

**Report of the
Boston Bar Association
Task Force on the
FY 2011 Judiciary Budget**



Joan A. Lukey, Chair
Ropes & Gray LLP

Michael B. Keating
Foley Hoag LLP

Lawrence S. DiCara
Nixon Peabody LLP

Mark C. Fleming
Wilmer Cutler Pickering
Hale and Dorr LLP

Suleyken D. Walker
Meehan, Boyle, Black
& Bogdanow, P.C.

Mala M. Rafik
Rosenfeld & Rafik, P.C.

Lisa G. Arrowood
Todd & Weld LLP

March 9, 2010

I. Introduction

The importance of a capable, independent, and adequately funded judicial system to the protection of the rule of law and the rights, security, and prosperity of Massachusetts residents cannot be overstated. Residents of Massachusetts are fortunate to be served by a highly-qualified and respected judiciary and a court system that, particularly in recent years, has made remarkable efforts to administer justice in an efficient and cost-effective way. Both before and during the current economic crisis, the Massachusetts judiciary has done its part to ensure that it delivers justice in a fair, even-handed, and timely manner and in a financially responsible and sustainable way.

In October 2008, in response to Governor Deval Patrick's call for austerity measures across the Commonwealth, the judiciary voluntarily instituted significant additional cuts in its budget. Although the effect on the Commonwealth's total budget was minimal—the judiciary accounts for only about 2 percent of that budget—the judiciary's effort was commendable. Nonetheless, the budget for the following year (FY2010) saw judiciary funding cut by \$24.2 million, or over 4%. This year, the Governor's proposed budget for FY2011 would further cut the judiciary budget by over \$10 million, or over 2%. Another proposal by the Governor would move all Probation funding to the Executive Branch, while leaving 537 unfunded probation positions (\$30.2 million) in the Trial Court.

The Boston Bar Association ("BBA") has watched with great concern as the voluntary October 2008 cuts and the FY2010 budget have required reductions in or elimination of critical services for the most disadvantaged Massachusetts residents, have led to the freezing of all hiring for key court staff positions, and have adversely affected both the safety and the efficiency of court proceedings. Last year, the BBA formed a task force to investigate and report on the recent history of court funding in Massachusetts and the likely consequences for the administration of justice of further cuts to the judiciary's budget ("the Task Force"). In light of the continued dire situation of court funding in the Commonwealth, BBA President John J. Regan reconvened the Task Force to conduct a similar investigation in advance of the General Court's vote on the FY2011 budget.

As set forth herein, the Task Force concludes that further budget cuts would severely undermine the capability and adequacy of our judicial system, particularly the trial courts, which are already operating on the brink. The Task Force strongly recommends that the General Court

refrain from further cuts and ensure that the constitutionally mandated independence of the judicial branch is carefully protected.

II. The Courts' Voluntary Cuts and Improved Efficiency

Since 2003, the Massachusetts Judiciary has engaged in comprehensive reform of court management with the aim of reducing cost and improving efficiency while continuing to discharge its constitutional obligations to the citizens of the Commonwealth. In August 2002, Chief Justice Margaret H. Marshall of the Supreme Judicial Court appointed a Visiting Committee on Management in the Courts “to provide an independent perspective on the state of management in the Judiciary and to make recommendations for its improvement.” That committee’s report—known as the “Monan Report” after the Committee chair, the Rev. J. Donald Monan, S.J.—soundly criticized the state of court management and proposed detailed recommendations for its improvement. In implementing the Monan Report, the courts have focused on performance and accountability by targeting timely case processing.

One result of the judiciary’s self-directed reforms is that each of the Trial Court departments now tracks performance targets, including (among others) clearance rates, disposition within time standards, and aged cases. These indicators show a steady increase in court performance. The volume of cases disposed within time standards has risen steadily from 74.1 percent in 2006 and reached 89.7% in 2009. This improvement in court management is particularly noteworthy given that case filings have *increased* over 10% from FY2005 (1,179,769 filings) to FY2009 (1,304,494 filings). During this period, the Trial Court also experienced growing numbers of cases involving *pro se* and Limited English Proficiency litigants, which generally consume higher levels of staff resources in case processing. Unfortunately, past gains and future promise are threatened by significant cuts to the Trial Court portion of the judiciary budget. Further advances in court management cannot be made, and advances will be lost, if the serious underfunding of the courts is not remedied.

III. Severe Cuts in the Trial Court’s Budget

Significant reductions in the judicial budget began in October 2008, when Governor Patrick requested that all areas of government identify cost-cutting measures and reduce spending by approximately 7 percent. Although the executive branch had no constitutional authority to order a reduction in the judiciary’s budget, Supreme Judicial Court Chief Justice Margaret H. Marshall and Chief Justice for Administration and Management Robert A. Mulligan

immediately convened an interdepartmental fiscal task force to identify areas of possible spending reductions. The assignment was unusually difficult, given that, as leanly-staffed as the courts are, 75% of the judiciary budget is comprised of employee salaries, and the courts were already underfunded. Most importantly, the core function of the judiciary—the delivery of justice, the provision of due process, and the protection of legal rights—is not discretionary.

