

FUTURE TRENDS IN STATE COURTS 2012

*Crisis in the Courts:
Reconnaissance and
Recommendations*
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CRISIS IN THE COURTS: RECONNAISSANCE AND RECOMMENDATIONS

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The courts are still in peril as a result of the nationwide economic crisis. The ABA Task Force on Preservation of the Justice System has put the issue of state court underfunding in the spotlight, and with its report has defined the crisis and offered recommendations to assist in dealing with it.

On August 8, 2011, the House of Delegates of the ABA voted unanimously for a resolution declaring that our state justice systems are underfunded and urging state and local governments—working together with the bar—to address that crisis. The resolution, in turn, rested on a report of a task force organized the year before by ABA president Steve Zack. Working under the co-chairmanship of David Boies and Theodore B. Olson, the task force members held hearings, during which they took testimony from judges, court administrators, attorneys, and other stakeholders throughout the country.

In their report, “Crisis in the Courts,” the task force documented the extent of judicial underfunding, its costs to our economic and political systems, and the broad outlines of systemic changes many have proposed. The task force found that, unlike other elements of state government, which fared relatively well in the better economic times before 2007, the nation’s courts and related services were already being curtailed even before the current recession, and that since 2008, the courts of most states have been forced to make do with 10 to 15 percent less funding. The task force commented that, because the budgets of the judiciary and related support

systems (juvenile counselors, drug diversion programs, probation officers) are typically 90 percent personnel expenses—as opposed to other agencies tending our highways, parks, or hospitals, which devote a far greater percentage of their budgets to capital projects, where expenditures can be deferred without immediately impacting essential services—those cuts to judicial budgets have had a debilitating impact on available court days and all of the other functions that require *people* to work *immediately* on burgeoning caseloads.

In their report, the task force documented four different types of harm resulting from this underfunding.

1. The Adverse Impact on Public Safety

The task force agreed with many commentators that there can be little doubt that budget cuts so adversely affect the courts’ ability to resolve cases in a reasonably prompt manner that the courts cannot fulfill their traditional role in maintaining societal order and public safety. Most obviously, many states have experienced delays in resolving criminal dockets to the point where judges and prosecutors are faced with the choice of warehousing untried defendants in local jails (at additional expense to other government agencies) or releasing potentially violent offenders simply because further pretrial detention is either constitutionally impermissible or practically impossible.

In Georgia, for example, a capital case was delayed repeatedly—with the defendant jailed for five years—because the state could not pay anyone to represent him. On the other hand, in Washington State a suspect in a violent case was released as a result of speedy-trial concerns, only to rape a woman and then kill a pedestrian in the ensuing high-speed chase.

The more “routine” effects of cutbacks in the courts’ ability to serve public safety are no less troubling. Throughout the country, the added cost in time and money to local police departments in traveling longer distances or spending more time waiting to testify at trials that have been transferred or delayed because of insufficient court time is clear. For lack of funds, DNA data on arrested offenders are not being entered into databases in Nevada for future use. Inadequate funding of mental health and substance abuse programs—and the judicial officers who

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must decide which offenders could benefit from medical treatment rather than the polar alternatives of prison or outright release—is likewise endangering public safety *and* increasing the costs of an overwhelmed prison system.

The adverse impact of reductions in judicial time on public safety, of course, is not limited to delays in criminal proceedings, which are at least given some priority in most states. They extend to sensitive civil matters as well. A delay in providing protective orders in domestic relations cases, for example, can lead to tragic results.

2. The Adverse Impact on the Economy

The task force was also troubled by the fact that, as serious as the adverse impact of insufficient funding of the justice system can be in terms of public safety, the negative effect on the economy is no less devastating—and far more widespread. Over the past few years, a number of economists have made detailed

calculations of the costs, both direct and indirect, of court budget deficits, all with the same conclusion: Those costs to local economies far exceed the supposed “savings.”

For example, the task force heard from one group of economic consultants who had calculated the true costs of state-funding cutbacks that had resulted in annual deficits for the Los Angeles Superior Court projected to range between \$80 million in 2009 to \$140 million in 2012. They found that the resulting reductions in court time, increasing delays in adjudicating cases, and other related expenses would total many times the projected “savings” to the state.

