

# Pennsylvania Bar Association Quarterly

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VOL. LXXXIII

JANUARY 2012

NO. 1

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\$30.00 PER ANNUM

CURRENT COPIES \$6.25

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# **SYMPOSIUM ISSUE**

## **Justice Unfunded—Justice Undone?**

### **Assuring Sustainable Funding For Our Courts<sup>1</sup>**



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#### **PREFACE**

Renowned state and national leaders convened Nov. 10, 2011, in Carlisle to address the crisis in court funding at “Justice Unfunded—Justice Undone? Assuring Sustainable Funding for Our Courts.” Program participants shared their insights and expertise on questions of the value of the justice system and how the proper balance is struck in making sure there are adequate financial resources available to our courts to

1. (Ed. Note) The speaker remarks and related material were collected and edited cooperatively with Pennsylvania Bar Association President-elect Thomas G. Wilkinson Jr. Mr. Wilkinson is a shareholder at the law firm of Cozen O’Connor, which donated assistance with the transcription of the videotaped program. The editors also gratefully acknowledge Magna Legal Services for its technical support.

guarantee citizens the prompt, efficient administration of justice. This symposium edition of *The Pennsylvania Bar Association Quarterly* will highlight the remarks of these distinguished speakers.

The first session, held at Dickinson College, focused on the current fiscal state of the courts. John E. Jones III, U.S. District Court judge for the Middle District of Pennsylvania, introduced speakers PBA President Matthew J. Creme Jr., Chief Justice Ronald D. Castille and American Bar Association (ABA) President William T. Robinson III.

The second session, held at Katz Hall at the Pennsylvania State University Dickinson School of Law, was moderated by former Pennsylvania Governor and U.S. Attorney General Dick Thornburgh. The panel included state Supreme Court Justice Debra Todd, Pennsylvania Senate Majority Leader Dominic Pileggi, state Budget Secretary Charles Zogby, National Center for State Courts President Mary McQueen and National Governors Association Federal Relations Director David Quam. The panel discussion was simulcast live to the Law School's University Park campus, and both events were taped for later broadcast by the Pennsylvania Cable Network.

Sponsorship and planning for the day's events was spearheaded by the Pennsylvania Supreme Court Judicial Independence Commission. The Commission was formed in 2005 to raise public awareness of the importance of a strong, independent judiciary in a free society. The Commission believes chronic underfunding of the nations' courts will negatively impact the independence of the judicial branch. The Pennsylvania Bar Association, the Dickinson College Clarke Forum for Contemporary Issues, and the Pennsylvania State University Dickinson School of Law also were name sponsors of the events.

While the panel's discussions were national in scope, funding for Pennsylvania's judiciary provided a local focus. In the latest budget cycle in Pennsylvania, collaboration between the three branches of state government resulted in a judiciary budget that was moderately increased in a difficult budget year after years of flat or decreased budgets.

Prior to this year, Pennsylvania's judicial system was underfunded by a cumulative \$94 million. In most of those years, the judiciary used funds earmarked for judicial automation to fund operations. Throughout the period, the judiciary has continued to work on initiatives that are both innovative and cost-effective, even though much of the savings have benefited government entities other than the courts.

Across the country, the problems of adequate funding for state judicial systems are just as severe. The ABA reports that most states cut court funding 10 to 15 percent within the past three years. At least 26 states—including Pennsylvania—delayed filling open judgeships, while courts in 14 states were forced to lay off staff and other states closed courtrooms or decreased court hours. The report of the American Bar Association's Task Force on the Preservation of the Justice System of August 8, 2011 also is reprinted in this symposium edition of *The Pennsylvania Bar Association Quarterly*.

## **“JUSTICE UNFUNDED—JUSTICE UNDONE? ASSURING SUSTAINABLE FUNDING FOR OUR COURTS”**

### **FIRST SESSION**

#### **Program and Luncheon**

Dickinson College, Stern Center

Introductions	John E. Jones III U.S. District Court Judge, Middle District of Pennsylvania
Remarks	Matthew J. Creme Jr. President, Pennsylvania Bar Association
	Ronald D. Castille Chief Justice of Pennsylvania
	William T. Robinson III President, American Bar Association

#### **John E. Jones III**

#### **U.S. District Court Judge, Middle District of Pennsylvania**

My first responsibility, which is one of great personal privilege, is to introduce Matthew Creme, a fellow member of the Class of 1977 of Dickinson College. Matt is the 117th president of the 28,000-member Pennsylvania Bar Association, which is a formidable job in that a lawyer basically has to put his practice on hold for a year to lead our statewide professional association of lawyers. The Pennsylvania Bar Association is one of the sponsors of our program today. Matt has enjoyed a distinguished career in private practice in Lancaster. He is a former president of the Lancaster Bar Association, a terrific lawyer, and a fellow coal region native, although we have lost him to Pennsylvania Dutch Country.

#### **Remarks of Matthew J. Creme Jr.**

#### **President, Pennsylvania Bar Association**

It is a great pleasure to greet you on behalf of the judges and lawyers of the PBA and to do so in this historic building on this historic campus so dear to me. The last time I was in this building was the fall of 2004 when our oldest child, our daughter Katie, was welcomed as a first-year student. The first time was the fall of 1973 when I was that first-year student.

As a political science major, the concepts of rule of law, separation of powers and judicial independence were items of daily consideration. We were reminded that we were students at a school started in 1773 and chartered as a college in 1783—the first in the new nation and the first west of the Susquehanna. Our founder, Benjamin Rush, our namesake, John Dickinson and many of our first benefactors were participants in the great enterprise of establishing this nation and framing its government. The walls of this College are witness to that history.

Having had experience with arbitrary government and having prosecuted a war of revolution for independence, for these patriots the value of an independent judi-

ciary wasn't a philosophic principle. An independent judiciary was a bulwark against the tyrant.

**“At the Pennsylvania Bar Association, we stand ready to defend the freedom of our judiciary to do the right thing, the just thing, the thing that the law requires be done.”**

—PBA President  
Matthew J. Creme Jr.

There are some in our nation today who misunderstand the meaning of judicial independence—or choose not to understand it. As a result they criticize judges as activists or worse as rogues.

Judicial independence is not a license for judges to do whatever they may choose. In fact, it is the freedom to do what the application of the law to the facts requires them to do—without fear or favor.

At the Pennsylvania Bar Association, we stand ready to defend the freedom of our judiciary to do the right thing, the just thing, the thing that the law requires be done. And we welcome the partnership of the ABA, the

Commission on Judicial Independence, Dickinson College and the Penn State Dickinson School of Law in organizing today's program.

### **Judge Jones**

I now have the honor of introducing our next distinguished speaker, Chief Justice of Pennsylvania Ronald Castille. Chief Justice Castille was elected to the Supreme Court of Pennsylvania in 1993 and ascended as Chief Justice in 2008. His many achievements are hallmarks in the natural progression of a distinguished career of public service, whether serving his country in Vietnam or as a line prosecutor and district attorney in the City of Philadelphia and now on the commonwealth's highest court. He has exhibited great courage, integrity and passion for the truth and an extraordinary passion for judicial independence. He “gets it,” he understands what this is all about and why we are here today.

I can tell you from my own personal experience that the Chief Justice has endorsed, advanced, participated in and sponsored many events such as today's educational session. These public events have led to and have fostered a better understanding of our judiciary and how it works, as well as better communication between the bench and the media. Today's program will take a detailed look at one of the critical governmental issues of our time, which is sustainable funding for our courts. Chief, thank you for all you have done for the judiciary. We are much honored to have you here with us at Dickinson today.

### **Remarks of Ronald D. Castille Chief Justice of Pennsylvania**

Thank you and good afternoon to attendees here at Dickinson College and to those viewing these proceedings on the Pennsylvania Cable Network. It is great to welcome back home to Pennsylvania former Governor Dick Thornburgh, who will be moderating a panel discussion later today. We welcome those who are participating as panelists, and especially ABA President Bill Robinson, our keynote speaker.

We have a spectrum of guests at today's luncheon, including Dickinson College students, some of whom more than likely will become tomorrow's policy makers. To those who fit that description let me say this: If future times are similar to present times, your task, as is ours now, will be the challenge to continue to allocate scarce resources in difficult economic times.

If you are confronted with that challenge, I hope you will recognize that governance is not just about resources, important as their careful use may be. Governance is also about principles—and in the Pennsylvania court system, our principles reach back 327 years to 1684 when William Penn established the Provincial Court, the direct ancestor of our Supreme Court and the modern Pennsylvania court system.

The meaning of a just society and the means of attaining justice through established constitutional principles are essential to the continued success of our democracy. And so, at the state level here in Pennsylvania, I want to spend a few minutes talking about the intersection of the issues of resources and principles.

Since 1790, our state Constitution has guaranteed Pennsylvanians the right to prompt and efficient administration of their cause through our courts so that important rights of a citizen or litigant can be protected and enforced.

Article I, Section 11 of Pennsylvania's Constitution (1790) states:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay . . ."

**"I believe that with creative solutions, with continued cooperation and collaboration between the three branches of our government, and with political courage, we in Pennsylvania can meet the goal of an efficient judicial system and an adequately funded judicial branch."**

—*Pennsylvania Chief Justice  
Ronald D. Castille*

To ensure many of the rights that we hold important in our society, the road to justice often relies on America's courts. A fully-functioning, efficient court system is essential to providing justice for Pennsylvanians and to do that, the courts must be provided with the resources that are reasonable and necessary to carry out their constitutionally mandated functions . . . "without sale, denial or delay."