The courts' fiscal task force endorsed \$22 million in voluntary spending reductions. The courts' task force identified further savings measures for FY2010. The reductions have come at a substantial cost, both to the members of the public who rely on the judicial system and to employees of that system who strive to serve the public. According to the case-weighted staffing model used by the judiciary, 102 of 116 courts (88%) in the Trial Court department are staffed below their full staffing level. Because of its commitment to maintaining a lean operation, the Trial Court uses 85% of identified needs as its target for staff allocation; eighty-one (81) courts (70%) are below even that level. 49 courts (42%) operate below 75% of required staffing. As of February 25, 2010, the Trial Court had 637 fewer positions than on July 1, 2008; further personnel reductions are expected to continue through FY2010. The judiciary also relocated operations from three courthouses and is engaged in efforts to continue that process in the future.

For FY2010, the Governor ultimately proposed funding the Trial Court at \$540 million, which would have been a 7.5% reduction from the \$583.7 million budget for FY2009. The FY2010 budget was the subject of this Task Force's report dated February 5, 2009. The General Court did not adopt the Governor's figure, but it nonetheless reduced the Trial Court's FY2010 budget to \$559.5 million—a reduction of \$24.2 million (over 4%) compared to FY2009.

This year, the Governor has proposed a \$10 million reduction in the Trial Court's FY2011 budget, which amounts to 2.46% below FY2010.¹ The combination of minimal staffing and consistently high volumes of case filings (including many more *pro se* cases that produce staff-intensive demands) has placed the Trial Court at the edge of sustainability.

It is a credit to the judiciary's commitment to improved management that it has continued to perform its function at a high level while carrying out its constitutional function. But as is

¹ The Task Force understands that the Governor's proposed budget envisions separate budgets for the Trial Court (\$398 million) and Probation (\$146 million), which in previous years have been combined. The Task Force understands, however, that despite having removed all of the *funding* for Probation from the Trial Court budget, the Governor has filed legislation that would leave the Trial Court responsible for the *costs* of the Commissioner of Probation and 537 Juvenile and Probate and Family probation positions without the necessary \$30.2 million in corresponding funding.

more fully set out in the following section, the effect of the cuts has nonetheless been highly troubling. Voluntary attrition and retirement incentive programs have deprived the courts of experienced personnel who cannot be replaced. Elimination of the services of education advocates and most guardians ad litem have actual harmful consequences not just for the courts themselves, but for the approximately 42,000 people who walk into a Massachusetts courthouse each day (a figure that does not include jurors or court staff). The burdens of inadequate funding are particularly evident in the Trial Court, which has lost over 600 employees since July 2008 and—due to the continued hiring freeze—has been unable to replace them.

The Trial Court provides critical functions in protecting the community, as well as essential front-line functions for children, the elderly, and the mentally impaired in proceedings such as custody determinations, competence hearings, and restraining orders. Due in part to the reduced availability of low-cost legal services, litigants are increasingly appearing in court *pro se*—a trend that would increase the amount of time and resources needed to dispose of each case even if there were sufficient court personnel to provide advice and guidance to *pro se* litigants.² The Trial Court cannot absorb further cuts without seriously harming the delivery of justice in ways that will have a disproportionate impact on the most needy citizens of the Commonwealth; indeed, such an impact is already being felt.

IV. The Impact of Deeper Cuts on the Trial Court

This Task Force's report dated February 5, 2009, detailed several adverse impacts of budget constraints on the Trial Court, all of which have either remained in place or worsened during the past year:

- The Trial Court continues under a complete hiring freeze that leaves hundreds of positions unfilled, including positions in the security force, Clerks' Office, and Probation, notwithstanding the consistently high volume of case filings.
- Contracts with alternative dispute resolution providers were cancelled and not renewed, thereby eliminating one of the system's best options for early and less expensive resolution of controversies.

² The Boston Bar Association was approached in the past year by a Lieutenant Colonel of the United States Army's Judge Advocate General's Corps with troubling information about the effects of litigation on Massachusetts servicemembers, veterans, and military families. The Army representative reported that Massachusetts servicemembers deployed to Afghanistan, Iraq, or other foreign locations are often distracted from their military mission by the stress of legal difficulties back home, many of which must now be handled *pro se* by families navigating a legal system that does not have the resources to provide necessary assistance.

