The Real Danger of Inadequate Court Funding

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If the apocalyptic title of this Judges' Journal introduction paints a prophetic image of doom for the honored principles of fairness, judicial independence, and access to justice in our nation's courts, it is doing its job. The previous issue of this Journal (fall 2011) focused on the political targeting of sitting state supreme court justices because of disagreement with a court ruling and the projected adverse impact of that effort on judicial independence. This issue of The Judges' Journal, with special articles by ABA President William T. (Bill) Robinson III and Immediate Past President Stephen N. Zack, examines how inadequate court funding poses a similar danger not only to judicial independence, but also to the principles of access to justice and the availability of a fair and impartial forum to resolve disputes.

The hurdles faced by courts to defend themselves were recognized and acknowledged in Federalist No. 78 by Alexander Hamilton when he stated:

...[T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

One type of attack has been excessive diminution of court budgets over the last decade. Even though most state court budgets account for only a small percentage of a state's budget—in some cases less than 2 percent—state courts have faced progressively severe budgetary cuts. In a 2006 report entitled “The Cost of Justice: Budgetary Threats to America's Courts,” The Constitution Project listed some of the actions taken by state courts to continue operations in the face of these crises. These steps included staff layoffs and, for example, the following:

- Oregon: closing the courthouse on Fridays;
- New York: substantially raising fees required to file claims and the amount of imposed surcharges;
- Iowa: closing county courthouses 10 additional days per year;
- Colorado: imposing eight days’ unpaid furlough for all court employees;
- California: permanently closing and temporarily shutting courtrooms;
- South Carolina: furloughing employees and cutting heat to buildings on the weekends;
- Utah: closing two courthouses; and
- Kansas: increasing court fees to supplement a fund for the exclusive use of the judiciary.

In all the commentary about budget and finance issues faced by the country’s courts, nobody seems to dispute the conclusion that inadequate court funding negatively affects judicial independence, access to the courts, and the ability of courts to provide a fair and impartial forum to resolve disputes and vindicate the rights and privileges of litigants.

Late last year, the president of the California State Bar, in a message to the bar membership, suggested that California's budget crisis might reflect a declining level of respect toward courts and the rule of law, leading to something more serious, such as a gradual dismantling of the judicial system. Others have raised similar questions, namely, might the steady erosion of court funding reflect something other than a downturn in the economy? Could it be that budget cuts faced by some courts are the result of political disagreement with certain court rulings? Such questions are not hypothetical. One candidate for his party's nomination for the office of president of the United States suggested last year that in response to court rulings with which they disagree, executives and legislatures...
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Justice Patricia Timmons-Goodson has earned her Waymaker status the old-fashioned way, through service to others and leadership in the profession. She is a triple Tar Heel, having received her undergraduate degree, law degree, and honorary doctorate from the University of North Carolina at Chapel Hill. She served as an Assistant District Attorney in her home of Fayetteville from 1981 to 1983, then worked as a staff attorney for Lumbee River Legal Services, Inc. from 1983 to 1984.

Her judicial career began in 1984 when Governor Jim Hunt appointed her to be a district court judge in North Carolina’s Twelfth Judicial District. Since then she has won all five judicial elections in which she was a candidate. After being elected and re-elected to her district court position, she was appointed to the North Carolina Court of Appeals in 1997. She decided not to seek another term on that court and retired in 2005, assuming her judicial career had run its course.

However, North Carolina Governor Mike Easley had other ideas, and in February 2006 he appointed her to the Supreme Court of North Carolina. Justice Timmons-Goodson is the fourth woman, and the first African-American woman, to sit on that Court. She was elected to a full term in November 2006. She is known to the appellate bar for her no-nonsense questions from the bench during oral argument.

Justice Timmons-Goodson has long been an active member of the American Bar Association. She served as secretary of the Appellate Judges Conference, a member of the Commission on Women in the Profession, co-editor of The Judges’ Journal, and she has worked tirelessly with the Judicial Clerkship Program. She has received the Order of the Long Leaf Pine, one of North Carolina’s highest civilian awards, and her focus on women and minorities in law has resulted in awards from the North Carolina Association of Women Attorneys, the North Carolina Legislative Black Caucus, and induction into the North Carolina Women’s Hall of Fame.

Justice Timmons-Goodson commutes between Raleigh and Fayetteville while maintaining a home for her husband and two young-adult sons. Thankfully, we were able to get her to slow down long enough to answer a few questions.

Let’s start at the beginning. Tell us a little about your parents, your education, and your family.

Family, faith, and education have guided me since childhood. My father, affectionately and professionally known as Sergeant Timmons, was a non-commissioned officer in the United States Army, and my mother was a homemaker. The oldest of their six children, I was born in Florence, South Carolina, and was reared on military bases in Europe and throughout the United States. Because my father was reassigned every few years, I learned to make friends easily and to adapt to new surroundings. My parents always ensured that the one constant in the family’s life was their love and support. Wherever the Army stationed my father, we quickly located a church to attend. My parents stressed that God gave each child all the talent needed to succeed in life, and it was the obligation of each of us to cultivate our gifts.

Whether at home or overseas, my parents worked hard to provide a good life for their large family. They valued knowledge and convinced their children that a better life could be achieved through education. I earned my Bachelor of Arts and Juris Doctorate degrees from the University of North Carolina at Chapel Hill. And I share my parents’ pride that all of my siblings have earned a graduate or a professional degree.

What led you to seek a career on the bench?

As a child and teenager, it appeared to me that when people wanted a deeper understanding of what was going on in their community, when they needed some interpretation of significant events, and when they had complex problems, they consulted a lawyer. I remember thinking, “That’s what I want to be for my community. I want to be one of those persons who can help others better understand the legal issues that affect their lives.”

While I did not know the breadth of the lawyer’s work and role in society, I sensed...
that lawyers were affecting change. And perhaps as much as any profession, lawyers could make things happen. I wanted to be a lawyer—a good lawyer.

I never set out to become a judge. In fact, when the notion was first raised by colleagues, I dismissed it. I believed that I would one day become a great trial lawyer. My legal experience in the prosecutor's office up to that time suggested that I “had a way with juries.” Nevertheless, lawyers and community members encouraged me to seek a newly created seat on our state district court. I realized that if I truly desired to make a difference in people's lives, this special court with broad jurisdiction would surely fit the bill. At a time when no person of color had served the two-county district, I realized that there would be a tremendous opportunity to impact the judiciary and the lives of the citizens of the district. The district court had jurisdiction over domestic court, juvenile court, mental commitment hearings, misdemeanor criminal and limited civil matters. It was the court most often called upon by the greatest number of citizens.

After deep reflection, I sought the gubernatorial appointment to the new district court judgeship. To assist Governor James B. Hunt Jr. in his assessment of my credentials, I tendered letters of endorsement from citizens throughout the district. Governor Hunt appointed me to the bench at the age of 29, and I was sworn in on September 17, 1984. I served on the court for almost 13 years and am eternally grateful to Governor Hunt for entrusting me with such responsibility at a rather young age.

When you retired from the Court of Appeals in 2005, it appeared that your judicial career had ended. The following year, however, Governor Michael Easley asked you to accept an appointment to the Supreme Court of North Carolina. Acceptance would require that you run again in a statewide, popular election. Would you discuss the factors you considered in making your decision?

I resigned from the North Carolina Court of Appeals on October 31, 2005. I decided that 21 years in the trial and appellate judiciary was sufficient and that it was time to give someone else an opportunity to serve on the Court of Appeals. I was surprised three months later when a call came from the Office of the Governor inquiring whether I had any interest in serving on the Supreme Court of North Carolina. I requested time to confer with my family. My older son reminded me of our family's plans to spend more time together after my retirement from the judiciary. My younger son pointed out that the opportunity to serve on the highest court might not come again. My husband expressed that the people of North Carolina had by their vote granted me 21 years of judicial experience. He said, “To whom much is given, much is required.” I considered the drain of a statewide, popular election and the 130-mile daily commute, but this was, after all, an opportunity to serve on North Carolina's court of last resort. I was also mindful that fewer than 100 citizens in the state's history had been privileged to serve on the Court, a group that included only three women, none of whom were African-American.

I further considered that in joining the Court, I again would be working with Justices Mark Martin, Ed Brady, and you. I also knew of Chief Justice Sarah Parker's sterling reputation. The opportunity to serve with these colleagues gave me high hopes that I would be effective and enjoy the work.

What has it meant for you to serve on the Supreme Court of North Carolina? I am now at the pinnacle of my 27-year judicial career. Serving as a member of the judiciary of North Carolina has meant an opportunity to make a difference in the lives of her citizens and the jurisprudence of the state. Serving on the Supreme Court of North Carolina has also meant that my father and the thousands of other African-American men and women who served in our armed forces, some of whom died, did not serve in vain. These soldiers fought in many instances so that their children and grandchildren would have more choices than they had in this rich nation of opportunity. My service has fulfilled, in part, the dreams and aspirations of generations of people of color that have gone before me. I hope that my contributions on the Supreme Court honor them as they have honored this nation in their service.

What experiences as a judge at the trial and intermediate appellate courts have been useful to you as a justice on a court of last resort?

As you know, district court judges often serve as judge and jury. The litigants are in close physical proximity to the bench and the judge. Frequently, judicial proceedings take place within hours of the offending conduct, which means that litigants often bear the marks of conflict and emotions are still raw. My service as a trial judge imprinted on me an indelible understanding that while decisions of the courts are grounded in law, real people with real problems are at the heart of every case. During those years on the trial bench, I also came to understand the high expectations and tremendous trust that people have in our courts. In some instances, I witnessed blatant distrust of our system. These lessons from my trial court experience have proven invaluable throughout my appellate career.

