

**Report of the  
Boston Bar Association  
Task Force on the  
FY 2010 Judiciary Budget**



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# **REPORT OF THE BOSTON BAR ASSOCIATION TASK FORCE ON THE FY 2010 JUDICIARY BUDGET**

## **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 citizens 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. In October of 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 was minimal on the Commonwealth's total budget because the judiciary typically accounts for only about 2 percent of that budget, the effort was commendable.

The Boston Bar Association ("BBA") has watched with great concern as the voluntary October 2008 cuts have adversely affected the efficiency of court proceedings, frozen hiring for key court staff positions, and reduced or eliminated critical services for the most disadvantaged Massachusetts residents.

The Governor's proposed FY2010 budget calls for an additional \$24,000,000 reduction in the judiciary's budget. In order to ensure that the views of the BBA would be timely presented to the General Court before the latter acts upon the Governor's proposed FY2010 budget, BBA President Kathy Weinman 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 if further cuts to the judiciary's budget are enacted ("the Task Force").

As set forth in this report, the Task Force concluded that further budget cuts would seriously threaten the delivery of justice in Massachusetts. This is true most notably because such additional budget cuts would exacerbate significant reductions in key functions that have already adversely impacted the administration of justice. The burdens of inadequate funding have fallen, and will continue to fall, disproportionately upon the Commonwealth's most disadvantaged residents and upon court employees who already bear the weight of understaffing.

The Task Force strongly recommends that the General Court ensure that the Commonwealth's courts are adequately funded and able to deliver effective justice to all, and that the constitutionally mandated independence of the judicial branch be carefully protected.

## **II. Impact of Budget Cuts on Court Management Reforms**

In August of 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." Six months later, that committee issued the so-called "Monan Report," named for the Committee's chair J. Donald Monan, S.J. The Monan Report soundly criticized the state of court management, and proposed detailed recommendations and an implementation plan. Over the ensuing several years, major strides have been made in managing the courts, although work remains to be done. Unfortunately, significant cuts to the Trial Court portion of the judiciary budget threaten the management reforms introduced to date and the significant progress made.

Following the Monan Report, efforts have been made to focus on performance and accountability by targeting timely case processing. To that end, each of the Trial Court departments uses time standards and tracks clearance rates, disposition within time standards, and aged cases, among other performance targets. The volume of cases disposed within time standards has risen steadily from 74.1 percent in 2006 to 89.8 percent in the third quarter of 2008.<sup>1</sup> This noteworthy performance improvement has occurred at the same time that case filings have increased 13 percent from FY2005 to FY2008 and 19 percent since FY2001, and at a time that the Trial Court is experiencing growing numbers of *pro se* and Limited English Proficiency (LEP) litigants.<sup>2</sup>

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<sup>1</sup> This information can only be tracked and reported because of the multi-year implementation of MassCourts, the web-based case management system that enables the data collection and information-sharing needed to track case progress and timeliness. The many efficiencies made possible by this robust system now include over 500 daily transmittals to the Registry of Motor Vehicles and 13,000 monthly transmittals to the Committee for Public Counsel Services. As MassCourts is expanded fully across all departments, additional efficiencies will be realized. The development and training associated with the introduction of the system have been staff and time intensive; therefore, these critical future conversions would be jeopardized by further staff reductions.

<sup>2</sup> As discussed in the next section, *pro se* litigants, as well as those with English language difficulty, require higher levels of staff resources.

These court management improvements, both with regard to substantively improved performance and with regard to capabilities to track performance, are, by their very nature, staff intensive. Remarkably, the improvements have been made against a staffing model that demonstrates that 95 of 116 courts are staffed below their needs level, and 64 courts are below the lean targeted objective of 85 percent of required staffing. With such minimal staffing, with higher levels of case filings, and in the face of staff-intensive demands of new populations of litigants, the Trial Court has been functioning at the edge of sustainability. The informal hiring restrictions voluntarily imposed by the Chief Justice for Administration and Management in July of 2007, compounded by the formal hiring freeze in October of 2008, have left the Trial Court with no margin.

Further advances in court management cannot be made, and advances will be lost, if the serious under-funding of the courts is not remedied.

