

**AMERICAN BAR ASSOCIATION
JUDICIAL DIVISION
STANDING COMMITTEE ON JUDICIAL INDEPENDENCE**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges states and territories to support
- 2 quality and accessible justice by adopting judicial branch budget procedures that will
- 3 ensure adequate, stable, long-term funding of their courts under all economic conditions.
- 4
- 5 FURTHER RESOLVED that the American Bar Association adopts the black-letter
- 6 recommendations of the ABA Commission on State Court Funding, dated August 2004.

Black Letter Recommendations of the ABA Commission on State Court Funding

August 2004

- A. The American Bar Association urges states and territories¹ to adopt judicial budgeting procedures that ensure efficient and effective use of public funds and enable the courts to fulfill their constitutionally prescribed role. To that end the judicial budget should be governed by the following principles:**
- 1) There should be a predictable general funding stream that is not tied to fee generation;**
 - 2) There should be direct submission of the judicial branch budget to the funding authority; and**
 - 3) There should be a reasonable degree of flexibility to expend funds across line items and fiscal years to encourage efficiency in the administration of justice.**
- B. The American Bar Association urges courts to demonstrate their fiscal responsibility by providing clear and detailed documentation for budget requests, and by establishing measures by which their expenditure of public funds can be evaluated. Such documentation should include:**
- 1) Those costs beyond the control of the courts, but which must be incurred as a result of increased caseloads, new laws, unfunded mandates, and the effects of federal and state funding to other entities; and,**
 - 2) The public benefits expected from new programs and services for which funding is requested.**
- C. The American Bar Association encourages courts to engage in regular communication with the other branches of government, as well as with the bar, the business and civic communities, and the public concerning the administration of justice and its costs.**
- D. The American Bar Association encourages courts to establish broad-based advisory bodies comprised of laypersons, lawyers and representatives of all branches of government to help courts secure the funding necessary for the delivery of judicial services.**

¹ All references to States and Territories are meant to include the local courts of the District of Columbia.

Report

Background

With the support and encouragement of ABA President Dennis W. Archer, the Judicial Division and Standing Committee on Judicial Independence formed the Commission on State Court Funding in September 2003. The Commission was formed to make specific recommendations to ensure adequate, stable, long-term funding for state courts under all economic conditions. The report and recommendations of the ABA Commission on the 21st Century Judiciary² discussed challenges in funding state court systems and served as a further impetus for the Commission on State Court Funding. The Commission on State Court Funding gathered information on court funding issues from the three branches of government, a wide range of experts and other sources.

Seventeen different ABA entities and affiliated organizations named representatives to the Commission on State Court Funding, reflecting the widespread concern over court funding throughout the Association and the profession. The entities represented on the Commission are: Section of Business Law, Coalition for Justice, Commission on Domestic Violence, Conference of Chief Justices, Section of Family Law, General Practice, Solo and Small Firm Section, Government and Public Sector Lawyers Division, Section of Individual Rights and Responsibilities, Judicial Division, Standing Committee on Judicial Independence, Standing Committee on the Delivery of Legal Services, Section of Litigation, Senior Lawyers Division, Section of State and Local Government Law, Steering Committee on Unmet Legal Needs of Children, Tort Trial and Insurance Practice Section, and Young Lawyers Division. In addition, six outside organizations and bar associations provided liaisons to the Commission: Committee for Economic Development, League of Women Voters of the U.S., National Association of Counties, National Conference of State Legislatures, National Governors Association, and State Bar of California.

The Commission on State Court Funding recognizes that states face difficult choices not only regarding expenditures on programs but also with regard to sources of revenue. However, consistent with its commitment to defend liberty and pursue justice, the American Bar Association has long been concerned with assuring that state courts are funded at a level that will enable them to fulfill their central constitutional role. In 1991 the House of Delegates of the American Bar Association approved a resolution, which read in part, “the American Bar Association recognizes that the highest priority of the bar and bench must be to promote improvements in the American system of justice by ensuring balanced and adequate funding for, and timely access to, the entire justice system.” Subsequently, the ABA Special Committee on Funding the Justice System published the findings of several surveys of funding in the states. These included “Funding the Justice System – A Call to Action” (1992), “Saving Our System: A National Overview of the Crisis in America’s System of Justice” (1993), “Striving for Solutions: An Overview of Crisis Points in America’s System of Justice” (1995) and “Agenda for Justice – ABA Perspectives on Criminal and Civil Justice Issues” (1996), all of which concluded that there would be long-term funding problems. Although it may be confusing to some, it is important to note that the “justice system” includes entities other than the “judicial system.” The justice system includes such additional entities as law enforcement, prosecutors, corrections and

² JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, American Bar Association, at 82-86 (2003).

others. In total, the funding of the justice system accounts for a significantly larger share of state and local government budgets, with corrections largely a state obligation and law enforcement funded locally. The portion of the justice system budget that is attributable to the judicial system is relatively small.

