigorous training and certification of non-lawyer limited jurisdiction judges.

B. Dispositions on the Record and Reviewable

One practice that is unique to some limited jurisdiction courts is the procedure of not creating a record of the proceedings in limited jurisdiction court and then providing for an appeal *de novo.* This practice should be abandoned.

A *de novo* appeal usually means that cases appealed from a limited jurisdiction court begin anew. If the limited jurisdiction court is a court of record, an appeal from the limited jurisdiction court may be to a court of general jurisdiction or to an appellate court (intermediate appellate court or court of last resort) for review on the record. However, when no record is made in the court of limited jurisdiction, the "appeal" to a higher court begins the case anew. In a *de novo* appeal, there can be no consideration by the higher court of anything that occurred in the limited jurisdiction court, even a verdict rendered by a jury. Because there is no record of limited jurisdiction court proceedings, no review of the limited jurisdiction judge's rulings or procedures occurs. The limited jurisdiction judge never learns, by being affirmed or reversed, whether the judge's process and legal rulings were correct or, if incorrect, for what reason.

The practice of not recording limited jurisdiction court proceedings requires litigants to go through the same process of trial and verdict again in the general jurisdiction court before there is an opportunity for appellate review. No defendant accused of a felony and no litigant in a high-value civil case is burdened with such a "two-tier" system of adjudication. In 2010, over forty of the fifty states reported having some form of *de novo* appeal, most often from a non-record limited jurisdiction court.[52]

This oddity garnered the attention of the United States Supreme Court in Colten v. Kentucky, where the Court examined a Kentucky system that provided a defendant convicted in a limited jurisdiction court a right to a *de novo* trial in a general jurisdiction court if the defendant requested a new trial within a

specified time after the conviction.[53] The defendant in Colten received a fine of $50 after the *de novo* trial although the fine after the limited jurisdiction court proceeding had been only $10. The United States Supreme Court affirmed this "two-tier" system: "In reality, [the defendant's] choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of a judge or jury in the superior court, with sentence to be determined by the full record made in that court."[54]

Four years later the Court upheld the Massachusetts *de novo* system in part because "[n]othing in the Double Jeopardy Clause prohibits a state from affording a defendant two opportunities to avoid conviction and secure an acquittal."[55] The Court later reiterated this holding even if the first conviction in the limited jurisdiction court rested on insufficient evidence.[56] Lydon is the most recent case from the United States Supreme Court to address *de novo* appeals. The contrary view is found in the dissent by Justice Stevens in Ludwig:

> A second trial of the same case is never the same as the first. Lawyers and witnesses are stale; opportunities for impeachment that may have little or much actual significance are present in the second trial that were not present in the first, a witness may be available at one time but not the other; [and] the tactics on cross-examination, or on the presentation of evidence, in the first trial will be influenced by judgment of what may happen at the second.[57]

State courts have not overwhelmingly embraced this dissenting view. In reviewing a system where defendants typically without counsel had to obtain a certificate of probable cause in order to stay the limited jurisdiction court's judgment on appeal *de novo* by filing a legal memorandum that demonstrated the likelihood of reversal, the Utah Supreme Court rejected the "perceived inadequacies relating to a defendant's ability to obtain a stay of his or her conviction" and upheld this process.[58] Part of the court's reasoning was that a limited jurisdiction court defendant would get a "second opportunity to relitigate facts relating to his or her guilt or innocence after having had the advantage of learning about the prosecution's case during the first trial."[59]

The Nevada Supreme Court found whether due process is violated when a non-attorney presides over criminal cases absent a right to a *de novo* appeal remained an open question after North in Goodson v. State, 991 P.2d 472 (Nev. 1999) (holding Nevada's *de novo* process did not violate due process). Several states have upheld as not a violation of due process having criminal trials before non-lawyers followed by appeal on the record.[60]