This last type of damage from underfunding our justice system cannot be overlooked and, of course, is especially problematic in difficult economic times. For it is precisely at those times that the economy is *most* in need of prompt judicial resolution of such matters as foreclosures, business reorganizations, bankruptcies, related credit problems, and other business disputes that have resulted from the downturn.

Perhaps nowhere is this more apparent than in residential foreclosures. The dramatic increase in mortgages requiring judicial adjustment or termination, combined with reduced staff and courtroom hours, has led to “robo-signing” abuses by some lenders (which can hardly be monitored by judges who have less than a minute per file), as well as undue delay of that essential reorganization of the real-estate markets. Such losses can then have a ripple effect as they deprive small family businesses of ancillary income to make ends meet for their other unrelated businesses.

Finally, in an ironic twist, the reduction in state expenditures for *properly* functioning courts even harms the state treasury itself. Many of the economic costs noted above—directly lost salaries and indirectly lost business opportunities—result in corresponding tax losses estimated to be as much or more than the “savings” they were intended to create.

3. The Adverse Impact on Those Who Need the Protection of the Courts

Given their historic role as the protectors of the least advantaged in our nation, the courts have rightly been called “Society’s Emergency Room.” And, as the task force repeatedly heard, never is that title so warranted as in times of economic distress. The same recession that has led legislatures to *reduce* access to our justice system has obviously *increased* the number of people who need it.

Family relationships ruined by unemployment or foreclosure often need judicial mediation. Yet when family and probate courts are forced to restrict hours or close entirely, the processes of child or elderly custody, legal separation or divorce, and child support orders are delayed or frustrated all together. The rights of minorities also suffer when the courts cannot promptly address actions filed to enforce state antidiscrimination laws.

All of this litigation burden on the courts is then compounded when those needing judicial protection are also denied access to free legal services and hence must proceed (if at all) *pro se*—thereby requiring even *more* time of judges and their staffs, who must then provide the additional guidance an appointed attorney would otherwise satisfy. During the recession, legal-aid agencies across the country have seen their budgets slashed as a direct result of both reduced state expenditures and historically low rates now paid on Interest on Lawyers’ Trust Accounts (IOLTA)—a primary source of many legal-aid budgets.

4. The Adverse Impact on Our System of Government

Finally, the task force heard from a number of witnesses who explained that, ultimately, the continuing failure to address the underfunding of our judicial system threatens the fundamental nature of our tripartite system of government. As Hamilton so aptly put it in the *Federalist* more than 200 years ago—in language just as relevant today—the judiciary is ultimately dependent on the executive and legislative branches for the funding it needs to exist at all as it has “no influence over either the sword or the purse.”

In 2010 that issue was directly addressed by the New York Court of Appeals in an action filed on behalf of the state’s 1,300 judges, seeking their first cost-of-living increase in more than a decade. In *Maron v. Silver* (2010), the court confronted a

situation that is increasingly true around the country, where judicial salaries had been held hostage to partisan disputes to the point where the court concluded the very separation of powers was imperiled.

The *Maron* court explained that the 1,300 judges had not received any pay increase in 11 years, during which inflation had eroded their salaries in real terms by about 30 percent, while their dockets had *increased*, coincidentally enough, also by about 30 percent to a “staggering” 3,500 cases for each judge. Faced with this growing crush of litigation—and a legislature unwilling even to meet the cost of living—the court was forced to rule that situation a denial of our basic notions of a separate-and-equal judiciary. Although that ruling has led to some improvement, the task force found that much more needs to be done to redress the level to which court funding has sunk throughout the nation.

Crisis in the Courts: Proposals and Options*

In the first year of its existence, the ABA Task Force on Preservation of the Justice System did not stop at defining the crisis. It researched and sought proposals and ideas from the states. The National Center for State Courts provided references, ideas, and assistance. The committee is grateful to NCSC president Mary McQueen and her leadership and staff for providing many of the tangible ideas that the ABA resolution recognized. The state courts have been facing pressure and funding shortages for decades and have responded creatively. Going forward, these experiments demonstrate not only ways in which to react to a crisis but also methods to make the courts better over the long term.

