



**Boston Bar**  
A S S O C I A T I O N

# **Justice on the Road to Ruin:**

Report of the Boston Bar Association  
on the FY 2012 Judiciary Budget

May 2011

**"The Trial Court's ability to deliver timely justice is, without exaggeration, at the breaking point."**

**Testimony of Honorable Robert A. Mulligan  
Chief Justice for Administration and Management  
Joint Committee on Ways and Means  
February 25, 2011**

Given the Commonwealth's historic attention to an independent and functioning judiciary; the dependence of so many on effective judicial intervention; and the surprisingly small amount of public funds expended by the judicial branch in comparison to the state budget as a whole, this is a chilling statement by the judicial officer in charge of the Commonwealth's trial courts. Yet the statement is without question true and the situation will worsen absent immediate steps to rectify it.

#### HOW DID WE GET HERE?

As we debate the allocation and distribution of state appropriations for fiscal year 2012 (July 1, 2011-June 30, 2012), and specifically the allocation of funds for the Trial Court of the Commonwealth, it is important to put in context the dollar amounts at issue. From fiscal year 2009 to the present, the trial court has been systematically starved of resources with few voices raised in opposition.

In fiscal year 2009, the Legislature appropriated \$605.1 million for trial court operations. With that fiscal year less than one-third completed, the United States and the Commonwealth entered into a recession of historic proportions, state revenues fell, and the Governor called for virtually across-the board reductions in state governmental spending. Although the judicial branch of government, for reasons of long-respected principles of separation of powers, could not be compelled by the Governor to withhold expenditure of any portion of its lawfully enacted

appropriations, the trial court nevertheless agreed voluntarily to forego a substantial level of expenditure, and managed to reduce its spending by approximately 3.5% during fiscal year 2009.

The history of governmental appropriations in Massachusetts and elsewhere demonstrates that budget-makers are most influenced by spending patterns of the most recent fiscal year, which means insufficient attention is paid to factors that may make that year inappropriate as a spending model. Fiscal year 2010 was no exception to this pattern. Despite the fact that fiscal year 2009 spending by the trial court had been artificially low by virtue of voluntary reductions during an economic crisis, the Governor and the Legislature used that expenditure figure as a starting point, and the trial court appropriation for fiscal year 2010 materialized at \$559.5 million (a reduction from the original fiscal year 2009 appropriation of about 7.5%).

This trend continued into the present fiscal year (fiscal year 2011) during which the appropriation for trial court operations was reduced again to \$544.1 million. Accepting that reality and mindful of the continuing pressures on state appropriations created by a still recovering economy, the Chief Justice for Administration and Management, with the support of the Chief Justice of the Supreme Judicial Court, submitted for fiscal year 2012 a "maintenance" budget request of \$568.1 million. That figure reflected the anticipated cost during fiscal year 2012 of the same level of trial court operations that had taken place in fiscal year 2011 with no provision for expansion of those operations. The Chief Justice for Administration and Management subsequently reduced the trial court's request to level funding at \$544.1 million.

In April 2011 the House of Representatives recommended \$520.5 million for fiscal year 2012 for the trial court, a reduction of \$23.5 million compared to the fiscal year 2011 appropriation. If the Ways and Means figure is the trial court's final appropriation, the trial court

appropriation will have dropped an additional 4.3% from fiscal year 2011. This compares to a 2.2% reduction in total proposed appropriations for the entire state government. To put it all in perspective: the Ways and Means recommendation of \$520.5 million for fiscal year 2012 means fiscal support for the Commonwealth's trial court system will have dropped by more than 14% in the space of three years. The judicial branch simply cannot absorb such a reduction without dramatically undermining its obligation to protect the safety and welfare of our citizens.

### WHY HAS THIS HAPPENED?

A principal reason why these disproportionate cuts have occurred is, at least in the abstract, an admirable one. The Governor and the members of the Legislature take seriously their responsibility to safeguard the expenditure of funds that the public has entrusted to them. Particularly during a time of economic uncertainty, it is understandable that the Executive and Legislative Branches will be conservative with respect to state spending.