My time on the intermediate appellate court was equally valuable. At the Court

Justice Robert H. Edmunds Jr. was elected to the North Carolina Supreme Court in 2000. He and Justice Timmons-Goodson have adjoining offices in the courthouse and adjoining seats on the bench.

L. Neal Ellis Jr. is an AV-rated partner with the firm of Ellis & Anthony, LLP, in Raleigh, N.C. He also serves on the editorial board of The Judges' Journal.
of Appeals, I honed skills essential to an appellate judge, such as research and writing and how to most effectively utilize law clerks. I also came to understand what collegiality really means. Further, I gained an appreciation for the level of disagreement I must necessarily have in order to voice my position through a written dissent. As I learned the business and role of the error-correcting body, I realized that the Court of Appeals was the de facto court of last resort in greater than 95 percent of cases decided. So in 2006, when I joined the Supreme Court of North Carolina, I had 21 years of judicial experience and a realistic sense of what was required to serve effectively on North Carolina’s court of last resort.

I have endeavored to strengthen the rule of law and thereby improve the lives of my fellow citizens.

Do race and gender factor into the judicial decision-making process?
Judge Patricia Wald, retired judge of the U.S. Court of Appeals for the District of Columbia, has suggested that being a woman and being treated by society as a woman is a vital element of a female judge’s experience. That experience, in turn, can subtly affect the lens through which she views issues and solutions. This notion applies to race as well. A woman of color who has suffered discrimination based upon her gender and race or has witnessed others suffering due to either immutable quality will invariably be more sensitive to them. Do race and gender influence judicial decision making? Sure, but so does the unique personal and professional background that each judge brings to the conference table. For example, beyond race and gender, my background includes nearly three decades in the state judiciary, military connections, a Southern heritage, faith, a long-term marriage, and a love of golf. Each aspect of a judge’s experience colors the lens through which that judge analyzes cases and reaches conclusions.

In your experience, how can judges most effectively serve the public, the profession, lawyers, and their judicial colleagues?
As a career jurist, the people of North Carolina have invested a great deal of time and energy in my development. I feel obliged to repay this investment by serving as an ambassador for the rule of law in a democratic society. To that end I have endeavored, and will continue to endeavor, to speak clearly and forcefully on behalf of a system that I believe func-

Who were some of your mentors and how did those mentors influence the way you approach decision making?
One does not achieve professional success without huge investments by others. I have had and continue to have many mentors. From birth I have been blessed with positive models within my sight daily, such that my first mentors were family members. Judicial mentors include Judge Elreta Alexander, Judge Willie Whiting, Judges Joe Dupree, Sol Cherry, Beth Keever, and Arthur Lane. From each I learned lessons important to judges—lessons of patience, listening, and transparency. Our system works best when the litigants understand what is transpiring. So, I was mentored to inform criminal defendants of their rights, and I learned to explain my civil rulings from the bench. Later, in my prepared judgment, I could formalize the court’s reasoning.

In addition, each judicial mentor reinforced that it is the work of a judge to decide cases. You make the decision based on the law as you understand it and apply that law to the facts of the case. I also understood that there were adequate reviews to correct mistakes that affected fairness. My mentors took pride in the judicial system and understood that their role was to make the system function as it was designed. They also recognized when the system failed and made swift efforts to correct those failings. These men and women were courageous jurists, and I have endeavored to emulate their example.

What are some of the biggest challenges facing the judiciary?
For all that the legal system and the judiciary do well, we confront huge challenges. The greatest challenge facing the judiciary is the assault on judicial independence. The independence of the courts is essential to the survival of our constitutional democracy. Because of this, the large sums of money being infused into judicial campaigns concerns me. At
the same time, inadequate funding of the judiciary deprives the courts of resources essential to carry out the mission of peacefully resolving disputes. When the courts fail to timely address conflicts, often our citizens lose faith in this vital institution. Eventually, people may seek alternative avenues to resolve legal controversies.

The fast-moving pace of life today also poses challenges to the judiciary. Rapid advances in science and technology are sometimes in tension with the deliberative nature of judicial institutions. While the law is most effective when it is clear and predictable, the value of technology often depends upon innovation. One area where I see these competing values intersect is with DNA evidence. Thankfully, powerful tools for gathering and analyzing DNA evidence are leading to the release of innocent inmates. These exonerations, however, expose flaws in the legal system that may diminish the public’s trust in the rule of law. I know the trust citizens and businesses place in the law, and it is imperative that judges and attorneys take proactive measures to maintain the public’s trust of our legal system.

Given the quality of our judicial leaders and young lawyers, I remain confident that our profession will overcome these and other challenges.

I understand that you plan to seek a Master of Laws in Judicial Studies at Duke University School of Law. What motivated you to continue your legal and judicial education?

The exciting, stimulating work in which I am engaged at the Supreme Court of North Carolina affects the life of each citizen of the state I cherish. The legal questions presented are novel and often without easy resolution. My quest for excellence in this important work, and all that I do, leads me to pursue a Master of Laws in Judicial Studies. The opportunity to share my judicial experience and to learn from the experiences of other jurists has considerable appeal. This exchange of ideas can only make me a better jurist.

How would you like to be remembered as a member of the judiciary?

I would like to be remembered as a servant of the people of North Carolina and one who demonstrated a lifelong commitment to the law. I am proud of my contributions to North Carolina’s jurisprudence and the legal profession. Whether deciding the most pressing legal issues facing the people of my state, writing judicial opinions, providing leadership in state and national bar associations, or teaching other lawyers and judges at continuing legal education programs, I have endeavored to strengthen the rule of law and thereby improve the lives of my fellow citizens. With this backdrop, I hope to be remembered as one who, regardless of where I sat or what positions I held, always stood for justice.

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The Judges’ Journal is seeking your response, whether comment, praise, or constructive criticism, to the content of our articles or the design and structure of the magazine. We would like to publish letters unless otherwise instructed, and we will take every comment to heart as we prepare future issues.

Please submit your letters to the Editorial Board co-chairs:

Keith Roberts • keithofrpi@earthlink.net
and
Judge Herbert B. Dixon Jr. • Herbert.Dixon@dcsc.gov
Rising to Historic Challenge
FUNDING FOR STATE COURTS, PRESERVING JUSTICE

By William T. (Bill) Robinson III

Consider recent headlines about the worsening crisis of state court underfunding and the resulting negative consequences: “State budget cuts clog criminal justice system,” cautioned The Wall Street Journal in October. The venerable Economist titled state judiciaries “[t]he feeblest branch.” The Huffington Post wrote, “Liberty and Justice for Some: State Budget Cuts Imperil Americans’ Access to Courts.” The Los Angeles Times, New York Times, and Washington Post have run similar headlines. These are news articles, not editorials, in a few of the most widely read publications in the United States. Major television networks and local affiliates, including NBC and FOX, have similarly decried the sorry spectacle of the finest justice system in the world starving financially.

These stories describe a crisis that ultimately affects every person, business, and community in the United States. It threatens our economic growth and public safety. It jeopardizes the independence of the judiciary and our model system of justice. Systemic state court underfunding is disastrous. But thanks to a growing coalition of stakeholders who are motivated to educate and politically agitate for additional investments in our courts, the outlook may be brightening.

Figures and Stories from Across the Country
Last year, the American Bar Association (ABA) created the Task Force on Preservation of the Justice System co-chaired by noted lawyers Theodore Olson and David Boies, who come from opposite ends of the political spectrum. Over the last year, under their
leadership, the Task Force has collected stories detailing just how badly our state courts have been harmed by inadequate funding.

The judiciary is one of the three co-equal branches of government. Yet, across the United States, state judiciaries must try to operate on less than some individual departments in their states’ executive branches. Many of our state judiciaries receive as little as 1 percent or less of the annual state operating budget and not one receives more than 3.5 percent. Yet according to the National Center for State Courts (NCSC), which is working closely with the ABA on these issues, 40 out of 50 states cut court funding in fiscal year 2010, and budget cuts continue from New York to California. Some states, including Maine and Oregon, will lose 10 percent of their already withered budgets.

Six states now close their courthouses at least one day a week because of inadequate funding. Fifteen states have reduced the number of hours their courts are open. Thirty-two states have delayed filling much-needed court administration positions, 14 states have laid off judicial staff, 26 states have delayed filling critical judicial vacancies, and staff in 16 states and judges in 9 states are being furloughed without pay.

- A municipal court in Ohio 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. In Georgia, the state judicial budget is so lean that some courts actually 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.

- In Alabama, a judge asked the charitable arm of a local bar association to donate money to the court to help pay juror stipends.

- Facing a 10 percent budget cut, the Shawnee County District Attorney’s office in Kansas recently announced that inadequate resources meant cases like domestic violence would no longer be prosecuted at the county level. Then in early October (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 state’s severely depleted judiciary budget, which has suffered the largest reduction in California’s history. Despite a supplemental infusion of cash, San Francisco will close 25 of 63 courtrooms, while giving pink slips to 40 percent of the court staff. A story in the New York Times emphasized just how overburdened San Francisco courts have already become without adequate financial support. The lines at the courthouse are often so long that people actually bring lawn chairs to use while they wait. With additional budget cuts, it may take as long as five years for a civil case to reach trial and more than a year for a divorce. The presiding judge in San Francisco, Katherine Feinstein, has warned that “the civil justice system in San Francisco is collapsing” and that “the future is very bleak for our courts.”

- Earlier this year, Oregon Supreme Court Chief Justice Paul De Muniz likened its courts to “a dying tree that you prop up in your front yard so that the landscaping looks okay, but it’s a facade because behind that are layoffs, furloughs, and elimination of all kinds of services.”

