

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 8-9, 2011**

**RESOLUTION**

RESOLVED, That the American Bar Association urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.

FURTHER RESOLVED, That the ABA urges state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately, provide that funding as a governmental priority, and develop principles that would provide for stable and predictable levels of funding of those justice systems.

FURTHER RESOLVED, That the ABA urges federal, state, territorial, and local courts to identify and engage in best practices to insure the protection of the citizens within their jurisdictions, efficient use of court resources, and financial accountability.

FURTHER RESOLVED, That the ABA urges state, territorial and local courts and bar associations to develop sustainable strategies to communicate the value of adequately funding the justice system utilizing advisory groups, enhanced civic and public education, and direct engagement with public officials at all levels.

## REPORT

### CRISIS IN THE COURTS: DEFINING THE PROBLEM

#### Introduction

The courts of our country are in crisis. The failure of state and local legislatures to provide adequate funding is effectively -- at times quite literally -- closing the doors of our justice system. At the same time, Congress has reduced its support for both the federal courts and other programs that directly and indirectly support our justice system at the state, county and municipal levels.

As a result, over the last few years, the courts of virtually every state have been forced into debilitating combinations of hiring freezes, pay cuts, judicial furloughs, staff layoffs, early retirements, increased filing fees, and outright closures. These reductions in court staff and related resources come at the very time when the demand for the judicial resolution of economic claims has increased dramatically. Our courts, already short-staffed, have thus been forced to lay off judges, clerks and other personnel just as they are being inundated with hundreds of thousands of new foreclosures, personal and small business bankruptcies, credit card and other collection matters, domestic fractures, and the many other lawsuits resulting from the Recession. The courts must then deal with these increased caseloads, often facing the additional problems created when litigants proceed *pro se*, which occurs all the more frequently in hard economic times.

Sadly, the courts are easy prey for Draconian budget cuts, because they lack the power to tax to support themselves and hence are at the mercy of legislative and executive branch political priorities. At its most extreme, this had led to constitutional crises where, as in New York last year, judges were forced to sue legislative and executive branch officials in an attempt to obtain even the most basic level of support.

Yet the “savings” to a state or local government from drastic cuts in funding the justice system are typically insignificant when viewed in terms of a government’s overall fiscal woes. The proportion of state and local budgets represented by even a fully-funded court system is quite small -- in the range of 1 to 2%. And since judicial budgets consist almost entirely of personnel costs, the courts do not have the ability simply to postpone expensive items to a more robust economic time; and thus reductions in court funding directly and immediately curtail meaningful access to the justice system.

When that happens, the costs to society are great. The undue delay or outright denial of effective judicial action results not only in further harm to those who need prompt and fair resolution of their disputes, but also, in many instances, to more overcrowded prisons, threats to public safety, and harm to those, such as broken families, in the greatest need of legal support.

In cold hard cash the results can also be staggering. For example, it was recently estimated that the quantifiable costs from court-related delays in foreclosure cases in

Florida alone was nearly \$10 billion.<sup>1</sup> And ultimately, when our courts -- the focal point of our legal system -- cannot provide justice, such problems breed contempt for the law itself.

## **I. The Extent of Our Underfunded Justice System**

Unlike other elements of state government which fared relatively well in the better economic times from the mid-1990's to 2007, the nation's courts and related services were being curtailed in many respects even before the current Recession. And the ABA has long been concerned by that situation.

In 2003 its Standing Committee on Judicial Independence issued a report which documented the growing disparity between the courts and agencies that serve other state functions, such as education and healthcare, which had been the beneficiaries of a "burst of increased spending in the 90's." The committee report warned that it was "no longer the case" that the "courts' status as a co-equal branch of government" would serve as an effective "buffer" from even deeper budget cuts.<sup>2</sup>

A year later, in August 2004, the House of Delegates focused on the increasingly common legislative practice of reducing judicial funding at the same time, they demanded more and more of the courts in terms of both traditional adjudication and new, related social services. The House voiced concern over the budget processes of many states which made it difficult, if not impossible, for judges and court administrators to use financial resources in the most effective manner.<sup>3</sup> The report accompanying the House resolution echoed the findings of a prior report of the ABA's Commission on the 21<sup>st</sup> Century Judiciary (2003), that, without enhanced funding, the judiciary's capacity to preserve itself would be threatened.<sup>4</sup>

Over the next few years, a few states responded to these concerns with some modest improvements in court funding procedures. But, with the onset of the current Recession in 2008 -- and the significant loss of tax revenues that soon followed -- the courts once again became the target of budget cuts more severe than those imposed on other entities.

Over the last three years, the courts of most states have been forced to make do with 10 to 15% less funding than they had in 2007. And because the budgets of the judiciary and related support systems (juvenile counselors, drug diversion programs, probation officers) are typically 90% personnel expenses -- as opposed to other agencies tending our highways, parks, hospitals or libraries which devote a far greater percentage of their budgets to capital projects or equipment, where expenditures can be deferred without immediately impacting a reasonable level of services -- these cuts to court budgets have had a direct and debilitating impact on available court days and all of the related functions that require people to work on burgeoning caseloads on an immediate basis.

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<sup>1</sup> Washington Economic Group, The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Underfunding (2009) at 1.

<sup>2</sup> Zemans, Court Funding (August 2003) at 10.

<sup>3</sup> ABA, House of Delegates Resolution and Report (August 9, 2004).

