

# The Indiana Judicial System: An Analysis of Change

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## I. INTRODUCTION

For several years Indiana judges, legislators, local government officials, and lawyers have recognized that our trial court system needs reform. In 1975 the Indiana Judges Association also perceived this need and began a study of the state's trial court system. In 1978 the Association published a two-volume report<sup>1</sup> and submitted it to the General Assembly. In the report, the Association recommended that "[t]he Indiana trial courts should be organized on the basis of a unified state wide trial court system."<sup>2</sup> The Association also made general recommendations concerning the then existing trial court system<sup>3</sup> and, with substantial assistance from the Indiana Council of Juvenile Court Judges, submitted recommendations concerning the juvenile court system.<sup>4</sup>

The proposed unified system would consist of a single tier of trial courts each of which has the same subject matter jurisdiction.<sup>5</sup> The trial courts would be organized into geographic districts with a presiding judge in each district exercising general supervisory authority over the courts in the district.<sup>6</sup> The trial courts would "be funded by the state under the budgetary authority of the Chief Justice of the Supreme Court."<sup>7</sup>

Although the legislature did not act on the report immediately and has not implemented a unified court system, both the legislature and the courts have subsequently implemented some of the general proposals.<sup>8</sup> Nevertheless, the need for comprehensive administrative and organizational reform of the trial court system remained.

In 1986, the Legislative Council of the General Assembly created an Interim Committee on Courts and Civil Procedure. The Committee's assignment was to review the Indiana court system and consider a

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<sup>1</sup>INDIANA JUDGES ASSOCIATION, THE INDIANA TRIAL COURT SYSTEM RECOMMENDED IMPROVEMENTS (1978) [hereinafter 1978 PROPOSAL].

<sup>2</sup>1978 PROPOSAL, *supra* note 1, at 15.

<sup>3</sup>*Id.* at 71-80.

<sup>4</sup>*Id.* at 81-148.

<sup>5</sup>*Id.* at 15.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 16.

<sup>8</sup>*See* INDIANA JUDGES ASSOCIATION, A PROPOSAL FOR REFORM OF THE INDIANA TRIAL COURT SYSTEM 3-8 (1986) [hereinafter 1986 PROPOSAL].

comprehensive plan to improve it. The Association prepared a second proposal.<sup>9</sup> After receiving comments from judges and an analysis of the proposal from a committee of the state bar association, the Judges Association modified the report by adding an addendum. The Association then submitted the modified proposal to the Interim Committee, but, due to time constraints, the Committee was unable to adequately study the proposal.

In 1987 the General Assembly created a commission to study the needs and problems of the state's trial courts, conduct public hearings throughout the state, analyze financial mechanisms to implement a reform plan, and report to the General Assembly before October 1, 1988.<sup>10</sup>

This article will review some of the organizational and administrative problems that now exist in the trial court system as well as some of the other issues that are important to judges, local government officials, lawyers, and citizens and that ought to be considered in any truly comprehensive reform plan. This article will also discuss the Indiana Judges Association's proposals as well as some of the criticisms of those proposals.

## II. ADMINISTRATIVE, STRUCTURAL, AND FISCAL REFORM: A UNIFIED TRIAL COURT SYSTEM

### A. *Indiana's Trial Court System*

The state constitution provides for "one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."<sup>11</sup> Although the constitution limits the legislature's power respecting the structure and jurisdiction of the supreme court<sup>12</sup> and the court of appeals,<sup>13</sup> it gives the legislature broad authority respecting the structure and jurisdiction of the circuit courts and other courts the legislature may establish.<sup>14</sup> Over the years, the legislature has created and abolished courts in response to specific perceived needs. Thus, the state trial court system has evolved sporadically, and, consequently, the state's trial court system is not the epitome of planning and structure. Instead, Indiana has a sometimes confusing combination of circuit courts,

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<sup>9</sup>*Id.*

<sup>10</sup>Act approved May 6, 1987, Senate Enrolled Act 18, sec. 4, 6 West's Ind. Legis. Serv. 81, 82-84. Senator Edward A. Pease is the chairman, and Representative John W. Donaldson is vice-chairman.

<sup>11</sup>IND. CONST. art. VII, § 1.

<sup>12</sup>*Id.* art. VII, §§ 2, 4.

<sup>13</sup>*Id.* art. VII, §§ 5, 6.

<sup>14</sup>*Id.* art. VII, §§ 7, 8.

superior courts, county courts, municipal courts, small claim courts, one probate court, and city and town courts.