### **III. October 2008 and Its Aftermath**

By October of 2008, a scant three months into FY2009, Governor Patrick faced a stark realization: actual revenues would not meet budgeted revenues for that fiscal year. Substantial cuts in spending were therefore necessary. The Governor 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 over the co-equal judicial branch, and therefore could not 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 a task force to identify areas of possible spending reductions. The assignment was an unusually difficult one, given that fully 75 percent of the Trial Court budget is comprised of employee salaries in a leanly staffed judicial branch;<sup>3</sup> that the core function of the judiciary, *i.e.*, the delivery of justice and the protection of legal rights, is not discretionary; and that the courts were already under-funded.

Despite the difficulties, the task force successfully identified reductions to satisfy the Governor's request, and the judiciary accepted \$22 million in spending reductions, thereby

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<sup>3</sup> As noted in the preceding section, at least 95 of 116 courts are already staffed below identified needs as determined by a case-weighted staffing model. Because of its commitment to maintaining a lean operation, the Trial Court uses 85 percent of identified needs as the target for resource allocation, and 64 courts are below even that level. Since implementation of the informal hiring restrictions in July of 2007, the Trial Court has almost 100 fewer positions than it did before July of 2007.

voluntarily meeting the Governor's target reduction for the judicial branch. In a branch as lean as the judiciary already was, the reductions came 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. Examples of the adverse impact of the reductions include the following:

- (a) Negotiated pay raises for 3,500 members of Office and Professional Employees International Union Local 6 ("OPEIU Local 6"), administrative employees and similar personnel whose annual salaries begin at \$25,000 and average \$40,000, were unilaterally deferred.
- (b) The informal hiring restrictions in place since July of 2007 were formally extended as a hiring freeze. As a practical matter, this meant that, at the Trial Court, positions in the Clerk's Offices would continue to go unfilled at a time when case filings were growing.<sup>4</sup> At the appellate level, the Reporter of Decisions serving both the Appeals Court and the Supreme Judicial Court would continue to function with two unfilled staff positions.
- (c) Non-employee per diem court reporters, the stop-gap measure by which the Trial Court had managed to keep sessions operating even in the face of a shortage of salaried court reporters, could no longer be used, with resultant delays of trials.
- (d) Contracts with alternative dispute resolution providers have been cancelled at a time when Trial Court filings are increasing, thereby eliminating one of the system's best options for an early and less expensive resolution of controversies.
- (e) The use of per diem guardians ad litem, an important part of child custody and elderly custody and competence reviews, was significantly reduced, leading to delays in determinations as to the best interests of children and the elderly, two of the groups that are in greatest need of judicial intervention and protection.

Regrettably, many of these reductions have already adversely affected the most vulnerable among us, from children, the elderly, and the mentally incompetent for whom guardians ad litem may be the last bulwark against mistreatment or neglect, to visitors and immigrants for whom the stress of court proceedings is exacerbated by a language barrier. These vulnerable residents are now relegated to awaiting the availability of employee guardians whose

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<sup>4</sup> As also discussed in the preceding section, according to records of the Trial Court there were 1,179,769 case filings in FY2005. In FY2008, that number increased by 13 percent to 1,329,868.

numbers are far too few because of earlier cuts. For these disadvantaged residents, justice delayed will unavoidably become justice denied. Similarly, court employees who can least afford the financial burden are being told that the 3 percent raises to which they are contractually entitled are indefinitely postponed.

#### **IV. The Projected Impact of Continuing and Deeper Cuts**

As discussed above, certain members of the public and certain employees are already paying an unacceptable price for current cost reductions. Given the lean funding of the judicial branch even before the October 2008 reductions, the preferred course would be for the General Court to fund the judiciary at the same level as it did in FY2009, before the October reductions, in order to reverse some of the damage already done as described above. If that is not possible, the judiciary should, at the very least, be funded at the adjusted FY2009 level, with an add-on in the Trial Court's budget to cover the obligations to the employees of OPEIU Local 6.

The importance of guardians ad litem, and court reporters to the functioning of a court system is obvious. If the Trial Court cannot afford to provide these basic functions through employees of the Commonwealth, it must be able to do so through the independent contractors known as per diems. If it cannot provide the necessary services even on such a stop-gap basis, the system simply cannot administer justice, especially to those who are most in need of assistance.

The current state of the economy is expected to increase the demands on judicial employees who are already unduly burdened because of under-staffing. During the recent economic slump, legal service agencies have experienced a 35 percent increase in people seeking legal assistance and must turn away a majority of the increasing requests for representation. With no other options, those who must seek judicial redress and cannot afford to retain private counsel are relegated to proceeding *pro se*. For *pro se* litigants, Clerk's Office staff provide the best hope for successfully navigating the court system. Unfortunately, at the same time that the need for personnel to assist *pro se* litigants is increasing, the hiring freeze has reduced the number of available staff to assist such litigants.