The issues being discussed here today, in a moment by ABA President Bill Robinson on a national scale, and a bit later by Governor Thornburgh and our panelists on a local scale, are tied to these two questions: What is the value of our justice system? And how is the proper balance struck in ensuring appropriate resources to sustain the justice system?

While the issue of adequate funding for the courts of Pennsylvania is an important concern for our state, I think you will hear from Bill Robinson that these issues are topics of grave concern in many other states in our nation.

But first let me describe for you how at this moment we are a bit more secure in ensuring that our principles of justice for all can be upheld in Pennsylvania, because our resources are at least somewhat more secure.

Over the last six years, our state judicial system was consistently under-funded by about \$94 million and a long-term financial deficit was dug out of which the Judiciary could never alone save itself. In some of those years the Judiciary had to 'rob Peter to pay Paul,' by using funds statutorily set aside for court computerization purposes just to keep courthouse doors open. Open they have remained though, even as we have also continued to implement programs that are both innovative and cost-saving—if often cost-saving to the other branches of government outside of the judiciary.

In some recognition of those cost-saving efforts—but decidedly in a renewed and strong spirit of collaboration between the three branches of state government for which we in the judiciary are most appreciative—the state judiciary's budget was moderately increased in this difficult economic year.

It was critical that the Legislature and the Governor realized and addressed the need for sufficient funding for the court system. However, we hope in the court system that this is also a beginning to placing the state judiciary on a stronger, long-term financial platform and to improving the budgetary decision-making process, a process that often leaves the courts as the last funding decision to be made in the state budget process.

Of course, adequate funding goes hand in hand with the responsibility of the courts to use our appropriated funds effectively and efficiently and to do more with less in recognition of economic reality.

Over the past few years, the courts have had to make some hard choices when it came to cutting spending.

For example, we have started “right-sizing” the complement of 546 magisterial district judges in Pennsylvania based on caseload. We have already trimmed 10 district judgeships, and the Supreme Court’s goal is to eliminate another 40 magisterial districts through attrition. The result would be 50 fewer MDJs thereby saving about \$5 million annually in salary and benefits along with reduced court supported expenses at the county level.

We have also periodically suspended merit and cost-of-living salary increases, banned most out-of-state travel, instituted a targeted hiring freeze and renegotiated lower costs for contracts and leases.

Also, with the agreement of the Governor and Legislature, temporary judicial vacancies have remained unfilled over the last two years. However, with this week’s election, 50 of those vacant judgeships will once again be filled in January 2012. But if our budget challenges remain, we again will urge that judicial vacancies remain unfilled over the next two years until the next election cycle and perhaps even to further eliminate additional judicial positions.

The Judiciary has not shied away from hard choices, knowing that the General Assembly and its leaders and the Governor must make hard choices also. People often ask me what a Chief Justice does.

In addition to my judicial duties—hearing cases and writing opinions—I oversee with my colleagues the entire state judicial system of 1,200 judges and associated personnel and its 65,000 licensed attorneys. In that role, perhaps the most important responsibility of a Chief Justice is to prod the judicial system to continually balance fiscal efficiency with the constitutional task of dispensing justice to our citizens. It is the duty of the Chief Justice to be the judiciary’s advocate to ensure that through the court system our society remains a just society and that the principles of justice are not eroded.

My intensity is guided by the principles that I alluded to earlier—principles that have been established with sound reason by generations past and shaped over time by experience in the jurisprudential process. These principles cannot be subject to mere expediency, if they are to be held as principles at all.

These principles are the bedrock in assuring that Pennsylvanians’ rights are protected and enforced through the guarantee of prompt and efficient judicial administration of the causes that are brought before the courts.

So, part of a Chief Justice’s responsibility is also to occasionally and respectfully remind our co-equal branches of government about those principles, recognizing as I do the difficulties the other branches face in meeting a myriad of other obligations. We have all heard the maxim, “Justice delayed, is Justice denied.” But, I ask, what if that maxim, by intent or by misfeasance, is reduced to simply “Justice is denied?” If the courthouse doors are closed, what justice will there be for a prisoner awaiting trial? For persons awaiting a divorce? For an adoption waiting final resolution? For

those awaiting resolution of a legal dispute of any kind? Where will our society be if this happens? You will hear faint echoes of these challenges today, and you will hear of actual situations where these events are occurring in other states as we speak.

Today's discussions will, against a national backdrop, focus on the adequacy of funding for Pennsylvania's courts and the interbranch cooperative process by which it must be accomplished.

I believe that with creative solutions, with continued cooperation and collaboration between the three branches of our government, and with political courage, we in Pennsylvania can meet the goal of an efficient judicial system and an adequately funded judicial branch.

### **Judge Jones**

Bill Robinson is the president of the American Bar Association, and like Matt Creme, is in the middle of his term. The genesis of Bill's attendance occurred in February this year when I attended a session on media and the courts in Arizona at the invitation of former U.S. Supreme Court Justice Sandra Day O'Connor. While there, I met President Robinson, and we developed a friendship that resulted in my asking him if he would like to come to Pennsylvania. He said, "I'm in, I'll be there," and true to his word, he is here with us today. What impressed me about Bill was his sense of joy for his job and his commitment to judicial independence and to what I believe is the seminal issue for our time—court funding.

Bill is passionate about his life, his proud Kentucky roots, and he will not tell you about his many accomplishments. He has been a fantastically successful lawyer, a great family man, and it is clear that he has operated at one speed over the course of his forty years of practice—full speed ahead. He brings that speed to Carlisle today and brings it to bear on issues that are important to all of us. Bill is fond of Dr. Martin Luther King Jr.'s saying that "There is always time to do good." Bill's life epitomizes that in every single way. I am proud to introduce my friend, American Bar Association President Bill Robinson.

### **Remarks of William T. (Bill) Robinson III President, American Bar Association**

It's an exceptional honor to follow Chief Justice Castille, who is an outspoken and powerful advocate for Pennsylvania's courts. It is additionally a privilege to speak after the Justice, knowing that he has served our country in uniform: 2 Purple Hearts and a bronze star with combat "V".

Your Honor, I understand that today is the 236th birthday of the Marine Corps. And tomorrow, as we all know, we offer thanks to the men and women who offered their freedom and security to preserve ours. So let's take this opportunity to thank Chief Justice Castille and all of our veterans for their dedicated service to our country.

The Chief Justice's remarks are prescient and his emphasis on the necessity of courts for the continued vitality of our constitutional democracy is spot-on. The great challenge Pennsylvania courts face is mirrored in every other state in our Union. We each grapple with a funding crisis—born from sustained fiscal instability, generated by two financial catastrophes in the last decade.

This is a battle of numbers and bottom lines. We, as a legal community, are fighting to keep justice alive. We are trying to cure a chronic disease that is wasting away our state courts. According to the National Center for State Courts, which is working closely with the American Bar Association on the issues around the court underfunding crisis, 40 out of 50 states cut court funding in fiscal year 2010, and bud-

get cuts continue in 2011 from New York (\$178 MM in early 2011—500 laid off) to California (\$350 MM in last 15 months—40% laid off in San Francisco area alone). Some states, including Maine and Oregon, will need to find ways to operate without 10 percent of their already withered budgets.

The judiciary is a co-equal branch of government. Yet too many of our judiciaries receive as little as 1 percent or less of the state budget pie, and no state judiciary receives more than 3.5 percent of the state's annual operating budget.

At least six states close their courthouses at least one day a week because of inadequate funding. Fifteen states have reduced the number of hours the courts are open to serve the public. Compounding the backlog of cases and consequent delay in our courts, 32 states have delayed filling much-needed court administration positions. Twenty-six states have delayed filling critical

**“Together, we can restore funding to our courts, and renew the promise of equal justice under law that can only exist if courts are open and accessible. The cost of inaction is too great. We cannot afford to be silent because all of us in this room know: No Courts, No Justice, No Freedom.”**

—*American Bar Association President William T. (Bill) Robinson, III*

judicial vacancies.

Like many government employees, judicial staff in 16 states and judges in nine states are being furloughed without pay. Fourteen states have laid off judicial staff. State courts around the country confront uniquely challenging circumstances. A municipal court in Ohio, for example, announced that no new cases could be filed unless the litigants brought their own paper to the courthouse. The court simply had no money for office supplies.

This is a reoccurring theme across the country. In Georgia, the budget is so lean that courts solicit pen and pencil donations from vendors like LexisNexis and Westlaw. A local bar association in North Carolina ran an office supply drive to collect paper and copier

toner because shortages meant that parties could not exchange documentation, even in serious criminal cases.

Facing a 10 percent budget cut, the Shawnee County (Kansas) District Attorney's office recently announced that inadequate resources mean that cases like domestic violence would no longer be prosecuted at the county level. Then in early October, which is Domestic Violence Awareness Month, the Topeka City Council voted to decriminalize misdemeanor domestic battery for budgetary reasons.