The Delaware Supreme Court recently advised that legislation allowing an appeal from non-jury verdicts by non-lawyer judges in limited jurisdiction courts would be constitutional only if the sentence includes a fine of $100 or more or imprisonment of more than one month.[61] A federal court in Arkansas approved of the procedure requiring a bench trial in limited jurisdiction court with a right to a jury during the *de novo* appeal.[62] By contrast, the Montana Supreme Court held that the right to a jury trial under the state constitution required a jury trial in limited jurisdiction court and upon a *de novo* appeal.[63] In the same case in which it found a requirement that limited jurisdiction judges must be lawyers, the California Supreme

Court rejected the claim that the right to an appeal corrected for the lack of a record: "an appeal from a justice court judgment is particularly inadequate to guarantee a fair trial since justice courts are not courts of record,[64] and thus no transcript is ordinarily made of the original proceeding. If there is no transcript, an appeal would be based solely upon a statement of the case settled or prepared by the non-attorney judge himself."[65]

The Kansas Supreme Court's Blue Ribbon Commission recommended in January 2012 that limited jurisdiction judges should be attorneys, all limited jurisdiction proceedings should be recorded, and appeals should be on the record and not *de novo*.[66] As of this writing none of the recommendations had been enacted and prospects for future adoption appear slim.

An unusual demonstration of the unintended impact of not making a record of limited jurisdiction court proceedings is underway in Bexar County, Texas (San Antonio). In fiscal year 2012-2013, defendants convicted of traffic offenses in limited jurisdiction courts filed 6,406 appeals to the general jurisdiction court, an increase of 500% above the 1,253 appeals in the prior year, at great expense to the county. Reasons given for the increase in appeals include that the lack of record makes the appeal inexpensive and the low priority given such cases on appeal in the higher court results in plea agreements to a lower fine than the defendant received in the limited jurisdiction court.[67]

The practice of not recording proceedings in limited jurisdiction courts has passed its expiration date. Technology exists to permit digital audio recording at more reasonable cost than would be required for a court reporter. The making of a record in this manner is recommended by COSCA: "State courts should move to digital recording as the method for making the verbatim record, with the possible exceptions for complex civil and capital criminal cases where real-time or stenographic reporting are specifically designated. State courts should establish ownership of the record and review the feasibility of the digital recording being the official record on appeal."[68]

Requiring limited jurisdiction court proceedings to be on the record would allow for review of those proceedings on the record on appeal. This does not impose any expense for limited jurisdiction courts in those states where the limited jurisdiction courts record preliminary hearings to determine if there is probable cause to proceed in the general jurisdiction court in felony cases. However, the expense of providing a court reporter or method for digital audio recording of proceedings in limited jurisdiction courts would be required where limited jurisdiction courts do not yet have such capacity. The cost to implement digital audio recording, including equipment, staff training, and placing a court employee in the courtroom to monitor the equipment, is not insignificant. State-funded grants or a phased implementation could more reasonably spread the cost than a sudden, expensive transition.

Beyond the need for funding to buy equipment and provide staff and training, the change to a court of record would be a fundamental change in how the law views limited jurisdiction court proceedings in those states, counties and municipalities that do not now make a record in limited jurisdiction courts. Written appellate opinions approving the work of a limited jurisdiction judge or correcting any errors that occur in limited jurisdiction court would guide limited jurisdiction court

judges on proper processes and procedures. The legal acumen of limited jurisdiction judges, whether lawyers or not, could be readily determined by review of the recorded proceedings. This would provide transparency and promote faith in the judicial process that is not found when limited jurisdiction court proceedings are not recorded.

The tide has not yet turned fully toward the view that there is a constitutional imperative to make a record of limited jurisdiction court proceedings. Judicial economy and basic fairness to court litigants make this change critical. Readily available technology that can be funded and implemented over time diminishes the objection of costs for recording limited jurisdiction court proceedings. In 2013 COSCA adopted a policy advocating court ownership of and control over all court records.[69] In 2009 COSCA adopted a policy advocating digital audio recording for all but the most complex court proceedings.[70] The cases that are resolved in a limited jurisdiction court without a record impose costs and time on courts and litigants to preserve the notion of justice from a people's court. COSCA recommends as best practice that a record be created of all limited jurisdiction court proceedings, allowing for meaningful review of the court's cases.

