

Perspectives on
State Court Leadership

A CASE FOR COURT GOVERNANCE PRINCIPLES

*One in a series from the Executive Session
for State Court Leaders in the 21st Century*

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This is one in a series of papers that will be published as a result of the **Executive Session for State Court Leaders in the 21st Century**.

The Executive Sessions at the Harvard Kennedy School bring together individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue.

Members of the Executive Session for State Court Leaders in the 21st Century over the course of three years sought to clarify the distinctive role of state court leaders in our democratic system of government and to develop and answer questions that the state courts will face in the foreseeable future. Themes addressed include principles for effective court governance, the tension between problem solving and decision making, the implications of social media for court legitimacy, how courts defend themselves from political attack, and the notion of chief justices as civic leaders. Many themes were developed by Session members into papers published in a series by the National Center for State Courts.

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INTRODUCTION

Hard times can inspire new ways of thinking about old problems. State courts today have ample reasons for questioning the continued viability of traditional approaches to organizing their work and to providing leadership. This paper proposes a set of principles for governing state court systems that is intended to begin a dialogue about how court governance can best be enhanced to meet current and future challenges. Governance is defined as “the means by which an activity or ensemble of activities is controlled or directed, such that it delivers an acceptable range of outcomes according to some established social standard” (Hirst, 2000:24).

The principles outlined in this paper were developed by re-examining what courts, as institutions, need to do internally to meet their responsibilities. This is in contrast to much of the current writing about the future of court governance, which tends to focus on ways in which the state courts can improve their relationship with the other branches of government.

The section that follows sets the stage by describing the ways in which state court systems currently are structured. The manner in which state court systems are organized presents problems for effective court governance. The next section discusses the distinctive cultural problems associated with governing courts as opposed to other parts of state government. Existing discussions of court governance are insufficiently attentive to this cultural dimension. Eleven principles of court governance are then presented, with explanatory commentary, to respond to the challenges presented by both court structure and court culture.

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COURT ORGANIZATION: CONTEMPORARY MODELS

The state court systems of today emerged in the 1970s and 1980s as the long-standing vision of court reformers began to be realized at a rapid pace. Reformers had decried the degree to which trial courts were enmeshed in local politics, subject to overlapping jurisdiction, and governed by widely divergent court rules and administrative procedures within a state.

To varying degrees in recent decades, all states have changed the organization of their courts to address these concerns. Implementation of court unification was the main engine driving that change, which had four key components. First, the number of trial courts was to be reduced as the courts of each county were consolidated into one trial court or a simple two-level structure of a single general jurisdiction and a single limited jurisdiction court. A side benefit would be the gradual elimination of non-law trained judges.

Second, responsibility for trial court funding would be taken from county and city governments and placed instead in the state budget process. Judicial salaries would no longer be paid out of fees and fines. The court budget could be used to distribute resources across the state courts in an equitable and efficient manner, and budget priorities could be established for the entire state court system.

Third, court administration would be centralized in a state-level administrative office of the courts that prepared the state court budget. This would standardize court policies across the state and take local politics out of the hiring and supervision of court personnel. At the same time, centralization would promote professionalization of the state court workforce.

Finally, the administrative rules for a state’s courts, would be set not by the legislature, but by the governing authority of the judiciary, consistent with the principle of the judiciary as an independent branch of state government.

A progress report in 2010 shows the court unification agenda was only partly realized. Today, 10 states have a single trial court and another seven have a

simplified two-level system. Thus, roughly one-third of the states completed the logic of consolidation. On the other hand, five states retain a significant number of non-law trained limited jurisdiction court judges.

State funding was more fully realized. Forty-two states now fund 100 percent of salaries for their general jurisdiction court judges. However, only 17 (out of 44) states with limited jurisdiction courts provide full funding for their judges. Even where judges' salaries are fully funded, however, responsibility for other court funding is still fragmented in some states.

Most states took important steps toward centralization. All states have an administrative office of the courts and in the majority of states the office has sole responsibility for budget preparation, human resources, judicial education, and serving as a legislative liaison.

Most state judicial branches have taken over rule making responsibilities. In 32 states, the court of last resort has exclusive rulemaking authority, and in 21, there is no legislative veto. Legislatures retain primary rulemaking responsibility in eight states. In others, the authority is shared or held by a judicial council.

The pace of changes to state court structures slowed considerably in the 1990s. While some states continued to consolidate trial courts and shift responsibilities to the state level, in most states the model for court organization seems fixed for at least the medium term.