Right now, California courts are reeling from the elimination of \$350 million from the state's judiciary budget in just the past 18 months, the largest reduction in California's history. San Francisco will receive a supplemental infusion of cash, but the city announced last month that it still must close 25 of 63 courtrooms, while giving pink slips to 40 percent of the court staff. The lines in San Francisco courts are so long that people are actually bringing lawn chairs to use while they wait. Cuts mean it may take as long as five years for a civil trial and more than one year for a divorce.

One of the more distressing stories reported to an ABA blue ribbon panel convened specifically to examine this issue—the Task Force on Preservation of the Justice System—came from New Hampshire, where depleted court financial resources were so strained that the resulting case backlog forced the suspension of all civil jury trials by then Chief Justice John Broderick for an entire year. So you are not alone here in Pennsylvania in dealing with this crisis.

Chief Justice Castille mentioned something that I would like to expand upon. This college is named after one of the authors of the second Pennsylvania Constitution and a champion of judicial independence. John Dickinson is as responsible as any other for the promise in your constitution that, quote, “All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. . . .”

Those words are unequivocal. The basic definition of judicial independence demands that courts be open and accessible. Legislatures that do not provide adequate funding for their judiciaries shrug their constitutional responsibility to adopt a budget that guarantees the individual right of access to justice.

My home state of Kentucky has the same protection written into our constitution. In fact, most states have specific “right to remedy” language. To fulfill their constitutional responsibilities, courts need to be sheltered from budget squalls. Lawyers, judges, court personnel, the general public; we all have a stake in this crisis. Remember that “justice delayed is justice denied.” That is why we all have a responsibility to be advocates for our courts.

The ABA is doing our part. Our Task Force will continue to gather data and stories like those I have shared with you, and promote innovations in technology, case management, and the criminal justice system that can help states and court systems save money. We are building coalitions, especially with state and local bar associations, which will confront this problem head on.

Everyone in this room needs to be involved as well. Together, we can restore funding to our courts, and renew the promise of equal justice under law that can only exist if courts are open and accessible. The cost of inaction is too great. We cannot afford to be silent because all of us in this room know: No Courts, No Justice, No Freedom.

## **Judge Jones**

As the Pennsylvania Commission on Independence was planning today’s event on court funding, one of our members, Ned Madeira, suggested that we bifurcate today’s session into a discussion of “What are the problems?” and “What are the solutions?” You have just heard about the problems from our distinguished speakers, and we will move forward this afternoon to the Penn State Dickinson School of Law for a panel discussion of the solutions.

When we planned the afternoon session, we had hoped to have a distinguished panel, and it has exceeded our wildest expectations. We have representatives from all three branches of state government, national leaders from the National Center for State Courts and the National Governors Association, and one of Pennsylvania’s most respected public figures, former Governor and U.S. Attorney General Dick Thornburgh, as our moderator.

We appreciate very much that Senator Pileggi, who is majority leader of the Pennsylvania Senate; Charles Zogby, who is the Governor’s Budget Secretary; and Justice Debra Todd were willing to join with us for the panel. It is not easy to get out and talk about these issues in public, because the answers are not always what people want to hear, but it is our hope that the highlighting of these problems will lead to good solutions at the end of the day.

**“JUSTICE UNFUNDED—JUSTICE UNDONE?  
ASSURING SUSTAINABLE FUNDING FOR OUR COURTS”**

**SECOND SESSION**

**Panel Discussion**

The Pennsylvania State University Dickinson School of Law

Welcome and Introductions	Philip J. McConnaughay Dean, The Pennsylvania State University Dickinson School of Law
Moderator’s Remarks	Dick Thornburgh Former Pennsylvania Governor and U.S. Attorney General
Panel Discussion	Mary McQueen President, National Center for State Courts  David Quam Director of Federal Relations, National Governors Association  Debra Todd Justice, Supreme Court of Pennsylvania  Dominic Pileggi Majority Leader, Pennsylvania Senate  Charles Zogby Secretary, Pennsylvania Office of the Budget
Conclusion	John E. Jones III U.S. District Court Judge, Middle District of Pennsylvania
Closing Remarks	Ronald D. Castille Chief Justice of Pennsylvania

**Philip J. McConnaughay**  
**Dean, Penn State University Dickinson School of Law**

Good morning and welcome to today’s program, “Justice Unfunded—Justice Undone? Assuring Sustainable Funding for Our Courts.”

Today’s program was conceived of and largely organized by United States District Court Judge John Jones, the co-chair of the Pennsylvania Commission on Judicial Independence, with much help and support from Tom Darr, deputy court administrator for the Administrative Office of Pennsylvania Courts, and Ned Madeira, chair emeritus of Pepper Hamilton and a member of the Pennsylvania Commission on Judicial Independence. We are very grateful to them for their efforts. The program’s co-sponsors are the Pennsylvania Commission on Judicial Independence, the Pennsylvania Bar Association, the Clark Forum for Contemporary Issues at Dickinson College and the Penn State University’s Dickinson School of Law. The program

is being simulcast to the law school's campus in University Park, and it is being recorded for later broadcast by PCN, the Pennsylvania Cable Network.

The topic of adequate funding for our state and federal judiciaries is one of great importance for all citizens. The swift and effective administration of our system of criminal justice ensures both public safety and the rights of criminal defendants. The judicial branch of government protects the rule of law, our basic freedoms and our civil liberties. The timely resolution of civil and commercial disputes is essential to a functioning economy. One of our distinguished members of the audience today, American Bar Association President Bill Robinson, has dedicated his presidency largely to the issue of funding shortages affecting our system of justice, which he addressed so eloquently during our luncheon today.

Another distinguished member of the audience, Pennsylvania Supreme Court Chief Justice Ron Castille, along with his predecessors, Chief Justice Emeritus John Flaherty and the late Chief Justice Ralph Cappy, and fellow justices James Fitzgerald, Debra Todd and Michael Eakin, have provided strong leadership and support to the Commission on Judicial Independence, which educates the public and the Legislature about the critical importance of adequate funding for our judiciary. Chief Justice Castille also provided a very forceful and eloquent address during our luncheon.

Today's distinguished panelists include the Honorable Justice Debra Todd of the Pennsylvania Supreme Court; the Honorable Dominic Pileggi, majority leader of the Senate of Pennsylvania; the Honorable Charles Zogby, budget secretary, Office of the Governor; Mary McQueen, president of the National Center for State Courts; and David Quam, director of federal relations of the National Governors Association.

The moderator of today's panel is former Governor of Pennsylvania and U.S. Attorney General Dick Thornburgh. Governor Thornburgh served two terms as Pennsylvania's governor and was recognized throughout his tenure as one of the nation's most effective governors. His record includes balancing the state budget for eight consecutive years and reducing Pennsylvania's unemployment rate from one of the ten highest in the nation when he took office to one of the ten lowest when he left. He served as Attorney General of the United States under Presidents Ronald Reagan and George H.W. Bush, and he was a leader in achieving enactment of the Americans with Disabilities Act. Following his services as attorney general, he went on to serve as Under Secretary General of the United Nations in charge of personnel, budget and finance. Just recently, Governor Thornburgh was listed in *Washingtonian* magazine as one of the ten legendary Washington lawyers who will forever leave their mark on the District of Columbia's legal landscape. Ladies and gentlemen, please join me in welcoming our distinguished panelists and today's moderator, Governor Dick Thornburgh.

### **Dick Thornburgh** **Former Pennsylvania Governor and U.S. Attorney General**

Thank you, Dean, and let me add my words of welcome to all of you who have joined us here today to address a very important problem in the Commonwealth of Pennsylvania and elsewhere.

About forty-four years ago to the day, I was preparing to assume my role as an elected delegate to Pennsylvania's Constitutional Convention. I must add that it was the Constitutional Convention of 1967-68, because when I first told my children I

had been a delegate to the Constitutional Convention they thought I was an acquaintance of Ben Franklin and John Adams. The Constitutional Convention of 1967-68 was momentous because it was the first attempt to overhaul the Pennsylvania Constitution adopted in 1874. As a result of the three months of deliberations in that convention, a new Judiciary Article was enacted for Pennsylvania. It was the first proposal made to the convention, which I was privileged to present, having served as a member and secretary of the Judiciary Committee to the convention.

One of the major innovations in the proposed Judiciary Article was the creation of a statewide judiciary system. Theretofore, each court in the commonwealth had

**“What was left unanswered in that Judiciary Article (from the Constitutional Convention of 1967-68) was the question of funding. There was a tacit belief on the part of the delegates—certainly on my part—that we would eventually move to a system of statewide funding for a statewide system.”**

—Former Pennsylvania  
Governor and U.S.  
Attorney General  
Dick Thornburgh

been its own separate fiefdom, so to speak. Some of the judges that I recall, mostly now mercifully departed so they can't respond to any of my observations, sat as tyrants on the bench and were not subject to having to answer to any higher authority other than that which ultimately took them from us. The creation of a statewide judicial system was a contentious item because those who enjoyed the favors of having their own separate judicial realms grudgingly gave up those positions.

When we finally adopted the constitutional provision, there were many on the bench who sought to use the complaint about the statewide judicial system to compel rejection of the entire article by the voters in the referendum that followed the convention. Happily, this did not happen, but what was left unanswered in

that Judiciary Article was the question of funding. There was a tacit belief on the part of the delegates—certainly on my part—that we would eventually move to a system of statewide funding for a statewide system.

