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A self-funding judiciary

True judicial independence will happen when the judiciary isn't reliant upon 'co-equal' branches for raises

By CARY ICHTER, Special to the Daily Report

Any match for "Cary Ichter" is highlighted below in bold red type.



(Zachary D. Porter/Daily Report)

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In the recent past, there has been much written and said on the subject of "judicial independence." Pundits, practitioners and, in some cases, members of the judiciary themselves have bemoaned the threats posed to the judicial branch and its independence by legislative meddling, voter initiatives and caustic commentary. And in all the back and forth in the debate over judicial independence—what it means, what it should be and whether it is genuinely threatened—very little, if anything has been said about a structural defect in our system that threatens to make the entire concept of judicial independence an absurd farce. The defect in the system is that the judicial branch is dependent on the Legislature to pass and the governor to approve a pay raise for a co-equal branch of government.

We saw that structural defect in the relationship between the supposedly co-equal branches of government played out once again this month when Gov. Sonny Perdue vetoed legislation that would have granted judges in the state of Georgia a pathetic and paltry 5 percent pay raise—the first real pay raise the judiciary would have received in 10 years!

While much could, and should, be said about Gov. Perdue's decision, detailed commentary on the misguided nature of that decision would distract attention—as it always does—from the more basic issue.

We expect the judiciary to vigorously and zealously protect and defend the Constitution, the laws of the state and the rights of the people. Whether inadvertently or intentionally, the interests that the courts are bound to protect occasionally come into conflict with the will of the Legislature and the governor. When such conflicts arise, we expect the "independent" judiciary to intervene and to review such controversies without prejudice or favor.

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We harbor this expectation of independence despite the financial strangle-hold one of the parties has over the judiciary and its members. We expect judges to treat the people who control their pay in the same manner as they would treat anyone else. Were such a conflict of interest to arise in the practice of law, the practitioner would be disbarred if he were to fail to proactively remedy the situation. Although we daily see judges continue to act with independence and courage in discharging their duties, at a minimum, the current system gives rise to

an appearance of impropriety.

This profoundly awkward situation has persisted because too many believe that there is no alternative to judicial dependence upon the other branches of government. That belief is, I submit, misguided and born of a lack of creativity. I submit that the judiciary could be, and should be, self-funding.

The judiciary could be self-funding by imposing a user fee on those who use the courts—hence the name "user fee." The first component of such a user fee scheme would involve a fee imposed upon practitioners who use the courts for their livelihood. Trial lawyers, many, perhaps most, of whom enjoy financially rewarding careers as a consequence of the availability of the courts, ought to pay an annual fee as a prerequisite to enjoying the right to practice before a tribunal.

Second, the parties ought to have to contribute substantially more to the costs of operating the courts. Increasing filing fees would make a small contribution to funding the entire judicial budget, but filing fees constitute a barrier to access justice that rises with each dollar added to the filing fee. That said, filing fees for certain types of cases, for example complex commercial cases, ought to be increased to reflect the value of the service being provided and to more closely resemble the substantial charges that private conflict resolution providers charge. The courts should always be a relative bargain, but the market should influence to some extent the amounts the courts collect for the services they provide.

Third, convicted criminal defendants ought to have added to their sentences restitution to the state for the cost of their trial. This seems to be so intuitively correct that I think it requires no further discussion.

Fourth, parties ought to pay a user fee that represents a percentage of any and all funds (or anything else of measurable value) that passes between the parties in connection with the litigation. In other words, if the case is settled before final disposition, the courts would receive a small percentage; similarly, if a judgment were entered and collected, the courts would collect a small percentage. The obligation to make such a payment would operate as a first priority lien against any such funds, and the payer would be obligated to ensure that the proper amount was paid to the court. Failure to make the payment would be at the payer's peril; that is, upon discovery that the payment had not been made, the payer would have responsibility to pay the fee regardless of whether it had already been mistakenly made to the other party.

The judiciary should produce its own revenues and should set its own budget. The courts should decide what, if anything, its revenues would be used for beyond judicial salaries. The funds derived from these user fees should not, and would not, be subject to disposition by legislative fiat. The judiciary would collect these revenues and decide the manner in which they are to be spent.

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Details concerning county stipends and other details can be dealt with along the way, but the journey to true judicial independence will require a bold and creative first step. I submit this proposal embodies such a step. If we, in this profession and in this country, truly value judicial independence, it is time to stop ignoring the structural defect in the system that undermines the independence of the judiciary and ensures that judges will forever remain the underpaid redheaded stepchildren of the budgetary process. As long as the courts are not financially independent, they will never be truly independent and the judiciary will remain underpaid and neglected by its more powerful "co-equal" branches.

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