C. Foster Judicial Independence through the Processes for Appointment or Election of Limited Jurisdiction Judges and Court Funding

In many states, a local governing body such as a city council or an elected official such as a mayor appoints some limited jurisdiction judges. States with municipal appointment of judges include Alabama, Arizona, Colorado, Delaware, Mississippi, New Jersey, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, West Virginia and Wyoming.[71] These courts are also funded by the municipality. The appointment process combined with local fiscal pressures may diminish the judicial independence that is essential to fair and impartial justice. As the Special Commission on the Future of New York State Courts found:

> [A]t least some [limited jurisdiction] justices feel inappropriate pressure from municipal leaders to take measures to maximize the local revenue that their courts generate, revenue that is not necessarily used to fund the courts but which can be used for any purpose the municipality sees fit. . . Especially given that these same municipal leaders decide court budgets, fix justices' salaries and can influence a justice's reelection prospects, the resulting risk to judicial independence cannot be overstated.[72]

In many states, following appointment or election, general jurisdiction judges continue in office upon retention by 50 percent or more of the electorate who vote to retain or non-retain. In other states, judges in general jurisdiction courts are confirmed after appointment or run directly in partisan elections. COSCA does not here support a particular method for selection of general jurisdiction judges or advocate for elimination of locally funded or municipal courts. COSCA does support a method for selection of limited jurisdiction judges that reflects whatever safeguards are in place for ensuring judicial independence in the state's selection process for general jurisdiction state court judges.

A comprehensive survey of limited jurisdiction municipal courts in Washington by the National Center for State Courts found

that local officials strongly favored local control of judicial appointments and administration, although the NCSC found, "[t]he predilection toward a high degree of city control over court operations creates obvious concern in regards to judicial independence and the ability of the judiciary to exercise authority over the cases as an independent branch of government." [73]

A fact that appears to aggravate the perception of improper interference with judicial independence is the existence in many limited jurisdiction courts of part-time judges. This may be especially acute when the method of selection is a local appointment without a defined term for the judge, and where the judge is a practicing attorney or local business owner the majority of the time. Balancing such concerns is the idea that an experienced attorney with an active legal practice may bring superior qualifications to a part-time position than would otherwise exist in candidates for a part-time position with limited compensation.

Aggregating a number of part-time positions into a full-time judgeship with responsibilities in several regional limited jurisdiction courts, as is discussed in the NCSC examination of Washington's limited jurisdiction courts presents one means of reducing concerns about part-time judges.[74] COSCA recommendations made in this paper, especially regarding selection and funding structures that support judicial independence as well as mandatory ethics and substantive training, will support the perception and fact of fair and impartial justice where limited jurisdiction courts include part-time judges.

Interference by local political office holders with locally appointed judges may be discrete and difficult to identify, but these structural challenges clearly add a layer of complexity to the other administrative responsibilities facing the limited jurisdiction court. The opportunity for interference with judicial independence may be avoided by ensuring a process of election by voters or appointment and confirmation independent from the discretion of those who hold local political office. The process for appointment and reappointment of limited jurisdiction judges should reflect the process for selection and retention of the state's general jurisdiction judges.

Funding is another area in which judicial independence can be threatened in courts of limited jurisdiction. Almost a century ago the United States Supreme Court held a court denied the defendant due process in a trial held by a village mayor where both the village and the mayor-judge received a portion of the fine collected.[75] However, the following year the United States Supreme Court held there was no denial of due process when the defendant was tried by a town mayor whose fixed salary was not dependent on the fines collected, although the collections went to the town coffers.[76] Today limited jurisdiction courts may not be subject to the direct connection between judicial compensation and collection of revenues; however, the perception of an indirect relationship remains and has an impact on the public perception of the courts' independence.