Now, I recognize that this matter is *sub judice* at the present time, and I am not going to get into the merits of this, but it clearly indicates that we had left unaddressed the very issue that we are grappling with today. I feel somewhat responsible and offer meager apologies, although I doubt very much if we would have been able to resolve the issue any more easily than the challenge we are faced with today.

Today is a special time for judges in the judiciary. I watch with interest as my party, the Republican Party, attempts to choose a presidential candidate, and I watch with alarm at the kinds of arguments that are presented by some of the candidates as to why they should be the nominee or be elected.

When it relates to the courts, these are mostly objections raised with the federal courts, but they should make any judge or justice uneasy. It is suggested that the life tenure provision for federal judges be abolished and that they be subject to review by the Senate on a periodic basis as is any other nominee of the president. It is suggested that there be a legislative veto available of decisions of the United States Supreme Court. None of these things is new, but the fact that otherwise responsible candidates feature them prominently is a source of considerable concern. There is even one candidate who states that part of his platform on the judiciary would be to abolish the Ninth Circuit Court of Appeals. I don't view these planks in anyone's platform as serious, but I do find it appalling that they are even raised as possibilities. They are symptomatic of some of the objections that we may be able to address today, although this is not a substantive discussion of the federal courts or any other

courts. They indicate that any attempt to solve the problem that we are addressing today simply by raising more revenue is going to be difficult. This, of course, is compounded by the fact that we find ourselves in a state of economic crisis generally. So we have not picked an easy topic today to have our experts address. Yet, at the same time, it is a topic that left unaddressed will have dreadful consequences for the nation as a whole.

So let me assume my task as moderator here initially by telling you how I define this job. My job is to keep the discussion moving, to try to provoke reasonable responses to my unreasonable questions and to promote as much interchange as possible among those folks who share this platform with me so that we leave no stone unturned in our examination of the issues.

We are blessed with an extraordinary panel. We have leaders from each of the three branches of government in Pennsylvania, and these are not just people sent *by* the leadership—they *are* the leadership.

Justice Todd, who I think is an important spokesperson for the judiciary, can speak for that branch of government, and we will offer her absolution for any acts of commission or omission that she makes in discussions about the other branches of government to encourage her to speak with candor.

Dominic Pileggi is a distinguished leader in our Legislature, the majority leader of the Senate. A veteran, experienced and canny legislator, he has the kind of ability to solve problems that is often lacking in many of our legislative halls in this day and age.

Finally, Charles Zogby, the secretary of the budget, is the man with his hand on the lever. He is a member of our executive branch of government, the third branch, which has the ability to make it happen. Having held the position of governor, I well remember how much I welcomed the discussions over budget matters. For me, it was a marvelous learning experience, as I am sure it has been for all of my predecessors and successors, because the budget is a key document—if I might say—the *key* document for any administration. It is within the four corners of the budget that priorities are established and goals are identified.

So you can see that, from the Pennsylvania standpoint, we are right on the front lines, and I hope to encourage as much candor in the discussion of these issues as possible. We also have a bonus in that we have national leaders here to give us a sense of the context in which our Pennsylvania problems arise.

Mary McQueen is president of the National Center for State Courts, which is the brains of the organization when it comes to keeping track of what is going on among the fifty states in matters of the judiciary. Mary, your organization is truly a gem in terms of its contributions to those of us who are grappling with these problems on a day-to-day basis.

David Quam is director of federal relations for the National Governors Association, which was my favorite interest group when I was in office. I used to occupy myself with the NGA's massive briefing books while my staff was trying to get me interested in doing something constructive like offering 3.5 miles of paved road in Coraopolis to get a vote on a particular item. I was a policy wonk and I admit to it. The staff of the National Governors Association has the responsibility to provide for the care and feeding of fifty governors and also to help the governors build relationships in positive and constructive ways with members of the United States House and Senate, with members of the presidential administration in Washington and with each other. You could get a lot more mileage out of having fifty governors

signed on to a particular issue than you could by being a lonely voice trying to advance an issue yourself.

We are going to start with you, Mary, to ask you to give us some sense of what the view is from the National Center for State Courts on the problems in court funding.

**Mary McQueen**  
**President, National Center for State Courts**

I will give you some examples of the impact of the funding crisis on the courts, and I would like to put those into three categories: The first is an access issue; the second is a public trust and confidence issue; and the third is the economic impact. These issues have resulted in increased tension among the branches of government. In the access area, we have seen, in an effort to try to mitigate the impact on courts

**“I will give you some examples of the impact of the funding crisis on the courts . . . The first is an access issue; the second is a public trust and confidence issue; and the third is the economic impact. These issues have resulted in increased tension among the branches of government.”**

—*Mary McQueen*  
*President, National Center for State Courts*

that get an average of less than one percent of the entire state appropriation or budget, a call nationally to increase fees. Raising all types of fees, whether filing fees or response fees, does have an access-to-justice impact at some point. We have also seen an increase in court closings, where courthouses have been closed permanently or closed one or two days a week or a number of days a month.

We have seen a reduction in services, whether it is services for people who have limited English proficiency, for people who can’t afford a lawyer or for people seeking to mediate an issue through mandatory arbitration/mediation programs.

We also have seen, especially in Pennsylvania, an increase in the number of problem-solving courts and the questions raised then by the funding branch of government as to what are the core functions of these courts and whether they are just boutique courts or whether they really contribute to the delivery of justice.

In the justice-delayed area, we have seen judicial vacancies held open, staff positions eliminated and staff furloughed across the board. In some states, we have even seen the elimination of jury trials, especially on the civil side. So, if you are a small business and there is a contract issue with one of your providers, you will have an open lawsuit that your audit shows as a liability and it could result in an inability to get funding and a reduction in the public’s confidence in investing in your company. So it is not just an issue for big corporations; it is also an issue for Main Street. We have also seen a proliferation of self-represented litigants—people who need to come to court to resolve a dispute, whether it is a domestic relations dispute or a property issue—and this impacts the courts because of the length of time it takes a judge to resolve those kinds of cases.

Finally, I would like to explain how the underfunded courts issue has increased tension among the branches of government. One example, from just a few months ago, is when there was a shutdown of government in Minnesota, and there was a rush of different agencies, including education and corrections, that came to the Supreme Court in Minnesota, each seeking an order establishing that it was a central service. This placed the judicial branch of government into a policy-decision process that constitutionally is preserved for the Legislature, so all of a sudden you have this tension that has been created by this problem.

Governor Thornburgh talked about some of the platforms of the presidential candidates. One governor recently was questioned about what would happen if someone were to bring a lawsuit questioning the adequate funding of public education, and the governor was quoted as saying that should the Supreme Court disagree with his position, he would view the court's decision as non-binding. Another Legislature actually introduced a resolution determining that any Supreme Court decision that had budgetary impact would be presumed to be non-binding.

So, the economic crisis has forced state governments and the federal government to deal with the unintended consequences of raising these constitutional issues as well with the actual impact on services provided by courts.

### **Governor Thornburgh**

Ninety-five percent of the litigation in this country is filed in state courts. This means that our state courts are really the supermarkets of judicial decisions and really have an impact on each one of us that cumulatively cannot be matched anywhere else. One can argue that United States Supreme Court decisions have a longer-term impact, and I do not mean to denigrate that, but on a day-to-day basis our state courts are really the high impact courts when it comes to our citizenry. The governors are litigants before the courts. In many states, they appoint the judges, they provide the budget, they are involved almost as an extra judge on every court, if you will.

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—Former Pennsylvania Governor and U.S. Attorney General Dick Thornburgh

I ask you, David, to look at the issues that Mary has raised, not as a critique but from the point of view of the governors and the National Governors Association. In terms of priority, how do you view these particular issues from the NGA standpoint?

### **David Quam**

#### **Director of Federal Relations, National Governors Association**

I feel a little bit out of place because, I have to be honest, to be here with state leaders is rather remarkable. From Washington, I wish I could say that I am here to help, but if you look at what is happening in Washington, everybody knows that all of the real action these days is actually in the state capitals and in the states themselves. This is where things are being done and solutions are being found, and it is one of the reasons I like working for governors. Governors have a remarkable way of wanting actually to find solutions to problems.

Court funding is a sizeable problem because in these days of high unemployment every governor is looking for ways to create, hold and sustain jobs. From the jobs standpoint, you look to the courts to enforce a contract and to keep the engine of business running. Business relies on the justice system, so you can argue that this important third branch is critical to maintaining the business systems that we need to move the economy forward.

That being said, governors are in an unprecedented situation. During the previous major recession that began early in 2000, state revenues and expenditures actually still went up. Year after year, as we have tracked it, annual growth averaged

between four and six percent for all states over time. The last recession it dropped to 1.2 percent growth, which reflected the bursting of the Internet bubble. Compare that to what governors face today. With the recession of 2009-2010, state revenues dropped from between five percent and six percent per year, which represents the first negative levels since we have been tracking this data.

It is an unprecedented level of change for state government. The gaps that have been filled by governors just this past year will amount to almost \$80 billion and this is in the third year of the recession. What does that mean? It means that all the easy fixes were done the first couple of years. It means that governors are having to cut to the bone at this point; there are no easy solutions, there are only tough ones.

