

# Massachusetts Bar Association

## Annual Address

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This annual event is perhaps the most visible occasion on which the judiciary and the bar stand together. But every day of the year, from Boston to Greenfield, in pro bono programs and on court committees, through law reform efforts, legal educational seminars, and civic education programs, the leaders and members of the Massachusetts Bar Association work to strengthen the Judicial Branch, and to bring more perfect justice to the people of Massachusetts. You are our indispensable allies. On behalf of all of the judges and the judicial staff of this Commonwealth, I thank you.

On this, my tenth anniversary of speaking to you as Chief Justice, would that I could take this opportunity, as I often do in my annual address to you, to celebrate the many, many recent achievements on the road to excellence that have been flowering in our courts. I wish that I could dwell on the successful, sweeping managerial reforms that have made, and continue to make, the Judicial Branch of this Commonwealth admired across the country. I wish I could take this time to acknowledge some of the extraordinary people, inside the judiciary and out, who have made those achievements possible.

But this year is no time for celebration, no time for congratulations. Why? In a word: crisis -- a deepening crisis -- with funding cuts that are putting great strain on our courts. Justice is in jeopardy in Massachusetts. These are strong words, and I use them with care.

Let me be clear from the outset. A year of global financial turbulence has drained the treasuries of virtually every state, including Massachusetts. A huge swath of the private sector, including the private bar, has felt the sting of contraction. From day one of this crisis, I committed the judiciary to work with the Governor and the Legislature to shoulder the judiciary's fair share of the fiscal misery. For well over a year, judicial leaders -- judges and staff -- have

worked ceaselessly to devise and implement meaningful cost-saving measures that do not compromise the Judiciary's ability to hear and to decide cases promptly and fairly.

All three branches of government have worked together because we all recognize that courts that resolve cases promptly and fairly are well-functioning courts, and well-functioning courts are essential to the people's security, freedom, and prosperity. Courts are the arbiters of personal and property rights. They provide orderly, accessible dispute resolution. They protect against arbitrary government action. Courts are where the people go to find justice.

On average, every working day, 42,000 people, excluding jurors and court staff, come to our courthouses. 42,000 people each day. Some may not know that the Massachusetts Constitution guarantees them justice delivered "completely . . . promptly, and without delay."<sup>1</sup> But surely that is what they expect, and that is what they have a constitutional right to expect.

Yet prompt, effective justice is what our trial courts are losing the capacity to deliver. Recent cuts to the Trial Court's budget have been massive, they are ongoing, and they are disproportionate to the cuts requested for, or implemented in, many other sectors of state governments.

I begin with the numbers. One year ago, in October, 2008, at the request of Governor Patrick and in light of shrinking revenues, the Trial Court voluntarily cut its operating costs by \$22.1 million, from \$605 million to roughly \$583 million. In reverting this money to the Commonwealth, Chief Justice Robert A. Mulligan implemented stringent measures: an across the board "hard" hiring freeze; the wholesale elimination of court-based alternative dispute resolution programs; the termination of all per diem court reporters and, later, all per diem

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<sup>1</sup> Article 11 of the Declaration of Rights of the Massachusetts Constitution.

personnel; and a sharply reduced budget for court-appointed guardians ad litem. With the help of a committee headed by Chief Justice Lynda M. Connolly and Chief Justice Steven D. Pierce, we searched every nook and cranny of operating expenses -- library materials, supplies, utilities, all expenses -- to identify and to eliminate costs.

The significant cost reductions, it turns out, were but a prelude. For Fiscal Year 2010, which began on July 1 of this year, funding for the Trial Court is set at \$554 million. That is, about \$50 million -- nearly ten percent -- less than the initial appropriation for the last fiscal year.

And here is the truly dismal news: the bleeding has just begun. Although some have claimed that the private sector is beginning to recover from the economic downturn, the forecast for the Commonwealth's revenue collections remains bleak. Further cuts in Fiscal Year 2010 are likely. Just this month, the Chair of the House Ways and Means Committee described September tax collections as "worse than what I actually thought would be the worst-case scenario." Revenues, he said, "are going down, and they're not coming back anytime soon."<sup>2</sup> The Chair of the Senate Ways and Means Committee recently predicted "significant cuts" in spending, saying, "we don't have any margin of error anywhere."<sup>3</sup> The budgetary forecasts for Fiscal Year 2011 and Fiscal Year 2012 presage more fiscal pain.