While these efforts addressed the needs of the entire justice system, recent attention has been focused specifically on the funding of the courts. The American Bar Association joined with the National Center for State Courts and the National Conference of State Legislatures to co-sponsor the 1995 “National Interbranch Conference on Funding the Courts.” In 1998, the ABA published “Funding the Justice System: How are the Courts Funded?” that was among the Coalition for Justice’s “Roadmaps,” a ‘How-to’ series to help the community, the bench and the bar implement positive change in the justice system. In addition, the Judicial Division and Standing Committee on Judicial Independence have created an online toolkit on state court funding that includes data on current funding levels in all fifty states, model op-ed pieces and talking points for those promoting adequate court resources, and a collection of links to more information on state-specific problems and issues.³ Most recently, the ABA Commission on the 21st Century Judiciary reaffirmed the importance of adequate, stable court funding to the independence of the judiciary.⁴

The American Bar Association has not been alone in expressing its concern over the condition of state court funding. Both the Conference of Chief Justices and the Conference of State Court Administrators have similarly explored this area of concern and made a series of recommendations that will be described below. They are continuing their work in this area and have provided information and assistance to the Commission on State Court Funding.⁵ These concerns are well founded, as the boom years of the late 1990’s were followed by an economic downturn that severely affected government revenues, and therefore the funds available to all branches of government. According to the National Governors Association, states faced their worst budget crisis since World War II. That assessment was confirmed by the National Conference of State Legislatures, which reported that FY2003 revenues failed to meet projections in 37 states, resulting in a three-year cumulative budget gap of \$200 billion.⁶ Unlike the federal government, which can borrow to pay for current expenditures, 49 of the 50 states are required to balance their budgets. With a reluctance to raise taxes, states have focused their efforts on decreased spending and the courts have not been spared.

Although the courts account for only a very small proportion of state budgets (in only two states do they account for more than 3% of the budget, and in three-fifths of the states less than 2% of the budget), they have faced dramatic cutbacks and have been forced to compete for scarce resources.⁷ Courts have little control over their workload. Courts have little control over the

³ See www.abanet.org/jd/courtfunding/home.html.

⁴ American Bar Association, *supra* note 2, at 83-84.

⁵ Dan Hall, Vice-President, National Center for State Courts appeared before the Commission on February 7, 2004 and presented resolutions on state court funding adopted by the Conference of Chief Justices and the Conference of State Court Administrators.

⁶ *State Budget & Tax Actions 2003*, National Conference of State Legislatures, available at <http://www.ncsl.org/programs/fiscal/presbta03.htm>.

⁷ *State Budget Appropriations to the Judicial Branch*, ABA Justice Center (2003) available at <http://www.abanet.org/jd/courtfunding/resources.html>.

demand for their services. Court budgets are dominated by fixed costs. For these reasons, the results of budget cuts have been dramatic. The following are only some examples. In Oklahoma, court employees' pay was cut; Colorado instituted a hiring freeze and mandatory three-day unpaid furlough; Virginia Beach, Virginia stopped prosecuting 2200 domestic violence cases and Oregon drastically reduced funds for indigent defense and suspended appointed counsel for some offenses.⁸ California courts "furloughed workers, cut service counter hours and closed courthouses;" and Oregon Chief Justice Wallace P. Carson Jr. "ordered every courthouse in the state to close on Fridays from March through June and decreed that courts suspend the processing of small claims cases and nonperson misdemeanors... Alabama's austerity program included a temporary suspension of jury trials, a hiring freeze and layoffs."⁹ Massachusetts courts stopped conducting civil trials in twenty-five courtrooms.¹⁰

A survey by the Conference of State Court Administrators to its members confirmed reductions in similar areas across the board. In addition to the impact on court staff, training and technology have been similarly affected.¹¹ A follow-up survey in June of 2002 reported that 62% of the states imposed hiring freezes or delays in hiring for FY2003. A majority of states also cut purchases (60%), enhancement of electronic communications (57%) and out of state travel for training programs (69%). Particularly troubling, 43% of the jurisdictions reported the imposition of new court fees.¹²

Increasing or adding new court fees to raise revenues is particularly problematic because of its implications for access to the courts. Funding the courts through user fees is not consistent with the recommendations of this Commission. While in most cases it is the legislature that determines fees and directs revenues, some courts have been compelled to impose additional charges. For example, in FY2003, after years of budget cuts, and a determination that the Judicial Branch could not perform its constitutional and statutory duties, the Kansas Supreme Court authorized an emergency surcharge of \$5 for most cases.¹³ The Kansas Attorney General issued an opinion that "[t]he Kansas Supreme Court has inherent authority to take action necessary to ensure that it is adequately funded to carry out its judicial functions. As long as the Court has made the necessary findings of urgency and necessity, its order ... is a proper exercise of this inherent power."¹⁴ With recognition of a continuation of a significant shortfall in judicial branch funding and with the urging of many legislators, the Kansas Supreme Court extended the FY2003 Emergency Surcharge to FY2004.¹⁵ The effort by Harris County, Texas to impose a \$15 surcharge (family protection fee) upon divorces and annulments faced the possibility of it conflicting with the open courts provision of the Texas Constitution.¹⁶ In another effort to raise

⁸ David L. Hudson, Jr., *Cutting Costs...and Courts*, ABA JOURNAL, April 2003.