Further budget cuts will exacerbate this already difficult situation.<sup>5</sup> This is expected to give rise to particular concerns in the following contexts:

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<sup>5</sup> For example, further budget cuts will prevent the courts from fulfilling the creative and cost saving initiatives recently identified by a special committee appointed to improve services to *pro se* litigants. The hoped-for training

- (a) The Probate & Family Court will have insufficient capacity to deal in a timely and safe fashion with sensitive child custody matters and competence and custody matters involving the elderly.
- (b) The Juvenile Court, created for the very purpose of assisting children at risk before youthful indiscretions and misbehavior become adult crimes, 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.
- (c) The Housing Court will be unable to deal 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.*, hotels), in addition to causing extreme personal upheaval and heartache.

#### **V. Impact of Reductions on Revenues Generated by the Courts**

Efforts to balance the budget obviously must consider the revenue side as well as the expense side, a fact that may sometimes be overlooked with regard to the budget of the judicial branch. Revenue collection of filing fees and probation supervision fees has grown from \$72.3 million in FY2003 to \$123.5 million in FY2008. The probation component of those totals grew from \$8.8 million to \$22.7 million through a concerted effort to educate court and probation employees. In FY2008, the courts retained only about \$43 million of the \$123.5 million in revenues generated. The Task Force understands that the Governor's proposal for FY2010 will permit the Trial Court to retain an additional \$4 million, half of which is to be generated in new revenues and half in increased retention from probation fees. The contribution of the substantial remaining revenues to the Commonwealth's coffers should not be overlooked in the budget process. Cost reductions that affect the ability of the court system to function at full throttle may also result in reduced revenues to the Commonwealth.

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of court staff and members of the judiciary will not take place, and the development of electronic resources and referral guides, as well as increased assistance through technology will no longer be possible.

## Recommendations

The Task Force recognizes that the Governor's proposed budget for FY2010 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 FY2010 budget for the judiciary. Inherent in these Recommendations is the recognition that, if the Governor's anticipated proposal to reduce the judicial budget further is to be rejected, 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. It is the position of the BBA 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 urges continuing vigilance to ensure that the doctrine of separation of powers is observed and protected. Such vigilance should include, but is not limited to, continuing to ensure that the executive's 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."
- (2) The Task Force recommends that the General Court approve maintenance level funding at the original FY2009 level. Stated in approximate numbers, for the Trial Court, the requested maintenance budget for FY2010 is therefore \$605 million, for the Supreme Judicial Court \$9.6 million, and for the Appeals Court \$11.6 million. The total recommended judiciary budget for FY2010 is therefore approximately \$626 million, as contrasted with the Governor's proposal of \$580 million. The Task Force believes that maintenance level funding at the original FY2009 level is warranted given that the judiciary starts from a position of serious under-funding, the judiciary voluntarily answered the Governor's call in October of 2008 by accepting a significant reduction in its FY2009 budget, and the current level of under-funding has already caused adverse impacts on the public and at least some employees of the Trial Court. However, if the General Court concludes that the judiciary's budget cannot be maintained at the original

FY2009 level, the Task Force strongly urges that the budget at the very least be maintained at the reduced FY2009 level, with an upward adjustment for the Trial Court to meet the Trial Court's obligations to the members of OPEIU Local 6. That amount for the Trial Court is \$583 million plus such amount as is necessary to meet the referenced obligation to the OPEIU members. For the Supreme Judicial Court, the reduced maintenance level funding is \$9.2 million and for the Appeals Court \$11.2 million. The total reduced budget would therefore be approximately \$603.4 million, plus the amount required to meet the referenced obligation to the OPEIU Local 6 members.

- (3) 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 recommends that the CJAM be granted expanded authority, with full reporting responsibility to the General Court, to transfer funds as he deems necessary and appropriate for the balance of FY2009 and for FY2010.
- (4) The Task Force recommends that long-term study be given to whether the extreme disparity in the relative funding of the three co-equal branches of government, with the judiciary at only a little over 2 percent of the total state budget, is wholly justified by the differing roles and responsibilities of the three branches. Care should be given to ensuring that no part of the disparity is a function of the lesser voice of the judicial branch in the budget process, given that the judiciary has neither the executive's power to propose the total budget nor the legislature's power to enact it.