It means that as you look to the future as a governor, you are looking at a ten-year window. Recession starts in 2008, it ends nationally in 2009; states lag the downturn in that they are picking up the unemployment and Medicaid expenditures. Unemployment does not recover by most measures until late 2012, and I would actually argue for the same numbers up to 2013. State revenues do not recover to 2008 levels until late 2012-2013. You have the deferred investment with regard to education and infrastructure and possibly pension plans. You have to put all of that back in, and by 2018 the states have recovered. That is assuming everything stays as it is. That is not taking into account what happens in Greece or the other countries in Europe or what happens with the world economy; it does not account for a double dip; it does not account for changes in federal law that may increase mandates at the state level.

So, in that context, twenty-nine new governors, the largest class in history, came into office at the beginning of this year, and there is nothing harder than your first year as governor, as I have been told and nothing harder than your first budget, and in that first budget there are no easy answers and the budget also has to be fixed. So many of the state legislatures are in a special session right now trying to figure out how to fill the holes that have emerged just in these last two quarters. In that context, for the first time, everything is on the table. Medicaid this year will consume twenty-three percent of the average of state budgets. It will become the largest consumer of state budgets almost across the board for all states, overtaking education. So, with Medicaid and education as priorities number one and two, then comes public safety and behind that stand the rest of the operations of state government.

That is the world into which governors are thrust. And so when you ask me the question, "What priority should the courts be given?" I would answer that, of course, it is a priority. But, as a recent governor who actually retired after his first term said, "I sat down the other day with my budget officer and my chief of staff, and we closed the door and we looked line-by-line through the budget to see what could be taken out in order to save as many programs as we could. When we got down to considering whether or not to provide milk for school children, I wasn't having any fun anymore." This has become a really difficult job at a really difficult time. In that context, how does the judicial branch make its best case for supporting state government?

I think that is the question that has to be asked. I think it is the question that the executive branch needs to have answered so that it can set the priorities against everything else. Governors need help, the legislative branch needs help and the judicial branch needs help, and I think that is why you have such a distinguished panel talking about the importance of this issue.

## Governor Thornburgh

Justice Todd, how do you make that case? You have heard the challenge that David issued as to what the job description for the courts is, that is to make the case for these necessary additions even given the fact that the expenditures on behalf of the judiciary are in the range of one or two percent of the total budget, so you don't have much moving-around room. You want to take a shot at that?

## Debra Todd

### Justice, Supreme Court of Pennsylvania

I would be happy to Governor, thank you, and I wanted to mention it is such a pleasure to be here today to represent the Supreme Court of Pennsylvania, which is our highest court in the Commonwealth, and also to represent the judicial branch, which is one of the three co-equal branches of government in Pennsylvania. It is a privilege for me to serve on our Supreme Court because we are the oldest Supreme Court in the United States, tracing our roots back to William Penn's provincial court in 1684, which evolved into what we now know as the Pennsylvania Supreme Court in 1722, so we have been around for a while.

I believe that the essential point that the judiciary needs to continue to make and to remind the public and its co-branches of government about is that we are not a department and we are not a state agency. We are a co-equal branch of government. Our Pennsylvania government is set up as is the United States government—divided into three equal branches. Unless we all recognize this going in, the judiciary is starting out at a disadvantage.

We in the judiciary in Pennsylvania have suffered over the past six years with a repeated and continuing deficit due, in part, to the economic circumstances of the state, but also due, in part, to the failure to recognize that the need for adequate judicial funding should not be looked at by the Legislature and the executive branch as a question of priority but rather as an absolute necessity.

In Pennsylvania, the budget of the judicial branch actually comprises one-half of one percent of the state budget—one-half of one percent. So it seems to us on the Supreme Court that the natural assumption going into the budget process each year should be, "Let's look at the needs of the judiciary. Let's grant the reasonable and necessary costs for running the judicial system, recognizing that they are one-half a percent of the entire state budget. Let's give the judiciary what it needs, and then let's look at all the needs of the remaining majority of the budget."

The Legislature itself consumes only one-half of one percent of the budget, and the executive branch and all the multitude of agencies and needs that the executive branch addresses for the Commonwealth of Pennsylvania consume the other ninety-nine percent. So our position has been, "Let's put the judiciary out there first. Let's recognize that it is not simply a priority to be weighed against the other priorities in the state, but let's recognize that it is one of our Commonwealth's three equal branches. Let's accord it what it is due. Let's give that one-half of one percent,

**"The essential point that the judiciary needs to continue to make and to remind the public and its co-branches of government about is that we are not a department and we are not a state agency. We are a co-equal branch of government."**

—*Pennsylvania Supreme Court Justice Debra Todd*

whatever that actual number is, because it varies from year to year, let's do that upfront."

I am so pleased to say that, after this six-year period of operating in a deficit and having in essence to rob Peter to pay Paul within the judicial system to make our unified judicial system work for the citizens of Pennsylvania, this year we reached a milestone. We saw what I regard as the beginning of an era of cooperation with the Legislature and with the Governor's Office.

I extend on behalf of the Supreme Court my sincere thanks to Governor Corbett and Senator Pileggi. I believe that we are now at a turning point with the Legislature and the Governor's Office who worked together to give the judiciary the increase that it needed to make our funding adequate. There will continue to be needs, there will continue to be increases and there will continue to be austerity measures undertaken by the court, all of which will determine what the number will be each year, but this year we really reached a milestone, and I do indeed see an era of cooperation beginning among the three branches.

### **Governor Thornburgh**

Senator Pileggi, that is high praise indeed coming from a justice of the Supreme Court. Is it justified? Will it continue? Is the Justice's hope that there will be a priority consideration given to the needs of the court system going to be a hope realized or dashed in the future?

### **Dominic Pileggi Majority Leader, Pennsylvania Senate**

First, the good news in Pennsylvania, as Justice Todd said, is that in this current year's budget, even though we reduced total general fund spending across the

**"One of the things we really haven't talked about that makes this very difficult is the historic option of raising revenues through tax and fee increases broadly. This is something that is difficult, if not impossible to do, in the current political climate—people just don't want their taxes increased."**

*—Pennsylvania Senate  
Majority Leader  
Dominic Pileggi*

board, we increased our funding for the court system by in excess of seven percent—\$20-plus million—and that was a change in direction over past years. I do commend Chief Justice Castille and Justice Todd and members of the court for their advocacy before the General Assembly and before the Governor's Office in making their case that we really did need to change direction.

A number of speakers have talked about context, even starting from the constitutional revision and the establishment of a unified court system and how that works through. I don't think these decisions, these budgetary decisions, are ever made without context influencing. We are in a recession, we are in a period of declining revenues and budgets are about choices,

about priorities, and they are a joint exercise started by a governor's budget address and ultimately decided by the appropriation authority of the General Assembly. But that process necessarily puts all items on the table. I don't believe it would be the court's position that they would simply send over a requisition or in the form of a budget request that we would simply accept and start with, but there is a negotiation as to what is the right amount of funding given the context of any budget year and what we can do to move that process forward.

The percentages are what they are, and it is worth noting that the General Assembly and I measure things generally in a percentage of a general fund budget. In that percentage analysis, the General Assembly's budget for itself is about one percent of the general fund budget, about the same as the court system. Our budget is the subject of negotiation with the Governor's Office, as is the governor's executive branch budget a subject of negotiation. I don't think anything is off limits in a budget discussion, but if we go through the process with a respect for the nature of the court as a separate and equal branch of the government and the necessity of the court system, we will get to the right result as we did this year.

One of the things we really haven't talked about that makes this very difficult is the historic option of raising revenues through tax and fee increases broadly. This is something that is difficult, if not impossible to do, in the current political climate—people just don't want their taxes increased.

So you are not working with an equation where you can easily increase revenues, and it becomes a situation of what to do when you have less revenue. What do you do to balance the budget with that reduction in revenues? How do you make those decisions? They are not easy decisions, but I think courts are certainly essential and need to be adequately funded. Certainly the General Assembly needs to be adequately funded. But making those decisions is not an easy process, and the trade-offs become, for example, do you not provide school lunches or do you not provide dental care for people or do you limit hospital stays for sick people?

How do you make those decisions when the competing cost drivers are public welfare, which in Pennsylvania represents thirty-eight or thirty-nine percent of our general fund budget and education is right behind that? Chief Justice Castille has said on a number of occasions that efficiencies have been introduced into the state court system as a result of the pressures that reduced revenues have brought to the system. If we hadn't any such pressures, would that same force of focus on efficiencies be there for all branches of government?

Hopefully we will come out of this recession and we will have easier decisions to make, but I agree with the process. We made a turn in direction in this year, and it is my intent to stay on that direction in future years.

### **Governor Thornburgh**

Let me turn to our final speaker, final only in order of appearance but preeminent when you come to the budget process itself, because Charles Zogby, as I indicated, is the individual with his hand on the lever of power. Charles, speak the truth to us, my friend. You are right there at the center of all this activity. Give us your thoughts about process. Do you think that the process for funding the judiciary as it now stands makes sense or are there other ways to do it?

### **Charles Zogby Secretary, Pennsylvania Office of the Budget**

When he took office, Governor Corbett walked into a \$4.2 billion deficit that we needed to close—it was really unparalleled, in modern memory. I think you probably would have to go back to the Great Depression to find any comparative year.