⁹ Lisa Stansky, *The Big Squeeze*, THE NATIONAL LAW JOURNAL, May 23, 2003.

¹⁰ Michele Kurtz, *25 State Courtrooms Dropping Civil Trials*, BOSTON GLOBE (Online version), May 2, 2002.

¹¹ *Survey of the Budgetary Status of Courts*, National Center for State Courts, November 2001.

¹² *Id.*

¹³ *The Budget Situation in State Justice Systems*, National Center for State Courts, August 27, 2003.

¹⁴ See <http://www.kscourts.org/ksag/opinions/2002/2002-017>.

¹⁵ See <http://www.kscourts.org/31402.htm>.

¹⁶ This surcharge is also distinguished by the fact that the revenues were to be distributed to selected nonprofit agencies. Matt Schwartz, *Divorce court fee on hold*, HOUSTON CHRONICLE, January 12, 2004.

revenue to offset a budget shortfall, Minnesota substantially increased fees on civil filings, although in this case the state legislature was directly involved.¹⁷

It was in this context of depressed state revenues and dramatic cuts in court services that ABA President Dennis W. Archer charged the Commission on State Court Funding to further examine current realities and develop specific recommendations to help secure adequate funding for the courts. Although the recent economic downturn affirmed the urgency of this enterprise, the Commission began its work with the recognition that economic cycles will continue to occur and that its effort should be directed to providing recommendations that will ensure adequate, stable, long-term funding of the courts. Additionally, the Commission committed itself to making recommendations that would be applicable to all states despite significant diversity in the items that are included in judicial branch budgets and the variability in the sources of funding.

Importance of Adequate Funding for the Courts

The American constitutional system provides for a separation of powers among three distinct branches of government and delineates a balance of power among them. Among the inherent tensions built into our government is the judicial branch's dependence upon the legislature (and in some cases the executive) for the funds to operate. Under the weight of a budget crisis, courts are particularly vulnerable, even though it is clear that any judicial branch savings will not contribute significantly to solving a fiscal crisis. Still, at these times the executive and legislative branches may come to view the courts as just another government agency competing for scarce resources. Such an approach can threaten the ability of the judicial branch to fulfill its constitutional role to sustain the rule of law that is the bedrock of our democracy.

Through the federal and state constitutions, the people have limited governmental authority and guaranteed their rights. It is to the courts that we turn to ensure that conflicts are resolved peacefully and according to the rule of law, that rights are protected, and that government actors operate according to the limits of the law. The predictability provided by the impartial application of law sustains our social and economic relationships. It is the decisional independence of judges to make their determinations according to the law without interference from other government actors or even the majority will of the moment, and the institutional independence of the courts to operate without undue influence of the other branches of government that enable the courts to perform their constitutionally prescribed role. The Commission on the 21st Century Judiciary expressed concerns that without sufficient funding, the institutional independence of the courts and the judiciary's capacity "to preserve itself as a separate and co-equal branch of state government" would be threatened. The Commission on State Court Funding believes that constitutional imperatives must not be subject to the financial exigencies of the moment.¹⁸

The rule of law, timely resolution of conflicts, and access to justice are in jeopardy when courts cannot fulfill their constitutional role due to insufficient funds. In addition to maintaining access and timely results, the realities of a changing world mean that to achieve these ends new funding may be required in some instances. For example, the growing need for funds to provide court interpreters for our increasingly multi-lingual society, and legal representation to meet the

¹⁷ Robert W. Tobin, *Learning from Recession Experience*, National Center for State Courts, at 4 (2003).

¹⁸ *Supra* note 2, at 82.

broadened definition of the constitutionally mandated right to counsel must be met. It is important when funders evaluate the need for such resources (and others delineated in the judicial branch budget), that they consider the impact of their actions on constitutional imperatives.

The Commission on State Court Funding makes the following specific recommendations to ensure adequate, stable, long-term funding of the courts under all economic circumstances:

- A. The American Bar Association urges states and territories to adopt judicial budgeting procedures that ensure efficient and effective use of public funds and enable the courts to fulfill their constitutionally prescribed role. To that end the judicial budget should be governed by the following principles:**
- 1) There should be a predictable general funding stream that is not tied to fee generation;**
 - 2) There should be direct submission of the judicial branch budget to the funding authority; and**
 - 3) There should be a reasonable degree of flexibility to expend funds across line items and fiscal years to encourage efficiency in the administration of justice.**

Courts in the states may be funded from state, county and municipal governments, depending on the state. While appellate courts traditionally have been state funded, trial courts usually have been funded locally. Over the years, however, there has been a trend toward state funding for the trial courts as well; the American Bar Association called for state financing of trial courts in its 1974 Standards of Judicial Administration. In most states, trial courts are currently funded from a combination of state and local sources, with judicial salaries largely funded at the state level.