In 2012, facing a shortfall in available funding, the New Orleans Municipal Court threatened to reduce or eliminate the option of community service in lieu of paying fines in order for the court to generate more than $1,000,000 in court revenues; "[a]s the Court will be looking to maximize revenues, incarceration has proven to be a more persuasive incentive to collections than alternative sentencing."[77] Throughout the

New Orleans criminal courts, fees collected in the courts flow into "judicial expense funds" over which judges have discretionary spending authority that has been used to purchase health insurance and cars, the product of patent structural and personal conflicts of interest that one author concludes "violate defendants' due process rights."[78] Concern over links between revenue generation and court funding is not new. In a 2004 survey of court employees in the municipal courts of Missouri, only 34 percent of respondents disagreed or strongly disagreed with the statement that one of the important responsibilities of the court is to raise revenue for the city or municipality.[79]

In 2011, COSCA adopted a Policy Paper entitled "Courts Are Not Revenue Centers" which included as Principle 7 that "[t]he proceeds from fees, costs and fines should not be earmarked for the direct benefit of any judge, court official, or other criminal justice official who may have direct or indirect control over cases filed or disposed in the judicial system."[80] Even an indirect link between court revenue and judicial compensation creates the appearance of impropriety. In Washington, follow-up interviews with judges after an extensive survey of limited jurisdiction courts revealed that "most judges made clear that city officials did their best to avoid interfering or 'crossing the line' in any particular case" even though in at least one locality the municipality placed management of the court under the police department.[81]

As Utah Chief Justice Christine M. Durham asserted in 2008, there is a "growing public perception that justice courts are vehicles for generating revenue."[82] A recent series of reports on National Public Radio criticized the impact on the poor from rising court fees for indigent defense, jury fees, electronic monitoring devices, jail room and board, drug testing, and payment plans.[83] Even if due process is not threatened when fines and fees indirectly relate to court funding, the perception of courts as a business threatens the authority of courts to function independently.

Separating court funding from court revenue also establishes institutional distance between local politics and court operations, or the perception of local influence on court actions. The New York Special Commission on the Future of New York Courts found that local funding of limited jurisdiction courts left these courts with grossly disparate physical and technology resources which were almost universally inadequate. The Commission concluded there was a need "for the state to turn its attention to this long-neglected institution and to provide a significant infusion of direct financial assistance" in order to "strengthen judicial independence in that the Justice Courts will be less dependent on town and village boards, because they have a funding source separate and apart from the locality."[84]

In sum, funding courts through fines and fees that flow to the local town or county that pays court staff and judges creates at least the perception that judicial independence is diminished. Moreover, local funding can be so variable as to defeat the goal of uniform justice throughout a court system. Although it may not be necessary to require state funding of all courts, it is necessary to have a uniform standard for funding limited jurisdiction courts that provides fair funding and compensation for judges with institutional segregation between the decisions made by a judge and the funding source. Added to a process that segregates judicial selection or retention from local appointment, segregation of court

funding from revenue generation helps support the judicial independence that is at the center of a properly functioning justice system.

D. Professional Court Governance

In its 2001 "Position Paper on Effective Judicial Governance and Accountability," COSCA advocated for courts to "[t]ake the lead in addressing judicial governance issues and not leave it to the bar associations, court reform groups or other civic entities to develop standards or define issues in this area."[85] It is time to recognize that the need for professional court management is not confined to state courts of general jurisdiction, but applies as well to state and local limited jurisdiction courts.