Chief Justice Castille and the court itself did a remarkable job in getting to the executive branch early in the process and making known the concerns about what was perceived as historic underfunding over the prior years in the prior administration.

I think we were able to make incredible progress. Senator Pileggi talked about context, and every budget decision is made in a much broader context than in a year where you are closing a \$4.2 billion gap, where we eliminated nearly seventy line items, cut 250 or so others and collapsed, I think, another fifty or so. For the courts to come out with what was a \$22 million or 7.9 percent increase when the rest of the general fund was cut by four percent was a pretty remarkable result. It was due in large part, not only to the advocacy of the court but also by the recognition of both

**“We have some good news in terms of being able to make the pivot that we did in the last budget, but we have some difficult challenges ahead and continuing that progress is going to take every ounce of creativity and entrepreneurial spirit that we have in us.”**

*—Pennsylvania Budget Secretary Charles Zogby*

the executive and the legislative branches that this was a course correction that needed to be made.

I am hopeful that we can sustain this progress going forward, but I would be remiss if I didn't remind folks of the incredibly challenging state that we're in currently. We sit here today at \$282 million below revenue estimate for the year. This could grow to as much, if not more, than one-half a billion dollars by the end of the fiscal year. We are in the midst of our budget planning for fiscal year 2013, and our balance sheet looks to be about \$750 million dollars—likely more—below estimates, which is a hole that we are going to have to close having coming off again an extraordinary spring.

There is no fat out there left to cut. There is no sort of miscellaneous “nice to have” line item. The governor is in the unique position of having to balance all of these interests, perhaps unlike the other branches of government, at least in a single elected office. So it is a difficult balancing test that we are going to have before us.

We also have, as Senator Pileggi mentioned, revenues being off the table and not only because of the politics of the current environment. I work for a governor who has pledged not to raise taxes, so even if that were an option it is now off the table. As to Justice Todd's earlier comments, I do think that because of the way in which the process works the judicial system is maybe not given the level of attention that it requires. We go through every line item in the general fund line item by line item, department by department. I am not sure that we give the same level of focus in attention to the judicial branch and perhaps we need to do a better job on this.

Again, we are under incredible fiscal pressure right now as a state, and many economists are looking more at recovery by 2015, 2016. There was a recent report that incomes for families and individuals are not expected to rebound to pre-recession levels until 2021, so we may have a distance to go. I remind people that the four greatest cost drivers in state government are medical assistance, corrections, pensions and debt service. Of those the corrections-public safety area is really the only one that the executive and legislative branches control to any degree. Pensions are pretty much locked in. On debt service you can issue less in the way of debt going forward, but you still have debt service that has to be paid, so that number is not something you can really affect overnight. In medical assistance, while you can make some changes in that program area, it is fairly limited because of the nature of the benefits, with entitlements largely controlled by the federal government.

While we have some good news in terms of being able to make the pivot that we did in the last budget, we have some difficult challenges ahead and continuing that progress is going to take every ounce of creativity and entrepreneurial spirit that we have in us, because it is going to be an incredible challenge.

## Governor Thornburgh

Before the ink dries on your observations about this year's budget, I would make sure that a copy goes to Bill Robinson and to our other friends visiting from out of state and say to the other forty-nine states, "Go thou and do likewise," because if that were to be the case, by my calculation, we wouldn't be sitting here today talking about the ways to fund our courts adequately.

I really think that representatives of all branches of Pennsylvania government can take a bow on that, cautioned, of course, by your observation that the future remains murky and uncertain. But it is nice to be in a position where this problem is being addressed as clearly a priority. Otherwise we wouldn't have gotten that kind of increase.

Well, we have reached a point now in which we have heard from each one of you, and I cannot express enough of our thanks for your taking the time to deliver these thoughtful comments. I would like to offer to any of you the opportunity to comment on what you have heard today. So the floor is open for any of our panelists.

## Justice Todd

I think it is helpful for not only our audience here at Dickinson Law School but also for our viewers on PCN to have an understanding of what we are talking about when we refer to the needs of the judicial branch because the needs of the judicial branch are really those of the citizenry of Pennsylvania.

I think it is important that our audience knows that we are constitutionally obligated under Pennsylvania's Constitution, Article I, Section 11, to keep our courts open, and that specific provision of our constitution states, "All courts shall be open; and every man for an injury done to him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

What that means in practical terms is that the child who is abused in Pennsylvania is protected by our courts, that we have an improved foster care system thanks to Justice Baer's program that has reduced the number of children in foster care by over 5,000. We are looking at the real, practical results of keeping our courts open—access to justice for children, access to justice for civil litigants, access to justice for victims of domestic violence and for the entire array of corporate and family and civil and criminal matters that come before the court, including the rights of defendants who have a constitutional right to a speedy trial and must be brought to trial and justice within specified time frames.

It is important for us to remember that when we speak of the judicial branch we are talking about the rights, the constitutional rights under the United States Constitution and the Pennsylvania Constitution, for each and every citizen to seek redress and to be able to have access to our courts.

## Governor Thornburgh

May I add another commendation, I think, to our court system, which is the downsizing that is taking place first of all with the magistrate judges. The management

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—*Pennsylvania Supreme Court Justice Debra Todd*

of attrition probably offers the most promising way to deal with that challenge and I think that is truly admirable and rather ingenious on the court's part.

### Justice Todd

Absolutely, and we like to call it right-sizing rather than downsizing.

### Governor Thornburgh

Right-sizing (Laughs)—well said. That's a very good observation. I am not as impressed with the notion of letting vacancies sit unfilled for an undetermined period of time, but that's a debate for another day.

### Justice Todd

There is a judicial election every two years, Governor.

### Mary McQueen

There are some lessons to be learned here. When we talk about equal branches of government or separation of powers, there's a misconception that somehow the justice system thinks it is the imperial branch of government and not accountable in any way. But those of us

**"The criminal justice system is an hourglass. All the sand at the top may be law enforcement and all the sand at the bottom may be corrections, but every grain of sand has to go through that little bitty aperture in the middle called the courts."**

—Mary McQueen  
President, National Center  
for State Courts

may recall from eighth-grade history class that there are checks and balances on each branch of government and the Legislature has a constitutional responsibility along with the governor to manage the budget and to be accountable for the revenues and the expenditures.

What we've seen that we can take away from the experience here in Pennsylvania is recognition of that partnership and how the judicial branch came with a plan that not only looked at structure but also looked at process. They looked at the application of automation, through using videoconferencing instead of having to move prisoners from correctional facilities into

courts, which is a major cost related to public safety.

If William Penn came back today, he probably would be most comfortable in the courts as looking similar to what government looked like when he first started. How do we—using the budget process possibly—motivate courts to do this re-engineering or re-inventing of themselves?

The Conference of Chief Justices and the Preservation of Justice Task Force under ABA President Robinson have looked at some financial principles that we might consider for courts, specifically line item restrictions on moving monies between certain categories. Is there a way that we could say okay, we understand that you have a vision about how you think you can become more efficient, so we are willing to provide lump-sum budget authority, but we want you to be accountable by indicating what your standards for delay are?

How are you going to measure that? Or what if you could keep half of any amount that you are able to save in your appropriation at the end of the funding period with some kind of performance measurements? Do you have any thoughts about how we can reinforce the responsibility of the judiciary to act as an equal branch?

## Senator Pileggi

You hit on it directly. We accomplished it between the willingness of the court and Chief Justice Castille to lay out a path toward a more efficient court operation and the willingness of the General Assembly to appropriate more funds for the court's operations. I think that's an ongoing process and one that builds on itself so that I'm sure in the next budget discussion there will be a report on how the process of becoming more efficient is working, what the next steps are, how the appropriation for the prior year was sufficient or insufficient and why, and that conversation is how successful budget decisions are made. The necessary part of it was a willingness to look at court operations, to open the doors and say here is what we think we can do differently so that we are performing our services more efficiently at a lower cost to taxpayers. This gains credibility and makes the process from the legislative side a lot easier because it eliminates the concern that the monies are not being correctly appropriated.

## Justice Todd

A large part of our success in reaching agreement and coming to a consensus with the Legislature was a recognition that the Pennsylvania court system has put back \$480 million into the general budget as a result of our assessment and collection of fines and restitution and fees and also \$200 million just from Justice Baer's innovative approach to children and families.

On that same subject, the problem-solving courts that we have set up in Pennsylvania, ranging from mental health courts to DUI courts to drug courts and most recently the sex offender court in Allegheny County, and Justice McCaffrey's initiative to promote veterans courts in the various counties of Pennsylvania have resulted in cost savings. They're creative. They're innovative. Most are using federal funds or reallocating funds that the judiciary already had and are using them in a smarter, more efficient, more focused, more directed manner. It has been studied and determined that for every dollar we spend on a specialty problem-solving court we are ultimately saving the Commonwealth \$4.74 in the "down the road" cost in the criminal justice system.

## Governor Thornburgh

Charles, do you have any thoughts on those kinds of innovative approaches?