As part of the court unification movement, reformers pushed for state funding as a way to equalize justice within the states and to improve efficiency by simplifying and centralizing budgeting. State funding was also seen as a way to relieve local pressure to raise funds and thereby avoid the appearance of improper influence on judicial decisions. Opponents argued that a decrease in local control would result in a decline in responsiveness and would stifle innovation. However, towards the end of the twentieth century local jurisdictions were themselves increasingly supportive of state funding as costs increased and local revenues came under pressure. The actual effects of state level funding appear to be limited, with the arguments of neither the proponents nor opponents having been fully realized. Overall funding does not appear to increase with state funding, though the flexibility to move funds across jurisdictions has improved. It is likely that funding for the courts in most states will remain a shared responsibility between state and local governments. Thus, the recommendations of the Commission on State Court Funding to improve court budgeting are designed to be applicable to funding from all levels of government.

At the time of the National Interbranch Conference on Funding the State Courts, the state government covered 90 – 100% of trial court expenses in nine states. In the remaining states, the role of state funding of trial courts increases with the level of the court (with general jurisdiction courts most likely to be funded), or expense item (with judicial salaries and automation as

examples of items most likely to be state funded).¹⁹ The expense least likely to be state funded is facilities, the costs of which are often shared with other state and local agencies. The trend toward state funding of courts continues, as currently about three-fifths of court systems are primarily funded by the state, with additional states moving in that direction.²⁰ One of the benefits of full state funding is that it limits the number of governmental entities to which courts must turn for their resources. Nevertheless, states still differ considerably as to how much of the judicial branch expenditures are included in state, county and local budgets and which items are funded as part of a judicial or executive branch budget. For example, indigent defense may be the responsibility of the judicial or executive branch or a combination of both, and it may be the responsibility of the state or the county government.²¹

As a branch of government, the judiciary might expect significant control over its own budget. Here too there is considerable variability among the states (and counties and localities) as to the degree to which line item specificity is required and the extent to which the courts' budget is subject to the control of the executive as well as the legislature. In eighteen states, governors can amend the judicial branch budget request, and with few exceptions, this is done routinely. In only fourteen states is the judicial appropriations bill filed as a separate bill. Budgetary independence ranges from pro forma acceptance of the court budget to domination by the other branches. The degree of restriction also varies, with some court budgets prepared by the executive branch with detailed line items and strict limits on transferability of funds among such items. Thus in some states it is not just the total dollars for which courts depend on the other branches. In other states the courts have considerable control and flexibility. In West Virginia, the judicial branch budget is "certified to the governor by the auditor," for inclusion in the governor's state budget, and the legislature is explicitly prohibited from decreasing any item relating to the judiciary."²² In Utah, the judicial branch budget has only four line items: operations, leases and contracts, juries/witnesses/interpreters, and the guardian ad litem office, with the operations item constituting the bulk of the budget. Within this major line item there is a great deal of flexibility to use funds as needs change during the course of the fiscal year. In addition, for the last ten years, the Utah legislature has allowed the judiciary (and some other parts of state government) to rollover unused funds from one fiscal year to the next. Apparently this is not a legal requirement, but the legislature has granted the courts this flexibility to encourage efficiency in expenditures.²³ At the opposite end of the continuum is Massachusetts, whose judiciary must submit a budget with more than 175 line items.²⁴

¹⁹ FUNDING THE STATE COURTS: ISSUES AND APPROACHES: FINAL REPORT ON THE NATIONAL INTERBRANCH CONFERENCE ON FUNDING THE STATE COURTS, National Center for State Courts, at 39 (1996).

²⁰ Tobin, *supra* note 17, at 2.

²¹ Declining revenues can put severe strains on the availability of funds for indigent defense. In Mississippi, where the cost has been borne by the counties, Quitman, County has filed a lawsuit against the state to force it to assume the costs. Jimmie E. Gates, *Report: Public Defenders Needed*, THE CLARION-LEDGER, January 20, 2004.

²² West Virginia Constitution, Article VI, Section 51, Subsection B- Budget Bills, (3) & (5).

²³ Conversation with Myron K. March, Deputy Court Administrator, Utah Administrative Office of Courts, April 15, 2004.

²⁴ Charles D. Chieppo and James Stergios, *On Courts, Legislature is Out of Order*, BOSTON HERALD, March 25, 2002. It should be noted that in contrast to the judiciary, the executive branch departments in Massachusetts each submit a single line-item budget.