But there are other factors at work, and it is important that they be recognized and their impact understood. Courts have an extremely small constituency to advocate for them. While the public may have an abstract understanding of the importance of a functioning, independent court system, the actual contacts between citizens and the courts are often viewed negatively by the individuals involved. It goes without saying that there can be little for a criminal defendant who becomes embroiled involuntarily in the criminal justice system to like. A defendant in a civil proceeding is also there other than by choice, and can become involved in a protracted case that may end in the entry of a money judgment or the granting of other relief against him. Even a civil plaintiff often becomes disenchanted by the length and complexity of the process of vindicating a claim--and particularly so if at the end of the proceeding his claim is adjudged to be

without merit. Media accounts of trial proceedings and results often favor the theatrical at the expense of the analytical, and can mislead with respect to what is actually taking place in the courtroom or the reasoning behind a decision. Even a practice as centrally accepted within our culture as the jury trial is viewed as a nuisance when a jury summons arrives in the mail and commands involuntary attendance at a court session for at least a day. In this environment, it is difficult to develop much public support for the courts when it comes to allocation of scarce resources.

Another contributing factor to the disproportionate cuts is that state court judges in Massachusetts are appointed by the Governor rather than elected by popular vote. The Boston Bar Association stands firmly behind the practice of appointing judges, but an effect of this is that Massachusetts judges, who do not interact with the public in the course of electoral campaigns, develop no political base and as a class wield little or no influence with respect to policy-making decisions by the other branches of government. The result is that judges, the group with the most immediate interest in, and the most profound knowledge of, the court system, have a voice that is rarely heard when the question of appropriations for the judiciary is debated.

It is also a fact that fewer lawyers now run for, and are elected to, seats in the Massachusetts Legislature. The reasons for this are unclear, but the effect is apparent. The number of legislators who, by training and experience, will be the most knowledgeable about the needs of the courts, has dwindled. Given all of these realities, the decline in fiscal support for the trial court cannot surprise. With declining revenues and rising expenditure demands, programs without advocates fall by the wayside.

## THE TRIAL COURT'S RESPONSE

By any measure, the trial court has responded admirably to the fiscal pressures of the past three years. Indeed, the efforts of the trial court to satisfy public expectations and even to exceed them with diminished resources may be a reason why the Judicial Branch has been denied adequate funds.

Approximately one quarter into fiscal year 2009, responding to the worsening economy and the Governor's call for reduced state expenditures, the Chief Justice for Administration and Management instituted a complete freeze on hiring within the trial court. The freeze applied not only to any possible expansion in the number of positions, but also to the filling of positions that became vacant. The hiring freeze has remained in place to the present day (a period of two and one-half years) and is expected to continue.

The normal attrition of personnel that would have occurred in any event during this period has increased because of the adoption of incentives designed, and successfully so, to encourage early retirement by trial court employees. Other than judges' positions, the vacancies have not been filled. The result is that in only three and one-half years we have lost the critical assistance of over 1,000 highly experienced employees working in our trial courts. This number is even more alarming when one considers that the judicial branch is labor-intensive (75% of the budget of the trial court is devoted to salaries), and that the trial court was under-funded even in 2007, when compared to national standards. The personnel reductions have a direct effect on the capacity of the court to perform. For instance, as of February 16, 2011, two of the trial court departments that routinely encounter some of the most serious social problems--the Housing Court and the Probate and Family Court--are at only 66.7% and 73% of full staffing respectively.

The Land Court department, which is one of the departments responsible for overseeing numerous mortgage foreclosures, and where permitting and zoning disputes are resolved or litigated, is staffed at an astonishing 45.6%, as measured by the National Center for State Courts. This has a direct impact on the daily lives of residents, as well as economic development in the Commonwealth. Reduced staffing in the Superior Court increases the number of pre-trial detainees and exacerbates jail overcrowding.

Reduction in force by means of attrition avoids layoffs and is therefore obviously desirable from both a humanitarian and a political perspective. But its use has unfavorable management consequences. Retirees and others who leave the system depart without reference to the courts or functions that require manpower, and the effect on the system is a random disconnect between where personnel are needed and where they are in fact working. With limited ability to transfer personnel, the Chief Justice for Administration and Management cannot deploy the inadequate number of remaining employees to maximum advantage.