- One of the more distressing stories the Task Force heard came from New Hampshire, where court financial resources were so strained that the resulting case backlog forced the suspension of all civil jury trials for an entire year. Lawyers are fond of the maxim “justice delayed is justice denied.” In New Hampshire, justice was denied for a year due to lack of funds.

It is astounding how little real money is saved by court cuts when so much is sacrificed to the detriment of so many. Because many state judiciaries cost 1 percent or less of their state’s annual operating budget, the massive percentage cuts in court budgets do not represent—in real dollars—a significant financial savings for the state operating budget as a whole. Consider that earlier this year, New York slashed $178 million from the state’s judiciary budget. That is about 6 percent of the state’s annual judicial budget and just one-tenth of 1 percent of the operating budget as a whole. Yet, the $178 million cut resulted in unemployment for 500 people. One would expect that to put 500 people out of work and hamstring New York’s court system, the state would see a significant savings. Not so. In fact, for every dollar New York spends, taking away 6 percent of the total judiciary budget only saves New York a fraction of a penny.

While these cutbacks are often “justified” by legislators in the name of saving tax dollars, it’s almost impossible to calculate the real cost to the public, to businesses, and to society. The real value of access to needed justice is often tied to the timing of the judicial remedy that is sought. Individuals need access to our courts when they need it, certainly not years later.

Likewise, businesses—including the vast number of small businesses that are the backbone of this nation’s economy—need open and available courtrooms. Commerce depends on the reliability and

William T. (Bill) Robinson III is president of the American Bar Association (2011–12) and member-in-charge of the Florence, Kentucky, office of Frost Brown Todd LLC, specializing in civil commercial litigation and class actions. He can be reached at ABAPresident@americanbar.org.
timeliness of the justice system. Among its many other benefits to our society, the historical dependability of our courts has made the United States, globally, the most secure opportunity for business growth and international investment. Economists have testified at ABA Task Force hearings that uncertainty resulting from court budget cuts have a negative impact on business, and ultimately cost the states sorely needed revenue. Businesses can be discouraged from opening new facilities in places where the judiciary is financially unable to operate effectively and in a timely manner. (For some financial estimates of these costs, see the article by Judge Lee Smalley Edmon in this issue on page 18.)

Burden and Opportunity for the Justice System

State judicial budget cuts do not take into account the workload and needs of our modern justice system, where approximately 95 percent of all legal cases are filed in state courts. In 2008, the most recent year for which data are available, there were 106 million incoming trial court cases, more than in any of the preceding 35 years. Remarkably, the number of incoming cases per general jurisdiction judge often reaches into the thousands. South Carolina, with one judge for every 100,000 residents, topped the list with a caseload of 4,842 incoming nontraffic cases per judge. Not surprisingly, the downturn in the economy in 2008 prompted an influx of civil cases, 1.3 million more cases in fact. State appellate courts are also under intense pressure, handling nearly 300,000 cases that same year.

Individual jurisdictions continue to make extraordinary efforts to adapt to a rapidly changing fiscal environment. Courts from Massachusetts to Utah are expanding the use of technologies to further improve efficiency in their systems. The Boston Bar Association, for example, credits the web-based Mass Courts with increasing the timely disposition of cases by more than 15 percent.

Courts are in some cases reengineering the judicial process itself to become more efficient in the face of budgetary hard times, while still maintaining a high quality of access to justice. Minnesota is centralizing functions that were previously carried out at the local level, while in Oregon, rules are being simplified in civil cases to speed dockets, no doubt partially in response to additional pro se applications.

At the same time that courts are coping with record caseloads, governments have expanded the definition of what is "criminal" with enthusiasm. It's often been said that "more laws have been adopted in the last 20 years than in the 200 prior."

It is astounding how little real money is saved by court cuts when so much is sacrificed to the detriment of so many.

That statement is only half in jest. An ABA report in the late 1990s addressed the federalization of criminal law, a trend of expanding crimes traditionally under state purview. Ultimately, the commission studying over-criminalization concluded that the wild expansion of federal criminal law "represents an unwise allocation of scarce resources needed to meet the genuine issues of crime." It is disturbing, then, that the federal criminal population has ballooned eightfold in the last 30 years.

But federalizing state criminal law hasn’t lessened the burden for states, which also have soaring prison populations. The United States, with the highest incarceration rate in the world, has one in every 31 adults under supervision of a government agency—in prison, on parole, or on probation. The United States imprisons its citizens roughly five to eight times more than the countries of Western Europe, and 12 times more than Japan. In 2009, well more than 2 million people were either in jail or prison in the United States compared to the fewer than 500,000 Americans incarcerated in 1979. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned in the land of the free.

At any one time, half a million individuals sit in jail awaiting trial, not yet convicted of a crime. The annual cost of our supervised population is a staggering $9 billion.

The 1.4 million incarcerated in state facilities in 2008 cost an average of more than $23,000 per inmate that year, some $32 billion in total.

Whether or not we incarcerate criminals too long and too harshly, there is a stupefying cost to do so. At a time when states are straining to provide basic services and even court copying machines are treated like extravagances, lawyers and judges must find additional ways to save money through criminal justice reform in the states.

Criminal Justice Reforms

The ABA has identified many reforms that keep communities safe while lessening costs to already overburdened state criminal justice systems. These include pretrial release of accused low-risk offenders; the decriminalization of minor offenses; reentry support programs; expanded reliance on parole and probation; and community corrections.

Stories in states across the nation demonstrate that these reforms merit serious consideration.

In the Southern District of Iowa, a case study of the effectiveness of releasing individuals before trial found that, when courts released 15 percent more individuals pretrial, the overall percentage of individuals whose release was not revoked because of...
rearrest and new alleged criminal activity increased from 95.6 percent to 97.3 percent. As a result, the district saved $1.7 million in fiscal year 2008–09.

- Florida has seen substantial benefits to public safety and to its bottom line by decriminalizing minor offenses. Between 2004 and 2005, 95,254 juveniles were referred to the juvenile justice system in that state. Of the offenses that were referred, 26,990 were for school-related offenses. After implementing an alternative civil citation system that avoided criminal records and jail time for juveniles, Miami-Dade County reduced juvenile arrests by 46 percent, and reduced the first-time offender rate of re-offense within the first year by 80 percent. Importantly, the average costs associated with civil citations is $386 per juvenile compared to the $5,000 it costs to process a juvenile through the criminal justice system.

- Brooklyn’s Community and Law Enforcement Resources Together prisoner reentry program (ComALERT) is a model for other jurisdictions. In 2010, it cost Brooklyn over $6,000 to process a single rearrest. With significantly fewer arrests, Brooklyn saved almost $450,000 on rearrest costs alone. And this does not reflect the money saved on re-incarceration, which costs over $53,000 per inmate, per year. Since 2004, the program boasts over $2 million in rearrest savings and over $8 million in re-incarceration savings, and has increased tax revenue by more than $600,000.

- In Kentucky, the Pre-trial Services Agency has saved the state millions of dollars in incarceration costs through early, managed release and subsequent dismissal of charges. Between 2006 and 2007, Kentucky’s Social Work Pilot Project saved almost $1.4 million in reduced incarceration costs. Recidivism rates improved. When this program is implemented statewide, savings are projected to be $3.1 million to $4 million per year.

The ABA has advocated for such reforms for some time, but more recently our prolonged national economic stagnation has caused legislators and district attorneys to take note. In part as a result of the ABA Criminal Justice Section’s ongoing work with states, politicians, and organizations from across the spectrum—from the American Civil Liberties Union to the Heritage Foundation—more states are embracing what can only be called “smart on crime” policies.

Not Quite As It Was Envisioned
At a more fundamental level, the very notion of an independent judiciary is undermined by persistently anemic judiciary budgets. The basic definition of judicial independence demands that courts be open and accessible, and yet the other two branches of government often treat the judiciary like an executive agency that provides appreciated but noncritical services.

That is not how the founders of our
federal and state judiciary envisioned the system of justice to work. Every state constitution establishes and enumerates the responsibilities of the judiciary as one of the three co-equal branches of government. Our 50 state constitutions don’t say, “Judicial power is vested in the court system . . . unless financial times get tough.” State judiciaries are just as important and just as constitutionally required during an economic downturn as any other branch of government.

To put it bluntly, legislatures that do not provide adequate funding for their judiciaries shrug off the constitutional responsibility entrusted to them to adopt an adequate budget for the judiciary to guarantee an individual right to access justice. Consider words found in the Kentucky Constitution: “All courts shall be open, and every person 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.” Most states have a similar specific “right to remedy” provision.

There is really no argument more clear or cogent as to why our state courts are entitled to more adequate funding. To fulfill their constitutional responsibilities, courts need to be sheltered from budget squalls. To properly fulfill their own mandated responsibility, legislators need to preserve the right to legal action when needed, as enumerated in our state constitutions.

**Restoring Our Courts, Together**

Like the hardest problems, neither the potential solutions to court underfunding nor the work required to achieve them is simple. Some of the cost-saving strategies discussed earlier provide a partial answer. Ultimately, though, only significantly increased investments in our courts can shore up our justice foundation. It is clear, of course, that our state courts will not be restored after just one appropriation cycle. In fact, if there is any lesson to be learned from the last decade of shrinking budget figures, it is that we as a legal profession must always remain vigilant against future cuts.

It requires a united community of judges, lawyers, court employees, bar associations, and stakeholders (a term that applies to every business and resident of our nation) to effectively address the existing crisis. Fortunately, a recent University of Kentucky College of Law and Kentucky Law Journal symposium on court funding cosponsored by the ABA, NCSC, and LexisNexis demonstrated that there is a will to collaborate and build a strategy that will convince state and local budgetary authorities that our courts need to be financially supported in a more meaningful way.