The state now has ninety circuit courts.<sup>15</sup> Eighty-eight of Indiana's ninety-two counties have a circuit court; the remaining four counties are in joint circuits of two counties each.<sup>16</sup> Each circuit court "has original jurisdiction in all civil cases and in all criminal cases, except where exclusive jurisdiction is conferred by law upon other courts of the same territorial jurisdiction."<sup>17</sup> To determine the extent of a particular circuit court's jurisdiction, one must determine whether the legislature has granted exclusive jurisdiction over certain matters to another court within the circuit's boundary. Consequently, the original jurisdiction of the various circuit courts varies from circuit to circuit.<sup>18</sup>

Effective January 1, 1988, there will be more than 130 superior court judges in fifty-five counties.<sup>19</sup> Some counties, for example, LaPorte and Tippecanoe, have more than one superior court.<sup>20</sup> On the other hand, one superior court serves both Ohio and Switzerland Counties.<sup>21</sup> Some of the larger counties have a unified superior court but have more than one superior court judge.<sup>22</sup> Generally, the jurisdiction of the superior courts is coextensive with that of the circuit courts; however, specific statutes prescribe the subject matter jurisdiction of a particular superior court. Frequently, certain matters will be reserved exclusively for the circuit court or for the superior court or for a particular superior court if there is more than one superior court sharing authority with a circuit court.

The only court that is called a probate court is in St. Joseph County.<sup>23</sup> It has concurrent jurisdiction with the county superior court over such matters as the probate of wills, guardianships, and administration of trusts.<sup>24</sup> It also has exclusive juvenile jurisdiction in the county.<sup>25</sup>

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<sup>15</sup>IND. CODE §§33-4-1-1 to -92 (1982 & Supp. 1987).

<sup>16</sup>*Id.* §§ 33-4-1-39, -78 (Jefferson and Switzerland Counties) and §§ 33-4-1-15, -58 (Dearborn and Ohio Counties).

<sup>17</sup>*Id.* § 33-4-4-3(a) (Supp. 1987).

<sup>18</sup>For example, the Allen Circuit Court does not have juvenile jurisdiction because the Allen Superior Court has exclusive juvenile jurisdiction. *Id.* § 33-5-5.1-5. In Boone County the circuit court has exclusive juvenile jurisdiction and Superior Court no. 1 has exclusive probate jurisdiction. *Id.* § 33-5-9-5.

<sup>19</sup>*Id.* §§ 33-5-4.5-1 to -50-1.

<sup>20</sup>*See id.* §§ 33-5-31.1-1, -41-1, -42.1-1.

<sup>21</sup>*Id.* § 33-5-37.7-2.

<sup>22</sup>*See id.* § 33-5-35.1-1 (Marion County).

<sup>23</sup>*Id.* §§ 33-8-2-1 to -24.

<sup>24</sup>*Id.* § 33-8-2-9.

<sup>25</sup>*Id.* § 33-8-2-10.

Effective January 1, 1976, the General Assembly established a county court system.<sup>26</sup> Since then the legislature has upgraded some of these county courts to superior courts, but several counties still have a county court.<sup>27</sup> County courts have limited jurisdiction in both civil and criminal matters. They have original concurrent jurisdiction over actions in contract or tort in which the amount claimed is not more than \$10,000<sup>28</sup> and in possessory actions between landlord and tenant.<sup>29</sup> County courts have "original exclusive jurisdiction in actions for the possession of property where the value of the property sought to be recovered does not exceed ten thousand dollars."<sup>30</sup> County courts have no jurisdiction to issue injunctions, to appoint receivers, or to hear cases "pertaining to paternity, juvenile or probate . . . or in suits for dissolution of marriage."<sup>31</sup> County courts may hold "preliminary hearings in felony cases."<sup>32</sup> In addition, the county courts have original and concurrent jurisdiction over "all Class D felony, misdemeanor, and infraction cases"<sup>33</sup> and ordinance violations.<sup>34</sup>

Marion County has no county courts, but it has municipal<sup>35</sup> and small claims courts.<sup>36</sup> The municipal courts have concurrent, original jurisdiction in tort and contract actions where the claim does not exceed \$20,000.<sup>37</sup> They also have jurisdiction in possessory actions between landlord and tenant.<sup>38</sup> The municipal courts have jurisdiction over ordinance violations,<sup>39</sup> misdemeanors and infractions,<sup>40</sup> and Class D felonies.<sup>41</sup> Municipal courts may issue warrants and conduct certain pre-trial hearings in criminal cases,<sup>42</sup> and they have jurisdiction over some

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<sup>26</sup>*Id.* § 33-10.5-1-1.

<sup>27</sup>*Id.* § 33-10.5-1-4(a). That section provides:

A county court is established in each county, except a county:

- (1) for which [§ 33-10.5-1-5] provides a joint county court;
- (2) for which IC 33-4 provides a small claims docket of the circuit court;
- (3) for which IC 33-5 provides a small claims docket of the superior court; or
- (4) for which IC 33-11.6 provides a small claims court.

<sup>28</sup>*Id.* § 33-10.5-3-1.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* § 33-10.5-3-2.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* § 33-10.5-3-1(a)(3).

<sup>34</sup>*Id.* §§ 33-10.5-3-1(a)(4), -1(a)(5).

<sup>35</sup>*Id.* §§ 33-6-1-1 to -9-5.

<sup>36</sup>*Id.* §§ 33-11.6-1-1 to -30.