In assessing what is essential for an effective, modern court system, the National Association for Court Management (NACM) identified "Caseflow Management" as one essential competency because, "[e]ffective caseflow helps ensure that every litigant receives procedural due process and equal protection. The quality of justice is enhanced when judicial administration is organized around the requirements of effective caseflow and trial management."[86] The Special Commission on the Future of New York Courts reached the same conclusion in 2008:

We believe that administrative help is necessary, not optional, to the sound functioning of the Justice Courts. To this end, we propose that all Justice Courts be required to employ, at minimum, a part-time court clerk to assist the town or village justice(s) with administrative, recordkeeping, and other tasks necessary to the smooth functioning of the courts . . . [I]t is our view that Justice Courts can no longer be expected to function optimally without some degree of professional administrative assistance.

We also believe that clerks should report, not to the town or village board as is currently the case, but instead to the court to which the clerk is assigned, to promote the independence of the judicial function by vesting in the court the ability to hire, supervise and discharge non-judicial staff.[87]

In a 2004 survey of court employees in the Missouri municipal courts, the most serious interference with court administration was identified as occurring when the court employees were under the supervision of the city's finance director, police department or city manager.

> One administrator provided this overall assessment of the tension that can arise when the court is supervised by non-judicial personnel: "As a court administrator, I have always tried to maintain a certain degree of independence from the other offices of city government and I am finding this harder and harder and more frustrating all the time. I have lost several judges that I have worked for, because they stood up for what they believed the Constitution stands for, and because they were appointed and not elected, they were 'let go' by a majority of the board of aldermen or mayor. This does not give us, as court administrators or court clerks, much security in our positions . . ."
>
> The vast majority of respondents wanted to report to the judge: 76 percent wanted to report only to the judge, while another 19 percent wanted to report to the judge and another city official . . . Most, though, believed that it was especially important to make sure that judges not allow someone in

> the executive branch of city government to influence the judging of cases, and that the court structure should be separate from the executive branch of city government.[88]

In an article published as part of the Harvard Kennedy School's Program in Criminal Justice Policy and Management, in 2012 Utah Chief Justice Christine M. Durham and Utah State Court Administrator Daniel Becker urged as a Principle of Court Governance that "the judicial branch should govern and administer the operations that are core to the process of adjudication," concluding that non-court management and local oversight of court records are "likely the vestiges of an earlier time when the administration of courts lacked structure and organization. Courts that follow this model should reexamine this structure."[89]

The importance of professional court governance does not diminish when the courts being managed are limited jurisdiction courts. Following the NCSC's May 2013 examination of limited jurisdiction municipal courts in Washington, one recommendation "to standardize municipal court operations and procedures, ensure consistent municipal operating costs, and advance the goal of equal justice for all Washington citizens" was a transition to regional courts. While a number of municipalities had regionalized based on earlier similar recommendations, "many other municipalities oppose the regional court concept on the grounds of maintaining autonomy, ensuring local control over municipal court operations and costs, and providing only the services that their communities require. *The status quo, however, does not help to pursue the goals of standardizing court procedures, providing for a consistent cost structure or advancing equal justice throughout the state* (emphasis added)."[90]

In 2013 COSCA identified court ownership of and responsibility of court records as an essential component of delivering justice at all court levels.[91] Here COSCA recommends requiring that limited jurisdiction courts make a record of all proceedings. Managing those court records, and managing all the activities of limited jurisdiction courts where so many Americans interact with the justice system, is the work of professional court staff.

In those state court systems where the general jurisdiction courts are administered by the Administrative Office of the Courts (AOC), the AOC should be responsible for management of limited jurisdiction courts. In those states with decentralized court structures, the governance structure for the district or county courts should include limited jurisdiction courts. These existing governance structures include staff trained and solely dedicated to court administration, in contrast to local or municipal employees for whom court activities can be a part-time duty that competes with the employees' other responsibilities. Inclusion of courts of limited jurisdiction in the governance structure of courts of general jurisdiction is an important structural means toward the end of efficient, effective delivery of equal justice in limited jurisdiction courts.

COSCA recommends all courts, including limited jurisdiction courts, be managed by professional court staff dedicated to the principles of court governance so widely recognized as essential to the fair and impartial administration of justice.