- Court use of guardians ad litem, an important part of child custody and elderly custody and competence reviews, remains restricted. This continues to produce delays in court determinations of the best interests of children and the elderly, two of the groups that are in greatest need of judicial intervention and protection.
- The Trial Court remains obligated to pay certain negotiated pay raises for 3,500 members of Office and Professional Employees International Union Local 6, who are administrative employees and similar personnel whose annual salaries begin at \$25,000 and average \$40,000. Only one year (FY2009) of that three-year negotiated contract has been funded. The union has filed a grievance that is currently in arbitration.

In the past year, the BBA has received numerous examples of the unacceptable effects of the current funding situation, of which the following are only a few representative examples:

- Several courts now have a severe shortage of court officers. In some courts, uniformed police officers are asked to provide security in courtrooms; in others, court sessions proceed without any court officer at all, creating a significant security risk for judges, litigants, witnesses, court staff, and the public.
- The Boston Municipal Court in South Boston routinely receives more petitions for substance abuse commitments than there are available treatment beds. A court clinician is available only after 1:00 p.m., with the result that afflicted individuals languish until they can be evaluated late in the day. Due to overcrowding, the agencies that administer the treatment centers must release patients early in order to make room for new admissions. Because the patients do not receive the full treatment they require, they tend to relapse more often, creating a vicious cycle of addiction and crime.
- A Boston Municipal Court judge told of a situation in which medical evaluations of three individuals were not complete until the end of the day, at which point only one treatment bed was available. When the clinician reported that all three should be committed, the judge was forced to decide which one would receive the bed and which two would be sent home.
- The Probate and Family Court in Middlesex County closed the session in Concord and no longer has sufficient sessions clerks to cover all courtroom sessions. All

assistant judicial case managers (AJCMs) now are required to attend court sessions, meaning that they generally are not available to assist the public or the bar. The BBA has received several reports of situations in which litigants or attorneys have waited hours for an AJCM to be available to respond to a simple query.

- Attorneys working in the Superior Court have relayed numerous stories of lengthy waits for rulings on dispositive motions and the scheduling of hearings as reductions in both court staff and clerks have resulted in an increasingly overburdened judiciary. Attorneys told of cases that directly affected the health of their clients, including one case where a contentious family business matter had caused a severe strain on the physical health of the parents involved. In another case, a victim of an alleged assault and battery who suffers from severe facial injuries had hearings on dispositive motions postponed for several months due to cutbacks. The individual's health has been prejudiced due to the delay.
- On one day in the Housing Court, 203 cases were on the docket: in those cases, 189 tenants appeared *pro se*, as did 43 landlords. This necessarily lengthens the proceedings as judges and court staff must assist the litigants in understanding the process.³
- Of the over 600 employees who have left the Trial Court since July 2008, several did so pursuant to two retirement incentives, the most recent of which required retirement no later than October 31, 2009. The consequence has been the loss of some of the most experienced court personnel, none of whom can be replaced due to the hiring freeze.

V. Real-Life Impact on Commonwealth Residents

The underfunding of the judiciary can no longer be dismissed as a need for judicial belt-tightening. Rather, the courts' plight is having real-world consequences for many Massachusetts residents.

³ A special committee appointed to improve services to *pro se* litigants recently identified several creative cost-savings initiatives, including development of electronic resources and referral guides and increased assistance through technology. Such measures will be more challenging in the current budget environment.

Cases Involving Mental Illness and Antipsychotic Medications. Cases in which antipsychotic medications are required will inevitably be delayed due to a lack of court-appointed personnel to monitor the treatment (so-called “Rogers monitors”). Cases requiring civil commitment of persons with mental health issues are likewise delayed due to the reduced number of guardians ad litem. Such reductions can pose severe health and safety threats.

Custody, Restraining Order, and Competence Cases. Many of the reductions in court services have already adversely affected the most vulnerable among us, including children, the elderly, and the mentally incompetent, for whom guardians ad litem, restraining orders, and prompt proceedings may be the last bulwark against mistreatment, violence, or neglect. Further cuts will greatly reduce the capacity of the Probate and Family Court to deal in a timely and safe fashion with sensitive child custody matters and competence and custody matters involving the elderly. For example, one litigant told of a situation where she spent one and a half hours in Probate Court attempting to file a motion for an emergency hearing to prevent a family member from being put into a nursing home; the earliest court date she was able to obtain on this emergency matter was three weeks away. Similarly, a probate attorney attempting to obtain a divorce order addressing imminent issues such as child support and mortgage payments on the primary residence waited over a month.

Juvenile Cases. The Juvenile Court will confront increasing difficulty in offering timely assistance to troubled youth before they “age out” and find themselves thrust into a criminal justice system ill-equipped to deal with them. The Juvenile Court now has fewer guardians ad litem at its disposal and no education advocates, who previously played a critical role in identifying suitable educational placements or programs for children, many of whom have significant health and behavioral problems.