The task force organized the reform ideas into three categories. First, courts must address funding issues and appropriations limitations. The goal of these reforms is to achieve stability, adequacy, and predictability in the funding of the judicial branch. Second, in the face of funding realities, courts must be as efficient with available resources as possible. The goal is to deliver the fundamental constitutional requirements of justice using modern and effective means. Third, all who are concerned with the justice system should establish better means of communicating the needs and importance of the system to decision makers. Although citizens generally trust the courts, they do not understand the great demands placed on the courts. Raising public awareness will increase the support base for court system

reform and make positive change more possible. Likewise, legislators and other decision makers become better advocates and supporters for the courts when they understand directly the functions and needs of the system.

1. Achieving Financial Predictability and Adequacy

The actual examples and proposals emphasize several basic themes in the budgeting process. As a separate branch, the judiciary should be accorded more discretion in directing funding among the various functions and needs according to evolving facts and realities. Exercising such discretion is good management practice as long as accountability is maintained. Courts can achieve that kind of flexibility only if legislatures provide less-rigid dictates in appropriations and fewer line items, eliminate unfunded mandates, allow shifts of funding during budget cycles, and use funding formulas that reflect realities in the judicial system. Together, these reforms can meet the twin goals of fostering both flexibility and accountability within state

Achieving Financial Predictability and Adequacy

1. Provide for flexible management of funding within the judicial branch (ABA Standing Committee on Judicial Independence, 2004: 9).
2. Establish court system appropriations and budget bills with fewer line items and fewer legislative restrictions on expenditures (ABA Standing Committee on Judicial Independence, 2004: 8).
3. Develop a judicial workload funding formula that fosters fair and predictable funding (National Center for State Courts, 2003b, 2003a: 12, exhibit 4).
4. In furtherance of predictable and supportable funding, budget processes must show measureable outcomes, prove fiscal accountability, and deal with long-term goals of the court system. NCSC has developed “principles of judicial administration” that may guide these reforms (National Center for State Courts, 2010; Baar et al., 2010: 8-9).
5. Establish limits for cutbacks by legislatures or executive branches by recognizing the inherent powers of the judiciary as a separate branch of government (*Chiles v. Children*, 1991; West Virginia Constitution, art. IV sec. 51 (b)(3); Stumpf, 2004: 107; Boston Bar Association, 2009).
6. Establish unified funding for courts at the state level (ABA, 1990; Tobin, 1999; Baar et al., 2010: 6).
7. Identify, pay for, or eliminate unfunded mandates on the justice system (Texas Association of Counties, n.d.).
8. Eliminate functions that are no longer necessary, have less priority, or can no longer be afforded as part of the budget of the courts (Hall and Suskin, 2010).

judiciaries. To gain these reforms, courts must demonstrate a commitment to efficiency by eliminating waste and streamlining operations.

2. Increasing Efficiency and Reducing Waste

The task force identified efficiency as critical to courts in this era of austerity. As in some other industries, a major cost in the courts is personnel. To the extent that less expensive technology can replace personnel, such technology can produce the double benefit of reducing costs and increasing efficiencies. Examples of beneficial technological improvements can range from online payment of speeding tickets to entirely Web-based case management systems.

In addition to technology, adopting corporate administrative models can improve management and business process operations. By corporate administration, the task force means statewide management of administrative functions such as staffing, payroll, and recordkeeping, as well as centralized allocation of judicial resources to the areas they are needed most. A centralized administrative model does not erode local control over selection of judges and development of case law, but it does reduce costs and inefficiencies associated with multiple levels of administration.

Increasing Efficiency and Reducing Waste

1. Enhanced use of technology to improve the efficiency of the judicial system (Boston Bar Association, 2009; Schauffler and Kleiman, 2010: 292; National Center for State Courts, 2009).
2. Use business process management principles to evaluate efficiency (Klaversma, Roper, and Steelman, 2003).
3. Establish principles for “reengineering” the judicial process (Conference of State Court Administrators, 2011; Hall and Suskin, 2010; National Center for State Courts, 2009, 2011).
4. Use alternative, more efficient, and less expensive means of resolving conflicts and delivering justice (National Center for State Courts, 2009).
 - a. Consider the use of specialty courts such as drug court, business court and family court.
 - b. Foster alternative dispute resolution (Riskin et al., 2005: 22-35).
 - c. Community resources—Family Centers (Baar et al., 2010: 10).
5. Reexamine court jurisdictions and consider consolidation or elimination of certain courts (National Center for State Courts, 2003b).