## Secretary Zogby

Certainly, Pennsylvania taxpayers are demanding that in every respect when it comes to their state government and for the court. The chief justice did not come in and say, "We're the judicial branch, give us money." But rather, he demonstrated the efficiencies that they've made . . . the innovative things that they're trying to do to stretch the tax dollar, and that's an important aspect not only for informing the Governor and the General Assembly in terms of the budget-making process, but particularly here in Pennsylvania, where the judges are elected, it's in-

**"The challenge continues to be that our economy is not producing enough growth. It is not producing enough revenue so that we can sustain and fund all of the things that we want our state government to be able to do."**

—*Pennsylvania Budget Secretary*  
Charles Zogby

forming Pennsylvania taxpayers, the voters, that there is wise stewardship of tax dollars in support of the court system and state government. So that's an important aspect of the process, and certainly going forward it's up to the court system to benchmark itself or to lay out the metrics by which it will be judged in terms of its efficiencies.

Having those and being able to do those measurements, that's the same type of thing that we're asking of every department of state government, particularly when they're asked to come in with level-funded budget requests and this year likely to be looking at taking less or getting less than they received the year before. So certainly, the court being proactive in that respect helps immensely at every sort of level of the budget process and with the various audiences that we have in putting together a budget.

### **Governor Thornburgh**

I wonder if, Mary, you might address the feasibility and dangers of using fees to fill gaps in budgets. My own sense is that you're solving one problem but creating another in terms of access and there must be a limit out there beyond which you should not venture in utilizing fees as a source of revenue. Can you make sense of that?

### **Mary McQueen**

Two years ago we saw everyone look at all different kinds of fees. For example, we saw a rise in response fees, which are fees you pay when somebody files a brief you have to respond to and you have to pay a fee to file this response. The concern is that when you have so many people who are self-represented or so many people who really do not have the ability to pay, you are basically violating their constitutional rights to have access to court.

What we have seen nationally is that those fees that are directly related to court services have pretty much topped out. And the question now is whether these service fees are just another way of creating taxes with an ability to get under the taxation limits. Filing fees and penalizing courts are the easy, low-hanging fruit that have been harvested. Now people have to look at the really tough decisions. For example, we have had some states that actually have looked at the elimination of court reporting and going digital. We have seen states that have even looked at decriminalizing lower level misdemeanors. So we are talking about having to look at public safety issues.

I always have to take a deep breath when I hear at the federal level recommendations to create major programs to fund police officers at the state level because the criminal justice system is an hourglass. All the sand at the top may be law enforcement and all the sand at the bottom may be corrections, but every grain of sand has to go through that little bitty aperture in the middle called the courts. So we see a large amount of federal dollars available for corrections and available for law enforcement, but not for the courts. Five million a year is the maximum amount of federal dollars that are available to the state courts. What we have to do is look at the overall impact on the courts of those policy decisions.

Because if we're not going to fill judicial positions, if we're going to continue to reduce or freeze staff, citizens still have to go through that little space in the middle we call a court.

### Governor Thornburgh

That is a vivid image you have created for us, and I think I have heard of the fees for filing a pleading in a case. If you are going to file an answer to a complaint you do not file a fee with that, do you? That gives a new and perverse meaning to pay to play.

### Mary McQueen

Yes, it does.

### Governor Thornburgh

Well, we are rapidly running out of time, believe it or not. I want to make sure that we hear from each of you to the fullest extent you want to contribute to our discussion and I will take a quick run down the line here and see if you have any parting thoughts on what the challenge is and how we can best deal with it. Charles, why don't you begin.

### Secretary Zogby

The challenge continues to be that our economy is not producing enough growth. It is not producing enough revenue so that we can sustain and fund all of the things that we want our state government to be able to do. As long as we have these pressures we're going to continue to be in an environment of very difficult choices, and it doesn't make my job a lot of fun, so it would be nice to have some revenue to spend and invest and particularly to be able to provide the type of support that we need to sustain a well-functioning court system.

### David Quam

Two quick thoughts. Number one, everything has changed. There are no sacred cows. The argument of a co-equal branch of government is just that, it is an argument. But the fact of the matter is that everything has to be on the table under these current circumstances. I think Pennsylvania is to be congratulated for what it has done. I think the chief justice is to be congratulated for making the point and coming up with solutions. I'm reminded of a story by a governor who once said, when you're a governor the best thing to do is be second because you want somebody else to come up with a good idea and you want to steal it and make it great. Then you want to call it your own and go from there. Well, the type of innovation here needs to be mirrored in other states and needs to be improved upon and built upon, but more importantly this innovative has to last longer than just a single year. Because we are not coming out of this any time soon, and every year the governors are going to need to have a case remade.

**“Well, the type of innovation here (in Pennsylvania) needs to be mirrored in other states and needs to be improved upon and built upon, but more importantly this innovation has to last longer than just a single year. Because we are not coming out of this any time soon, and every year the governors are going to need to have the case remade.”**

—National Governors  
Association Director of  
Federal Relations  
David Quam

### Governor Thornburgh

That is why they call the states the laboratories of democracy. Mary?

**Mary McQueen**

Well, I have always been accused of being a glass-half-full person. And if, in fact, the three branches of government rediscovering each other is an unintended consequence of the economic tsunami, I think that is something that we can take away from our discussion this afternoon. And I agree with you, Governor and David, in that I think that like most liberties and discussions that were started in Pennsylvania, this one has promise, too.

**Governor Thornburgh**

This one has legs you think, then?

**Mary McQueen**

This dog will hunt. (Laughter)

**Governor Thornburgh**

Justice Todd, can you add a cliché to Mary's and my collection? (Laughter)

**Justice Todd**

Well, we may not be kissing and hugging, but at least we are dancing together, so it is very good. The efficiencies that the court has worked on over the past years have been recognized by the National Center for State Courts. Our Justice Eakin has been instrumental in our computerization program that is second to none and has, in fact, been a model for the other state courts. Our Administrative Office of Pennsylvania Courts has been a model of efficiency and recognized nationally. In fact, Pennsylvania Court Administrator Zygmunt Pines was honored this year as the outstanding court administrator in the entire nation. So, we have been working hard on efficiency.

It all boils down to the fundamental recognition that the judicial system, the judicial branch, is responsible for ensuring due process to our citizens. It is a core value of our judicial system, and it is through due process that we ensure that every citizen, every litigant and every criminal defendant receives the fair hearing to which he or she is entitled and receives a judgment on the merits of his or her case by an impartial judge.

**Governor Thornburgh**

The last word goes to Senator Pileggi.

**Senator Pileggi**

Thank you, Governor. This is a great forum, but the challenges ahead are going to actually increase over the challenges we have faced in the past couple of years to adequately fund the court system and adequately fund all areas of state government. Certainly everyone in this room supports adequate court funding. Hopefully people who might be watching this in the future on PCN will learn maybe a new aspect or two about why it is critical that we adequately fund courts. But the budget process will be a competition for scarce dollars. It will require a continuing advo-

cacy by the court to explain why it is critical that it receive the appropriation requested. We will work to meet the needs of the court as best as we can, given the budgetary constraints that we must work within.

I am happy that we are here in November. The official start of the budget season is February when the governor gives his budget address, so this is a nice early start to this process, and hopefully we can keep this conversation moving forward. Communication among our governor, who is the former state attorney general and who certainly respects the role of the courts, the chief justice and his court, and the members of the General Assembly is key as well as a mutual respect of the roles that we each play in state government. Given the small size, relatively, of the court's appropriation and the General Assembly's appropriation, the focus in balancing the budget really should move away from those institutional costs to more programmatic costs in the future. This is a great step forward in continuing what we have built on in this budget year, and hopefully we can continue that going forward.

### **Governor Thornburgh**

Judge Jones, will you close these proceedings and send us on our way enriched by the quality of the discussion that we have had today?

## **CONCLUSION**

### **Judge Jones**

#### **U.S. District Court Judge, Middle District of Pennsylvania**

In terms of a takeaway today, two things I want to say before I introduce Chief Justice Castille and have him put the capstone on this event. I think an excellent takeaway today is how the governmental branches rediscovered each other and how the first step to solving these problems was getting together in a civil, meaningful way and having a discourse to identify these problems and try to work through them. It is easy for the public to demagogue all branches of government. It is easy for the branches of government, unfortunately, to demagogue issues with each other. You did not see that today, and I think that was very meaningful.

The other takeaway is that we have students here from these two great schools, Dickinson College and the Dickinson School of Law of the Penn State University. We are going to hand this ball off to you pretty soon. And the trite phrase that you are the leaders of tomorrow, well, in fact, these institutions do produce the leaders of tomorrow. And these challenges are not going to go away. You heard some rather daunting statistics about where the budgets are going and where the economy is going, so it is not going to get any easier as you take over in years hence. I hope this has illuminated the problems and the issues and some of the solutions for you as well. For a capstone—an appropriate capstone—I am pleased to call upon our Chief Justice, Ron Castille.

**“An excellent takeaway from today is how the governmental branches rediscovered each other and how the first step to solving these problems was getting together in a civil, meaningful way and having a discourse to identify these problems and try to work through them. It is easy for the public to demagogue all branches of government. It is easy for the branches of government, unfortunately, to demagogue issues with each other.”**

—U.S. District Court  
Judge John E. Jones, III  
Middle District of  
Pennsylvania

## **Closing Remarks**

**Ronald D. Castille**

**Chief Justice of Pennsylvania**

I want to first thank the Judicial Independence Commission. I also want to thank those individuals and the staff for putting this great symposium and panel discussion together.