Who will bear the brunt of this pain? Everyone who seeks access to our courts. Already the evidence is clear. The place where the Trial Court budget cuts to date are steepest are at the counters in our courthouses, the place of access for most court users. From July 1, 2008, to the

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<sup>2</sup> Quoting "Murphy Echoes Panagiotakos's Doomsday Talk on Revenues," Statehouse News Service, Oct. 6, 2009.

<sup>3</sup> State House News Report - October 8, 2009.

end of this month, October 31, 2009, the Trial Court will have reduced its workforce by a 7.5 % reduction. By the end of this month, 570 fewer Trial Court employees will be available to file and docket cases, to send out notices to litigants and lawyers, to answer the public's questions, to assist judges in legal research, to staff court sessions, to monitor probationers and secure our courthouses, and to keep cases moving through the system. By year's end, trial court staffing levels will be slightly more than two-thirds of the appropriate, the *necessary*, service levels identified for us by an independent, objective model developed by the National Center for State Courts, the nation's expert on that subject.

Courthouses, too, have fallen to the budget axe. To save money, Natick District Court has temporarily relocated to Framingham, and Winchendon District Court to Gardner. The lease for Lawrence Juvenile Court has been terminated, and that court has moved to the Fenton Judicial Center. Lease costs for court facilities have been reduced by \$1.8 million at sixteen Trial Court locations, and lease costs for the Administrative Office of the Trial Court at Center Plaza were reduced by \$1.5 million this fiscal year.

But here is the real sting. The Judicial Branch is being asked to absorb a disproportionate amount of the necessary reductions in government spending. The Judicial Branch accounts for just 2.1 % of all state spending in the Commonwealth. The 7.5 % reduction that has occurred in our workforce to date compares with far lower reductions taken throughout the rest of state Government, based on public sources.

The Massachusetts Constitution establishes three co-equal branches of government. The disproportionate share of budget reductions falling to the Judiciary comes at the worst possible time for the people of Massachusetts. When foreclosures in the Land Court now take six months

instead of six weeks, uncertainty is needlessly prolonged for all concerned. When it takes six to eight weeks longer to appear before a Probate and Family Court judge with a complaint for nonpayment of child support, families teeter on the edge of disaster. When Juvenile Court probation officers are pulled from the Boston public schools because staff reductions require them to be elsewhere, we lose a deterrent to delinquency and crime, and we are all less safe. When a vulnerable senior citizen cannot obtain an order of abuse protection from the local courthouse because there is no more local courthouse, how do we quantify that misery? And what do reductions in court staff mean for the judiciary's ability to collect the target of \$131 million in much-needed revenue for the Commonwealth?

Businesses, reasonably enough, cut back on expenses when business slows. The judicial branch is being forced to cut back its operations when claims for our services have intensified. The Register in Bristol Probate and Family Court, for instance, reports that complaints for modification of child support rose more than 18% in Fiscal Year 2009 over Fiscal Year 2008.<sup>4</sup> The delivery of justice is, of necessity, people intensive, and the need for justice does not diminish with a shrinking economy. Courts do not have the luxury of taking a breather while the financial markets sort themselves out. Court users may shy away from big purchases in bad economic times, but at such times they need access to the courts more than ever.

There are other signs that the recession has a direct effect on our ability to deliver justice. The explosion of litigants who proceed without counsel because they cannot afford a lawyer shows no signs of abating. The growth of immigrant populations has increased the need for

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<sup>4</sup> Curt Brown: "Region's sluggish economy reflected in Probate Court—child support reduction requests up, divorce filings down," *Standard Times* (New Bedford), Oct. 11, 2009 (on file).

interpreter services in languages from Spanish, Portuguese, Vietnamese and Russian, to Twi and Quiche. Problems have replaced issues as matters for judicial decision, and rarely can these problems be resolved by a single court event. My counterpart in New York, Chief Justice Jonathan Lippman, has it exactly right: "Whether we like it or not," he observes, "the state courts are in the eye of the storm; we have become the emergency room for society's worst ailments -- substance abuse, family violence, mental illness, mortgage foreclosures, and so many more."<sup>5</sup>