<sup>4</sup> Id. at 6.

State judicial officers have attempted to cope with these cuts in various ways -- all of which have a direct and negative effect on the pace and quality of adjudications. Over the last two years,

-- Twenty-six states have delayed filling judicial vacancies; thirty-one, judicial support positions; and thirty-four, vacancies in clerks' offices.

-- Thirty-one states have either frozen or reduced the salaries of judges or staff.

-- Sixteen have furloughed clerical staff, with commensurate reductions in pay; and nine have extended those furloughs to judges as well.

-- Fourteen states have simply laid off staff entirely.

-- Some twenty-two state court systems have attempted to offset some of these budget cuts by increasing filing fees and/or fines.

-- Last, but hardly least, fourteen state court systems have been forced to curtail the hours and even entire days they are open.<sup>5</sup>

The Task Force has heard many accounts of the extent and results of such chronic underfunding. To cite but one state's experience, the courts in Georgia have seen their funding shrink 25% over the last two years, such that their budget (which must also pay for prosecutors) now constitutes a mere 0.89% of the state's overall budget. As a result, criminal cases now routinely take more than a year to resolve -- with the innocent and guilty alike crowding local jails (thereby adding to that expense of other branches of the government). Those delays in turn cause an even greater reduction in court time for civil cases -- with at least one Georgia judicial circuit closing its doors entirely to all civil cases -- divorce, child custody, business and personal injury cases that simply are not heard.<sup>6</sup>

Georgia, of course, is not unique. To one degree or another, the court administrators of every state have stories ranging from the most tragic circumstances of the failure of courts to protect the most vulnerable in our society simply because there is neither the court time nor staff to hear their cases, to the absurd situation of an Ohio municipal court, which recently announced it can no longer accept new cases of any type simply because it has run out of paper.<sup>7</sup> Such is the state of our nation's justice system today.

## **II. The Adverse Impact on Public Safety**

There can be little doubt that the adverse impact of budget cuts on the courts' ability to resolve cases in a reasonably prompt manner degrades their traditional roles in maintaining societal order and public safety. Most obviously, many states have experienced delays in the

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<sup>5</sup> National Center for State Courts, Budget Impacts (December 2010).

<sup>6</sup> Transcript at 42-46, *Crisis in Court Funding: First Hearing before the ABA Task Force on Preservation of the Justice System*, Atlanta, Ga. (Feb. 9, 2011) [hereinafter Atlanta Hearing] (Testimony of Georgia Supreme Court Chief Justice Carol Hunstein).

<sup>7</sup> Transcript at 81, Atlanta Hearing, (Testimony of Manny Medrano, reporter/anchor, KTLA News and KNBC News, Los Angeles, CA).

resolution of criminal dockets to the point where judges and prosecutors are faced with the dilemma of warehousing untried defendants in local jails (at additional expense to other government agencies) or releasing potentially violent offenders simply because further pre-trial detention is either constitutionally impermissible or practically impossible. Such delays are rapidly becoming the rule. In Minnesota, for example, almost a third of all criminal cases now take more than a year to clear.<sup>8</sup> In Alabama, recent layoffs of judicial staff have led to an indefinite delay in a high-profile capital murder case, prompting the state's Chief Justice to observe that "Something has to get done. We can't have a civilized society without the court system."<sup>9</sup>

In Georgia another capital case was delayed repeatedly -- with the defendant jailed for five years -- because the state could not pay for anyone to represent him.<sup>10</sup> 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.<sup>11</sup>

Although these cases present more notable examples, 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.<sup>12</sup> For lack of funds, DNA data on arrested offenders is not being entered into databases in Nevada for future use.<sup>13</sup> Inadequate funding of mental health and substance abuse programs -- and the judicial officers who must make the critical decisions on 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.<sup>14</sup>

The adverse impact of reductions in judicial time on public safety 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.

Last, but not least, budget cuts are now commonly making our courthouses themselves unsafe.<sup>15</sup> Bailiffs, marshals, and other security staff have been laid off--and their broken screening equipment left unreplaced--to the point where some courthouses and many courtrooms no longer have the level of security their dockets deserve.<sup>16</sup>

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<sup>8</sup> National Center for State Courts, Budget Survey (October 2010) at 11.

<sup>9</sup> Associated Press, "Courthouse Lay-Offs Delay U.S. Murder Trial Over Australian Honeymoon Death" (April 13, 2011).

<sup>10</sup> Transcript at 46, Atlanta Hearing (Testimony of Georgia Supreme Court Chief Justice Carol Hunstein).

<sup>11</sup> Transcript at 80, Atlanta Hearing (Testimony of Manny Medrano).

<sup>12</sup> Transcript at 26, Atlanta Hearing (Testimony of Roy Weinstein, ).

<sup>13</sup> Transcript at 82, Atlanta Hearing (Testimony of Manny Medrano).

<sup>14</sup> Report of Boston Bar Association Task Force on the FY 2011 Judiciary Budget (March 2010) at 5, 7.

<sup>15</sup> Boston Bar Association Task Force on the FY 2011 Budget at 5.