I think you have seen some of the remarkable things we are doing in Pennsylvania and how the climate has changed from the last six years. You have heard about our cooperative talks and how they have resulted in funding for the court system, which in Pennsylvania has been pretty good compared to the horror stories you've heard about other states. ABA President Bill Robinson talked about some of those things and fortunately, in my remarks, I said they have not happened in Pennsylvania because we have had a cooperative effort. Everyone, from the governor, and the Legislature and the courts, has seen the problems. We have instituted, as Justice Todd explained, efficiencies in the court system that save other agencies money. We are all in this together, and we are all working for the taxpayers.

All three branches find ourselves in a really tough, tough economic era, and the court certainly recognizes the difficulties that the two other branches have in allocating the scarce resources. We will continue to work on this in a cooperative effort. I want to thank everyone for attending, and thank you, Governor Thornburgh, for coming back. It is always great to see you.

# Report To The House Of Delegates By The American Bar Association Task Force On Preservation Of The Justice System—Crisis In The Courts: Defining The Problem— Proposals And Options

By THE ABA TASK FORCE ON PRESERVATION OF THE  
JUSTICE SYSTEM



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## 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 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>2</sup> And ultimately, when our courts—the focal point of our legal system—cannot provide justice, such problems breed contempt for the law itself.

## 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>3</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>4</sup> The report accompanying the House resolution echoed the findings of a prior report of the ABA’s

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2. Washington Economic Group, The Economic Impacts of Delays in Civil Trials in Florida’s State Courts Due to Underfunding (2009) at 1.

3. Zemans, Court Funding (August 2003) at 10.

4. ABA, House of Delegates Resolution and Report (August 9, 2004).

Commission on the 21st Century Judiciary (2003), that, without enhanced funding, the judiciary's capacity to preserve itself would be threatened.<sup>5</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.

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>6</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>7</sup>

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5. *Id.* at 6.

6. National Center for State Courts, Budget Impacts (December 2010).

7. 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).

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>8</sup> Such is the state of our nation's justice system today.

## 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 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>9</sup> In Alabama, recent layoffs of judicial staff have lead 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>10</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>11</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>12</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>13</sup> For lack of funds, DNA data on arrested offenders is not being entered into databases in Nevada for future use.<sup>14</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>15</sup>

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

9. National Center for State Courts, *Budget Survey* (October 2010) at 11.

10. Associated Press, "Courthouse Lay-Offs Delay U.S. Murder Trial Over Australian Honeymoon Death" (April 13, 2011).

11. Transcript at 46, Atlanta Hearing (Testimony of Georgia Supreme Court Chief Justice Carol Hunstein).

12. Transcript at 80, Atlanta Hearing (Testimony of Manny Medrano).

13. Transcript at 26, Atlanta Hearing (Testimony of Roy Weinstein).

14. Transcript at 82, Atlanta Hearing (Testimony of Manny Medrano).

15. Report of Boston Bar Association Task Force on the FY 2011 Judiciary Budget (March 2010) at 5, 7.

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>16</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>17</sup>

## 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 cutbacks 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>18</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>19</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>20</sup> The report then carefully documented the costs of these additional delays to all of the key participants in the judicial system:

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16. Boston Bar Association Task Force on the FY 2011 Budget at 5.

17. 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 Management Robert Mulligan).

18. 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.

19. *Id.* at 6-7.

20. *Id.* at 8.

- 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.

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>21</sup>—the backlog of mortgage foreclosure cases alone cost that state’s firms and residents \$9.9 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>22</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>23</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>24</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—re-

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21. “Chief Justice Charles Canady Argues Against Cuts to Courts,” *Sunshine State News* (January 26, 2011).

22. Washington Economic Group, *The Economic Impacts of Delays in Florida’s State Courts Due to Underfunding* (February 2009) at 10.

23. See New Hampshire Hearing (Testimony of Maine Supreme Court Chief Justice Leigh Saufley).

24. Iowa Judicial Branch, *The Impact of Budget Costs on Justice* (January 2010) at 13.

sult 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 in lost state and local taxes.<sup>25</sup>

## **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.

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>26</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>27</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>28</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>29</sup> Indeed, it is estimated that 8 of every 9 people needing legal services are now being denied.<sup>30</sup> Such

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25. Weinstein and Porter at 1.

26. Boston Bar Association Report at 5, 7.

27. Communication from Legal Services Corporation (May 15, 2011).

28. Legal Services Corporation Press Release (April 12, 2011).

29. Boston Bar Association Report at 8.

30. New Hampshire Hearing (Testimony of New York State Chief Judge Jonathan Lippman).

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.

## 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.

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>31</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 that 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.

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31. 14 N.Y.3d 230, 925 N.E.2d 800 (2010).

## **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”?

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>32</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

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<sup>32</sup>. AM. BAR ASS’N STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES, Aug. 2004, at 9.

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>33</sup> A contrasting example is Massachusetts, which has several hundred line items. Reduction of line items requires the legislature to 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>34</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>35</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 measurable outcomes, prove fiscal accountability and deal with long term goals of the court system. NCSC has developed "principles of judicial administration."<sup>36</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 statewide judicial strategic plan.<sup>37</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>38</sup> This type of system further enhances the ability to obtain sustained legislative support.

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33. *Id.* at 8.

34. 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).

35. Minnesota Judicial Workload Assessment 2002, submitted by the National Center for State Courts, at 12 Exhibit 4.

36. 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>.

37. *Id.*

38. 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

**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. 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>39</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>40</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>41</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>42</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

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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).

39. *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).

40. REPORT OF THE BOSTON BAR ASSOCIATION TASK FORCE OF THE FY 2010 JUDICIARY BUDGET at 8.

41. 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.

42. 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).

available to fund those functions that do take priority.<sup>43</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.

## **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>44</sup>

The definition of efficiency is elusive. Just spending less may be considered efficient by some. Therefore, cutting the number of courtrooms 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:

### **9. 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 re-

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43. 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).

44. New Hampshire Hearing (statement of U.S. District Court Judge Norma L. Shapiro, E.D. Penn.).

ducing costs while increasing efficiencies. A simple example, implemented in Iowa, is online payment of speeding tickets. However, many more advanced options are available. For example web-based case management systems, such as MassCourts<sup>45</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>46</sup> Also, some courts in Utah have replaced court reporters taking a stenographic record with digital audio recording.<sup>47</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>48</sup>

**10. 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>49</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.

**11. 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>50</sup>

Reengineering also involves evaluating the current judicial functioning through such metrics as CourTools and using the “real time” budget performance infor-

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

46. 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).

47. 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).

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

49. Eight National Court Technology Conference, Using Business Process Reengineering Strategies for Courts, Kansas City, Missouri, 2003.

50. Transcript at 55, Atlanta Hearing.

mation to tailor annual budget submissions.<sup>51</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 reengineering is a plan to consolidate some judicial and administrative functions. That is, centralize statewide 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>52</sup>

**12. 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, alternative dispute resolution, drug court, etc.<sup>53</sup>

**a. Consider the use of specialty courts such as drug court, business court<sup>54</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>55</sup> However, overall ADR is an important option. One example of combining alternative dispute resolution and new technology is online dispute resolution of small claims in Michigan.<sup>56</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>57</sup>

51. Conference of State Court Administrators Budget Survey, National Center for State Courts, June 2009.

52. 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?CISO\\_ROOT=/ctadmin&CISOPTR=1625](http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISO_ROOT=/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.

53. NAT'L CTR. FOR STATE COURTS 2009 STRATEGIC PLAN, at 17.

54. New Hampshire Hearing (statement of Richard Samuels, Chair of the New Hampshire Business and Industry Association).

55. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 22–35 (4th ed. 2005).

56. Transcript at 152, Atlanta Hearing (Testimony of Janet Welch, Executive Director of the State Bar of Michigan).

57. NAT'L ASS'N FOR COURT MGMT at 10.

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

Can some courts be merged into others? Can smaller jurisdictions be combined with other smaller jurisdictions?<sup>58</sup> Consolidation can produce increases in both savings and efficiency.<sup>59</sup>

## **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:

### **14. 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>60</sup> Legislators have been invited to observe a day in the Family Courts of Massachusetts.

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

Judicial leaders and bar association leaders should work with civic and citizen groups to establish communication about the importance of the justice

58. See NAT'L CTR. FOR STATE COURTS at 39.

59. New Hampshire Hearing (statement of New Hampshire Supreme Court Chief Justice Linda Dalianis on combining Probate, Family and District Courts in New Hampshire).

60. 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).

system.<sup>61</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.

**16. 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>62</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>63</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 everyday lives.

**17. 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 taxpayers.<sup>64</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>65</sup>

**18. 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>66</sup>

**19. 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

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61. 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).

62. National Center for State Courts 2009 Strategic Plan, at 8.

63. 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).

64. Transcript at 167, 176, Atlanta Hearing (Testimony of NAACP General Counsel Kim Keenan).

65. *Id.*

66. 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).

Lester Tate III described the successful efforts of the Georgia Bar in persuading the Georgia legislature.<sup>67</sup> The Boston Bar Association developed a grass-roots email system of getting members to communicate with legislators.<sup>68</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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67. Transcript at 122, Atlanta Hearing (Testimony of Lester Tate III, President, State Bar of Georgia).

68. New Hampshire Hearing (Testimony of Don Federico, President, Boston Bar Association).

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