One reason for the slower pace is that the fundamental logic of the unification model is being questioned. There is no longer a consensus that full unification is the desired end state for all court systems to reach. Even during the heyday of the unification movement, it was speculated that “it is the individual elements of court unification—and not the overall level of court unification—which affect court performance” (Tarr, 1981:365).

There are developments that, in time, will likely strengthen the hand of central court administration in all models of court organization. There has been a dramatic improvement in the quantity and quality of

the case level information that flows from trial courts to the state level. This provides the raw material for planning and policy development. At the same time, sophisticated performance measurement systems and workload assessment methodologies have been developed that can provide a standard of management information never before available to court managers at both the local and state levels.

The court unification agenda focused on structural aspects of how trial courts should be organized. The next section looks at another dimension of challenges to court governance, those associated with the very distinctive organizational culture that characterizes courts.

THE CULTURE OF COURT SYSTEMS

“In our country judicial independence means not just freedom from control by other branches, but freedom from control of other judges” (Provine, 1990:248).

In these few words, Doris Marie Provine captures the challenge facing any effort at court governance. Accepting the above as a truism, how are decisions to be made on behalf of independent actors who see themselves first, as autonomous adjudicators and, second, if at all, as part of a system? Stated another way, how do you balance self-interest with institutional interests, while attempting to respect both?

An Orientation of Autonomy and Self-Interest

It is critical to understand the cultural challenges to effective governance if improved governance models are to be advanced. The manner in which judges are selected by third parties (governors, legislators, or the electorate) rather than their future colleagues contributes to this sense of independence from the outset of a judicial career (Lefever, 2009). As a consequence, judges' “mandates” do not all derive from the judicial institution itself, resulting in a decreased sense of organizational identity for many new judges. This sense

of individual independence poses a significant obstacle to creating a system identity and, in turn, fidelity to the decisions of a governing authority.

At the trial court level, this manifests itself in judges resisting the notion that they should be concerned about anything other than handling “my cases.” Presiding judges will frequently be heard describing themselves as “firsts among equals,” who experience great difficulty in confronting the self-interested perspective that many judges bring to issues of court administration and operations. In an environment where the first instinct is to assess any proposal from the perspective of “how will it impact me,” it is difficult to initiate change, or even make decisions.

Appreciating this self-interest orientation and working to overcome it, as well as understanding and working with it, will be critical to any form of court governance. Soliciting input, providing an opportunity to be heard, providing a forum for debate, explaining why an issue is important and why a decision was made the way it was, and ensuring effective lines of communication are important in any organization. The culture of courts makes such activities imperative.

Organizational Implications

Any organization (including courts) operates the way it does because the people in that organization want it that way or are at least complicit in accepting the operational structure (Ostrom and Hanson, 2010). The people who create this organizational culture in courts are judges, who used to be attorneys. Attorneys

operate in a professional culture where goals tend to be abstract, authority diffuse, and there is low interdependence with others. It has been said that “the inherent conflict between managers and professionals results basically from a clash of cultures: the organizational culture, which captures the commitment of managers, and the professional culture, which socializes professionals” (Raelin, 1985:1). Professional court administration, whether in the form of court administrators, chief judges, or judicial councils, must operate in the world of concrete goals, more formal authority, and task interdependence if the needs of the organization are to be met.

As noted above, some judges are called upon to take on administrative roles. The culture of judges being equals and a presiding judge being only a first among equals, frequently results in a lack of appreciation for the qualities needed in a leader. This can result in the practice of choosing administrative leaders based on seniority rather than administrative competence, or of selecting judges who are least likely to challenge individual judicial autonomy. At the state level, the practice of rotating chief justices is a manifestation of this culture, and frequently results in tenures too short to permit effective engagement or accomplishment. The desire for a personal legacy can result in a personal agenda at the expense of system needs.

The culture of courts also directly affects non-judicial, professional administrators who are responsible for ensuring effective and efficient court operation, but who, in most instances, lack the authority of chief operating officer positions found in other governmental or business environments. Court executives and presiding judges, and state court administrators and chief justices, ideally function as a management team. The extent to which this ideal relationship actually exists can vary widely, again because of court culture. Something as simple as whether a court executive has a seat at the table during bench meetings, or whether they are relegated to the back row, speaks volumes about the role of the executive in the operation of the court and the existence of a true management team.