<sup>16</sup> Transcript at 67. *Crisis in Court Funding: Second Hearing before the ABA Task Force on Preservation of the Justice System*, Concord, N.H. (May 26, 2011) [hereinafter New Hampshire Hearing] (Testimony of Maine Supreme Court Chief Justice Leigh Saufley, and Massachusetts Trial Court Chief Justice for Administration and

### **III. The Adverse Impact on the Economy**

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, one group of economic consultants was recently asked to calculate the true costs of state funding cut-backs that had resulted in annual deficits in the budget for the Los Angeles Superior Court projected to range between \$80 million in 2009 to \$140 million in 2012.<sup>17</sup> The authors 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.

Because the Los Angeles Superior Court -- with over 600 courtrooms and 5400 employees -- is the largest trial court system in the nation, this analysis merits some additional comment. But it is not unique. The problems of delay and attendant economic costs are being seen throughout the nation, wherever courts are so underfunded they are forced to reduce hours, close courtrooms, or otherwise delay trials and hearings solely to ration scarce resources.

In the Los Angeles study, the authors first described the most direct effects of the funding cuts, noting first that, as the projected deficits rose the court staff itself would be cut by nearly 500 in the first year to 1800 (about 1/3 of the pre-Recession level) by the fourth year studied -- all with a resulting loss in courtroom operating days starting at 5% but soon plunging by more than 35% from the 2001 baseline level.<sup>18</sup>

The predictable result, of course, was a commensurate delay in deciding cases, increasing the average disposition time of a little less than 2 years in the base year of 2009 to an anticipated 4-1/4 years by 2012.<sup>19</sup> The report then carefully documented the costs of these additional delays to all of the key participants in the judicial system:

-- The immediate loss of almost \$1.1 billion from the combined salaries of the laid-off court workers and the multiplier effect those direct losses would have on other workers in the local economy.

-- As much as \$13 billion more resulting from the losses to members of the legal services industry who would be unable to secure court time to litigate their cases.

-- As much as \$15 billion more from the losses in other economic activity that results when litigants, who are delayed in resolving civil cases, cannot invest or otherwise employ their resources as they can, and will, do once those disputes are resolved.

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Management Robert Mulligan).

<sup>17</sup> Weinstein and Porter, Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court (December 2009) at 2.

<sup>18</sup> Id. at 6-7.

<sup>19</sup> Id. at 8.

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 the area of residential foreclosures. The combination of the dramatic increase in mortgages requiring judicial adjustment or termination at the same time the courts are being forced to curtail 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 or outright denial of that essential reorganization of the real estate markets. It has been estimated that in 2009 in Florida -- where the courts constitute less than 1% of the state’s budget<sup>20</sup> -- the backlog of mortgage foreclosure cases alone cost that state’s firms and residents \$9.9 billion billion in additional legal fees, interest lost by financial institutions, and reductions in property values (over and above the “normal” declines from the general property market) as houses and offices remained vacant and not properly maintained as a result of the delay in the foreclosure process itself.<sup>21</sup> Such losses can then have a ripple effect as they can deprive small family businesses of ancillary income to make ends meet for their other unrelated businesses -- resulting in other business bankruptcies.<sup>22</sup>

Nor is this type of economic loss limited to states such as California and Florida that have perhaps been hardest hit by the Recession. In 2010 the Iowa courts reported that, in part because the judicial budget of that state also is 90% composed of personnel costs, an “across-the-board” reduction in state funding had resulted in the judicial branch suffering 49% of the lay-offs of the entire state government, even though it accounted for only 4% of that workforce.<sup>23</sup>

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. For example, the report on the Los Angeles Superior Court estimated that, over the four years the state hopes to save \$480 million through the deep reductions in the court’s budget, the resulting economic losses will include more than \$1.6 billion Billion in lost state and local taxes.<sup>24</sup>

#### **IV. 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 never is that title so warranted as in times of economic distress. The same Recession that has lead legislatures to reduce access to our justice system has obviously increased the number of people who need it.

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<sup>20</sup> “Chief Justice Charles Canady Argues Against Cuts to Courts,” Sunshine State News (January 26, 2011).

<sup>21</sup> Washington Economic Group, The Economic Impacts of Delays in Florida’s State Courts Due to Underfunding (February 2009) at 10.

<sup>22</sup> See New Hampshire Hearing (Testimony of Maine Supreme Court Chief Justice Leigh Saufley).

<sup>23</sup> Iowa Judicial Branch, The Impact of Budget Costs on Justice (January 2010) at 13.

<sup>24</sup> Weinstein and Porter at 1.

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.<sup>25</sup>

The rights of minorities also likewise suffer when the courts cannot promptly address actions filed to enforce state anti-discrimination 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) on a pro se basis -- thereby requiring even more time of judges and their staffs who must then provide the additional guidance an appointed attorney would otherwise satisfy. And, of course, that is precisely what has happened. During the Recession, legal aid agencies across the country have seen their budgets slashed, both as a direct result of reduced state expenditures and the historically low rates now paid on Interest on Lawyers' Trust Accounts (IOLTA) -- a primary source of many legal aid budgets.<sup>26</sup>

On the national level, funding for the Legal Services Corporation has likewise been cut significantly over the last few years, as a matter of both budget imperatives and partisan disputes. Most recently, the LSC Budget for FY2011 was reduced an additional 3.8% half way through that budget cycle (thus requiring cuts twice that large for the remainder of the year), even as the number of Americans eligible for civil legal aid was pushed by the Recession to an all-time high of 57 Million.<sup>27</sup>

One "new" group adversely affected by such reductions is veterans returning from Iraq and Afghanistan -- and the families they had left behind -- trying to deal with the almost unprecedented situation of overseas deployments in the midst of a Recession. Yet, just when the courts and legal aid offices should be gearing up to deal with the needs of these veterans -- and all of the others who must have access to free legal advice from advocates and court officers alike -- they are being told there are no funds for even the standard level of such services.<sup>28</sup> Indeed, it is estimated that 8 of every 9 people needing legal services are now being denied.<sup>29</sup> Such unassisted litigants are then left alone to deal with the delays of our justice system -- or, as is too often the case, simply to abandon the process entirely.