<sup>37</sup>*Id.* § 33-6-1-2(a)(1).

<sup>38</sup>*Id.* § 33-6-1-2(a)(2).

<sup>39</sup>*Id.* § 33-6-1-2(a)(3), -2(a)(5).

<sup>40</sup>*Id.* § 33-1-6-2(a)(4).

<sup>41</sup>*Id.* § 33-6-1-2(a)(7).

<sup>42</sup>*Id.* § 33-6-1-2(a)(6).

guardianship proceedings.<sup>43</sup> The municipal courts have no jurisdiction in actions involving title to real estate, appointment of a receiver, or dissolution of marriage.<sup>44</sup>

The small claims courts have concurrent original jurisdiction over tort or contract cases where the amount claimed is not more than \$3000,<sup>45</sup> over possessory actions where the amount or value claimed is not more than \$3000,<sup>46</sup> and over petitions for certain protective orders.<sup>47</sup> Small claims courts have no jurisdiction to grant injunctions, partition real property, declare or enforce liens, appoint a receiver, or dissolve a marriage.<sup>48</sup>

Finally, the legislature has authorized second- and third-class cities and towns to establish city or town courts.<sup>49</sup> These courts have jurisdiction over ordinance violations, misdemeanors, and infractions.<sup>50</sup> City courts also have jurisdiction over some civil matters, the limits of which depend upon the size of the city.<sup>51</sup>

Some of these trial courts also have appellate jurisdiction. Appeals from a city court are tried *de novo* in the circuit or superior court.<sup>52</sup> Similarly, appeals from the Marion County Small Claims Court are tried *de novo* in municipal court.<sup>53</sup>

## B. *Some Organizational and Administrative Problems with the Present Trial Court System*

1. *Uneven Distribution of Work Loads Among the Courts.*—The legislature has directed the Division of State Court Administration to collect and compile data on the judicial work of the state's courts and on revenues generated and funds spent by the courts.<sup>54</sup> This data shows that from 1977 to 1986 court filings increased from 751,989 cases filed in 231 courts to 1,072,315 cases in 269 courts.<sup>55</sup> Thus, filings increased forty-three percent during that ten-year period, but the number of courts

<sup>43</sup>*Id.* § 33-6-1-2(a)(8).

<sup>44</sup>*Id.* § 33-6-1-2(b).

<sup>45</sup>*Id.* § 33-11.6-4-2.

<sup>46</sup>*Id.* § 33-11.6-4-3.

<sup>47</sup>*Id.* § 33-11.6-4-4.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* § 33-10.1-1-3.

<sup>50</sup>*Id.* §§ 33-10.1-2-2, -7. A town court has *exclusive* jurisdiction over violations of town ordinances. *Id.* § 33-10.1-2-7(a).

<sup>51</sup>*Id.* §§ 33-10.1-2-3.1, -4, -5.

<sup>52</sup>*Id.* § 33-10.1-5-9(a).

<sup>53</sup>*Id.* § 33-11.6-4-14.

<sup>54</sup>*Id.* § 33-2.1-7-3.

<sup>55</sup>DIVISION OF STATE COURT ADMINISTRATION 1986 INDIANA JUDICIAL REPORT 40-41 [hereinafter 1986 JUDICIAL REPORT].

handling this increased work load increased only sixteen percent. Even so, this data does not tell the whole story. Each case, whether it is a traffic citation or a capital murder case, is simply shown as one case. The actual amount of judicial time and resources needed to handle these cases is quite different. Thus, the data does not adequately describe the "work load" of a given court.

Indiana's trial courts have managed to meet these increased demands. It has not been easy for many of the trial courts to keep up with the increasing work load, and the existing organization makes it more difficult to do so. Because jurisdictional authority is not uniform among the various courts within a circuit, it is not always possible to transfer cases from one court to another in order to alleviate backlogs. Thus, even if a nearby court has the time and resources to take on additional cases, it often cannot do so simply because it does not have proper subject matter jurisdiction. In addition, filings vary widely from county to county. For example, in 1986 while the Lake County Circuit Court handled 10,901 new filings,<sup>56</sup> most of the circuit courts handled less than 1000 new filings.<sup>57</sup> Under the present system there simply is not an effective and efficient way to equalize work loads among the various courts.

2. *Funding Problems.*—The legislature has always maintained structural and substantive control over Indiana's judiciary and has decided that local units of government should fund the courts. The net result of this decision has been to relegate the judiciary to a position of competing with departments of local government for limited local funds while the courts attempt to comply with legislative and appellate court mandates. To make matters worse the legislature has restrained local government's ability to obtain revenues. Since 1973 tax levies have been frozen, and, more recently, federal and state funds have been withdrawn. As a result, the ability of the counties to continue funding the state's judiciary is in jeopardy. Where adequate funds are not available, courts are understaffed, the staff is underpaid, and both the staff and the judges must work with inadequate equipment and facilities. The quality of justice a county's citizens receive is not always directly proportional to the competence of the judge and the judge's staff. Sadly, the quality of justice often depends upon the county's tax base.

