

**AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES  
August 11-12, 2003**

RESOLVED, That the American Bar Association reaffirms its support for adequate levels of compensation for state and territorial judges in order to attract and retain the best-qualified persons to serve on the judiciary.

FURTHER RESOLVED, That the American Bar Association encourages state, local and territorial bar associations to take a leadership role in promoting adequate compensation for state and territorial judges and independent mechanisms for determining judicial compensation levels.

FURTHER RESOLVED, That the American Bar Association encourages states and territories to determine judicial compensation levels through the use of independent commissions that have the following characteristics and authority:

**Authority.**

Judicial compensation commissions may be established by constitutional provision or by statute. Commissions should determine compensation levels only for justices and judges. In those states and territories having compensation commissions for all public officials, compensation levels for the judiciary should be considered separately.

**Appointment of Members.**

Members of judicial compensation commissions should be appointed by leaders of the executive, legislative and judicial branches of government and, where appropriate, by the governing body of the state or territorial bar association. The membership of such commissions should include both lawyers and lay members of the public and should reflect the diversity of the population. Appointed or elected public officials, public employees, and political party officers should not be allowed to serve on commissions.

**Terms.**

Commissioners should serve fixed, staggered terms.

**Meetings.**

Commissions should meet at least once annually.

**Sources of Information and Expertise.**

Commissions should employ such academic or professional experts as they see fit to provide statistical analyses and relevant data upon which to base recommendations. Commissions should hold open public hearings and invite members of the public, the

bar, the state judiciary, and other appropriate public officials and experts to provide testimony on judicial compensation levels.

**Issuance of Report.**

Commissions should issue reports at least every two years with recommendations for adjusted compensation levels at least thirty days prior to the start of the regular legislative session.

**Binding Nature of Report.**

Commissions should have the authority to set compensation levels. Their recommendations should have the force of law unless rejected by a two-thirds majority legislative vote within a fixed period of time following receipt of the commission's report. In those states having initiative petition, the commission's report may be rejected by the completion of a petition within a short, fixed time period to trigger a voter referendum on the commission's recommendations.

## **REPORT**

### **Background**

The American Bar Association has long supported adequate compensation for state and federal judges for the purposes of attracting and retaining the best-qualified people to serve on the bench and enhancing the institutional and decisional independence of American judges. The most recent ABA policy statement on state judicial compensation, the 1990 Standards for Judicial Compensation, addresses the need for compensation levels that are high enough to attract and retain highly qualified persons. The 1990 Standards also call for regular, independent review of judicial compensation. The recommendation accompanying this report is intended to augment the 1990 ABA Standards for Judicial Compensation by providing more specific guidelines for independent commissions to set state judicial salaries.

### **The Relationship Between Federal and State Judicial Compensation**

Many of the dynamics affecting state judicial compensation are similar to those found in the federal system. In February 2001, the American Bar Association (ABA) and Federal Bar Association (FBA) released a joint report detailing the state of compensation for federal judges in “Federal Judicial Pay Erosion: A Report on the Need for Reform.” Analyzing the salaries of federal jurists over time, the authors determined that federal judges’ dependency on Congress’ annual authorizations for pay raises has effectively diminished judicial salaries over the past 30 years. The 2001 ABA/FBA report was supplemented by a recommendation adopted at the 2003 ABA Midyear Meeting urging Congress to enact an immediate and significant increase in federal judicial salaries and break the statutory link between Congressional and judicial salaries.<sup>1</sup> The ABA and FBA released an updated report, “Federal Judicial Pay Erosion: A Report on the Need for Reform in 2003,” in May 2003. The updated report documents the continuing erosion of federal judicial pay and recommends again that action be taken to address the problems caused by inadequate judicial salaries.

Judicial compensation in many states has stagnated for similar reasons, as legislators have delayed or denied salary adjustments for political reasons. Tension between the legislative and judicial branches over the issue of appropriate levels of compensation for judges is a recurrent theme in state governments across the country. Although questions of judicial compensation in the states are strictly matters of state law, the circumstances and debates surrounding federal judicial compensation have far-ranging implications that frequently appear at the state level and impact the compensation of state judges. For example: many state judges’ salaries are linked either formally or informally to the salaries received by jurists on the federal bench, perhaps as a ceiling on what state judges are eligible to earn.

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<sup>1</sup> Policy adopted by ABA House of Delegates during 2003 Midyear Meeting is available at: <http://www.abanet.org/scfji/pdf/volkerrecrep.pdf>.