## **V. The Adverse Impact on Our Very System of Government**

Ultimately, the continuing failure to address the underfunding of our judicial system threatens the fundamental nature of our tri-partite system of government. If, as John Marshall observed, the "power to tax is the power to destroy," it seems just as clear that the repeated refusal of the legislative and executive branches to provide adequate funds for a state's justice system becomes a "power to destroy" the courts as a separate and co-equal branch.

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<sup>25</sup> Boston Bar Association Report at 5, 7.

<sup>26</sup> Communication from Legal Services Corporation (May 15, 2011).

<sup>27</sup> Legal Services Corporation Press Release (April 12, 2011).

<sup>28</sup> Boston Bar Association Report at 8.

<sup>29</sup> New Hampshire Hearing (Testimony of New York State Chief Judge Jonathan Lippman).

Last year, that issue was directly addressed by the New York Court of Appeals in an action filed on behalf of the state’s 1300 judges, seeking their first cost-of-living increase in more than a decade. In *Maron v. Silver*,<sup>30</sup> 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 court explained that the 1300 judges had not received any pay increase in 11 years in which inflation had eroded their salaries in real terms by about 30%, while their dockets had increased, coincidentally enough, also by about 30%, but in the opposite direction, to a “staggering” 3500 cases for each judge. The court noted that for each of the prior five years the governor and legislative leaders had publicly announced that the situation called for an immediate salary increase; and yet each year the measures to do so had been defeated as they became embroiled in disputes over unrelated legislation.

Whether from the corrosive effects of inflation so long left unaddressed -- or actual pay-cuts and excessive budget reductions -- the effect is the same: If we do not resolve to fund a justice system which is both independent and effective, we will have neither.

### CRISIS IN THE COURTS: PROPOSALS AND OPTIONS

As set forth above, the Task Force has received testimony and research that leaves no doubt that the courts in the United States are underfunded. The overall stability of the justice system is in jeopardy.

The suggested responses and solutions fall into three categories. First, we must establish a predictable and adequate funding system. Second, we must create a more efficient and effective system of delivering justice. Third, we must establish a means of communicating the importance of the justice system to the public and political decision makers. In developing proposals in these categories, our Task Force is drawing on previous ABA commissions, including the 2004 Commission on State Court Funding. We also draw on the research of the National Center for State Courts (“NCSC”), Conference of Chief Justices (“CCJ”), Conference of State Court Administrations (“COSCA”), the successful programs in many of our states and the testimony presented to the Task Force.

There is no question that the realities of 2011 require a look at varied approaches to ensure that courts can perform their constitutional duties while, at the same time, allowing the courts to be more efficient. Those are the goals of these proposals.

#### **I. Achieving Financial Predictability and Adequacy**

The preservation of the justice system requires the presence of adequate resources to support that system. This statement begs the question of how much funding is “adequate”? And who defines what is “adequate”? And, how do we define “justice system”?

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<sup>30</sup> 14 N.Y.3d 230, 925 N.E.2d 800 (2010).

For our purposes, the justice system includes courts and the budgetary expenditures that include providing basic access to the courts. In other words, the current crisis requires advocates to fight for funding that is sufficient to support overall access to the system. This crisis puts courts in a triage mode and funding for some things is more critical in the short term. This crisis does not make issues such as funding of sufficiently compensated judges unimportant. Those issues are important and should be addressed. However, first we have to keep the courthouse doors open. There must be advocacy for adequate personnel to allow access. For example, the cuts in legal services and in public defenders offices have an impact on "rationing justice". Fewer lawyers representing the poor results in more *pro se* parties and more delays in the justice system for everyone. Because of the reality of overall funding shortages, many of the reforms mentioned below deal with improving budget systems, efficiency and communications. That does not mean that supporting actual full funding is any less important.

Financing the justice system is a challenge for several reasons. While delivering justice is understood as fundamental to our society, the average citizen may not perceive or appreciate the tangible products of the system. Yet, undeniably, citizens are better off when the justice system swiftly and correctly handles criminals who endanger public safety. Citizens are better off when the rules of commerce are stable and enforced. In other words, when the justice system is working best, it may not be extremely visible, but it is extremely valuable.

The reforms identified below are efforts to use scarce taxpayer resources efficiently, effectively and accountably:

**1. Provide for flexible management of funding within the judicial branch.**

Flexible management of funds within the judicial branch allows the courts to allocate funds within the judiciary's budget. Having the ability to allocate funds within its own budget gives the judiciary the capacity and flexibility to confront unforeseen circumstances and maximize efficiency. The courts should also be able to carry over funds from one fiscal year to the next.<sup>31</sup> The goal of this reform is to allow the courts to do the most they can with available resources. For example, courts have used retired judges and reassigned judges among jurisdictions to address case overloads such as occurred when some jurisdictions had numerous foreclosure proceedings.