Real property taxes are the major source of local government revenue. Thus, even though the courts are open to all citizens, this method of funding disproportionately burdens the real property owners. On the other hand, most of the state government's revenues come from more broad-based sources: income and sales taxes.

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<sup>56</sup>*Id.* at 114-15.

<sup>57</sup>*Id.* at 102-33.

Furthermore, the state enjoys a net income from the state's courts while the counties suffer a net loss. In fiscal year 1977-78 the state spent \$9.2 million on the judiciary and received revenues of \$13.9 million.<sup>58</sup> Thus, the state enjoyed a net income from the courts of \$4.7 million. During the same period, counties spent \$24.9 million and received only \$7.3 million<sup>59</sup>—a net loss of \$17.6 million. In fiscal year 1985-86 the state's net revenues from the courts increased to \$9.5 million,<sup>60</sup> and the net expense to the counties increased to \$32.5 million.<sup>61</sup> Although the legislature has redefined and redistributed court costs,<sup>62</sup> the state will still derive a profit from the courts while the counties will continue to bear the expense burden.

### C. *The Judges Association Proposal*

The core concept of the Association Proposal is a state funded unified trial court system. The proposal also deals with other problems in Indiana's trial court system. Because some of the suggestions involve "procedural" issues and other involve "substantive" issues, the Association suggests that clearly substantive issues be presented to the General Assembly and clearly procedural ones be submitted to the supreme court. In order to avoid separation of powers problems, the Association is also recommending that all aspects of the proposed unified court system be enacted by the General Assembly and adopted by the Indiana Supreme Court.<sup>63</sup> In the same vein, the Association suggests that a permanent commission to review, assess, and make recommendations relating to procedural and substantive differences be formed.<sup>64</sup>

1. *A Unified Trial Court System.*—The Indiana Judges Association is proposing a uniform trial court system.<sup>65</sup> Each of the trial courts in the uniform system would have the same subject matter jurisdiction.<sup>66</sup> The General Assembly would continue to establish circuit courts, but the state would be divided into fifteen geographic districts.<sup>67</sup> The districts

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<sup>58</sup>*Id.* at 214-15.

<sup>59</sup>*Id.* This does not include revenues from city, town, and small claims courts. *Id.*

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>Act approved May 6, 1987, Pub. L. 305-1987 (House Enrolled Act 1163), 6 West's 1987 Indiana Legis. Serv. 758.

<sup>63</sup>1986 PROPOSAL, *supra* note 8, at 24.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 10. Initially the Marion County small claims courts and the city and town courts would remain in existence after the unified system is established. *Id.* at 17.

<sup>67</sup>*Id.* at A-7 to A-8. There are now 14 districts. ADMIN. R. OF CT. 3, *reprinted in* West's Annotated Indiana Code tit. 34 app. at 423-24. The Association proposes that Marion County should constitute the fifteenth district.

would have an administrative function, and a presiding judge would serve as the district's administrative supervisor.<sup>68</sup>

The presiding judge would have general supervisory authority subject to the final supervisory authority of the Chief Justice.<sup>69</sup> The presiding judge would have the authority to: (1) assign judges and non-confidential court personnel with the district, (2) supervise the district's financial affairs, (3) supervise a program of continuing education for the district's judges and court personnel, (4) serve as the district's chief representative, and (5) supervise the work of the district's administrative staff.<sup>70</sup>

Because each of the courts in the district would have equal subject matter jurisdiction, the presiding judge would be able to equalize work loads among the various courts in the district by transferring cases from courts with crowded dockets to courts with less crowded dockets, or the presiding judge may transfer a judge to aid another judge with an overloaded docket. The unified system will allow each judge to operate with utmost efficiency and not be hampered by a limitation on the court's authority to exercise jurisdiction.

Some judges might complain that because they sought and were elected to a particular court, the proposed system, if adopted, would require them to hear matters they never intended to hear when they sought election to the court. Even if that is true, no judge has a vested right to have authority over a particular range of subject matters. In addition, that a judge has authority to hear a wide range of cases does not necessarily mean that the judge will fully exercise that authority. The unified system *permits* each judge this full authority; it does not necessarily require that each judge exercise it. Many of the larger trial court systems within the state have developed certain areas of specialization. That specialization need not necessarily change when a unified system is put in place.

Some trial judges have expressed concern that there would not be enough local input in the process of determining how the local courts will function. Responding to this concern, the association added a proposal that the Indiana Supreme Court require each circuit to submit a circuit plan.<sup>71</sup> The circuit plan, which would be submitted to the presiding judge,<sup>72</sup> would include:

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<sup>68</sup>1986 PROPOSAL, *supra* note 8, at 10-11.

<sup>69</sup>*Id.* at 13.

<sup>70</sup>*Id.* The Association recommends that a trial judge be permitted to appeal the presiding judge's decision, but that the presiding judge's decision could be reversed only for an abuse of discretion. *Id.*

<sup>71</sup>*Id.* at A-8.