Direct submission of the court budget to the legislative authority, whether state or local, is beneficial on two separate counts. First, if the judicial branch is to operate independently of the executive, as it is required to do, then having its budget subject to the executive's review and alteration restricts its ability to fulfill its independent role. Further, and most practically at an operational level, it is the judiciary that better understands the demands of its operations and therefore the need for funds for particular budget items.

Flexibility across line items increases the availability of resources without new money. This is because assigning resources permanently to units or programs creates inflexibility and greater inefficiencies in their use; *funds budgeted become funds obligated*. The ongoing relocation of resources, even if only at the margins, improves the opportunity for more efficient and higher priority use of such resources.²⁵

It is also beneficial to the users of the courts for the judicial branch to have some flexibility in the expenditure of funds over the course of the fiscal year. This is particularly necessary for open-ended items for which expenditures cannot be predetermined because they are dependent upon factors beyond the control of the judiciary. Examples that directly affect the public include the cost of interpreters and jury fees.²⁶ These and other similar open-ended costs can be estimated in advance, but not determined. Flexibility across line items provides a continuing incentive throughout the fiscal year to seek efficiencies and expend funds where there is the greatest need. Micromanagement of court budgets is particularly burdensome and unwise during fiscal crises.

The same is true for blanket prohibitions on the rollover of funds from one fiscal year to the next. In addition to contributing to longer range planning, a rollover provision provides an incentive for courts to operate efficiently and expend funds conservatively. Without the ability to restrict its caseload, and its requirement to be accessible to the public, these self-management capacities can help the courts to fulfill their constitutional mandate and better serve the public. In considering the appropriate judicial response to the state fiscal crisis, the Conference of Chief Justices and the Conference of State Court Administrators have endorsed direct submission of the judicial budget to the legislative body, and limited line item restrictions as mechanisms to "minimize the impact of a state's fiscal crisis on the judiciary."²⁷

As mentioned, the Commission on State Court Funding is well aware of the variability in budgeting procedures across states and local jurisdictions, but believes that increasing the capacity and responsibility of the judicial branch for its own budgeting with flexibility sufficient to enable it to meet its constitutional mandate to provide impartial and accessible justice will

²⁵ Robert W. Tobin, FUNDING THE STATE COURTS: ISSUES AND APPROACHES: FINAL REPORT ON THE NATIONAL INTERBRANCH CONFERENCE ON FUNDING THE STATE COURTS – SERVING THE PEOPLE TOGETHER, National Center for State Courts, at 65 (1996).

²⁶ For example, for FY2003-2004 the North Carolina courts were provided \$233,000 to pay interpreters in the certified budget. The actual amount paid to interpreters in FY2003-2004 was \$1.5 million, with lapsed salary (generated by vacant judicial positions) the only source for fulfilling this financial obligation. In FY 2004-2005 interpreter expenses are continuing to increase with the same \$233,000 appropriation in the certified biannual budget. *Proposals for Judicial Branch Items in Governor's Budget*, Administrative Office of the North Carolina Courts, 2004.

²⁷ Conference of State Court Administrators, Resolution I, #4, *State Judicial Branch Budgets in Times of Fiscal Crisis*, (2003).

benefit the people in all jurisdictions. The Commission hopes individual states and local jurisdictions will devise budgeting procedures appropriate to their localities that are consistent with its recommendations. In making these recommendations, the Commission is fully cognizant of the designated role of the legislature in funding government and the need for the courts to be accountable for their expenditures. There are, however, more effective and direct means than executive alteration and restrictive line itemization of court budgets that provide an appropriate level of public accountability without threatening the ability of courts to fulfill their constitutional mandate. The next recommendation of the Commission addresses this issue.

B. The American Bar Association urges courts to demonstrate their fiscal responsibility by providing clear and detailed documentation for budget requests, and by establishing measures by which their expenditure of public funds can be evaluated. Such documentation should include:

- 1) Those costs beyond the control of the courts, but which must be incurred as a result of increased caseloads, new laws, unfunded mandates, and the effects of federal and state funding to other entities; and,**
- 2) The public benefits expected from new programs and services for which funding is requested.**

The checks and balances built into our constitutional framework make conflicts between the branches of government inevitable. The budget process, with its division of responsibility, is particularly ripe for interbranch tension. Nor are courts immune to the pressure on all public institutions to be accountable for the expenditure of public funds. Courts are understandably protective of their independence, but they also have a responsibility to demonstrate that they are operating in the best interests of the public. Although courts account for only a small percentage of state and local budgets,²⁸ the typical trial court costs several million dollars annually and large urban trial courts can have operating budgets of \$100 million.²⁹ With this level of spending it should not be surprising that the other branches of government expect the judiciary to be accountable for its expenditures, as does the public. In the Commission's view, it is very important for the judiciary to be in vigilant in its efforts to meet this expectation. Such fiscal accountability enhances its relationship with the other branches of government and the public at large.