**2. Establish court system appropriations and budget bills with fewer line items and fewer legislative restrictions on expenditures.**

This proposal is consistent with proposal No. 1 and facilitates its execution. Line items in appropriations can unnecessarily restrict how courts may use money given to them by the legislature and can often lead to inefficiencies, waste, and budgetary shortfalls. Additionally, having fewer line items allows courts to avoid being micro-managed by the legislative and executive branches. One example is Utah, where the judicial budget contains only four line items.<sup>32</sup> A contrasting example is Massachusetts, which has several hundred line items. Reduction of line items requires the legislature to

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<sup>31</sup> AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES, Aug. 2004, at 9.

<sup>32</sup> *Id.* at 8.

have greater faith in the courts stewardship of funds and accountability. Formulas described below can help provide that basis for legislative understanding and support.

**3. Develop a judicial workload funding formula that fosters fair and predictable funding.**

The purpose of establishing a specific formula is to assess needs in a rational way and to provide more predictability and stability.<sup>33</sup> One example is the California State Appropriations Limit which is a formula, applied to the state's judicial budget that looks at cost-of-living changes, changes in the population and workloads. Another example is the Minnesota Judicial Workload Assessment which provides a formula for determining the number of judges required to handle a given judicial workload.<sup>34</sup> Formulas may also use a combination with per judge costs or assessments of costs associated with different types of cases.

**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."<sup>35</sup> that may guide these reforms.**

This proposal goes beyond proposal No. 3, above, in that this proposal involves consideration of overall process changes, specifically transparent and measurable outcomes and long term sustainable reform. A court's annual budget proposal should be developed to further the long-term goals (three to five years) articulated in a state-wide judicial strategic plan.<sup>36</sup> Those long-term goals should have measurable outcomes, such as improving case flow management to reduce case disposition times, the associated pretrial detention and litigation costs. With measurable outcomes, the court system can evaluate the benefit of funding different programs and make intelligent allocation decisions to get the most out of limited resources.<sup>37</sup> This type of system further enhances the ability to obtain sustained legislative support.

**5. Establish limits for cutbacks by legislatures or executive branches by recognizing the inherent powers of the judiciary as a separate branch of government.**

This proposal seeks to ensure that there are no untoward cutbacks **during** a budget year.

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<sup>33</sup> NAT'L CTR. FOR STATE COURTS, PUERTO RICO SUPERIOR COURT JUDICIAL WORKLOAD ASSESSMENT MODEL, FINAL REPORT, EXECUTIVE SUMMARY; *see also* Atlanta Hearing (Testimony of Bert Brandenburg, Executive Director, Justice at Stake, on development of a "Justice Index" to help courts measure and communicate ability to deliver).

<sup>34</sup> Minnesota Judicial Workload Assessment 2002, submitted by the National Center for State Courts, at 12 Exhibit 4.

<sup>35</sup> Principles for Judicial Administration: Governance, Case Administration, Essential Functions and Funding, National Center for State Courts, July 2010 Draft Report, *available at* <http://www.ncsc.org/conferences-and-events/4th-symposium>.

<sup>36</sup> *Id.*

<sup>37</sup> NAT'L ASS'N FOR COURT MGMT, AMERICAN UNIVERSITY, BJA CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, *Financing The Third Branch in Lean Times: Placing the Present Fiscal Crisis in Perspective*, Mar. 2010 Final Draft, at pages 8–9; *see also* Transcript at 197, Atlanta Hearing (Testimony of Ron Overholt, Chief Deputy Director of the Administrative Office of the Courts of California, describing the California State Appropriations Limit Formula).

In certain states, there are constitutional or statutory limits on the ability of other branches to reduce or cut court funding during a fiscal year. The executive should not have authority to reduce funding in the judiciary unilaterally without justification. An unfettered power to cut intrudes upon that constitutionally protected inherent power of the judiciary as an independent branch of government. Courts have successfully used this reasoning to limit the ability of the Executive Branch or legislative branch unilaterally to reduce judicial budgets.<sup>38</sup> As an independent branch of government, the judiciary should have power to allocate and utilize its resources within the judicial branch in a way that makes the most sense to the administration of justice.<sup>39</sup>

**6. Establish unified funding for courts at the state level.**

For the last half-century of court reform, there has been a drive to shift funding responsibility from local governments to state governments. This process is seen as a way to strengthen the ability of state courts to perform their core functions and can help ensure the uniformity of justice throughout a state. Unified funding remains a key recommendation of the American Bar Association Standards on Court Organization. Under a unified state funding model, a central statewide court administrative office is responsible for the allocation and distribution of court resources at the local level.<sup>40</sup> Many systems in the United States are a mix of state and local funding.

**7. Identify, pay for, or eliminate unfunded mandates on the justice system.**

Legislatures and Congress have required the courts to perform certain tasks without providing the attendant funding. Courts should seek funding processes that prohibit or limit mandates that do not provide funding.<sup>41</sup>

**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.**

This type of action has been taken in Utah, Vermont and Michigan. The result of identifying and eliminating unnecessary functions is to make resources available to fund those functions that do take priority.<sup>42</sup> The issue, of course, is defining “unnecessary” functions. The ability of courts to show that they can streamline and participate in budget cuts enhances their legislative credibility.