<sup>72</sup>*Id.* at A-9.

- (a) An assessment of the various workloads of judges within the circuit;
- (b) The necessity for transfer of cases to initially equalize workloads within the circuit;
- (c) Consideration of the necessity or lack of necessity for a mandatory rotating filing system within the circuit;
- (d) An assessment of the need or lack of need for additional judges to assist in the handling of caseloads within a circuit;
- (e) The adequacy of probation services within the circuit, including the existence of any court-related programs and facilities;
- (f) The need or lack of need to maintain existing court-related programs and facilities;
- (g) The need or lack of need for the existence of specialized divisions of the district court within a circuit;
- (h) If there exists a need for specialized divisions of the district court within a circuit, the proposed manner of rotation or non-rotation of judges in those divisions;
- (i) The allocation of court personnel within the circuit;
- (j) The adequacy of law libraries within the circuit;
- (k) The availability of "senior judges" within the circuit;
- (l) Provision of legal services for indigents in criminal cases;
- (m) Any other matters which the Indiana Supreme Court deems necessary to acquire input from trial judges and to assess existing situations within the various circuits.<sup>73</sup>

The presiding judge would then file a district plan with the supreme court.<sup>74</sup> The content of the district plan parallels the circuit plan.<sup>75</sup> In addition, the presiding judge must file "[a] statement as to the means by which information will be gathered and workloads of the various district judges will be assessed"<sup>76</sup> and "[a] statement of the guidelines to be utilized by the presiding judge in the transfer of cases or judges within the district when such is necessary to equalize workloads."<sup>77</sup> The supreme court may "approve, disapprove, or modify the plan as it deems necessary."<sup>78</sup>

The preparation and submission of budgets for the unified court system would follow a similar procedure.<sup>79</sup>

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<sup>73</sup>*Id.* at A-8 to A-9.

<sup>74</sup>*Id.* at A-9 to A-11.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at A-11.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at A-11 to A-13.

2. *State Funding.*—The Judges Association believes that the judiciary is, and should be, a third branch of the state government and that a court's ability to serve the citizens of a particular county should not depend upon that county's resources or upon the court's ability to obtain its share of limited local funds. Thus, the Association is proposing that the state should assume the cost of operating the court system.<sup>80</sup>

The revenues the courts generate through costs and fees have been less than the costs of operating the court system. It is assumed that this will continue to be true in the future. In 1986, for example, the state and counties spent \$72.9 million to operate the judicial system, and court revenues to the state and counties totaled \$49.9 million.<sup>81</sup> Thus, expenses exceeded revenues by \$23 million. The Association is proposing that all revenues generated by the courts, except those used only for local programs, be forwarded to the state.<sup>82</sup>

The Association recognizes, however, that the state cannot and should not be responsible for maintaining court facilities. For the most part, the courts share facilities with other departments of local government. Thus, it seems only practical that the counties retain the obligation to provide facilities for the courts. The Association is also aware that the fiscal impact on the state should be a major consideration. In 1986, to operate, the courts, local and state governments had a combined net operating expense of \$21.7 million.<sup>83</sup> That same year, the state received a net income of \$9.5 million.<sup>84</sup> Using these 1986 figures, the state will have additional expenses of \$31.2 million. Because of public law 305-1987<sup>85</sup> it is difficult to project the actual fiscal impact that state funding will have on the state; however, expenses are certain to climb because judges' salaries increased effective July 1, 1987.<sup>86</sup>

Other states that have switched or are switching to state funding have implemented the funding over a number of years. This procedure alleviates the adverse repercussions of an immediate and total transfer to state funding. The Association's proposal likewise seeks to alleviate such problems. Under the proposal, local units of government will maintain court facilities. Each county will be assessed a per capita sum for operating the courts, and each county will receive a credit against

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<sup>80</sup>*Id.* at 25-31.

<sup>81</sup>1986 JUDICIAL REPORT, *supra* note 55, at 214-15. These figures do not include city, town, or township expenditures or revenues. *Id.*

<sup>82</sup>1986 PROPOSAL, *supra* note 8, at 25-31, A-1 to A-2.

<sup>83</sup>1986 JUDICIAL REPORT, *supra* note 55, at 214-15.

<sup>84</sup>*Id.*

<sup>85</sup>Act approved May 6, 1987, Pub. L. 305-1987 (House Enrolled Act 1163), 6 West's 1987 Indiana Legis. Serv. 758.

<sup>86</sup>IND. CODE §§ 33-13-12-7 to -9 (Supp. 1987).

that assessment up to a percentage established by the legislature. Either or both the assessment or the credit can be adjusted to permit the state to receive relatively more funds from local units of government in the beginning years of the transition and relatively less funds in successive years. This accomplishes the same purpose of alleviating the initial fiscal impact on the state while also assuring that local governments will continue to maintain court facilities.