Housing Cases. The Housing Court is likewise facing major challenges in dealing promptly with eviction proceedings, where valid defenses to eviction may exist, thereby increasing the already swollen ranks of homeless individuals and families, overburdening shelters that have minimal additional capacity, and ultimately resulting in increased costs to the Commonwealth for more expensive forms of alternative housing (*e.g.*, motels).

Business Cases. Massachusetts has developed a strong reputation for resolution of business cases, including but not limited to the Business Litigation Session in the Superior Court for Suffolk County. Across the Commonwealth, businesses rely on the ability to obtain prompt

resolution of disputes as well as on their employees' ability to resolve their personal legal issues without having to be unduly distracted from their work responsibilities. To the extent that court underfunding makes it more difficult for Massachusetts companies and employees to navigate the court system successfully, the Commonwealth's economy necessarily suffers.

Cases Involving Servicemembers, Veterans, and Military Families. Among the burgeoning population of *pro se* litigants are veterans returning from Iraq and Afghanistan. Many veterans are confronted by legal problems that have remained untended for months or years.

VI. Impact of Reductions on Revenues Generated by the Courts

As always, efforts to balance the budget obviously must consider the revenue side as well as the expense side. Revenue collection of filing fees and probation supervision fees has grown from \$72.3 million in FY2003 to \$126.8 million in FY2009. The probation component of those totals grew from \$8.9 million in FY2003 to \$21.7 million in FY2009 and is expected to increase even further for FY2010, due to concerted efforts to educate court and probation employees, increases in fee levels, and diligent collection of fees. In FY2009, the courts retained only about \$41.7 million of the \$126.8 million in revenues they generated.

The FY2010 budget allowed the Trial Court to retain up to \$27 million of the revenue it earned. Generated revenue projections for FY2010 are projected to total \$78.3 million. The first \$53 million collected goes back to the General Fund, meaning that the Trial Court will retain only \$25.3 million, or \$1.7 million short of the maximum. The Task Force understands that the Governor's proposed budget for FY2011 eliminates retained revenue accounts and funds the judiciary out of appropriations only. The contribution by the courts of substantial remaining revenues to the Commonwealth's coffers should not be overlooked in the budget process. Additionally, it should be remembered that cost reductions that affect the ability of the court system to function will have negative repercussions on the Commonwealth's revenue from judicial sources.

VII. Conclusion and Recommendations

The BBA recognizes that the Governor's proposed budget for FY2011 has been completed and submitted to the General Court. As a result, these recommendations are directed to the latter, with the hope that the principles set forth in this Report will assist in shaping the final budget as it affects the FY2011 budget for the judiciary. Inherent in these

recommendations is the recognition that it is incumbent upon the Chief Justice of the Supreme Judicial Court and the Chief Justice for Administration and Management to continue their own diligent efforts to ensure that the judicial branch runs as economically and efficiently as possible.

The BBA continues to be of the view that this fiscal responsibility and obligation *must* constitutionally be vested in the judicial leadership, and not in another branch of government.

- (1) The Task Force recommends that the General Court approve maintenance funding for the judiciary. Stated in approximate numbers, the Task Force recommends a FY2011 maintenance budget for the Trial Court of \$565.8 million (including Probation), for the Supreme Judicial Court of \$9.2 million, and for the Appeals Court of \$11.3 million. The total recommended judiciary budget for FY2011 is therefore approximately \$586.3 million (including Probation). The Task Force believes that this funding level—rather than the Governor’s proposed reduction in the judicial budget—is warranted given that the judiciary starts from a position of serious underfunding, which has already had a severe adverse impact, as described above.⁴
- (2) In order to allow the Chief Justice for Administration and Management (“CJAM”) to manage his budget effectively in these dire economic times, the Task Force continues to recommend that the CJAM be granted authority, with full reporting responsibility to the General Court, to transfer funds as he deems necessary and appropriate between any of the Trial Court’s line items for the balance of FY2010 and for FY2011.⁵
- (3) The Task Force urges continued vigilance to ensure that the constitutional separation of powers is observed and protected. Such vigilance should include, but is not limited to, continuing to ensure that the executive powers under M.G.L. c. 29, section 9C are limited to the reallocation of funds solely within the executive branch. Ensuring that the executive does not have control over the allocation of funds within another branch of government is essential to the mandate of Article 30 of the Massachusetts Declaration of Rights, which provides that “[t]he executive shall never exercise the legislative and judicial powers.”

⁴ The maintenance budget includes unavoidable expense increases, including operating costs for the new Fall River courthouse (scheduled to open in May or June 2010) and “step” increases for low- and mid-level employees.

⁵ The Task Force notes that the Governor’s proposal removes the Probation line items from the Trial Court’s account. If these items are restored, the CJAM should be authorized to transfer these funds in order to carry out his mandate completely