Courts do not solicit business, nor may we turn it away. We do not pick and choose cases, or which constitutional or statutory duties we wish to carry out. Thirty years ago, domestic violence was considered a private matter between a husband and a wife. Then, in 1978, in the face of overwhelming evidence of the individual and social harm caused by domestic abuse, the Legislature enacted General Laws c. 209A, the domestic abuse prevention statute. Chapter 209A tasks the courts with issuing and enforcing protective orders to shield family members, often children, from the scourge of domestic violence. In the years since the law was first enacted, the Legislature has made abuse prevention a matter of the highest public priority. Again and again it has strengthened Chapter 209A, it has passed anti-stalking measures, it has enacted other measures to keep family members safe from intimate violence. And each time the Legislature has increased the obligations of judges to protect the victims of domestic abuse. In 2008 alone, approximately 35,000 women, children, and men sought and obtained Chapter 209A abuse prevention orders against violent family members, many representing themselves.

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<sup>5</sup> Future Trends in State Courts, 2009, National Center for State Courts, quoted by Honorable Christine M. Durham, 2009 State of the Judiciary, January 9, 2009.

Are we now prepared to tell a woman who seeks a protective order for herself and her children to come back next week because budget cuts have forced the court to close for a day or more? Is that message consistent with the strong public policy of Chapter 209A?

The closure of court sessions, the closure of more courthouses, is inevitable -- inevitable -- if the already decimated Trial Court budget is further reduced. I mentioned earlier that an average of 42,000 people enter our trial courts every day. That is a huge number of children, men, and women on whom to close the door. If even a handful of our Massachusetts courthouses is closed for a day a week, or even a few hours a week, that is a significant amount of time lost in moving cases to resolution. Juvenile cases and criminal cases and business cases and adoptions and foreclosures -- the list goes on.

I am cautious in my pronouncements. I do not point fingers. As Chief Justice, however, as one who has labored long and hard to bring *lasting* reform to the administration of justice in the Commonwealth, and to broaden access to justice, as one who is passionate about the importance of courts to a free people, I cannot, I shall not, ignore that our courts are at a moment of peril.

I sometimes hear the claim that courts are "without a constituency." As someone who grew up under a repressive regime in which the so-called justice system served only the most powerful, the assertion that the Commonwealth's courts are without a "constituency" is deeply painful to me. The people of Massachusetts understand that courts are the ultimate refuge for their rights, the arm of government in which they can demand, and receive, justice. The constituency of the courts? They are in this room. They are riding the T. They are in the

schoolyard. They are in homes and in shelters. They are on Main Street in three hundred fifty-one cities and towns across this Commonwealth.

In this moment of crisis, the Judiciary, the Legislature, and the Governor must work together to think strategically about significant changes in court structure, in court locations, in court budgets to address the evolving circumstances. The gigantic strides made by the judicial branch in just six short years to revolutionize its management practices -- strides that have been recognized and applauded nationally -- can leave no doubt about this Judiciary's commitment to continuous and creative improvements.

Let me mention some positive developments that have enabled us to manage more effectively. The Legislature's supplemental budget for the Trial Court and its consolidation of many line items in our budget have indeed made a difference. Also helpful is the Legislature's increase of certain Trial Court fees to assist the Court in reaching its retained revenue goals. These measures have increased the flexibility and eliminated some of the cumbersome red tape under which the Trial Court must labor. A single, unified budget for the Trial Court would go even further, much further, in freeing up administrative resources for where they are most needed.

One recent change in the way the Trial Court is funded, however, is counter-productive. I am speaking of the creeping practice of funding the courts through what is referred to as retained revenues. "Retained revenues" is a fancy umbrella term for fines, probation fees, and other costs charged directly to, and collected from, court users that are then made available to the judiciary under certain constraints. The catch? Unless the judicial branch collects those fees, the "retained revenues" ostensibly appropriated for our budget simply are not available. In short, we

cannot rely on these so-called "appropriations" because many forms of retained revenue are notoriously difficult to collect.

How serious is this? Nearly ten percent of the Trial Court's Fiscal Year 2010 budget -- \$53 million of \$554 million -- is slated to come directly from court users, but *only* if the fees can be collected. Twenty-six million of this \$53 million is targeted to come from the collection of probation fees, a 20% increase over the amount collected last fiscal year. Worse, the Trial Court is permitted to retain \$27 million from filing fees only *after* it collects a "floor" of \$53 million in fees that go to the general Treasury.