Additional cultural challenges result from the competing interests of different court levels and state versus local orientations. The culture of a supreme

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court could not be more different from the culture of a trial court, yet in many jurisdictions it is the supreme court or the chief justice who sets policy for the entire system. It is not surprising that as state supreme courts have taken on more administrative oversight, budget, and policy setting, that trial courts have frequently resisted many forms of coordination and centralization. Trial courts often seek autonomy and flexibility, whereas state goals tend to be more in line with coherence and consistency.

The cultural dimension of courts raises difficult questions. In the policy-setting arena, how do the voices of trial judges get heard? Are there forums for expressing needs and concerns, and if so, are they viewed as effective and credible? Do judges have to speak collectively through “associations” to be heard and, if so, how will these various voices speak for the system? If multiple voices result in conflicted messages, are not other branches of government free to selectively hear, interpret, and ignore judges’ voices? Providing a meaningful way for judges to contribute to policy decisions, maintaining effective communications, and assuring that decisions are clear are all critical to bridging the various interests of court levels and facilitating effective system governance.

It has been suggested that striking the balance between self-interest and institutional interests, while binding separate units of an organization together, requires strategies that embrace three elements: a common vision of a preferred future, helpful and productive support services that advance the capabilities of the organization’s component parts, and a shared understanding of the threat and opportunities facing the system (Griller, 2010). The governance principles set out in the next section are intended to explore these elements.

Finally, while court culture must be understood and considered when addressing governance, it cannot be allowed to serve as an excuse for failing to provide a court system with an effective means of self-governance.

PRINCIPLES OF COURT GOVERNANCE

There are multiple structural models in place for governing and managing state and local courts and distinctive challenges associated with the culture of court organizations. Thus, it is likely that any prescriptive efforts aimed at re-alignment must be consistent with the history, culture, and goals of any individual court “system,” however defined. This paper, therefore, attempts to posit unifying principles that can serve as a starting point for critiquing existing models, while understanding that they must be adapted to a variety of political, legal, and constitutional settings. The first eight principles are primarily focused on the internal governance of the court system, while the remaining three are focused on the relationship of the court system to other branches of government.

This paper, therefore, attempts to posit unifying principles that can serve as a starting point for critiquing existing models.

We suggest the following unifying principles for consideration:

1. A well-defined governance structure for policy decision-making and administration for the entire court system.

Ideally, in our view, this principle should apply to a state court system as a whole, but in many states this will have to be a long-term and perhaps incremental goal. The principle, applied at any level, however, suggests that structure should be explicit, and the authority for policy decision-making and implementation well defined. The absence of such clarity can significantly undermine the ability to make decisions.

2. Meaningful input from all court levels into the decision-making process.

This is a fairly obvious principle drawn from basic knowledge about system management. In the absence of any means of contributing to the process of making decisions, constituents who have to live with the decisions generally lack any sense of buy-in or ownership. This can result in, at best, indifference to the success of the enterprise or, at worst, resistance and sabotage. Perhaps more important, however, is the fact that the quality of the decision-making process is vitally enhanced by the knowledge and insights of all parts of the system.

3. Selection of judicial leadership based on competency, not seniority or rotation.

The complexity of modern court administration demands a set of skills not part of traditional judicial selection and training. Selection methods for judicial leadership should explicitly identify and acknowledge those skills, and judicial education should include their development. This is no easy task in the context of court cultures around the nation, but a more thoughtful conversation should begin and courts should seek ways to identify standards and practices that are better than many of those now in place.

4. Commitment to transparency and accountability.

The right to institutional independence and self-governance necessarily entails the obligation to be open and accountable for the use of public resources. This includes not just finances but also, and more importantly, the effectiveness with which resources are used. We in the courts should know exactly how productive we are, how well we are serving public need, and what parts of our systems and services need attention and improvement. This includes measuring the accessibility and fairness of justice provided by the courts as measured by litigants' perceptions and other performance indices. And we should make that knowledge a matter of public record.

No one wants to tell judges how to decide cases, although it is a reality that we may need to tell them how to manage case records, report court performance, move to electronic filings and discovery, and handle assignments and schedules.

5. A focus on policy level issues; delegation with clarity to administrative staff; and a commitment to evaluation.

Decisions about policy belong with the governing authority of a judicial system, but implementation and day-to-day operations belong to administrative staff. An avoidance of micro-management by the policymaker and clear authority for implementation in the managers are both important for the credibility and effectiveness of court governance, and can minimize the opportunities for undermining policy at the operational level. Finally, without a commitment to evidence-based evaluation of policies, practices, and new initiatives, courts cannot claim to be well-managed institutions.

