

## Judicial Independence — Organizations

# The President Of ACC Speaks Out On Funding State Courts

The Editor interviews **Fred Krebs**, President of the Association of Corporate Counsel (ACC).

**Editor: Is the fact that so few cases go to trial indicative of uncertainty as to the outcome if the case proceeds to that stage?**

**Krebs:** The uncertainty related to the outcome is one of the factors of why so few cases are tried. Fear of jury unpredictability is undoubtedly a factor that contributes to the uncertainty. But, there are many other reasons why our members don't want to take cases all the way to trial. There is a desire to control costs. A trial can expose a company to adverse media coverage, which can affect its stock price, as well as consumer perception of the company and its products. There is the possibility of public disclosure of sensitive corporate information – business practices, trade secrets or just information that the company wishes to maintain or keep confidential and does not wish to have spread throughout the media.

**Editor: To what extent does merit selection improve the quality of judges and contribute to judicial independence?**

**Krebs:** Merit selection of judges is a very good thing. It addresses public concern about the increased politicalization of the selection process and the influence that large political contributions can have on the decisions of judges. Judges should not have to run for office like any other public office holder – it denigrates the courts. It results in poor public perception of the judicial process and of the independence of the judiciary. As a result of these campaigns, judges are perceived as being beholden to one interest group or another.

**Editor: Does inadequate court funding result in clogged dockets that lead to judges not taking the time to control demands for e-discovery?**

**Krebs:** I have certainly heard in conversations with our members significant concerns about the abuse of e-discovery. We are all aware of the potential for abuse. Your publication has provided some very good assessments of this and some very good analysis.

Our members struggle with the immense burden that uncontrolled e-discovery can have on their corporate clients. They are conscious of the fact that very little ever goes away once it is put on a computer. The cost and the challenge of recovering electronic information is a huge problem. It is then complicated by the fact that, unlike the federal courts, most state courts have not adopted rules that would control e-discovery abuses – and even if they did, overburdened state court judges may not have time to implement such controls, even if they were formally adopted. There is more to it than inadequate court funding, but the problem is certainly more serious where that is the case.

**Editor: Is ACC distressed by the pro-**

**posals in many states to reduce funding for the court systems?**

**Krebs:** We have not taken a formal position on such proposals, but as our members become aware of these proposals and their practical impact, I believe they will be very distressed by them. Our members have voiced a general concern about the quality of justice and the functioning of many state court systems, and I am certain they will be particularly concerned about the effects of further cutbacks in the funding of state courts.

I am beginning to hear more about how funding cutbacks can lead to clogged dockets and delays. In this kind of a climate, it is important that we support our arguments for improved funding of our judicial systems with very specific facts and avoid what one of my law school professors referred to as “glittering generalities.” To do this effectively, we need to look at the impact of inadequate funding on the specific types of litigation – business versus business, consumer versus business, government versus business, etc. – and the particular forms that such litigation takes, whether it be class actions, derivative suits, criminal proceedings or individual actions.

**Editor: It has been suggested that because of inadequate compensation more judges are being drawn from the public sector and fewer from the private bar. It has also been suggested that this leads to less attention being given to business cases.**

**Krebs:** In a general sense, we want judges with a broad background of experience and not judges who are predominantly from the public sector because judicial compensation is insufficient to attract qualified people from the private sector. Our members would agree with Chief Justice Shepard's statement in the February issue of *The Metropolitan Corporate Counsel* that “the judiciary works best when you get people who have to come to the bench from a variety of past career experiences.”

You want judges drawn from as broad a spectrum of backgrounds as possible as they will interact among themselves and help to educate each other. The overall quality of the justice dispensed, gains from that diversity. However, in order to ensure a just result, it is also necessary for the judges handling complex business cases to have backgrounds that provide them with the ability to understand the issues involved.

**Editor: Does that mean that ACC supports the formation of specialized business courts?**

**Krebs:** That is correct. We supported the initiative of Chief Judge Judith Kaye to form the Commercial Division of the Supreme Court. Having been in operation for some time, this court has proven to be very successful in New York. Business courts have now been created in numerous states, in many cases with the enthusiastic support of ACC's local chapters.

Judges in such courts develop the



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expertise to handle complex business litigation. There is no doubt that these courts are respected for the quality of their decisions. We frequently hear the argument that such courts draw judicial resources away from other important activities. In today's economic climate, when it is even more important to attract new businesses to a state, the ability of the state courts to effectively and fairly handle business disputes is one element in creating an attractive business climate.

**Editor: Do you see a trend toward more experienced judges leaving the bench to join law firms and pursue careers as arbitrators because they cannot satisfy their families' needs on their judicial salaries?**

**Krebs:** It is a serious issue. ACC has vigorously supported higher or improved judicial compensation in the federal court system. I think it is ridiculous that a federal district court judge, or even the Chief Justice of the Supreme Court, makes less money than some first or second year associates at a large firm. That tells me that the judicial pay system is out of whack. Perhaps first year associate salaries are also skewed – but at least that is driven by competition in a free and open market.

I am less familiar with judicial compensation in the state court system, but what I do understand is that it is even a more serious problem there. In his interview in the February issue of *The Metropolitan Corporate Counsel*, the Delaware Chief Justice noted that

Delaware trial judges are the highest paid in the country. Most folks also realize that the quality of decisions that you get out of Delaware is quite high as a result of the expertise found there in the handling of business cases; certainly appropriate judicial compensation plays a significant role in the quality of the judges.

**Editor: How would you like to sum up your thoughts on the issue of funding and the role of the courts?**

**Krebs:** The need to adequately fund our courts and to provide reasonable compensation to our judges in order to help maintain judicial independence is critically important to every lawyer. As Laura Stein, ACC's Board Chair and Senior Vice President and General Counsel, The Clorox Company, aptly noted in your January issue, “It is critical to encourage talented and experienced lawyers, including those with significant experience in corporate practice, to become judges. A strong judiciary assures the rule of law.” ACC believes that we should take appropriate steps to protect judicial independence (<http://www.acc.com/practice/cjr.php>).

Finally, there is no question that the cost of litigation is too high. While we must also be careful not to lose sight of the big picture and acknowledge there are other factors that contribute to high litigation costs, inadequate funding of our courts exacerbates this problem. If your readers have any questions or need clarification, they can call me at (202) 293-4103.