The Commission recommends that courts adopt fiscal accountability measures and tie their budget requests to those measures. Recent research supports such an approach. In response to an inquiry about the best strategies for courts to adopt in the appropriations process, officials from all three branches of government point to "supporting documentation" as the most effective approach and recognize it as consistent with appropriate efforts by the judiciary to remain "above politics."³⁰ Sound fiscal management is not just for the budget process but is required in the daily operations of the courts to demonstrate that allocations are cost-effective.

²⁸ *State Budget Appropriations to the Judicial Branch*, *supra* note 7.

²⁹ John Hudzik, *Acquiring and Managing Court Budgets*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE*, American Bar Association Judicial Division, at 131 (Seventh Edition, 2001).

³⁰ James W. Douglas and Roger E. Hartley, *State Court Strategies and Politics during the Appropriations Process*, 21 *PUBLIC BUDGETING & FINANCE* 35 (2001).

Courts can also be more effective in their requests for additional funds. It is important that such requests are tied to clearly defined objectives and that in any given year such requests are limited to the highest priority projects. In addition, courts can support their requests by demonstrating that they have been fiscally responsible in the management of funds that have been allocated to them. As part of the budget request, courts need to communicate to legislatures how they expect proposals to improve service to litigants, law enforcement, jurors and witnesses. It should be made clear that the beneficiaries of an effective judicial branch are not just those appearing in court and that promoting confidence in government generally is an important goal.

Programs that require additional expenditures must be explained in light of the social benefits and long term savings they provide. It is appropriate for the judiciary to document benefits and savings along with costs. In recent years courts have also taken on a host of new services, either voluntarily or by legislative mandate. These include alternative dispute resolution mechanisms, pro se options, alternatives to incarceration, and social service delivery and treatment programs. It is particularly in family and juvenile courts that the post-adjudication role of the courts has been increasing rapidly into social service areas. Problem-solving courts have emerged to focus on social ills such as domestic violence, drugs, and mental health.³¹ All of these have been developed to provide justice in a changing society. In addition, specialized courts have been developed to meet the demands of business and commercial interests to ensure economic stability in the community. While most of these new services entail additional costs, it should be noted that such increased expenditures might also result in broader savings for the state budget as a whole. Pro se capacities provide greater access to justice and decreased legal costs, alternative dispute resolution programs save court time and often prevent more serious conflicts from arising. In addition, two studies by the California Judicial Council concluded that specialized drug courts have saved millions of dollars for the state by reducing incarceration and recidivism.³² Indeed, in 2003 the National Conference of State Legislatures ranked reduction of corrections costs by treatment and rehabilitation to be one of its top ten legislative issues.³³

In documenting its expenditures, the judiciary should also make clear the extent to which it does not control its own obligations, and that its budget must bear the costs of those obligations. It has often been noted that courts cannot limit their own workload, being constitutionally required to accept cases brought to them. The Conference of State Court Administrators asserts that the courts serve as “society’s emergency room.”³⁴ But those cases are themselves influenced by a number of diverse sources. Of course, court budgets are also affected by variations in the amount of criminal behavior and the number of lawsuits, both of which are affected by general economic conditions and a host of social variables. In addition, however, there are specific decisions made by other branches of state and federal governments that directly affect the work of the courts and their resultant funding needs.

³¹ Pamela M. Casey and David B. Rottman, *PROBLEM-SOLVING COURTS: MODELS AND TRENDS*, National Center for State Courts, 2003.

³² Conference of State Court Administrators, *supra* note 27, at 16, citing *The Statewide Cost Evaluation of California’s Adult Drug Courts*, The Northwest Pacific Consortium and California Administrative Office of the Courts. Investments in technology require capital expenditures, but can have substantial cost savings over time. For example, in 2003 Iowa implemented an online service to pay speeding tickets and other traffic and misdemeanor fines. Its cost savings will come in the form of clerk time and enhanced revenues in an increased payment of fines.

³³ *Id.*, at 18.

³⁴ *Id.*, at 16.

As the legislature defines more behaviors as criminal and creates new causes of action, more cases are brought to court. And the standards for criminal or civil liability may change. For example, as legislatures decrease the alcohol level that qualifies as “driving under the influence,” cases of drunk driving are likely to increase. There are also unfunded mandates such as turning child support enforcement over to the courts. In addition, as federal dollars flow to the states to increase the number of police, and in some cases prosecutors, in the ever-popular omnibus crime bills, courts are the recipients of increased cases with no match in funding. Appellate courts also impose burdens on trial courts, such as requiring interpreters for increasing numbers of immigrants, or lawyers for indigent defendants even if a suspended sentence is imposed and imprisonment is a remote possibility, as recently determined by the United States Supreme Court.³⁵ In accounting for its budget request, some judicial expenditures can be tied to legislative action and unfunded mandates.