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<sup>38</sup> *Chiles v. Children*, 589 So. 2d 260 (1991); *see also* W. VA. CONST. art. VI, § 51(b)(3), (5) (stating that when the budget is certified to the governor by the state auditor, the legislature cannot reduce line items related to judiciary); Felix F. Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary*, 2004 ABA Report 107 (Reno, NV: National Judicial College, 2008).

<sup>39</sup> REPORT OF THE BOSTON BAR ASSOCIATION TASK FORCE OF THE FY 2010 JUDICIARY BUDGET at 8.

<sup>40</sup> AM. BAR ASS'N, STANDARDS RELATING TO COURT ORGANIZATION, §1.50 at 106 (1990 ed.); *see also* Robert Tobin, *Creating the Judicial Branch: The Unfinished Reform*, National Center for State Courts (1999 & 2004); NAT'L ASS'N FOR COURT MGMT., at 6.

<sup>41</sup> *See generally* TEXAS ASS'N OF COUNTIES, STATE MANDATES: UNFUNDED AND UNDER-FUNDED, available at <http://www.county.org/resources/assets/UFM.pdf> (last visited May 5, 2011) (describing some of the problems with unfunded government mandates and listing several examples of the negative impact of unfunded mandates, including delay of the judicial process).

<sup>42</sup> NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2010, REENGINEERING LESSONS FROM THE FIELD 39, available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1625> (last visited May 5, 2011).

## **II. Increasing Efficiency and Reducing Waste**

In difficult economic times, each element of government, including the judiciary, must examine its use of resources. Tradition is not a justification for waste. Efficiency bolsters arguments for adequate funding.<sup>43</sup>

The definition of efficiency is elusive. Just spending less may be considered efficient by some. Therefore, cutting the number of court rooms or simply increasing the caseload of a judge could be classified as more “efficient” because expenses are reduced or “production” is increased. However, that kind of analysis discounts the effects and other costs of cutbacks such as delays and denial of basic access to justice. In fact, as shown above, such cuts can result in greater costs and more harm in the long run and a fundamental denial of due process. Consequently, in defining and achieving a more efficient justice system, the mission of the system cannot be sacrificed for false economies.

A consistent theme in court reform over the last two decades calls for improved organization, process and reengineering. Several terms have been used consistently to describe these types of reforms. The review of “business processes” is used to describe assessment of functional reforms that perform tasks in more efficient and less expensive ways. “Reengineering” has included reorganizing, streamlining and enhancing the use of technology. Enhanced use of technology has taken many forms, and examples are enumerated in this report. Implementing technological reforms requires a cost-benefit analysis to assure that the change augments the mission of the courts and is in fact more efficient and cost effective. Also, principles for evaluating reforms are identified.

There are specific best practices, reforms and cost efficient methods developed by NCSC, COSCA , CCJ and individual state courts. The Task Force has many examples, studies and resources available. As in some other industries, the major cost of the courts is personnel. To the extent that less expensive technology can, in some cases, replace personnel, such technology can be a source of reducing future costs. Additionally, effective use of personnel can save resources. Improved efficiency is not limited to improved technology. Improved management and business processes can be not only less expensive but also more effective for citizens encountering the justice system.

Further, there are alternative methods of delivering justice. For example, alternative dispute resolution has been promoted by some states and court systems to help resolve conflicts without resort to trials in court.

The following is a list of some options to make the justice system more efficient:

### **1. Enhanced use of technology to improve the efficiency of the judicial system.**

The use of technology within the judicial system has the double benefit of reducing costs while increasing efficiencies. A simple example, implemented in Iowa, is online payment of speeding tickets. However, many more advanced options are available. For

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<sup>43</sup> New Hampshire Hearing (statement of U.S. District Court Judge Norma L. Shapiro, E.D. Penn.).

example web-based case management systems, such as MassCourts<sup>44</sup> in Massachusetts and E-Filing in Florida, enable fast data collection and information sharing to track case progress and timeliness. The Boston Bar Association credits the web-based MassCourts with increasing the timely disposition of cases from 74.1 percent in 2006 to 89.8 percent in 2008.<sup>45</sup> Also, some courts in Utah have replaced court reporters taking a stenographic record with digital audio recording.<sup>46</sup> Courts have found increased efficiency with electronic filing, electronic document management systems, electronic payments of courts fees and costs, digital records for both transcripts and files, use of interactive television technology and fully integrated case management systems.<sup>47</sup>

**2. Use business process management principles to evaluate efficiency.**

The term “business process” refers to a group of related activities by which a court or any other organization uses its resources to provide defined results in support of its mission, goals and objectives.<sup>48</sup> By use, we mean nothing more than applying the same sort of synergistic model, employed in the corporate world, of efficiently using resources to maximize profit, to the judicial world. Individual courts that have implemented good business process management programs include Orange County, California; Sacramento, California; Maricopa County, Arizona; and Hennepin County, Minnesota.