Of course, the public at large has the largest stake in achieving adequate court funding.

Each of the constituent groups is hugely invested in the future of our courts and can speak with compelling reason. Judges can talk about the fundamental role of our courts—the part they play to stabilize society by judging with an even hand. Anecdotal evidence suggests that inviting policymakers to sit in on courtroom proceedings and shadowing a judge can also be very effective.

Court employees are also an essential component of our justice system, and their voice is needed. The crippling effect of understaffing and the impact on local economies when tens or hundreds of support staff and clerks are dismissed are troubling consequences in themselves. Increasingly, the business community is weighing in on what it increasingly and correctly perceives to be a growing danger to the orderly settlement of all manner of business and liability disputes. Political pressure from this community on appropriators who fund courts so that cases can move forward or be dismissed without needless costly delay is critical. The U.S. Chamber of Commerce—perhaps unfairly overlooked as a natural ally of the wider legal profession—stepped forward to share its concerns and national perspective at the University of Kentucky symposium. Unprecedented bedfellows and new alliances may be exactly what our nation needs to find a new path forward.

Of course, the public at large has the largest stake in achieving adequate court funding. But even if the average person only occasionally needs access to justice, its ready and timely availability is crucial. Having open courts allows filing for a needed divorce, child custody, and support. In the extreme, being able to walk into a courtroom provides the peace of mind when a restraining order is needed by a small business. A conviction is a step in the process of healing for a victim of a crime, or the beginning of rehabilitation for the convicted. In sum, access to justice protects our constitutional rights.

The ABA seeks to draw wider public attention to the court funding crisis, to offer recommendations that can help courts and state governments adapt to new budget realities, and to call on legislatures to provide more needed funds. The association’s efforts to increase awareness among the media, policymakers, and the public have been increasingly successful, thanks largely to the willingness of each of our partnering groups to volunteer their unique stories.

Our next task is to advocate for more adequate funding of our judiciary. But, again, lawyers alone cannot make that case. We must continue to build constituencies for needed court funding in states across the nation. With the strength of stakeholder support and a groundswell of public pressure, we cannot fail. With access to justice hanging in the balance, we can do no less. After all: No courts. No justice. No freedom.
Judicial Division Seeks Award Nominations

The National Conference of Specialized Court Judges is now accepting nominations for the following awards:

The Franklin N. Flaschner Award
Recognizes a judge in a court of limited jurisdiction who has an excellent reputation, a commitment to high ideals, exemplary character, leadership, and competence in performing judicial duties.

The William R. McMahon Award
Presented to a judge, court employee, or attorney who has made a significant implementation or development in the use of technological advances in a court of limited or special jurisdiction.

The Judicial Education Award
Awards a person or institution of judicial education or training for successful efforts in providing high-quality judicial education and training for judges.

Top Graduate of the United States Army’s Trial Judge Course Recognition
The NCSCJ presents annually a recognition plaque to the top graduate of the United States Army’s Trial Judge Course at the Army Judge Advocate General School, in Charlottesville, VA.

For rules and applications:
http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/awards.html

Deadline for applications is Friday, March 30, 2012.
Financial Crisis and the Rule of Law
By Stephen N. Zack

The rule of law and economic prosperity are inextricably linked. That is, countries thrive when they ensure and protect the rule of law. The rule of law provides consistency, predictability, reliability, stability, and equal access, which support economic growth. A necessary component of the rule of law is access to the judicial system for all. However, as we are learning firsthand, the inverse is also true. In times of economic crisis, when funding is being severely cut to the judiciary, the result is a direct threat to the strength, reliability, and viability of the rule of law. This is not an outcome we can accept because the fundamental principle of our society—"justice for all"—is without the qualification of "in times of economic prosperity only." Yet, this has been the result, a justice system without the financial resources to provide for all. As Judge Lippman stated, "access to justice is not a luxury affordable only in good times." In times of economic prosperity, protection of the judicial system thrives. Now, in financially difficult times, the judicial system is most vulnerable.

Essential to the rule of law is a legal system that maintains accountability, transparency, efficiency, and the financial resources for equitable and sustainable decision-making processes with the ability to enforce rights and obligations. The lack of proper functioning judicial institutions that promote social stability and legal certainty prevents the "delivery of justice" and "erodes public trust." In the absence of these features of the rule of law, a society's proper operation and economic sustainability are impeded.

The impact of the budget cuts is so severe that we tend to forget that the judiciary, the court system, is not simply a government agency, but rather a co-equal branch of government. One of the responsibilities of this branch is to provide checks and balances on the legislative and executive branch. These three branches are not independent of
one another because the Constitution set up a system of checks and balances to ensure that no one branch becomes too powerful. The removal of funding, which results in judicial vacancies, staff reductions, and court closings, removes the judiciary’s power to provide the checks and balances, those envisioned by the founders to ensure our fundamental rights, and puts our system at jeopardy.

As the U.S. economy has been suffering, so too will the rule of law suffer if we do not act to prevent the deterioration of our system of justice. To that end, this past year, the American Bar Association’s Task Force on Preservation of the Justice System reported its findings to the House of Delegates. The Task Force, headed by David Boies and Theodore Olson, toured the nation over the last 12 months surveying court conditions. The Task Force concluded that as a result of the funding cuts to the judiciary, “a substantial number of state justice systems are underfunded,” with court closings and delayed rationing of justice, denying access to justice to citizens and businesses, and jeopardizing public safety and the economy of our states.4

The Task Force further identified the lack of adequate funding as a “failure of the state and local legislatures.” Overall, the country has seen budget cuts of 10 to 15 percent. Courts have had to reduce their services, limit hours of operation, close locations, increase fees, lay off or furlough staff, suspend jury trials, and delay or refuse to fill judicial vacancies. These cutbacks limit access to justice for millions, victimizing ordinary citizens who need, use, and depend on the courts. Unlike government agencies whose projects are deferrable without immediate damage, reduced court budgets have had a direct and debilitating impact on available court days and all the related functions that require people to work on burgeoning caseloads on an immediate basis.

The National Center for State Courts Budget Resource Center reports5 that

- 28 states experienced judicial salary freezes;
- 22 states have increased fees and fines;
- 16 states experienced furloughs of clerical or administrative staff (with a reduction in pay);
- 14 states have reduced the hours of operation;
- 15 states have reduced the use of retired judges;
- 14 states have had staff layoffs;
- 25 states have delayed filling judicial vacancies;
- 33 states have delayed filling vacancies in the clerk’s office;
- 30 states have delayed filling vacancies in judicial support positions.

An inefficient and slow judicial system results.

Chief Justice Broderick gave a staggering account of effects of the budget cuts in New Hampshire. In New Hampshire, state courts are closed a day a month, with furlough days unpaid; 15 percent of the marital masters (who preside over divorce actions) and 12 percent of judicial positions are vacant, and court session days have fallen by almost 20 percent. At one point, Justice Broderick had to suspend civil jury trials in the State of New Hampshire for a full year.6

In Ohio’s Morrow County, a municipal court announced that it could no longer process new cases because they had run out of paper and lacked funds to buy more; the only way to bring a case would be to bring your own paper.7 Such a lack of funding has produced not only inefficiency but outright denials of justice for those who cannot afford it. Indeed, there is no access to justice for anyone when the courts are closed. These are but a few drastic examples of the results of the underfunding of our judicial system.

The larger problem stems from the fact that the judiciary’s budget is only a tiny fraction of the state budget. Hence, funding is being cut from budgets that previously consumed less than 1 percent of the state budget.8 Further tightening of court financial resources therefore cuts into the bone, threatening fundamental liberties and undermining a system that provides courts to hear the redress of people. According to National Center for State Courts, “from 2009 through 2012 46 state governments face projected budget deficits amounting to $601 billion. For the fiscal year 2011, only three states do not have a budget shortfall, while 18 states have shortfalls in excess of 20 percent.9 Employee cuts, larger fees and fines, reduced salaries, and reduced operating hours all impact the ability of the courts to “fulfill their constitutional functions and provide access to justice.”10 No judicial system can run efficiently with the severity of limitations placed on judicial funding. The very stability and reliability of the judicial system come into question.

The reduced funding, which appears to legislators as cost savings in the short run, will in fact increase costs in the long run. As one businessman testified,

Stephen N. Zack is immediate past president of the American Bar Association and was the first Hispanic American to assume the ABA presidency. He was also the first Hispanic American and youngest president of the Florida Bar. Zack specializes in civil trial law, as well as eminent domain, corporate, and international law.

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Civil War Lawyers is a comprehensive and fascinating look at the underappreciated role of the law—and of lawyers—during the United States’ Civil War. Great constitutional issues were addressed by the Supreme Court in tense courtrooms where individual lives were at stake. Presidents struggled with the legality of their actions, including questions on habeas corpus and military commissions that still have vital relevance today.

Lawyers dominated public and political life during the first third of American history, and many of the lawyers prominent during the Civil War period were not only aware of each other professionally, but they had also tried cases with and against each other before the War. The key members of Lincoln’s cabinet were all lawyers, as were Lincoln’s key diplomatic appointees and the five men who tried to end the War at the Hampton Roads Peace Conference in February 1865.