State funding of a unified system would result in a lesser degree of control over the judiciary by local units of government. Such control, to the extent it now exists, is founded solely upon legislative enactment. The Indiana Constitution does not require or expressly provide for local control of the courts. Because of the adverse effect that the present method of funding the state's courts has on local governments, they may welcome a switch to state funding even if that means they will lose some control over the judiciary.

### III. CHANGE OF JUDGE AND CHANGE OF VENUE

The controversy surrounding change of judge and change of venue has existed among judges, attorneys, and legislators for a number of years. Prior to 1981, Criminal Rule 12 provided for a mandatory change of judge in all criminal cases upon the filing of a timely motion. In 1981, the General Assembly enacted a statute that restricted change of judge in criminal cases.<sup>87</sup> That statute specifies the causes for which the defendant or the state may seek a change of judge and specifies that a motion for change of judge must state facts that show at least one of these causes. The Indiana Supreme Court, discerning what it determined to be legislative intent, amended Criminal Rule 12 to require a showing of cause as provided in that statute. The court also made the effective date of the amended rule coincide with the statute's July 1, 1981, effective date.

In 1982, the General Assembly stated, in a preamble to related legislation, that it was not intended that the statute change the law.<sup>88</sup> In *Hobbs v. State*,<sup>89</sup> the Indiana Court of Appeals held that the preamble did not serve to reinstate the automatic change of judge in criminal cases.<sup>90</sup>

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<sup>87</sup>*Id.* § 35-36-5-2 (1982).

<sup>88</sup>See Act approved February 25, 1982, Pub. L. 204, 1982 Ind. Acts 1518. The preamble to that Act states: "IC 35-36-5 shall not be construed to have changed the prior law of Indiana concerning change of judge, specifically the rule of law permitting automatic change of judge upon request."

<sup>89</sup>451 N.E.2d 356 (Ind. Ct. App. 1983).

<sup>90</sup>*Id.*

In 1984, the General Assembly amended section 35-36-5-1 to provide a "substantive right" for an automatic change of judge in criminal cases.<sup>91</sup> The Indiana Supreme Court then held that the statute conflicted with Criminal Rule 12, that the matter was "procedural," that Criminal Rule 12 controlled and that the amended statute was of no force and effect to the extent it conflicted with Criminal Rule 12.<sup>92</sup> During this period, the right to a mandatory change of judge or change of venue in civil proceedings has remained intact.<sup>93</sup>

The legislature and the supreme court each perceive that the other is infringing upon its power inherent in the separation of powers doctrine in the constitution. Attorneys sense a legitimate need for an automatic change of venue and change of judge in order to protect their clients from a judge's prejudice or bias or to avoid the harmful effects of a personality conflict between the attorney and the judge. Attorneys believe that they should not be required to introduce evidence of the judge's bias or prejudice in order to obtain a change of judge. In highly publicized cases the attorneys may have legitimate concerns that a change of venue to another county is necessary in order to obtain a fair trial. Conversely, an automatic change rule permits delay, and, where the rule allows counsel to agree to the judge or the court of venue, it permits "forum shopping." This shopping for judges and forums has created some of the major inequities in our existing court system.

The Association's original proposal retained the right of automatic change of venue and change of judge, but it permitted the presiding judge to select the panels of counties or judges.<sup>94</sup> This would allow the presiding judge to maintain equalization of work loads among the courts in the district. The proposal eliminates forum and judge shopping by making no provision for agreement by attorneys. Attorneys objected to this proposal because they wanted to retain the forum and judge shopping provisions. They also feared that the presiding judge, who may be a close friend of the trial judge from whom a change of judge is sought, will submit a panel of undesirable judges.

In order to meet this latter objection, the Association will amend its proposal and will ask the Indiana Supreme Court to adopt automatic

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<sup>91</sup>Act approved March 8, 1984, Pub. L. 170-1984, sec. 4, 1984 Ind. Acts 1389, 1392 (codified at IND. CODE § 35-36-1 (Supp. 1987)).

<sup>92</sup>*State ex rel. Jeffries v. Lawrence Circuit Court*, 467 N.E.2d 741 (Ind. 1984); *see also State ex rel. Robinson v. Grant Superior Court*, 471 N.E.2d 302 (Ind. 1984).

<sup>93</sup>IND. R. TR. P. 76. It is this writer's understanding that Indiana is the only state that affords an automatic right to change of judge or change of venue. That fact alone does not make the rule good or bad; there are salutary purposes for such a rule as well as detrimental effects surrounding it.

<sup>94</sup>1986 PROPOSALS, *supra* note 8, at 22-23.

change of venue and change of judge rules permitting an automatic change in both civil and criminal cases,<sup>95</sup> if the party seeking the automatic change files a motion within twenty days following the entry of the preliminary plea in a criminal case or within ten days after the closing of the pleadings in a civil case. The right to an automatic change would be renewed in the event a presiding judge is determined to transfer a case to a new judge or county. The motions for automatic change of judge or venue, if timely filed, would be certified to the supreme court. The supreme court would then appoint a special judge or name a court in a contiguous county within the district. This should overcome the objections of those who fear that the presiding judge's decision might be motivated by improper considerations.