Part IV. The Way Forward

COSCA recognizes and celebrates the healthy variety of court structures among the states. Appreciation for diversity does not require tolerance of inadequacy. Limited jurisdiction court structures that originated in the distant past are inadequate to deliver fair and impartial justice today. COSCA adopts and supports the following four essential elements for limited jurisdiction courts:

First – Require that limited jurisdiction judges are members of the local state bar in good standing. Where non-lawyer judges are continued, implement rigorous training, testing, and mentoring to ensure minimum knowledge commensurate with the cases within the limited jurisdiction court's jurisdiction.

Second – Require limited jurisdiction courts to make a record of all proceedings.

Third – Foster judicial independence in limited jurisdiction courts by a process for appointment or election of limited jurisdiction court judges that includes safeguards for judicial independence similar to those adopted by the state for judges in the courts of general jurisdiction, and fund limited jurisdiction courts in a manner that also promotes the perception and actuality of judicial independence.

Fourth – Require management of limited jurisdiction courts by professional court staff dedicated to principles of sound court governance in limited jurisdiction courts that are included in the county or state court structure.

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[1] Among the names given to a court of limited jurisdiction are "limited jurisdiction court," "magistrate court," "county court," "city court," and "justice court," although some of these might instead be the name of the state's court of general jurisdiction. This paper adopts the generic term "limited jurisdiction court" to refer to courts with jurisdiction inferior to the court of general jurisdiction. A limited jurisdiction court has jurisdiction over non-felony crimes, sometimes limited to a subset of misdemeanors and sometimes extending to all misdemeanors, and the court also most commonly has civil jurisdiction up to a limited amount in controversy, typically a ceiling of $10,000.

[2] Magna Carta, paragraph 45.

[3] North v. Russell, 427 U.S. 328, 338 (1976) 340 (Stewart, J., dissenting).

[4] Justice of the Peace Act, 1361 Chapter 1 34 Edw 3, available at http://www.legislation.gov.uk/aep/Edw3/34/1 *See also* Samuel P. Newton, Teresa L. Welch, and Neal G. Hamilton, *No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah's Infamous Local Courts,* 2012 Utah L. Rev. OnLaw 27, 31-32.

[5] Benjamin Will Bates, *Exploring Justice Courts in Utah and Three Problems Inherent in the Justice Court System*, 2001 Utah L. Rev. 731, citing James A. Gazell, *A National Perspective on Justice of the Peace and Their Future: Time For an Epitaph*, 46 Miss. L. J. 795, 797 (1975).

[6] Newton, et al., p. 33, citing Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 Am. B. Found. Res. J. 293, 326.

[7] Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. Rev. 119, 134 (1999).

[8] Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 Kan. J.L. & Pub. Policy 5, 19 (spring 1993).

[9] *See* state court structure charts maintained by the Court statistics Project at the National Center for State Courts (data current as of 2010) at http//www.courtstatistics.org/Other-Pages/State_Court_Structutre_Charts.aspx

[10] *Ibid.*

[11] Janet G. Cornell, *Limited Jurisdiction Courts--Challenges, Opportunities, and Strategies for Action,* NCSC Future Trends in State Courts 2012, 66, 67, citing Schauffler et al., 2011:3.

[12] *See* state court structure charts maintained by the Court statistics Project at the National Center for State Courts (data current as of 2010) at http//www.courtstatistics.org/Other-Pages/State_Court_Structutre_Charts.aspx

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[22] *Justice Most Local: The Future of Town and Village Courts in New York State*, A Report by the Special Commission on the Future of the New York State Courts (September 2008) pages 83-105.

[23] *Justice Most Local, supra* note 22, at pages 70-71.

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[25] Vermont Commission *Final Report* at p.37.

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[27] James A. Gazell, *A National Perspective on Justices of the Peace and Their Future: Time for an Epitaph?,* 46 Miss. L. J. 795, 813 (1975).

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