The book also includes an appendix containing more than 100 biographies of the lawyers of the time, a look at the cases in which the lawyers crossed paths before the War, a detailed timeline of Civil War events, and period photos and editorial cartoons. Civil War Lawyers is an indispensable addition to the bookshelves of all lawyers, historians, and Civil War buffs.
Business runs on a simple proposition. It needs predictability and timely legal order to create and maintain commercial relationships, whether between supplier and user, consumer and manufacturer, employee and employer, and others.\textsuperscript{11}

He explained that corporations decide where to locate their headquarters, in part because of the state judicial system. Commercial enterprises that seek predictability will avoid areas where the judicial system is vulnerable because it will ultimately prevent the enforcement of the “rules of the game,” or the rules either take too long to enforce or are unclear. An underfunded judiciary discourages business investments in states where businesses cannot enjoy timely and effective legal protection. As a result, underfunding undercuts business confidence, reduces chances for businesses to relocate, adversely affects a state’s economic environment, and reduces tax revenue and job opportunities.\textsuperscript{12}

Businesses are major users of state judicial systems and commercial transactions require a judicial system that is “accessible, fair, efficient, and predictable.”\textsuperscript{13}

Chief Justice John Marshall’s words, spoken over 100 years ago, much echo throughout our daily lives today: “No mischief, no misfortune, ought to deter us from a strict observance of justice and public faith.”\textsuperscript{14} When many see the economic crisis as the “misfortune” of our times, we need to ensure protection of the judicial system and the public faith in that system. These principles are paramount to our Constitution and fundamental to our civil society. The report rightly says that “even the most eloquent constitution is worthless with no one to enforce it.” “Underfunded courts fail to fulfill the promise of the constitution, that every citizen has the right to his or her day in court. Justice delayed is often justice denied. When funding our court system, we must remember that access to justice and trust in the courts are a basis for our democracy.”\textsuperscript{15}

Endnotes


4. This and later quotations are from The American Bar Association Task Force on Preservation of the Justice System, Report to the House of Delegates (2011).


7. Crisis in Court Funding: First Hearing Before the ABA Task Force on Preservation of the Justice System 81, Atlanta, Ga. (Feb. 9, 2011) (Testimony of Mr. Medrano).

8. Crisis in Court Funding: First Hearing Before the ABA Task Force on Preservation of the Justice System 16, Atlanta, Ga. (Feb. 9, 2011) (Testimony of Mr. Zack).


10. Id. at 41.

11. Crisis in Court Funding: First Hearing Before the ABA Task Force on Preservation of the Justice System 8–9, Atlanta, Ga. (Feb. 9, 2011) (Testimony of Mr. Withers).

12. Id. at 9.

13. Id. at 8.


15. Testimony of Ms. Adkison, supra note 3, at 92.
As I enter the second of my two years as presiding judge of the Los Angeles Superior Court, and after having served two years as assistant presiding judge, I offer some reflections on how we in Los Angeles are grappling with the budget crisis. The Los Angeles Superior Court is the largest in the nation, and many believe that little in our experience is relevant to them. Yet, as we all grapple with the challenge of preserving a fully functioning court system within "the new normal" of reduced government funding, I believe that our experience portends the future of many courts and state court systems.

The Fiscal Cataclysm and Our Response
The California trial courts are 58 county-level courts of general jurisdiction. They are collectively funded through a single line-item appropriation in each annual budget act. California’s Judicial Council then divides the appropriation among the 58 trial courts. Thus, California already uses some of the proposals for improved funding and budgeting: state funding, unification, and single line-item budgeting.

As I write, we await the governor's budget proposal for fiscal year 2012–13. To date, the California trial courts have seen state General Fund support drop 24 percent from $2.612 billion in fiscal year 2007–08 to $1.991 billion in 2012–13! How could one quarter of the California trial courts disappear, nearly overnight? We haven't, of course. How we have been keeping our heads (ever so slightly) above water in Los Angeles is a story worth recounting.

In Los Angeles, we saw the early warning signs of the financial meltdown that was to decimate California’s state government. We did our own intelligence-gathering. Months after banks began to fail, but while the media—and many in the California judicial branch—were still promoting cautious optimism, we began planning for disaster. By February 2009, it was a running joke that our judges' meetings were dominated by economic gloom-and-doom scenarios. We knew that state government funding levels tend to lag those of the state economy: We would not see the bottom for a couple of years, and then we would not see any relief until well after the private sector recovery.

It was clear, as well, that the political environment would only add to our problems, as the tax revolt gained its full head of steam just as government-sector revenues plummeted. Between 1930 and 1980, the share of American gross domestic product devoted to government rose steadily and then, with the Reagan revolution, topped out. In the decades...
since, government’s inability to keep up with people's demands for service has been covered by creative efficiencies and by moving problems from the federal government to lower levels. We recognize that government is not a growth industry, and the great recession only exacerbates the reckoning that is taking place in American government.

Our court has long invested in relationships with stakeholders at both the local and state levels, and this helped us develop useful intelligence about our environment—particularly our fiscal environment. We created strategies for working with our funders—in our case, the state legislature. We could see that our problems were a tiny fraction of the challenges they would be facing. California’s state government was hit by a whirlwind, reducing General Fund spending by nearly 15 percent in the first years of the recession. We knew that, in such an environment, the concerns of the judicial branch could easily be brushed aside by the calamities befalling health care, education, and other important sectors of government. By recognizing the pressures faced by our legislators and working with them, rather than confronting them or accusing them of cold-hearted ignorance, we have been able to assist them in helping us mitigate the worst of the cuts.

We also learned a lesson in 2002, when the dot-com bust (particularly painful here in California) forced us into the first layoffs in our court’s history. After that, as state funding slowly recovered, our staffing levels recovered even more slowly: We started putting money into a reserve as protection against the inevitable next state downturn.

So, we had a reserve fund, and we had a dire vision of our economic future. We knew we needed to begin a long-term planning horizon, and so we have since been budgeting according to a series of rolling three-year economic projections of likely revenues and projected expenditures.

We also began a major effort to educate our judges about the sources of the problem, its likely future course, and the range of possible responses. In normal times, judges are appropriately insulated from the vagaries of budget cycles and budgeting. But we knew that not only would we need buy-in from our bench officers to support the court’s leadership in managing the crisis, we also had to ensure that, every step of the way, our budgetary solutions would respect the priority of our core work: adjudication. Therefore we spent hours with working groups of judges to develop our analyses of the problem and our responses to it. Those judges then spent hours consulting with our rank-and-file judges, and with our Executive Committee, to vet the plans and respond to their concerns. The depth of understanding of our budget situation by our judges, and the extensive involvement that they have had in shaping our budget strategy, provides great strength to our court in these difficult times.

Externally, we reached out broadly to our community, from mayors and police chiefs to the school board member who might someday soon find herself at the state capital. Our message was carefully crafted and passed along to our bench officers to carry to their local Rotaries, city halls, and so forth. This message was magnified by the stalwart and skilled support of the attorney communities—at both the local and state levels—who carried it to our besieged legislators. It was a message that will resonate with every reader of this magazine: that justice is not a luxury; that the opportunity to plead for the government to right a wrong is not to be funded through user fees; that the significance of the work of the third branch is far out of proportion to its paltry funding level; and that the time-consuming due-process methods embedded in American jurisprudence are essential to core American values of liberty and justice for all.

We must continue to gain better visibility with our state legislators. But in the current climate, demands fall too easily on ears deafened by the latest deficit projections. Fortunately, in California, we had more than a good message. Our branch had recently embarked upon two large-scale programs: one to build 41 new courthouses statewide, replacing a fraction of the neglected and decaying buildings in which our trial courts operate; and another to create a statewide case management system. By scaling back these plans, we recouped some $130 million in the past fiscal year to mitigate the cuts. Because of these efforts, combined with our own prudent fiscal management in spending our reserve funding, we have yet to see the full brunt of the existing cuts on court operations.

Nonetheless, we have not been insulated from the cuts. Rather than preserve our previous staffing levels by spending down our reserve, we are rationing our reserves through managed and incremental staffing reductions. We laid off 329 employees in April 2010, and lost another 180 to a hard hiring freeze. In fiscal year 2001–02, we had 6,097 budgeted staff positions. Today, we have 5,071—a loss of 17 percent of our staff over a decade that has seen steady increases in caseload.

The Operational Response

We have responded, as have courts across the country, with new and creative ways to “do more with less.” With constitutional protections for judicial positions, the budget cuts have fallen largely on staff (staff salaries constitute 80 percent of our expenditures). We have had to come to grips with the reality that our shrinking staffing complement is inadequate to support the work of available bench officers. This puts a premium not only on standard ways of reducing court appearances (which save staff the time of calendaring, preparing for, and recording hearings), but also on utilizing judges

Judge Lee Smalley Edmon is the presiding judge of the Superior Court of California, County of Los Angeles, which has more than 580 judicial officers and 50 courthouses. Judge Smalley Edmon is the first female presiding judge in the court’s 130-year history.
without staff. For instance, we have an aggressive program of specialized settlement courts, where judges operate without staff to settle cases. (A fully staffed courtroom is then available to take and record the settlement.) In response to a sudden increase in the number of employment cases filed, lawyers with expertise in employment law conduct mandatory settlement conferences and help us try to resolve some of these employment cases. We also have created Voluntary Efficient Litigation Stipulations that are served on the parties to each civil case, to encourage the parties to reach stipulations to resolve their issues informally, without requiring full court hearings. (If you wish to see the Stipulations, they are available on the court's Web site at www.lasuperiorcourt.org, under Civil/Tools for Litigators.)

We have also implemented many of the same administrative innovations we see in courts across the country. Generous doses of automation have lessened the lines at our traffic ticket payment windows. Automation allowed us to redeploy nearly two dozen staff from opening and processing payment mail. Web-based automation also supports our jury portal, which allows prospective jurors to manage nearly all aspects of their jury service—including obtaining pre-approved postponements, which we find greatly increases the show rate on the day of summons. Throughout our administration, from online payments to contracting-out for guardianship investigations, we have found ways to “disintermediate”—reduce our reliance upon face-to-face contact for the thousands of daily transactions between our court and our court users. (You can read more about this strategy in this year’s edition of Future Trends, published by the National Center for State Courts.)