**3. Establish principles for “reengineering” the judicial process.**

By principles we mean goals, such as reducing the cost and complexity of the judicial process, maintaining and improving access to justice, and improving case predictability. Some example states include Vermont (restructuring the administrative bifurcation between state and counties; eliminated redundant jurisdictions between types of judges), New Hampshire (consolidating courts), Minnesota (centralizing functions formerly done at a local level, such as accounts payable), Oregon (simplifying civil rules for less complex cases) and Utah (reorganizing the Human Resource system to make it more professional and expand services for case management and *pro se* litigants).<sup>49</sup>

Reengineering also involves evaluating the current judicial functioning through such metrics as CourTools and using the “real time” budget performance information to tailor annual budget submissions.<sup>50</sup> In that way, funds can be reallocated to areas of need. Reengineering examples include re-designing antiquated court governance models to function more as an integrated quasi-business administrative entity. Another example of

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<sup>44</sup> <http://www.mass.gov/courts/press/pr112003.html>

<sup>45</sup> REPORT OF THE BOSTON BAR ASSOCIATION TASK FORCE OF THE FY 2010 JUDICIARY BUDGET at 3, available at <http://www.bostonbar.org/prs/reports/fy2> See Report of the Boston Bar Association Task Force of the FY 2010 Judiciary Budget at 3, available at [http://www.bostonbar.org/prs/reports/fy2010\\_judbudget020509.pdf](http://www.bostonbar.org/prs/reports/fy2010_judbudget020509.pdf)

<sup>46</sup> STATE COURTS AND THE BUDGET CRISES: RETHINKING COURT SERVICES, THE COUNCIL OF STATE GOVERNMENT, THE BOOK OF THE STATES 2010, at 292, available at <http://knowledgecenter.csg.org/drupal/content/state-courts-and-budget-crisis-rethinking-court-services> (last visited May 5, 2011)

<sup>47</sup> NAT’L CTR. FOR STATE COURTS at 39; see also National Center for State Courts 2009 Strategic Plan, at page 10.

<sup>48</sup> Eight National Court Technology Conference, Using Business Process Reengineering Strategies for Courts, Kansas City, Missouri, 2003.

<sup>49</sup> Transcript at 55, Atlanta Hearing.

<sup>50</sup> Conference of State Court Administrators Budget Survey, National Center for State Courts, June 2009.

reengineering is a plan to consolidate some judicial and administrative functions. That is, centralize state-wide administrative management of staffing, payroll, records, etc. (to streamline administration) but keep local selection of judges and case law development (to maintain legal continuity and integrity).<sup>51</sup>

**4. Use alternative, more efficient and less expensive means of resolving conflicts and delivering justice.**

Develop performance measures for evaluating the efficacy of specialized problem solving courts, such as family court, children's court,<sup>52</sup> alternative dispute resolution, drug court, etc.<sup>52</sup>

**a. Consider the use of specialty courts such as drug court, business court<sup>53</sup> and family court.**

These specialty courts have been successful in several jurisdictions, such as Florida with the use of drug courts and New Hampshire with the use of business courts. The goal is to provide greater access, judges with specific expertise, and the ability to handle disputes in less time and with better designed outcomes.

**b. Foster alternative dispute resolution (ADR).**

ADR has been successful in enhancing access to conflict resolution. There are various means to encourage ADR, such as court ordered mediation. Certain conflicts are not handled best by ADR, including those with vastly unequal parties, those involving fundamental social and constitutional conflicts and serious criminal matters.<sup>54</sup> However, overall ADR is a important option. One example of combining alternative dispute resolution and new technology is online dispute resolution of small claims in Michigan.<sup>55</sup>

**c. Community resources – Family Centers.**

Courts can make good use of community resources for little or no charge. For example, courts can use students as volunteers or as for-credit (at no cost to the court system) externs through local colleges and universities, and courts can also look to community volunteers.<sup>56</sup>

**5. Reexamine court jurisdictions and consider consolidation or elimination of certain Courts.**

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<sup>51</sup> National Center for State Courts, Future Trends in State Courts 2010, Reengineering Lessons from the Field, Hall and Suskin, *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1625> (last visited May 5, 2011). See also CourTools trial court performance measures developed by the NCSC to help identify and evaluate the efficiency of trial court functions. *See, e.g.*, National Center for State Courts 2009 Strategic Plan, at 22.

<sup>52</sup> NAT'L CTR. FOR STATE COURTS 2009 STRATEGIC PLAN, at page 17.

<sup>53</sup> New Hampshire Hearing (statement of Richard Samuels, Chair of the New Hampshire Business and Industry Association).

<sup>54</sup> RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 22–35 (4th ed. 2005).

<sup>55</sup> Transcript at 152, Atlanta Hearing (Testimony of Janet Welch, Executive Director of the State Bar of Michigan).

<sup>56</sup> NAT'L ASS'N FOR COURT MGMT at 10.

Can some courts be merged into others? Can smaller jurisdictions be combined with other smaller jurisdictions?<sup>57</sup> Consolidation can produce increases in both savings and efficiency.<sup>58</sup>

### **III. Communicating and Advocating a Stable and Effective Justice System**

The most universally endorsed reforms involve improved communication about the role and value of the courts. Virtually all witnesses in the Task Force hearings mention the importance of improved communications. Most other government expenditures have more constituencies and more political support. It is the responsibility of the legal profession to facilitate communication and advocacy for the justice system. The efforts to improve communication and advocacy take several general forms and have been implemented in numerous specific ways:

- Communicating with legislators and legislative leadership
- Creating coalitions of opinion and civic leaders to communicate with legislators
- Communicating to the general public and public schools as well as establishing grassroots support

A consistent problem with maintaining a reasonable level of support for the justice system is the lack of understanding of the system by the public and lawmakers. The issues of communication and advocacy of the system must recognize the inherent and ethical limitations on judges' involvement in the political process and the responsibility of the bar to act as advocates for the system. The Task Force believes a systematic approach to better public understanding of the functions of the system is essential to achieving the goals of adequate funding and efficiency:

#### **1. Include legislators directly in communication, familiarization and education programs.**

Any budgetary allocation begins with the legislatures. By working together and making legislators aware of the problems and needs of the state court systems, state court leaders can better advocate for change. Communication can come in the form of highly developed educational programs, but a great deal can also be done by continuing and sustained conversations and continuing relationships. For example, legislators in Oregon have spent a day with judges to become more familiar with the actual processes and the functions of the courts.<sup>59</sup> Legislators have been invited to observe a day in the Family Courts of Massachusetts.