The Conference of State Court Administrators acknowledges that when there are insufficient resources court leaders have an obligation to the public and the rest of state government to think creatively and make hard choices, whether it be closing underutilized courthouses, eliminating inefficient or outdated programs, or introducing cost saving measures such as audio or video recording of court proceedings.³⁶

Thus, reduced funding may also provide an opportunity to implement needed change and achieve reforms that might otherwise be difficult to implement. The bar may be more receptive to increasing their pro bono activities and automated management systems may be more readily introduced. Similarly, alternative dispute resolution may become more acceptable as delays and backlogs increase. Some court jurisdictions are the result of historical realities that no longer apply,³⁷ and there may be fiscal benefits to redrawing jurisdictional lines.

Fiscal pressures may facilitate movement to automated case management systems and should be used as an opportunity to review the court’s governance structure from a fiscal perspective. There may even be the prospect of achieving greater flexibility in the budget process. In his State of the Judiciary address, Iowa Chief Justice Lavorato expressed his appreciation to lawmakers for allowing clerks to supervise more than one office with a savings of \$450,000.³⁸

As part of the trend to provide greater accountability, courts have been developing measures to evaluate their performance. As one judge has stated, “my belief is that the rhetoric that the judiciary has used in the past to gain support for our budgets has pretty much run its course. In general it is my belief that public agencies that are (and are perceived to be) well run will be

³⁵ Alabama v. Shelton, 535 U.S. 654 (2002).

³⁶ Conference of State Court Administrators, *supra* note 27, at 13.

³⁷ It no longer seems necessary, for example, to determine the size of a judicial jurisdiction on the basis of distances achievable on horseback. Judicial districts are typically county based and “the principal criteria/guideline used originally to define the size of a county was based on how far a horse and carriage could travel in one day. This interval was supposed to be roughly the distance from the county seat to the farthest part of the county.” See www.mitre.org/tech/cyber/sectors/docs/GOV_SPECIFIC_COUNTY1.html.

³⁸ Iowa Chief Justice Louis A. Lavorato, State of the Judiciary Address, January 14, 2004, *available at* <http://www.judicial.state.ia.us/>.

funded in tough economic times.”³⁹ Budgeting processes and fiscal responsibility are important parts of that equation, but ultimately there is more to fulfilling the role of courts in society.

In 1997 after an eight year project, the National Center for State Courts published “Trial Court Performance Standards (TCPS),” which identified five areas by which to evaluate courts: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence. Although those basic categories remain credible, the twenty-two standards and multiple measures for each standard were notable more for their complexity than their practicality. More recently the Conference of Chief Justices and the Conference of State Court Administrators have been developing a shorter list of what they describe as “core performance measures” with specific measurements for each. Similarly, the Hennepin County, Minnesota courts have developed performance standards, constructed instruments (including victim and defendant surveys), and identified items in the court database to measure their operations. Interestingly, in addition to assembling performance measures related to the customers of the court, the processing of cases, and human resources, Hennepin County has identified the fourth important measure area as financial. In addition to proposing a number of questions that need to be answered to evaluate their own financial performance, they have specified the information that will be used to provide answers. Of note is the question that asks whether the executive committee of judges and administrators are actually using the measurement data in making decisions about the operation of the courts. In other words they are seeking to hold themselves accountable.⁴⁰

C. The American Bar Association encourages courts to engage in regular communication with the other branches of government, as well as with the bar, the business and civic communities, and the public concerning the administration of justice and its costs.

In the course of the budgeting process it is important for the judiciary to communicate with both the executive and legislative branches at the state and local levels. However, such communication should be built upon regular interaction throughout the year. In light of the potentially adversarial nature of the budgetary process, it is essential that it be built on a positive relationship between the courts and the other branches of government. Both formal and informal mechanisms are appropriate and effective. For example, many chief justices present a State of the Judiciary address to the legislature and executive to communicate directly with the other branches about the work of the court and recent developments in its operations. In addition, informal, interpersonal communication is also particularly valuable. A number of states, including California, Nebraska and Wisconsin, have instituted “ride-along” programs that provide for legislators to spend a designated period of time (perhaps a half or whole day) on the bench with judges in their legislative districts. In 2002 and 2003, the Oregon courts held open house events for legislators to enable them to see some of the court programs in actual operation.⁴¹ For instance, after a recent budgetary crisis, New Hampshire Supreme Court Justices and state legislative leaders began to meet regularly to improve the working relationship

³⁹ Chief Judge Kevin Burke, 4th Judicial District Court, Hennepin County, Minnesota, e-mail correspondence, March 23, 2004.

⁴⁰ *Id.*

⁴¹ Presiding Judge Dale R. Koch, Multnomah County (Oregon) Courts, e-mail message December 31, 2003.

between the two branches. Legislative leaders and court officials report that these informal meetings have achieved the desired result and will continue. Whatever the chosen mechanism, the goal is to ensure continuing communication among the three branches of government.