Fee increases may be necessary to meet retained revenue targets, but such increases work additional hardship on Massachusetts court users, who already pay some of the highest state court filing fees in the nation.<sup>6</sup> The result? Higher filing fees may inhibit the filing of meritorious actions and the vindication of important rights.

The Massachusetts Constitution commands that "Every" -- *every* -- "subject of the commonwealth" shall have the right to obtain "justice freely . . . completely, and without any denial; promptly, and without delay; conformably to the laws."<sup>7</sup> No "subject of the Commonwealth" should ever have to wonder whether he can afford to file a case, or whether the fine she has been assessed was influenced by pressure on a judge to prevent the layoff of judicial staff. Excessive reliance for funding the court from retained revenue is unrealistic and unfair -- unrealistic and unfair to the judicial branch, but most importantly to the people of Massachusetts.

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<sup>6</sup> Civil Filing Fees in State Trial Courts, 2009, published by National Center for State Courts, available at <http://contentdm.ncsconline.org/cgi-bin/showfile/exe?CISOROOT=/financial&CISOPTR=137>.

<sup>7</sup> Article 11 of the Declaration of Rights of the Massachusetts Constitution.

The question we face today is not whether the judiciary can operate under severe constraints. We have shown that we can. Judicial leaders foresaw early that deep cuts in our Fiscal Year 2009 and Fiscal Year 2010 budgets were inevitable. I am proud of the prompt measures we took, and the painful management decisions we made, in the face of huge budget reductions. The decisions have limited the impacts on our core mission: the delivery of justice. The question now is whether, under further severe constraints, our courts can operate effectively at all.

It may be, in thinking through costs and benefits, that some aspects of our court model are now unsustainable. Is courthouse consolidation an answer? Should some matters now heard by judges be handled administratively? Changes will require flexibility, creativity, and collaboration. And no plausible change should be off the table.

It may also be that certain costs savings are ultimately self-defeating. Can we in Massachusetts really afford to do away with all court-based alternative dispute resolution programs in our trial courts -- programs that make it faster, easier, and cheaper for people to resolve their disputes? Can we really afford to come close to eliminating the budget for court-appointed guardians ad litem when doing so means that children in distress remain longer in chaotic circumstances, and will need more government services down the road?

Like all of you, I recognize the often heartbreaking consequences that have flowed from budget cuts in social services to the Commonwealth's most vulnerable residents. Domestic violence shelters closed. Programs for mentally disabled adults and children, for families on transitional assistance, for homeless veterans, and the elderly, drastically cut or eliminated. The

cuts in these services, so important to the welfare of our community, represent public policy choices, a complex amalgam of advocacy, negotiation, and compromise.

Justice is not a public policy choice. Justice, delivered in our courts, is a constitutional imperative. The residents of Massachusetts could no sooner make do with a functionally disabled Judiciary than they could with a functionally disabled Governor's office or a functionally disabled Legislature. Indeed, the courts are where the Commonwealth's most vulnerable residents will go to vindicate their rights.

Every one of us, in and out of state government, has a role in keeping our courts viable. This brings me to my last point: the pressing need for advocacy for the courts by individual members of the bar.

As I speak, the Massachusetts Legislature has been asked by Governor Patrick to expand his budget authority over the other branches of Government. To my knowledge, such expansion would be unprecedented in the two hundred twenty-nine year history of our constitutional democracy. I urge all of you, *personally*, to contact the Governor and your legislators. Telephone them; sit down with them at their offices. Let them know, in no uncertain terms, that there is a constituency for the delivery of justice, that there is a constituency for maintaining our democracy. Never has your individual voice been more needed. Can we take the risk that your state Senator, or your state Representative, or the Governor will construe your silence as approval?

I began my address by saying that this is not the moment for celebration. Indeed it is not. But as I look around this room, as I think of the ten years in which I have had the honor to serve as Chief Justice of this Commonwealth, I must tell you how very proud I am of all that we have

accomplished together. I am privileged to know so many of you personally, and others through your positive work in our courts and communities. With your help I know that our courts will emerge from these challenging times more vital, vibrant, and effective in the delivery of more perfect justice.

Thank you.