In addition to a hiring freeze, soon to enter its fourth fiscal year, the trial court has exhausted its ability to reduce its non-personnel expenditures. Courthouse consolidations have been implemented where possible. Three courthouses have been moved from space leased from private landlords to space already owned by the Commonwealth. The Land Court has been moved from leased space to the Suffolk County Courthouse. Three trial court administrative offices have been transferred from leased to state-owned space.

Where possible, technological enhancements have been used to reduce clerical work that was performed previously by employees; digital recording equipment increasingly replaces the use of per diem court reporters. Energy savings have been achieved in the operation of the

courthouses. Savings have been realized from more highly centralized purchasing and from cuts in the provision of interpreter services. Likewise, there has been a considerable reduction in alternative dispute resolution services and appointment of guardians ad litem. The number of law clerks available to judges has been dramatically lowered with a visible effect on the pace at which cases can be processed. Mileage reimbursement for in-state travel has been reduced, and fewer legal reference materials for courts and libraries are purchased. In sum, the present trial court administration has more than done its part to accommodate the Commonwealth's chronic lack of public funds. Between the starving of resources and the efforts of the trial court to adjust, the court has been pushed to the precipice of becoming dysfunctional. To cite a single measure, in 2006 the court's clearance rate (cases ended compared to new cases filed) was a healthy 116%. By 2010, it had fallen to 96.9%, meaning that fewer cases were decided than were filed and backlogs were inevitably developing.

The sorry irony of this is that from a fiscal viewpoint the pain serves no purpose. The Senate is about to debate recommended appropriations for fiscal year 2012 that exceed \$30 billion and last month the House of Representatives' recommendation for the trial court was \$520.5 million, about 1.7% of the total state budget. The Commonwealth's fiscal crisis has clearly not been caused by the judicial branch, nor will it be solved by a disproportionate cut to a relatively small piece of the pie.

#### WHAT HAPPENS NOW?

To a limited extent, the judges share in the blame due for permitting the present circumstances to develop. That is because, understandably, they have not wanted to concede that they cannot do the job with the resources available. Instead, they have soldiered on, claiming

that greater efficiencies will make up for the lack of funds and will even make possible additional services. That has not been realistic for some time and will not be realistic in the foreseeable future.

Despite the best efforts and intentions of our valiant judges and other court personnel, if some reasonable level of public support is not provided, it is inevitable that judicial services that we have taken for granted will be curtailed. Cases of the greatest urgency will continue to receive high priority, but the routine business of all of our trial courts, on which thousands of people rely each day, will certainly suffer. Criminal cases will of necessity be given priority because the Constitution requires that criminal cases be tried within a given period or the charges dismissed. Even so, it can be expected that the process will become slower, resulting in the additional expense of an increasing population of pretrial detainees and additional stress for the victims of crime, for their families, and for the families of the accused.

At the same time, it is not likely that the courts will shrink from their traditional function of attending to emergency situations: care and protection proceedings; domestic abuse applications; threatened evictions; and the like. Because of the shortage of court resources, such cases will increasingly displace non-emergency matters. The resolution of most forms of disputes that come before the courts, both large and small, important and routine, will no doubt suffer as increasingly fewer personnel are available to staff them. Divorcing parents likely will be forced to wait longer for child custody decisions. Parties claiming serious personal or emotional injury will have to wait longer to get their cases to trial. Massachusetts companies can expect delays in resolving business disputes that could have significant implications for their employees, for their shareholders, and in some cases, for the Massachusetts economy. As court functions contract, disproportionate effects will be visited upon the poor, minorities, the

handicapped and others dependent on public support -- i.e., those without the economic resources to locate viable alternatives. And continued reductions in the numbers of court officers puts everyone who enters our courthouses, employees and the public alike, at risk for their safety.

## CONCLUSION

The Judiciary is not a state agency whose capacity to function can expand or contract depending on changes in public policy and available resources. It is a co-equal branch of government, founded in our Constitution, on which we all depend every day for preserving our safety, resolving our disputes, and safeguarding our liberty. That the courts lack a sophisticated or motivated constituency to advocate for them does not relieve the Commonwealth from the obligation to support an essential branch of government. The erosion in that support that has characterized the past several years has brought the trial court to an unacceptable level of capacity and must be reversed. We hope that the trial court's appropriation for fiscal year 2012 will at least provide level funding in the amount of \$544.1 million.