Federal Judicial Pay Erosion details the relative decline in federal judicial salaries over time and highlights attendant concerns over the potentially severe ramifications of the relative erosion of judicial salaries over time, particularly when compared to the market for their services in the private sector. The ABA/FBA report articulates concerns common amongst many jurists as well as observers of courts, including perceived threats to judicial independence, the diminished appeal of judicial service for otherwise highly qualified candidates, and real-world difficulties faced by members of the bench constrained from even marginal cost-of-living increases.<sup>2</sup> The report also laments the poor prospects for improvement in the absence of substantial reform of the structural linkages between congresspersons' pay and that of federal judges, an institutional constraint that renders jurists dependent upon legislators' ability to move beyond their natural reticence to award pay raises for themselves in scheduling increases for jurists.

Not surprisingly, a number of these very same arguments surface in the debate over pay scales for state judges as well. Very few public servants would say that they are in the job "for the money," and this is especially true for state judges. Yet the stakes remain high: regular receipt of salary for a public official safeguards not only sustenance in terms of support vital to them and their families, but also ensures the independence to perform one's duties in the public interest. This includes not only "independence" in the decision-making capacity, but also independence in the sense that state judges not be serving with an eye towards hunting for their next job opportunity. As is the case with the federal system, a number of proponents of increasing state judicial salaries across the board point to perceived difficulties in recruitment of the best qualified candidates – a problem that may be more striking in light of the increased workload and responsibilities facing state judges.

Although there is no hard data on point, it is commonly inferred from anecdotal evidence that there is a relationship between decreasing average ages of judges and judicial pay standards, particularly in lower federal and state courts. Moreover, some observers have argued that decisions to leave the court prior to reelection or retention have as much if not more to do with compensation issues than with political decisions. The ABA/FBA report cites a dramatic increase in the number of federal judges choosing not to remain on the bench.<sup>3</sup> Mary Lee Comer, president of the Indiana Judges Association, wrote that prior to a salary increase in 1995, "trial judges who resigned from office or decided not to seek reelection usually did so because greener grass beckoned."<sup>4</sup>

### **Compensation Commissions in the States**

The power to determine the appropriate method and processes for compensating jurists is entirely within the ambit of state legislatures and governors. How individual states have chosen to exercise this discretion amongst a myriad of competing values and attitudes towards state judiciaries is manifested in a number of ways. The structures of state processes for determining appropriate judicial compensation levels can be roughly categorized into three systems:

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<sup>2</sup>*Federal Judicial Pay Erosion: A Report on the Need for Reform* (American Bar Association and Federal Bar Association, February 2001).

<sup>3</sup> Id, at 15-16.

<sup>4</sup> Mary Lee Comer, "Best Laid Plans." *Indiana Lawyer*, 5/10/2000, at 4.

- Six (6) states have constitutional provisions or statutes authorizing judicial compensation commissions, whose sole mission is to concentrate on the salaries and benefits for state judges (Alabama, Hawaii, Iowa, Louisiana, Maine and Maryland);
- Fifteen (15) states have compensation commissions responsible for recommending appropriate salary levels for officials in all three branches of state government, including judges (Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Michigan, Minnesota, Missouri, New Jersey, Oregon, Rhode Island, Utah, and Washington);
- The remaining twenty-nine (29) states do not utilize any formal commissions for the purpose of determining judicial compensation, or may utilize strictly advisory commissions on an ad-hoc basis by the discretion of decision makers at particular points in time.

In addition, states such as Idaho, Texas, and Kansas, have made unsuccessful recent attempts during the past 10 years to create a commission. Other states have experimented with and later rejected the commission approach. For example: Ohio established a commission in 1996, but the general assembly concluded it was ineffective, and abolished it in 1998. The Wisconsin Supreme Court declined the recommendation of the state's Judicial Conference to consider the creation of a judicial commission, considering the present legislative committee process to be effective. In 1999, voters in Texas rejected by a 59-41 margin a constitutional referendum to create a Judicial Compensation Commission.<sup>5</sup>

The recommendations of commissions typically impact salary levels in one of three ways: recommendations of commissions become law unless successfully challenged and rejected by a floor vote in the legislature, recommendations of commissions must at least be considered in legislative appropriations, or they may be considered to be strictly advisory. Eleven of the states employing judicial compensation commissions limit the commission findings to advisory weight. In nine of the states the recommendations become law unless the legislature modifies or rejects them. Only in Washington State do the recommendations become law without input from the legislature.