We have not, however, radically changed operations. It is easy to say we should focus on “core work,” to the exclusion of other activities, but it is hard to make such a strategy pay off. Self-help, for instance, may not be a traditional court function. But such programs not only help litigants; they make our courtrooms run more efficiently. Our world does not consist of clearly defined “product lines” that are easily shut down. While criminal cases are an obvious public safety priority, so are those small-claims cases in which neighbor disputes threaten to boil over into violence. How can one determine which cases might be worthy of scarce judicial attention without actually judging them? We find that we do not do things that are not material to justice. The adversarial system, and the procedures that preserve reasoned deliberation of competing interests and claims, is stereotypically cumbersome and is a ripe target for modification. But the legitimacy of the American system of justice rests in large part on its promise of thoroughness and due process.

Of course, without making some tough choices, every area will suffer, as widespread delays bring the system to a halt. This is the major challenge before us. As our reserves run out, and the already-existing cuts make themselves felt, we will be forced to abandon business as usual. What that will look like is the big unknown.

**Impacts**

Such gridlock is emerging already. Delays are not just nuisances, but affect people’s lives. We have done our best to absorb the current losses internally. For instance, we have chosen not to close clerk’s offices or shorten their hours of operation. Thus, many of our backlogs are hidden from the public: They don’t see the tens of thousands of documents that are stacked up in our back offices waiting to be put into a court file. They don’t know that we have 1,600 boxes of dependency files sitting in a dark courtroom waiting to be archived. They don’t notice that our supervisors are not supervising staff any more; they’re doing the work piled up on other workers’ desks. Or that, instead of running a courthouse, on any given day several of our managers are pressed into service as courtroom clerks.

But people are starting to notice the impacts of our backlogs. There are 5,400 divorce cases that have been waiting for up to 12 weeks to be reviewed by clerical staff before they can be sent to a judicial officer. Until they are reviewed, the parties are not divorced, their property cannot be divided, the final arrangements for the custody of their children cannot be determined. Weeks from now, when they are reviewed, they may have to be returned to the litigants for corrections, resubmitted, and again wait for review.

The wait for a brief evaluation is frequently three months or longer. But extensive child custody evaluations, which were previously offered through the court at little or no cost to the families, are now almost exclusively available to those who have $15,000 or more to hire a private evaluator; the wait time is seven months or more for those few families able to obtain an evaluation through the court. The children denied child custody evaluations are the most vulnerable ones we serve, as such evaluations are necessary only when the parents have extraordinary conflict over the custody of their children or there are allegations that the parents are inadequate caretakers.

Guardianship evaluations, required when someone other than a biological parent is requesting custody of a child, are similarly delayed, resulting in court continuations that leave the children in uncertain circumstances.

In our probate courts, people rely on a guardian or conservator to handle their financial affairs and other aspects of their everyday lives. Those conservators cannot act without a judge’s order and those orders are being delayed because, with fewer staff attorneys, we cannot keep up with the work.
Clerical shortages in civil court also impede people from getting the judgments that they are due. When you come to civil court and win your case, the civil judgment orders someone to pay you money. But right now, for lack of clerks, it often takes six months for that judgment to be processed. And if you have to ask the judge to compel payment of that judgment, it can take another three months just to process that order.

A year ago you might have waited three months to see a judge about your traffic ticket. Now the wait is nearly a year and continues to grow. When the time to resolution of an offense is so long, can we expect a deterrent effect? At what point will people become justified in thinking that society does not really care whether traffic offenses are resolved and punished, or not?

All over, lines are getting longer for everything people try to do. In our West L.A. courthouse, we routinely close the doors at 4:30 p.m. with a line of people waiting outside—people who came to court, waited in line, sometimes for hours, but couldn’t complete their business that day. Such stories are not unique to Los Angeles and happen daily throughout the California courts.

There are also quantifiable economic ramifications of the gridlock. Our court collects nearly $1 billion each year in fines and fees—revenue equivalent to more than 1 percent of the state General Fund. The money is then distributed to dozens of agencies and programs throughout state and local governments. Delays in case resolution mean delayed revenue collection.

The economic implications of judicial branch gridlock go further. In the civil courts, where millions of dollars hang in the balance every day, delay means economic loss. A study done by Micronomics, Inc., a year ago estimated that projected delays due to then-current budget cuts would lead, over the following several years, to the following new costs:

- $13 billion in lost business activity resulting from decreased utilization of legal services;
- Approximately $15 billion in economic losses due to additional uncertainty among civil litigants;
- Close to $30 billion in lost output and more than 150,000 jobs from damage to the Los Angeles and California economies; and
- $1.6 billion in lost local and state tax revenue.

Similar impacts have been documented by studies of the courts in Florida and Georgia.

The erosion of our state courts is all too real—as has been documented clearly by the testimony of judges and lawyers from across the country who have participated in the ABA’s Task Force on Preservation of the Justice System. Justice hangs in the balance. The next fiscal year or two may tell whether Americans in several states will be able to depend on a fully functioning justice system.

What the Future Holds—and How We Must Shape It

The California state budget is not out of danger. The state Legislative Analyst’s Office recently projected that, at current spending levels, the state would see continued deficits of as much as $5 billion as far out as fiscal year 2016–17. The legislature faces a budget year with a $13 billion deficit to address. When they addressed the same size problem last year, the trial courts suffered an additional $350 million in cuts. There are more cuts to be made to California government; recovery is an impossibly long way out.

As we continue to navigate the crisis, we recognize there is no silver bullet. We are working hard on multiple fronts: advocating for more funding, adjusting to shortfalls, carefully using our existing resources, triaging (e.g., tolerating backlogs in some places but not others). Our lessons therefore are not in the form of a single strategic thrust, but rather a set of balancing acts, or disciplines to maintain:

1. The more entrenched we are in a boom-and-bust, one-year-at-a-time funding cycle (with state funding), the longer must be our own fiscal vision and strategies.

2. The more technical the underlying analyses (e.g., of budget problems and solutions), and the more we rely upon specialized administrators, the more work do we educate our rank-and-file judges about what the problems are and how we propose to respond to them.

3. As we seek to educate funders about the significance of our work, we must recognize the impossible budget pressures they face and must bring solutions, not just problems, to the table when we meet.

4. While we continue to fight for more reasonable funding levels, we continue to make adjustments to “the new normal” for our court, recognizing that a full recovery will not happen.

5. As we seek those adjustments in ways that preserve judicial independence, we also have to remember the many interdependencies we have with justice system partners and stakeholders how our actions will affect them and how their own budget difficulties will impact us.

6. The worse our fiscal situation becomes, and the more we are focused on the crisis of the moment, the harder we think about two things:
   a. The long-run implications of our actions and
   b. The need to preserve due process.

We have learned much from the creativity and dedication shown by trial court judges and administrators across the country, and the collective wisdom compiled by the ABA, the National Center for State Courts, and others. That is why I do not despair. I remain heartened by what I see: that those of us who face the worst of these budget challenges are managing to preserve access to justice and to maintain the basic functioning of our state trial courts. The spirit of justice still thrives in our courts; it is a powerful force.

Endnote
1. The study can be found at http://micronomics.com/articles/LA_Courts_Economics_Impact.pdf.
ONE LESSON FROM THE KENTUCKY SYMPOSIUM

Building a Multidisciplinary Constituency of Support

By Peter M. Koelling

As the University of Kentucky School of Law honored its alumnus William T. (Bill) Robinson III, president of the American Bar Association, with a major symposium about court funding this past September, noted scholars and court leaders shared ideas about how to address the court funding crisis. This article comments on one major theme that recurred in every presentation: the idea that courts need a multidisciplinary constituency that supports them before the legislature.

This is a relatively new phenomenon for the judicial branch. Lawyers once dominated state legislatures. Courts did not then need to explain what they did, why their role was so important, or what their position was in the constitutional framework of government. Today, however, lawyers are usually a small minority. Courts have to make certain that the elected officials who provide funding, either in the state legislature or on the county commission, understand the role and function of courts.

The legislature responds to the needs of the people who elected them. The courts therefore need to build a diverse constituency of individuals who will express their support for the judicial branch. Building such a constituency involves both education and outreach.

The logical place to begin is with state and local bar associations. Bar associations can both lobby on behalf of the judicial branch and help the courts develop programs that educate the public about their multiple roles. Unfortunately, many people’s perception of courts is influenced by a less than positive association; people typically end up in court when there has been a problem, a divorce, a dispute, a crime, or an injustice. One group involved with the court that does have a positive attitude is jurors. Surveys show that people who have served on juries have a
more positive attitude toward the judicial branch. Some courts have used the time that jurors wait in the jury pool to do some education—not just about the trial process but about the judicial system in general. This type of education could be used on a broader level to build a constituency for our courts.

As judges and lawyers, we understand the concept of judicial independence. But to build a constituency of support, it is important that we think about our messaging. According to a study done by Justice at Stake, the concept of independent judges is not always well-received by members of the public. According to that same Justice at Stake survey, while the public does not react well to the words “independent judiciary,” they do like the concept of checks and balances on governmental power. They do want courts to protect individual rights. They understand the need for fair and impartial courts. They also need to know that courts can protect and facilitate a free and fair market economy and protect society from crime. Yet, courts cannot do so if delay interferes with timely resolutions.

As a number of studies have shown, court delay has a substantial economic impact, and the continued underfunding of the courts will most certainly lead to more delay. This message, if effectively broadcast to the public, should gain widespread support for court funding because many individuals have a stake in efficient court functioning.