6. Open communication on decisions and how they are reached.

Judicial culture generally fosters a strong sense of autonomy and self-determination amongst judges—a necessary corollary of decisional independence. In the administrative context, that same culture can make system management tricky. No one wants to tell judges how to decide cases, although it is a reality that we may need to tell them how to manage case records, report court performance, move to electronic filings and discovery, and handle assignments and schedules. To the extent judges, and staff, feel that decisions emerge from a “black box,” without

their input and prior knowledge, the potential for discomfort and dissatisfaction, not to mention active defiance or other bad behavior is magnified. A good system of governance does everything it can to keep information flowing.

7. Clear, well-understood and well-respected roles and responsibilities among the governing entity, presiding judges, court administrators, boards of judges, and court committees.

Nothing undermines good governance faster than muddled understanding of who is responsible for what. Judges in general have a penchant for assuming that plenary jurisdiction and authority on the decisional side should translate into equally broad individual authority on the administrative front. Thus it is particularly important in court management for the assignments and authority of leaders and managers to be clear, explicit, and included in the general orientation of new judges and staff, as well as in the training of new and potential judicial leadership.

8. A system that speaks with a single voice.

A court system that cannot govern itself and cannot guarantee a unified position when dealing with legislative and executive branch entities is not, in fact, a co-equal branch of government. This does not imply only one voice; rather a unified message is necessary. Competing voices purporting to speak for the judiciary undermine the institutional independence of the courts and leave other parts of government (and the public) free to choose the messages they prefer in relation to court policy and administration. This is potentially very damaging both to the actual welfare of court systems and ultimately to the level of respect and attention afforded them.

9. Authority to allocate resources and spend appropriated funds independent of the legislative and executive branches.

If someone outside the judiciary has the power to direct the use of dollars, that entity has the power to direct policy and priorities for the third branch.

Obviously, there is always negotiation over funding priorities, but budget practices like line-item funding shift the policy-making from the judicial branch to the legislative, and have the effect of pitting different parts of a court system against each other. Courts with the authority to manage their own funds can ensure that priorities are dictated by agreed-upon policy and planning and not by the “project du jour.”

10. Positive institutional relationships that foster trust among other branches and constituencies.

Given the natural constitutional and political tensions that are inherent in our system of government generally, the judiciary must work constantly to explain itself to the other branches. Care and strategic attention must be afforded to building personal and professional relationships that will ensure an adequate level of credibility when the judiciary is in conversation with the other parts of state government. This is particularly essential on the budget and finance side, and on the question of openness and accountability. Legislative and gubernatorial staffers as well as their bosses need to know they can take information and numbers “to the bank” in terms of accuracy and transparency when they come from the courts. It also helps if courts are proactive in promoting quality in performance, demonstrating commitment to things like judicial education and performance evaluation for judges and courts.

11. The judicial branch should govern and administer operations that are core to the process of adjudication.

In some states and localities, the ownership and maintenance of the court record is the responsibility of an entity outside of the judicial branch. Key court staff may also be employees not of the courts but of an independently elected clerk of courts. Such an alignment is 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.

CONCLUSION

American courts are not alone in reexamining the governance of our systems. In Australia, the dependence of the courts on the Ministry of Justice for the administration of the courts has given rise to a call for self-governance. A recent report entitled *Governance of Australia's Courts: A Managerial Perspective* contained this observation:

“Even if the current arrangements seem to “work,” in the sense that they have not given rise to major catastrophes or dysfunctions, there is no reason why they could not be made to work even better. Good people can make bad structures work. But, good people can work even better within good structure” (Alford et al., 2004:94).

Many of us in the American state courts are in the same situation. Good people are doing good work in court systems hampered by a lack of good structure and good processes. We hope that this discussion will support a much broader consideration of what good court governance requires and how those principles might be brought to bear in the effort to do better work in better structures.

In conclusion, you may consider the following questions: if you assume for the moment that the principles set forth are viable and appropriate, would the state-level governance of your court system stand up to them? What about the governance within your individual judicial districts or courts? How would you know whose opinion would count, and how would you initiate meaningful improvements? If we ignore the question of how we can most effectively govern our courts, then are we not relegating the judiciary to something less than an equal branch of government and hindering our ability to provide the public with a fair and efficient forum for resolving disputes? Courts should carefully consider these questions along with the preceding unifying principles to maximize their own operability in favor of the most efficient, fair and highest standards of operation.

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