Other methods are used to determine judicial salaries in states without commissions. Two states, Texas and New Jersey, have successfully increased judicial salaries with interim commissions created by the legislature. Judicial compensation is regulated by statute in California, Nevada, and South Carolina. In the District of Columbia, salary increases are linked to increases for federal judges. In South Dakota, the judiciary receives the same annual increases as other state employees. Judicial salaries in Pennsylvania are adjusted annually in line with changes in the Consumer Price Index.

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<sup>5</sup> Kenneth Pankey and Kristi Remkus, "Judicial Compensation Commissions," in Survey of Judicial Salaries, Volume 27, No. 1 (National Center for State Courts, Winter 2002).

## **Findings of the Subcommittee on State Judicial Compensation**

In an effort to better understand the dynamics affecting state judicial compensation, the ABA Standing Committee on Judicial Independence established a subcommittee on state judicial compensation. The subcommittee studied the status of judicial compensation systems across all fifty states and conducted a survey of compensation commissions in 21 states to learn more about the effectiveness of different models for judicial compensation commissions. The subcommittee relied particularly on the Survey of Judicial Salaries and other research materials on state judicial compensation produced by the National Center for State Courts.<sup>6</sup> In developing its recommendations, the subcommittee also drew upon the American Judicature Society's Model Statute to Establish a Judicial Compensation Commission.<sup>7</sup>

Unlike the federal judiciary, the institutional structures of state courts exhibit considerable variation not only between states but also among different levels of court in the manner in which judges are selected, the ways in which they are compensated, and the mechanisms for retaining judges on the bench. This variation among states can frustrate attempts to put forth even broad guidelines at the national level. In spite of these distinguishing characteristics, the constitutional arrangements of state courts and processes for determining judicial compensation have enough underlying common features to make comparisons and generalized recommendations possible based on aggregated state experiences. Ultimately, the recommendations of the subcommittee on state judicial compensation are intended to improve and illuminate the interactions between state judges and legislators as well as to further assist state bars in promoting adequate levels of compensation for state judges.

It should be noted that the adequacy of compensation for judges must be measured not only in terms of actual salary. "Fringe benefits" such as medical insurance, vacation time, funding for continuing education, and retirement or pensions plans are an important aspect of overall compensation packages. Indeed, for judges who do not plan to return to private practice after retirement from the bench, the sufficiency of retirement plans takes on even greater importance. The 1990 ABA Standards for Judicial Compensation and the ABA Survey of State Judicial Fringe Benefits (1988) offer a number of guidelines for determining appropriate non-salary benefits for state judges.

### **Recommendations**

In developing recommendations to augment the 1990 ABA Standards on Judicial Compensation, the subcommittee sought to address the most important procedural aspects relating to the setting of state judicial salaries and benefits. Following a thorough review of judicial compensation practices in the states, the subcommittee identified seven characteristics of independent judicial compensation commissions. Those seven characteristics, which form the heart of the accompanying recommendation to the ABA House of Delegates, are discussed further below:

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<sup>6</sup> National Center for State Courts materials available at <http://www.ncsconline.org/>.

<sup>7</sup> Reprinted at 78 *Judicature* 9 (July-August 1994).

### **Authority.**

**Judicial compensation commissions may be established by constitutional provision or by statute. Commissions should determine compensation levels only for justices and judges. In those states and territories having compensation commissions for all public officials, compensation levels for the judiciary should be considered separately.**

Commentary: Only six of the twenty-one state compensation commissions are authorized by constitutional provision; the remaining fifteen are authorized by statute. While compensation commissions created by constitutional provisions are certain to be more durable and less vulnerable to revision or elimination than those created by statute, constitutional amendments to create commissions may not be achievable in many states. The subcommittee expresses a preference for separate commissions to determine judicial salaries in order to break any formal or informal links between salaries for judges and for other public officials, but recognizes the predominance of commissions for all public officials and the successes of those commissions in many states.

### **Appointment of Members.**

**Members of judicial compensation commissions should be appointed by leaders of the executive, legislative and judicial branches of government and, where appropriate, by the governing body of the state or territorial bar association. The membership of such commissions should include both lawyers and lay members of the public and should reflect the diversity of the population. Appointed or elected public officials, public employees, and political party officers should not be allowed to serve on commissions.**

Commentary: Eight of the twenty-one compensation commissions include members appointed by leaders of all three branches of government. In addition, four states provide a role for the state bar association in appointing or nominating commission members. The role of state and territorial bar associations may necessarily be limited in the context of commissions that determine or recommend compensation levels for all public officials. Commissions that include both lawyer and lay members and that reflect the diversity of the each state's population will benefit from a broad range of views and may be more likely to enjoy greater public support.