The courts also need an effective response to the accusation that they are unaccountable. One response is to make it clear that the judicial branch is subject to multiple levels of accountability. Courts are highly transparent institutions. Virtually all court proceedings are open to the public. So are most court records, except those involving juveniles. Trial courts involve actual citizens in the decision-making process through the use of jurors, the only branch of government that actually involves citizens in its fundamental process. The courts do not control the types of cases that are filed but hear all matters brought by citizens.

The adversarial process allows parties to bring forward evidence, point out errors, and ask for corrections. This process makes certain that both sides of an issue are always considered. Decisions of trial courts and intermediate courts may be appealed. This is a system of legal accountability that makes certain that lower courts adhere to the law. In addition, courts provide written explanations of their rulings and actions. They operate under an enforced code of conduct that holds judicial officials to a higher standard than officials in other branches.

Each state has a mechanism to investigate and punish violations of the code, and judges who violate the code’s standards of behavior are often removed from the bench. In their operations, most court systems have begun to adopt performance measures such as the time standards passed by the ABA, the Conference of Chief Judges, and the Conference of State Court Administration. In addition, judges in most states also must face some form of election. This message of the multiple levels of accountability needs to be better communicated to the public.

In order to build a diverse constituency of support, courts must be responsive to the many needs of different communities. Courts should be in a constant cycle of improvement by assessing the needs of the communities they serve, measuring how well the judicial branch is meeting those needs, looking for ways to improve its performance, and measuring the effect of the steps that are taken.

Vital to support is the issue of access: Do people have the ability to use the courts? According to a recent survey of lawyers, small businesses and the middle class are beginning to see use of the courts as cost prohibitive. Can those who are poor or who do not speak English well have an opportunity to be heard? There can be access issues even for those who can afford the cost of litigation. As critical resources are being cut in some courts, the civil docket is forced to take a back seat to the criminal docket due to the necessity of meeting speedy trial demands. When this happens, the courts are not serving the interest of those in civil disputes. The

Courts have to make certain that the elected officials who provide funding, either in the state legislature or on the county commission, understand the role and function of courts.

Peter M. Koelling is the director and chief counsel of the ABA Justice Center, which encompasses the Judicial Division, the Standing Committees on Federal Court Improvements and Judicial Independence, and the Coalition for Justice. Koelling has worked in court administration in Texas, Washington, and Colorado. He is also a Ph.D. candidate at Northern Illinois University in the fields of public administration and public policy. He can be reached at peter.koelling@americanbar.org.
Courts should be in a constant cycle of improvement by assessing the needs of the communities they serve.

Courts have the opportunity to embrace new information management systems and other technology to handle and process information. The use of new technology can allow the court to operate more efficiently and to better communicate with parties and the public without compromising justice. While new technology often involves a substantial investment, courts that have been able to obtain the necessary resources have been able to show the continuous savings and service level improvements in the future that have been able to obtain the necessary resources. The judicial branch also needs to review its governance model and to make certain that there is representation from all court levels and regions in the administrative decision-making process.

Those decisions, such as the allocation of budgeting resources, should be transparent and realistic. If so, the judicial branch will have greater cohesion among its members in dealing with other branches of government.

Courts must reach out to these various constituencies, delivering their message. There should be regular dialogue with the legal community, a relationship that cannot and should not be ignored. The judicial branch must articulate its needs to the bar so that its members can be strong advocates on behalf of the courts. Judges sometimes assume that lawyers already understand the needs of the court, but this is not always true.

The courts also need to reach out beyond the legal community. The support of new technology can allow the court to operate more efficiently and to better communicate with parties and the public. Courts should be in a constant cycle of improvement by assessing the needs of the communities they serve.

Endnotes

2. Id.
6. Id.
7. See, e.g., Wash. Econ. Grp., The Economic Impacts of Delays in Civil Trials in Florida’s Courts Due to Under-Funding of Court System (2009).
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Symposium Summary: Five Ways to Solve the Court Funding Crisis

By William K. Olivier

Every now and then, an event causes its participants to realize that something important happened. So it was on a late September 2011 weekend in Lexington, Kentucky, with a landmark symposium on the nationwide court funding crisis. The symposium included 13 current or former state supreme court justices; other dignitaries from the judicial, legislative, and executive branches; and prominent lawyers, law professors, and judicial system analysts.

Setting the Stage
Following a welcome by Kentucky Supreme Court Chief Justice John Minton, Erwin Chemerinsky set the stage for discussion. The key questions to address, according to Chemerinsky, were:

1. What is the nature of the problem and why?
2. When does inadequate funding violate the federal and state constitutions?
3. What can be done about it?

In highlighting the extreme consequences that can occur from inadequate court funding, he noted that in a Russian courthouse where a conference on courts in Russia was being held, prisoners awaiting trial were kept in cages because there was no money for security guards. With that backdrop, he recited State of California court funding cuts of $200 million followed by an additional $150 million in cuts and $300 million placed on hold for court construction. He also noted discussions about cutting 34 percent of court employees in Los Angeles and 200 court employees in San Francisco that would include closing half the courtrooms even though the caseload was not decreasing.

Chemerinsky proposed a constitutional argument against such defunding, the “essential functions thesis,” saying that Congress cannot restrict court funding in a way that undermines their essential functions. To help legislatures provide adequate funding, he proposed more “think tank” focus on court administration, determining how litigation can be used to help fund courts, use of the political process, achieving long-term solutions such as longer term funding, and addressing the larger social issue of how to tax without branding government as evil. He ended with the query of how great will the problem have to get before the rule of law is compromised.

Panel discussions further illustrated the difficulties facing courts under the funding crisis. As noted by Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform, the single issue all businesses share in common is the need for an independent, fair, and impartial judiciary. She estimated that small businesses will absorb a $152 billion impact from tort case disputes, which will affect the ability of those businesses to obtain financing because banks will not want to loan money to businesses potentially subject to big tort liability.

Donna M. Melby, a business trial lawyer with Paul Hastings in Los Angeles and a member of the Board of Directors of the National Center of State Courts, commented that California already was seeing a delay impact from the funding crisis and that the American jury trial, including civil jury trials protected by the Seventh Amendment to the U.S. Constitution, are being threatened by inadequate funding. John T. Broderick Jr., dean and president of the University of New Hampshire School of Law and former chief justice of the New Hampshire Supreme Court, said states cannot fill some judicial vacancies because they need to allocate the money to pay health-care costs for existing employees.

Over the course of the two-day symposium, the panels identified various avenues
for meeting the dire financial challenge: (1) litigation, (2) negotiation, (3) education, (4) communication, and (5) innovation.

**Litigation**
Citing state constitutional provisions, some panelists saw litigation as one way to resolve the funding crisis. Robert S. Peck, president of the Center for Constitutional Litigation, P.C., stated that it may not be possible to persuade legislators to fund the courts adequately without the pressure of litigation consequences. The political will must be there to achieve what the constitution mandates. Specific causes of action were not mentioned, however. Also debilitating impact upon the courts when you decrease the 1 percent by 10 percent.

Convincing legislators of that unfairness is a problem. As some panelists stated, often legislators consider the courts just another government agency, and the courts have to get in line for their money. Certainly, executive branch agencies have their own compelling needs for funding. Some agencies have mandated funding requirements such as paying benefits or adhering to educational standards. G. Alan Tarr, director of the Center for State Constitutional Studies and distinguished professor of political science at Rutgers University–Camden, noted that, if courts negotiate for the courts, it was noted that judges cannot speak for themselves. Therefore, a collaboration is needed that includes the courts, the bar, and related associations.

**Education**
Underlying the budgetary problem is the need to educate the voting public on the role of the courts and their need to remain financially viable. It was noted that the services provided by specialty courts, for example family law services, were the first to feel the impact of severe budget cuts. As former ABA President Stephen N. Zack observed, you cannot have a remedy if you do not have a court to administer it. Professor Tarr noted that there are two possible solutions: either larger budgets or a larger share of the budget allocated to the courts.

David Barron, professor at Harvard Law School, commented that the overall effort to solve the funding crisis will have an impact on the decisional independence of the courts. He stated that solutions need to fix both short-term and long-term issues. Discussion in that regard must involve a language shift from what services courts provide to what courts are. Delaware Supreme Court Justice Jack Jacobs noted that the purpose of the courts is to resolve legal disputes effectively and that this role is jeopardized because the cost of litigation has become too expensive, not just for individuals, but even for large corporations.

Zack proposed that an independent agency, and the courts have to get in line for their money.

As some panelists stated, often legislators consider the courts just another government agency, and the courts have to get in line for their money.

not mentioned were the inherent conflict of interest of a litigant being the arbiter in the same dispute and the problem of trying to litigate in a dark courtroom due to lack of funding. Other negative features of litigation are that it creates hostility among the parties and polarizes people necessary to the resolution of any dispute. As Chemerinsky suggested, it may be necessary to study how litigation can be used to help fund the courts. Perhaps one means might be to pursue recall elections for legislators that refuse to abide by their oath to uphold their constitutional provisions to provide adequate funding.

**Negotiation**
Negotiation with legislators to obtain the necessary resources is not without pitfalls. Some panelists conceded that it is difficult to address a huge financial deficit without impacting the courts. Others stressed that the courts typically receive only 1 percent of a government budget and that a 10 percent budget cut across the board has a

have to compete for state resources, they will be waiting in a very long line.

However, there are ways to improve one's place in the line. Jon Mills, dean emeritus and professor of law at the University of Florida Fredric G. Levin College of Law and a former speaker of the Florida House of Representatives, commented that an effective way to negotiate with legislators is to have a persuasive story. He gave an example of a prisoner being released because of speedy trial issues who then went out and committed a rape and murder. As noted by the Honorable Peggy A. Quince, former chief justice of the Florida Supreme Court, the little amount of money saved in budget cuts must be weighed against the great harm created by the funding cut. Oregon Supreme Court Chief Justice Paul J. De Muniz said the legislature must see the judicial branch in a different role, as a participant in a problemsolving scenario rather than as an entity with a hand out looking for money.