Improved communication between the courts and the bar is also essential. With limitations on direct political activity by judges, the bar can be an important advocate for the courts. Annual or more frequent reports to the bar and appointment of members of the bar to court committees help nurture the natural relationship between the bench and the bar. The exchange of information resulting from this relationship has led to direct assistance from the bar to the courts. For example, in 2001, the Massachusetts courts received \$40 million less than had been requested and were told to expect more cuts the next year. Threats to the budget became so dire that the Massachusetts Bar Association organized a “Court Funding Lobby Day” at the legislature to protect funding for interpreters, court reporters and guardians ad litem. The Iowa State Bar Association has actively endorsed full funding of the judicial branch, issuing a detailed position paper with supporting documentation.⁴²

To be more effective, the courts must build a constituency, and to that end should develop programs and means to ensure on-going communications with the public, including the business and civic communities. At the National Interbranch Conference on Funding the State Courts, there was frequent reference to the weak, unclear and sometimes negative image of the judiciary in the public mind. A number of legislators observed that the failure of courts to build public support weakened the budgetary position of the courts.⁴³

Since then courts have become significantly more proactive in reaching out to the public. For example, a number of state supreme courts have held oral arguments around their states, sometimes at local schools. The Minnesota Supreme Court recently held court at St. Paul Harding High School, the “19th time that the high court has traveled to sit in session at a school since 1995 when it decided to ‘put a face on justice.’”⁴⁴ In addition to the lawyers’ arguments, the judges spoke with students at lunch and in classrooms. Many judges speak to business and civic groups and courts often use appointments to court committees to engage business and civic leaders and benefit from their expertise.⁴⁵

The key to building a constituency for the courts is on-going communication. This effort may be time-consuming and beyond what many perceive as the traditional work of the judiciary. Yet, the effort is important if the courts are to build the support that is necessary to effectively fulfill their constitutional role in our system of government.

D. The American Bar Association encourages courts to establish broad-based advisory bodies comprised of laypersons, lawyers and representatives of all branches of

⁴² “Judicial Branch Budget,” *available at* www.iowabar.org/legislation.nsf.

⁴³ Tobin, *supra* note 25, at 81.

⁴⁴ Marquez Estrada, *Minnesota High Court Holds Court in High School*, STAR TRIBUNE, April 7, 2004.

⁴⁵ For a summary of the wide variety of programs that have been implemented, see JUDICIAL OUTREACH ON A SHOESTRING, American Bar Association Judicial Division, 1999. Information on continuing efforts at judicial outreach can be found at www.abanet.org/jd/judgesnetwork.html.

government to help courts secure the funding necessary for the delivery of judicial services.

Much energy has been devoted in recent years to developing more robust constituencies, especially among non-lawyer members of the public, to support the needs of the courts and bolster public trust and confidence in the judicial system. One means of developing such constituencies is through the formation of broad-based advisory bodies comprised of laypersons, lawyers, and representatives of all three branches of government. Such advisory bodies can be formed at both the state and local levels and can help court systems adapt to evolving needs, plan for the future, and secure adequate funding.

At the state level, the Washington State Board for Judicial Administration created the Court Funding Task Force in 2003 to develop a broad-based approach to funding the courts and to informing the public about the importance of adequate resources for the courts.⁴⁶ At the local level, many jurisdictions have experimented with commissions or other entities that review the needs of the courts and advocate for local needs. In Montgomery County, Maryland, for example, a volunteer Commission on Juvenile Justice serves as an advisor to the County Council and County Executive. Working with juvenile judges of the Circuit Court, the Maryland Commission has documented high vacancy rates in juvenile probation officer positions and requested increased funding from the state to allow the juvenile justice system to manage its caseloads effectively.⁴⁷

Conclusion

While the ABA Commission on State Court Funding was appointed in response to the burdens state courts have experienced during a fiscal crisis, it has made recommendations to ensure adequate, stable, long-term funding for state courts under all economic conditions. Although states vary considerably in the structure and operation of their courts, the recommendations of the Commission are adaptable to all jurisdictions irrespective of the source of their funding or the specific items that are contained within the court budget. The responsibility for guaranteeing that the courts have sufficient funds to perform their role in our constitutional system of government resides with the courts and the other branches of government. Working together they can produce the budget flexibility necessary to meet evolving needs and the financial documentation to ensure fiscal accountability. Thus, they can meet their joint obligation to enable the judicial branch to fulfill its constitutional role to sustain the rule of law that is the bedrock of our democracy.

Respectfully submitted,

Richard N. Bien
Chair, Judicial Division

D. Dudley Oldham
Chair, Standing Committee on Judicial Independence

August 2004

⁴⁶ For information on the work of the task force see “Justice in Jeopardy: inadequate funding of the trial courts,” Bar News, Washington State Bar Association, January 2004, and the Task Force website at www.courts.wa.gov/programs_orgs/pos_bja/?fa=pos_bja.funding.

⁴⁷ See Montgomery County Code, Section 12-36 for statutory basis for the Commission on Juvenile Justice.