#### **2. Develop coalitions that include business groups and general counsels of corporations to help educate and influence legislators.**

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<sup>57</sup> See NAT'L CTR. FOR STATE COURTS at 39.

<sup>58</sup> New Hampshire Hearing (statement of New Hampshire Supreme Court Chief Justice Linda Dalianis on combining Probate, Family and District Courts in New Hampshire).

<sup>59</sup> Transcript at 36, 50, and 60, Atlanta Hearing (Testimony of Texas Supreme Court Chief Justice Wallace B. Jefferson, Georgia Supreme Court Chief Justice Carol Hunstein, and Oregon Supreme Court Chief Justice Paul J. De Muniz).

Judicial leaders and bar association leaders should work with civic and citizen groups to establish communication about the importance of the justice system.<sup>60</sup> The voices and efforts of the business community through the Missouri Law Institute had a positive effect in communicating needs to their legislators. Effective efforts to influence legislators and decision makers require broader community involvement from outside the legal profession.

**3. Enhance education on the role of the courts for the public and in schools.**

Civic education can take the form of judges participating in community activities and focusing on providing greater public understanding of the role of the judiciary.<sup>61</sup> One example of public education is holding court in different locations available to the public. Minnesota and Maine have even held court in high schools.<sup>62</sup> In New Hampshire, fourth graders go to “law school” and must explain the courts and constitution to their parents as part of their work. Long term support of the justice system requires public understanding and support. The American Bar Association, through its Least Understood Branch Project, sends judges and non-judge members into the community and the schools to educate on the role of judges and courts in our every day lives.

**4. Establish a communications plan that explains that certain judicial cuts result in more cost to the taxpayer in the long run.**

One problem in the communications gap between the legislature and judiciary (and public at-large) is a failure to express how severely a cut in the judicial budget affects court functions and how those depressed functions affect tax payers.<sup>63</sup> The fact that a delay of access or denial of access can result in greater harm to individuals and greater cost to the public is easily provable. As NAACP General Counsel Kim Keenan stated, an uninformed public “ would rather spend the money on having the firemen go and put out the fire than spend the money on some court personnel to resolve it amicably.”<sup>64</sup>

**5. Use national media to deliver the message through compelling and specific stories on the impact of justice system cuts.**

Publicizing dramatic impacts will enhance general awareness and facilitate the creation of coalitions and advocacy groups. As shown above, the Task Force heard many examples of how the budget crisis in the court system has caused dramatic harm to citizens.<sup>65</sup>

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<sup>60</sup> Transcript at 6 and 15, Atlanta Hearing (Testimony of Wayne Withers, General Counsel (ret.), Emerson Electric, on creation of the Missouri Law Institute). *See also* National Center for State Courts, 2009 Strategic Plan, at 12 (describing plan to build a constituency for the state courts by partnering with leaders of state courts, state bars, and the corporate community).

<sup>61</sup> National Center for State Courts 2009 Strategic Plan, at 8.

<sup>62</sup> Black Letter Recommendations of the ABA Commission on State Court Funding, Aug. 2004. *See also*, New Hampshire Hearing, (Testimony of Maine Supreme Court Chief Justice Leigh Saufley).

<sup>63</sup> Transcript at 167, 176, Atlanta Hearing (Testimony of NAACP General Counsel Kim Keenan).

<sup>64</sup> *Id.*

<sup>65</sup> Transcript at 87, Atlanta Hearing (Testimony of Manny Medrano, reporter/anchor, KTLA News and KNBC News, Los Angeles, California, and Hon. Dennis W. Archer, former ABA president, suggesting the ABA use its resources to facilitate coverage on national media such as CNN, MSNBC, or Fox News).

**6. Advocates for judicial funding should consider utilizing polling, paid media, and grassroots advocacy.**

The Georgia Bar Association conducted polling and paid for ads demonstrating the negative effects of court budget cuts. Georgia Bar President Lester Tate III described the successful efforts of the Georgia Bar in persuading the Georgia legislature.<sup>66</sup> The Boston Bar Association developed a grassroots email system of getting members to communicate with legislators.<sup>67</sup> These examples show that successful advocacy methods used by other groups can work for the justice system as well.

**Conclusion**

When there is a general sense of order and justice, the court systems are taken for granted. When they begin to fail, faith in the entire system of government deteriorates. Strong, effective, and independent justice systems are a core element of our democracy. Even the most eloquent constitution is worthless with no one to enforce it. The court crisis affects more than the justice system. It compromises citizen's faith in our government. Responding to this profound threat deserves a strong sustained response from the American Bar Association.

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<sup>66</sup> Transcript at 122, Atlanta Hearing (Testimony of Lester Tate III, President, State Bar of Georgia).

<sup>67</sup> New Hampshire Hearing (Testimony of Don Federico, President, Boston Bar Association ).