Further, courts must look for new and creative alternative administrative methods. Specialty courts can develop judicial expertise in certain areas; promotion of alternative dispute resolution can reduce the burden on the trial courts; and community judicial-volunteering programs can increase manpower and awareness. Within the last few years, U.S. courts have been trying new ideas to increase efficiency. Ultimately, however, the courts cannot trade off fundamental values of justice for efficiency. Justice remains the core mission.

3. Communicating and Advocating a Stable and Effective Justice System

Despite the undeniable importance and great needs of the judiciary, those needs are not always clear to the public at large or even to some public leaders. The judiciary has less political support and public outreach than the other branches of government. The lack of political power is a byproduct of the belief that the judiciary must be less political than the other branches. However, communication and advocacy must be part of any plan for protecting and enhancing the courts. The task force realized that communication between the judiciary and state legislatures must occur. Legislatures provide a major component of judicial funding, and programs of familiarization and education can help legislatures understand the problems facing courts. Individual legislators who understand the needs of courts can better advocate for court systems. In addition, reaching out to and educating business leaders, civic leaders, and the public at large can help explain the importance and needs of the court system to legislators who appropriate funds.

Ultimately, the social cost of inadequate funding must be explained to those outside the court system. A systematic approach to better public understanding of the functions of the system is essential to achieving the goals of adequate funding and efficiency.

Communicating and Advocating a Stable and Effective Justice System

1. Include legislators directly in communication, familiarization, and education programs.
2. Develop coalitions that include business groups and general counsels of corporations to help educate and influence legislators (National Center for State Courts, 2009).
3. Enhance education on the role of the courts for the public and in schools (National Center for State Courts, 2009; American Bar Association Commission on State Court Funding, 2004).
4. Establish a communications plan that explains that certain judicial cuts result in more cost to the taxpayer in the long run.
5. Use national media to deliver the message through compelling and specific stories on the impact of justice system cuts.
6. Advocates for judicial funding should consider utilizing polling, paid media, and grassroots advocacy.

Conclusion

The current crisis is beginning to receive more attention. The *New York Times*, *USA Today*, and the *Wall Street Journal*, among others, have found this issue worthy of their ink. For example, the *New York Times* recognized the crisis and referenced the task force report in an editorial, “Threadbare American Justice.” The conclusion of our task force report, a phrase quoted by the *Times*, was that “even the most eloquent constitution is worthless with no one to enforce it.” The courts are, in fact, the final guardian of our values and our Constitution, and nothing can be more important to our nation’s future.

The reality of the court crisis is complex. Different court systems will require different solutions, and the recommendations are examples of strategies that have worked before and provide logical options for the future. The task force is continuing to search for answers, and we look forward to working with the courts to ensure that our justice system is protected.

ENDNOTES

* These options and proposals were among the topics discussed in testimony offered by the following individuals at two hearings held by the ABA Task Force on Preservation of the Justice System in Atlanta, Georgia (February 9, 2011) and Concord, New Hampshire (May 26, 2011): Dennis W. Archer, former ABA president; Bert Brandenburg, executive director, Justice at Stake; Linda Dalianis, chief justice, New Hampshire Supreme Court; Paul J. De Muniz, chief justice, Oregon Supreme Court; Don Federico, president, Boston Bar Association; Carol W. Hunstein, chief justice, Georgia Supreme Court; Wallace B. Jefferson, chief justice, Texas Supreme Court; Kim Keenan, general counsel, NAACP; Manny Medrano, reporter/anchor, KTLA and KNBC News; Ron Overholt, chief deputy director, Administrative Office of the California Courts; Richard Samuels, chair, New Hampshire Business and Industry Association; Leigh Saufley, chief justice, Maine Supreme Court; Lester Tate III, president, State Bar of Georgia; Janet Welch, executive director, State Bar of Michigan; and Wayne Withers, general counsel (ret.), Emerson Electric.

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Justice Eileen C. Moore was charged with finding artwork for the new 4th District Court of Appeal building in Santa Ana, California with no budget. She contacted the school superintendent and then the probation department got involved. Students read court cases and depicted them in murals. This year's Trends cover was created by a 17 year old at Juvenile Hall. The case involved gang violations and disfiguring a public place and the young artist had also been charged with graffiti crimes. The resulting mural hangs in the courthouse, along with more than a dozen other paintings depicting Orange County, California cases.