#### IV. SELECTING JUDGES

Partisan selection of judges does little to further the goal of selecting qualified and competent people to the bench. Most voters do not have enough information to determine who is or is not qualified to be a judge. No one doubts that the voters are not qualified to choose the one among practicing physicians who ought to be the chief of the medical staff of the local hospital. Nevertheless, with little questioning the voters are permitted to select the attorney among all the attorneys in the county who will most competently, judicially, and fairly determine the course of many people's lives. The partisan selection process seems to be contrary to the goal of selecting an independent judiciary, one that will be fair to all segments of society—rich and poor, Democrats and Republicans.

We should consider other ways of selecting judges. One example is a non-partisan selection system.<sup>96</sup> Under a non-partisan system, candidates for judicial office do not align themselves with a political party. At the same time, the voters choose the judge. Nevertheless, attorneys must still incur the time and expense of a campaign for office without the benefit that comes from association with a political party. Some critics of the non-partisan election approach argue that, because candidates do not have the benefit of party support, candidates will align with special interest groups or individuals in order to obtain funding. Thus, the special interest group or individual will pressure the successful candidate to repay the "debt" after he becomes a judge.

Another selection method that ought to be considered is a merit selection system similar to the one used to select justices and judges to

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<sup>95</sup>The Association might except misdemeanor, infraction and ordinance violation cases.

<sup>96</sup>Vanderburgh County uses a non-partisan system to elect its circuit court and superior court judges. IND. CODE § 33-5-43.2-1.

the Indiana Supreme Court and the Court of Appeals.<sup>97</sup> District or county judicial selection committees could be formed that would select judges. From time to time, at intervals shorter than the ten-year interval used for appellate level judges,<sup>98</sup> the judges would stand for a retention vote. Critics note, however, that placing the authority for selecting judges in selection committees permits concentration of political influence that can lead to abuses. The advantages of this system include local input, screening on the basis of merit, and preservation of the electorate's rights to determine retention.

Although the Judges Association recommended retention of current systems of judicial selection, that position has been reassessed. The Association will be recommending to the Commission that the partisan election system be abandoned in favor of a more suitable means of selecting Indiana's trial judges.<sup>99</sup>

#### V. ATTRACTING AND KEEPING COMPETENT ATTORNEYS ON THE BENCH

Because the state's trial court judges are selected from the state's practicing attorneys, the state should provide incentives that attract competent attorneys to the bench and keep them there. Well-qualified attorneys should think of serving as a judge as a desirable career alternative to private practice. Of the factors that attract competent attorneys to the judiciary and keep them there, three are more important than others: (1) adequate salaries, (2) pensions, and (3) job security.

Competent attorneys who become judges may never receive the salaries they would have received had they remained in private practice. Nevertheless, judges' salaries should at least allow the attorney who becomes a judge to maintain a standard of living that does not amount to financial punishment to the judge and the judge's family; however, for many years, Indiana's judges have been the lowest paid in the nation. The General Assembly has begun to address that issue.<sup>100</sup>

Indiana's judges now have two different pension plans.<sup>101</sup> One plan applies to persons who became judges before September 1, 1985. These judges are eligible to receive pension benefits when they have reached age sixty-two and have served eight years.<sup>102</sup> Those who elect to receive

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<sup>97</sup>IND. CONST. art. VII, § 10.

<sup>98</sup>*Id.* art. VII, § 11.

<sup>99</sup>Telephone interview with Judge Baker, President of the Indiana Judges Association (Dec. 21, 1987).

<sup>100</sup>*See* IND. CODE §§ 33-13-12-7 to -9 (Supp. 1987).

<sup>101</sup>*Id.* §§ 33-13-9.1-1 to -8 (Supp. 1987) (applies to persons who began service as a judge before September 1, 1985) and §§ 33-13-10.1-1 to -12 (Supp. 1987) (applies to persons who began service as a judge after August 31, 1985).

<sup>102</sup>*Id.* § 33-13-9.1-4(a) (Supp. 1987).

benefits before they reach age sixty-five receive reduced benefits.<sup>103</sup> The amount of the judge's annual benefit is the salary being paid for the office in which the judge served multiplied by a percentage that varies according to the judge's years of service.<sup>104</sup> Thus, as the sitting judge's salary increases, the benefit paid to the former judge increases. On the other hand, a judge who began, or will begin, to serve after August 31, 1985, and who, at the time he leaves office, has at least eight years of service receives a percentage of the salary the judge received when he separated from service.<sup>105</sup> Consequently, the pension benefits of these judges do not allow for inflation and cost of living increases. Because attorneys who are considering a career on the bench are concerned about pensions, this pension benefits freeze will tend to discourage attorneys from becoming judges.