### **Terms.**

**Commissioners should serve fixed, staggered terms.**

Commentary: The majority of states with compensation commissions provide for fixed, staggered terms. The length of terms varies, but the majority of states (thirteen of twenty-one) provide for four-year terms.

### **Meetings.**

**Commissions should meet at least once annually.**

Commentary: While the subcommittee recommends biennial adjustments to judicial salaries (see Issuance of Report section below), annual meetings allow commissions to gather and consider data relevant to judicial salaries on a more frequent basis.

#### **Sources of Information and Expertise.**

**Commissions should employ such academic or professional experts as they see fit to provide statistical analyses and relevant data upon which to base recommendations. Commissions should hold open public hearings and invite members of the public, the bar, the state judiciary, and other appropriate public officials and experts to provide testimony on judicial compensation levels.**

Commentary: Commissions are encouraged to employ appropriate experts to provide analyses and comparative data that will strengthen the bases for their recommendations. Public hearings to gather testimony from a range of witnesses will further enhance the credibility of commissions' recommendations.

#### **Issuance of Report.**

**Commissions should issue reports at least every two years with recommendations for adjusted compensation levels at least thirty days prior to the start of the regular legislative session.**

Commentary: Judicial compensation levels should be adjusted at least every two years. In addition, states may opt to implement annual cost of living adjustments to ensure that judicial salaries are not eroded by inflation or increases in the Consumer Price Index. Reports should be issued at least thirty days prior to the start of the regular legislative session in order to give lawmakers sufficient time to review the proposed adjustments.

#### **Binding Nature of Report.**

**Commissions should have the authority to set compensation levels. Their recommendations should have the force of law unless rejected by a two-thirds majority legislative vote within a fixed period of time following receipt of the commission's report. In those states having initiative petition, the commission's report may be rejected by the completion of a petition within a short, fixed time period to trigger a voter referendum on the commission's recommendations.**

Commentary: The subcommittee on state judicial compensation strongly recommends that commissions have the independent authority to set compensation levels. If a commission's recommendations are merely advisory, they are too often easily ignored by state legislatures. Providing for legislative rejection of proposed compensation levels only through a two-thirds majority vote, as is the case in Michigan, further enhances the independence of the compensation commission while inoculating the process from political retribution against the judiciary that may be possible under a simple majority legislative rejection. The provision for rejection of a commission's report by initiative petition is drawn from the system utilized in Washington State.

## **Conclusion**

The Standing Committee on Judicial Independence recommends that states adopt independent commissions to determine state judicial compensation levels. Adequate compensation levels are crucial to attracting and retaining the best-qualified attorneys to serve as state judges. The positive experience of those states in which independent commissions are authorized to determine judicial salaries supports the adoption of compensation commissions in other states.

Respectfully submitted,

D. Dudley Oldham, Chair  
Standing Committee on Judicial Independence

August 2003

## General Information Form

**Submitting Entity: Standing Committee on Judicial Independence**

**Submitted By: D. Dudley Oldham, Chair**

**1. Summary of Recommendation**

The American Bar Association reaffirms its support for adequate levels of compensation for state judges in order to attract and retain the best-qualified persons to serve on the judiciary; encourages state, local and territorial bar associations to take a leadership role in promoting adequate compensation for state judges; and, encourages states and territories to establish independent commissions that have the authority to determine judicial compensation levels.

**2. Approval by Submitting Entity**

The Standing Committee on Judicial Independence approved the report and recommendation at its spring meeting on April 12, 2003.

**3. Has this or a similar recommendation been submitted to the House or Board previously?**

No.

**4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

The ABA Standards on Judicial Compensation, adopted in 1990, are the existing Association policy on state judicial compensation. This recommendation is intended to update and augment the 1990 Standards by providing specific guidelines for the use of independent commissions to determine compensation levels for state judges.

**5. What urgency exists which requires action at this meeting of the House?**

The stagnation of judicial compensation levels in many states has led to concerns about the ability of states to attract and retain highly qualified judges. The continued linkage, formal or informal, of judicial salaries to those of other public officials threatens the independence of the judicial branch and introduces inappropriate political considerations into the process of determining judicial compensation.

**6. Status of Legislation. (If applicable.)**

N/A

**7. Cost to the Association. (Both direct and indirect costs.)**

There are no costs to the Association.

**8. Disclosure of Interest. (If applicable.)**

N/A

**9. Referrals.**

The report and recommendations will be circulated to all ABA sections, divisions, forums, committees and commissions; the Conference of Chief Justices; and State, Local and Territorial Bar Associations.

**10. Contact Person. (Prior to the meeting.)**

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**11. Contact Person. (Who will present the report to the House.)**

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