

around the bar

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Former DOJ Lawyer Tribe Calls for Action on Access to Justice

American Bar Association News Service

By Kristin Loiacono

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CONCORD, N.H.— Harvard Professor Laurence H. Tribe cautioned that he may “offend” during his testimony at the American Bar Association’s public hearing Thursday on court funding and access to justice at the University of New Hampshire School of Law. While no one seemed to find them offensive, his remarks may have raised a few eyebrows as he called the U.S. Supreme Court “blind” and the justice system “fundamentally broken”.

Tribe, whose career spans four decades and who has served as the Department of Justice senior counselor for access to justice, said justice in America needs to not only be preserved, but also restored. And by restoring justice, he means it’s time for lawyers to walk the walk.

“Unless we make a real difference in the way we as lawyers are viewed, we will likely hit a low ceiling when we try to squeeze money from state legislatures,” said Tribe.

Tribe was referring to the dire financial situation of most state courts: they are being used more than ever, yet are sparingly funded – and the state legislatures control the purse strings.

Tribe was one of more than a dozen bench, bar and business leaders and citizens who testified before the American Bar Association’s Task Force on the Preservation of the Justice System about the effects of underfunded courts and the need for access to justice. In particular, Tribe highlighted the need for access to justice for “the struggling middle class.”

He said that part of the problem is that “little of the energy of our profession goes to preventing systemic problems.” Instead, more energy is spent on protecting turf.

Looking at Cases with Access to Justice in Mind

To illustrate his point, Tribe singled out a case recently decided by the Supreme Court of the United States – one in which a woman was charged \$30.22 in sales tax for the free phones she received for signing a two-year contract with AT&T. The federal trial court struck down AT&T’s contract language that said people with a dispute had to file suit individually instead of using class-based arbitration. The 9th U. S. Circuit Court of Appeals agreed and said the woman could proceed with class-based arbitration. The U.S. Supreme Court disagreed in a 5-4 decision.

“A system that can’t even get it together to resolve a dispute over thirty dollars is fundamentally broken,” said Tribe.

“AT&T’s lawyers drafted the fine print of the contract; the Department of Justice didn’t file an amicus in the couple’s suit; the Supreme Court let technical devotion to the contract and a cramped reading of federal arbitration doctrine blind them,” said Tribe.

He called on lawyers and courts to exert devotion, dedication and energy to look through technicalities to promote access to justice.

What Would Tribe Do?

David Boies, who co-chairs the ABA’s task force with Theodore B. Olson, asked Tribe what improvements the task force could recommend.

Tribe said state judiciaries that have made improvements should be held up as models. Courts should not focus on pay-as-you-go systems, ones that focus on increased fees and fines. They should regularize access to justice in the budget, and invest in new technology. And, he said, the public needs to be reminded that budgeting money for state courts is not an expenditure – it’s an investment and that the money is returned multifold.

Getting By on Morsels

With our courts starving for resources, the ABA will redouble its advocacy efforts



BY STEPHEN N. ZACK

IN WHAT COUNTRY DO COURTS require you to bring your own paper if you want to file a complaint?

Where are civil jury trials being suspended for up to a year?

Where is it that 97 percent of lawyers surveyed say their clients are under pressure to settle or plead because the court system is so seriously overloaded?

The answer to all is in our own country, due to a devastating nationwide funding crisis.

These are just a few of the findings from the inaugural public hearings and poll conducted by the Task Force on Preservation of the Justice System. On the first day of the 2011 ABA Midyear Meeting in February, task force chairs Ted Olson and David Boies heard expert testimony on the problems hitting the state courts. State chief justices were among those who detailed what is happening. (See "Beggaring Justice," March, page 58.)

This third, co-equal branch of government is being allotted roughly 1 percent of states' budgets. That amount is not just for judges and courtrooms; it is for prosecution, public defense and other important civil and criminal functions. The crisis affects all states.

Our court system is being starved of resources, making access to justice a luxury reserved only for the rich. When there is no access, there is no equal justice under law. That is simply unacceptable to all of us and jeopardizes our very democracy based on an adequately funded, co-equal branch of government—our judiciary.

It is also costly to business and job creation. A just-released study shows that, in Georgia alone, funding cuts crippled the state's total economic output to the tune of \$337-\$802 million annually. Assuming Georgia is typical and working from the midpoint of those numbers, that puts the national cost of the state court funding crisis at roughly \$28.5 billion per year.

Unfortunately, state courts are not the only places facing the budget ax. Legal aid providers that are funded through Legal Services Corp. grants are being threatened with measures that would slash LSC funding by more than \$10 million a month during the rest of this fiscal year. That's just for starters.

The ABA, a staunch backer of civil legal help for the poor and working class, must not allow it, especially in hard times when demand for court access is increasing.

The battle has been joined by the ABA's Governmen-

tal Affairs Office, which has notched many significant victories on behalf of the profession and our justice system. The ABA's nine registered lobbyists are talented, tireless advocates. Recent successes include:

- Clarifying "red flags" language to ensure the Federal Trade Commission's identity theft provision does not apply to lawyers. This would have been very costly and diverted lawyers from client service to compiling paperwork on a nonexistent problem.

- Continuing unlimited Federal Deposit Insurance Corp. protections for lawyers' trust accounts, providing money for low-income legal services and simplifying lawyer's obligations regarding IOLTA.

- Preventing the Consumer Financial Services Protection Bureau, established by the Dodd-Frank Act, from having jurisdiction over the practice of most lawyers.

In this Congress, the GAO's attention will focus on funding for the justice system, including the LSC. The other seven priorities of the ABA's federal legislative push—as approved by the Board of Governors in February—are: criminal justice system improvements and protection of rights, elimination of discrimination and protection of civil liberties, health care and tort reform, immigration, independence of the judiciary, independence of the legal profession, and promotion of the rule of law.

TAKING IT TO THE HILL

THE VOICE OF THE PROFESSION WILL BE RAISED BY ABA members April 12-14 during ABA Day—the association's organized member lobbying campaign on Capitol Hill. This multiday advocacy event informs legislative leaders of the cost to their constituents when the justice system is damaged by indiscriminate budget cuts. Other issues, including push-back against attempts to federally regulate lawyers, also top the agenda. ABA Day—leveraging the expertise of some of our best and most dedicated members—can move legislators to favor the ABA's positions on critical issues, as it has in the past.

Throughout the years, the ABA has realized that, in terms of legislative advocacy on Capitol Hill, members are our most effective resource. So speak out as an individual leader in your community. Talk about these issues in your civic and personal activities, at your office, and through your local and state bars. Also, join the ABA's Grassroots Action Team. If there is any question about whether you have time or reason to participate, just remember Thomas Jefferson's pointed message:

"We in America do not have government by the majority. We have government by the majority who participate."

Time to get out there and raise your voice for American justice. ■