Job security is another important consideration for attorneys who might leave private practice to become a judge. Frankly, every attorney must realize that whether he becomes or remains a judge has little to do with his merit and qualifications. It is a fact of political life that name recognition is a primary factor in any popular election. Moreover, the attorney must consider whether he wants to run a campaign against an incumbent who may win and hold a grudge for years. Even if the attorney wins, he must consider the possibility, perhaps probability, that he will remain in office for only one term, after having given up the clients, office space, books, and employees he had while in private practice.

Not only must the attorney seeking the position consider the decreased salary, the expense of mounting a campaign against a better known incumbent, and the probable loss of accumulated assets, clients, and employees, he must also be aware of the ethical restrictions on attorneys and judges who campaign for office. A campaign for judicial office is extremely hard to wage because many attorneys and judges feel that it is unethical to make an issue of how the candidate would rule in certain types of cases. Many judges who run on such platforms find that it becomes difficult or impossible to keep campaign promises because attorneys and litigants perceive them as unfair, prejudiced, and biased. These attorneys and litigants make every effort, through change of judge or change of venue, to remove the judge from the case. Conversely, those who choose not to make such campaign promises find that it is extremely difficult to campaign without issues to discuss with the voters. At the same time, the candidate who tries to wage a campaign based

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<sup>103</sup>*Id.* § 33-13-9.1-4(d).

<sup>104</sup>*Id.* § 33-13-9.1-4(b).

<sup>105</sup>*Id.* § 33-13-10.1-7.

on a scholarly analysis of the judicial system and proposed methods of improving it will probably find that the voters do not understand the issues and that such a campaign accomplishes no particular purpose. These are the dilemmas that qualified attorneys who aspire to judicial office currently face, and they are among the reasons why we need to reform our judicial system.

## VI. OTHER ISSUES

Some judges are concerned that the presiding judge's power to transfer judges within the district will mean that trial judges will find themselves performing judicial duties in a county in which they were not elected and that such transfers will cause a great deal of inefficiency in the judicial process. Clearly such transfers would create much "dead time" while the judge is traveling, waiting for courtrooms, and waiting for litigants.

Occasionally, transferring a judge or judges may be the best way to alleviate case backlogs. Nevertheless, this is not likely to become a common practice; more often cases will be transferred to the judges. This will permit the judge to use a staff with which he is familiar, and it will be a more efficient use of court facilities and judicial resources. Instead of wasting "dead time," the judge will be able to spend more time in chambers where even a little time can be used to complete daily paperwork.

Transferring cases to judges instead of transferring judges to cases will mean that litigants and their counsel will have more traveling time. On the other hand, in exchange for the inconvenience of additional travel, litigants might expect to have more expeditious rulings. Also, litigants and their counsel already spend such traveling time, in many cases, because of change of venue.

Some judges are concerned about the effect the Judges Association's proposal will have on the judge's confidential employees. The proposal will permit some degree of pooling of non-confidential employees.<sup>106</sup> Pooling clerk-typists, bailiffs, and administrative personnel should be a more efficient use of these employees' time and should improve the overall efficiency of the system. Nevertheless, each judge could still have one or more confidential employees who work only for that judge. Obviously, these matters could be included in the circuit and district plans.

Judges are also concerned about the means of disciplining trial court judges. Currently, the Judicial Nominating Commission, whose primary

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<sup>106</sup>The proposal permits the presiding judge to assign non-confidential court personnel. 1986 PROPOSAL, *supra* note 8, at 13.

function is to select nominees for the supreme court and the court of appeals, is also responsible for trial court judge discipline.<sup>107</sup> The Commission includes the Chief Justice, three attorneys, and three non-attorneys.<sup>108</sup> Although non-attorneys may have an adequate foundation upon which to make determinations regarding appointments to the appellate level judiciary, in many respects they lack the experience and knowledge to make determinations relating to disciplinary matters concerning trial court judges. Therefore, the Judges Association is recommending that the Chief Justice appoint a separate and distinct disciplinary board and that this board should include either or both sitting or retired judges.<sup>109</sup>

## VII. CONCLUSION

Many have responded to the proposals for improving the judicial system with the cautionary adage, "If it ain't broke, don't fix it." Similarly, the manual typewriter of bygone days may still be functional, but in the modern day world of word processing its continued utility is questionable.

While society generally has entered the world of word processing, the court system in Indiana, in an equal number of respects, continues to operate as a manual typewriter. Because of structural and administrative inefficiencies, the system's ability to continue to cope with the demands of society has decreased. "Fixing" the system is no longer sufficient; it is time for a review and improvements of the entire system. This will require an extremely careful consideration of governmental functions and of the needs and concerns of the bench, the bar, and the citizens of Indiana. All should be and are encouraged to participate so that the needs of each will be served. The task is complex, but it is time to get on with it.

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<sup>107</sup>IND. CODE §§ 33-2.1-6-1 to -30.

<sup>108</sup>See IND. CONST. art. VII, § 9; IND. CODE §§ 33-2.1-4-1, -2.

<sup>109</sup>1986 PROPOSAL, *supra* note 8, at 14.