Addressing the issue of who should

Addressing the issue of who should

William K. Olivier is chair of the ABA Judicial Division Lawyers Conference and is now a solo practitioner in dispute resolution in Colorado and Washington, D.C., after retiring from the U.S. Department of Justice Civil Division.
judiciary requires freedom from financial interference by legislators. Therefore, a goal in the budgetary battle is for the judiciary to determine its own funding needs and, unless vetoed, its budget becomes part of the state’s. Robert Peck noted that courts have inherent authority over their own government and over their right of continued operation.

Communication
Communication was identified as a necessary way to achieve support for court funding needs. Ohio Supreme Court Chief Justice Maureen O’Connor professed that lawyers need to do a better job of communicating to citizens about the courts by going into communities to discuss the role of courts and the funding problems. Some bar associations do it, she said, but not to the extent that it needs to be done. She recommended a grassroots campaign to educate citizens. She also said it was important to identify motivating factors for the business community to get involved.

North Carolina Supreme Court Justice Mark Martin called for a national dialogue about how the courts can effectively deliver justice in the current economic environment. He said that all segments of society have an interest in ensuring adequate court budgets and can help convey this message to state legislatures. Each state has constituencies that have the ear of state legislative leaders. Encouraging these groups to place court funding on their legislative priority lists can make a tremendous difference. However, Justice Martin cautioned that the judiciary must speak with one voice to deliver a consistent message and be careful not to create new problems while trying to cure existing ones. He noted that members of the media will be natural supporters of the courts and, therefore, key allies in this national dialogue.

Innovation
Success in achieving resolution of the court funding crisis may not be reached without innovation in the way the judicial system conducts business. This innovation includes both the use of advances in technology and the periodic reassessment of how business operations are performed.

Dean Broderick noted that the technology gap is dramatic between what is currently available and what is in the courts. He stated that funding is needed for future courts, not just for how courts now operate. He also stressed that more knowledge was needed on how to use technology, not just more money. He believes that every branch of government, including the judiciary, should enhance transparency, visibility, accountability, and accessibility.

Director of South Carolina Court Administration Rosalyn W. Frierson commented that the expectation of the public is that court records should be accessible 24/7 without stepping foot in the court. Social media are used to get feedback from court users as well as to provide information to users. Twitter makes court events available instantaneously to the public compared to the older system, which required a substantial time lapse before even posting results online. She said use of social media is not a question of when, but how. Web pages are not used much anymore, she observed. Now the media are Facebook, Twitter, and blogs. She gave an example that Twitter is now used to get the word out on last-minute stays of executions. Chief Justice De Muniz corroborated her observation by saying that social media reflect the younger generation’s views that we live in an open society and everything should be available.

On court operations, Michael L. Buenger, a senior counsel at the National Center for State Courts, said there is an obligation to not just talk about court funding, but to find ways to operate more efficiently by performing what business calls a “penetrating review of operations.” Performance measuring is a key to finding a solution to the funding crisis. Courts must constantly ask and analyze what can be done better and whether they are meeting the needs of the public.

Conclusion
Wrapping up the symposium, former Chief Justice of the Supreme Judicial Court of Massachusetts Margaret H. Marshall called for consistent, persistent efforts to protect the delivery of justice. She noted that about one-third of the people in the country are involved in court disputes each year and that justice is not the same as transportation, education, or even health care. She called upon leaders of the bench and the bar to respond by helping to craft solutions and to create a national conference because citizens do not yet know that the future of our state court system is at risk.

Echoing her words, ABA President William T. (Bill) Robinson III said it is time to enlist the public in resolving the court funding crisis by talking to our friends and neighbors about the impact to them on court delays and the consequent cost to them as taxpayers. He called for “consistent and consistent advocates for the courts.”

Endnotes
1. The symposium celebrated the 100th anniversary, and volume, of the Kentucky Law Journal (K LJ), and included a stellar cast of judicial system dignitaries. In addition to the K LJ staff, planners included ABA President William T. (Bill) Robinson III, North Carolina Senior Associate Justice Mark Martin, and National Center for State Courts President Mary Campbell McQueen.

2. Dean and Distinguished Professor of Law at the University of California, Irvine School of Law.
Lincoln’s Counsel: Lessons from America’s Most Persuasive Speaker

Arthur L. Rizer, III

Before Abraham Lincoln was called “Mr. President,” he was called “counselor” and “esquire.” Some consider him to be one of the nation’s greatest attorneys and, at the very least, an enormously persuasive speaker. He spent more years practicing law than any other president, and his years in the legal profession were essential to his eventual election to the presidency.

As a lawyer, Lincoln knew how to craft successful closing arguments. As a president—with his Gettysburg Address, perhaps the greatest closing argument in history—he knew how to persuade a bitterly divided country into ultimately doing what was right for all.

Through examples from Lincoln’s great speeches and closing arguments—including in their entirety are Lincoln’s First and Second Inaugural Speeches, the Gettysburg Address, the Emancipation Proclamation and more—this book instructs you in the art of persuasion in two simple ways: by providing lessons from Lincoln’s career as a lawyer and politician, and then by analyzing those lessons and discussing how to apply them to your own life. Lincoln’s Counsel gives important advice about advocacy straight from the very best.

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From 2002 to 2009, the U.S. Supreme Court decided three cases directly bearing on state judicial elections. Taken together, the decisions offer guidance as to whether elected judges really differ from other elected officials, and, if so, in what ways the law can—and cannot—protect and reinforce those differences. First, the Court held, 5–4, in Republican Party of Minnesota v. White that a state canon prohibiting judicial candidates from announcing their views on issues “likely to come before [them]” failed First Amendment strict-scrutiny analysis. Six years later, the Court upheld New York’s uniquely byzantine system of trial-court elections, emphasizing legislative deference and party associational rights over ballot access and voter and candidate interests. And most recently, the Court found a due process violation where a West Virginia Supreme Court justice refused to recuse himself from the appeal of a company whose CEO spent $3 million supporting the justice’s campaign for the bench.

This excerpted article is adapted from “Lawyer, Candidate, Beneficiary, AND Judge? Role Differentiation in Elected Judiciaries,” which appears in the 2011 edition of The University of Chicago Legal Forum. This more concise version focuses on current developments in the law of judicial elections, principally in light of White—mentioning the other decisions only briefly. The article then trains a focus on an excellent, and even more recent, decision by Judge Frank Easterbrook for the U.S. Court of Appeals for the Seventh Circuit.
that emphatically endorses the practice of states enforcing rigorous recusal rules that go beyond the constitutional minimum to protect the compelling interests in preserving and promoting both the actuality and the appearance of judicial impartiality.

**Ketchum v. Ketchum**

A recent recusal controversy in West Virginia—not the famous Massey Coal case1—illustrates the confusion and increasingly polarized perspectives within judiciaries themselves as to the canons of judicial conduct, the rules of disqualification, and the strained relationship between post-White campaigns for the courts2 and the role of elected judges once seated on the bench.3

While campaigning for a seat on West Virginia’s Supreme Court of Appeals (CAP) in 2008, Menis Ketchum promised, with respect to the state’s cap on punitive damage awards: “I will not vote to overturn it. I will not vote to change it. I will not vote to modify it.”4

Predictably, the CAP’s constitutionality was soon challenged, and the plaintiffs sought now-Justice Ketchum’s recusal because his campaign statements “indicate[d] clear prejudgment of this case,” violating the code of judicial conduct’s prohibition against candidates making “pledges or promises of conduct in office” or statements that “commit or appear to commit the candidate” on matters “likely to come before the court.”5

Citing White, Justice Ketchum denied the recusal motion, asserting: “those statements reflect my views as Lawyer Ketchum—not jurist Ketchum. . . . [A]s a jurist I am required to look at all issues from a different perspective than I enjoyed as Lawyer Ketchum.”6 “Lawyer Ketchum” was also, of course, candidate Ketchum, who expressly refers three times to how he would “vote”—a luxury not afforded to lawyers qua lawyers on such matters—if elected to the state high court.

Ketchum’s nonrecusal came via an order released only to the parties in the case.7 After learning of the nonrecusal, the plaintiff’s attorney8 told the National Law Journal that there was no appeal from Ketchum’s refusal, despite his clear contravention of the judicial code. As in most state supreme courts in the United States,9 the most a lawyer can presently hope for in West Virginia is a long-after-the-fact disciplinary reprimand of the judge that provides little solace to the litigant, and does little, if anything, to restore public confidence in the courts. This was not the end of the story, however.

Four days after the initial order, Justice Ketchum reversed his decision and disqualified himself.10 The justice stated his strong belief that there was no legal basis for his disqualification11 and complained of the lawyers who promptly shared his order with the National Law Journal: “the lawyers who moved to disqualify me are attempting to create a ‘firestorm’ by assaulting the integrity and impartiality of West Virginia’s Supreme Court.”12

What is shocking is that making the order public was what Ketchum intended to avoid. The matter was not a dispute before a private arbitrator bound by confidentiality; rather, it involved an order from a justice of the Supreme Court of Appeals of West Virginia in a case involving a challenge to a state law. Beyond the almost tragicomic qualities of the initial and subsequent written orders,13 Ketchum’s view of the merits of the recusal motion reflects a deeply troubling misunderstanding of disqualification standards and of judicial independence more generally. Ketchum based his original refusal to recuse himself on an erroneous reading of White, which, while striking down a prohibition against judicial candidates announcing their views,14 explicitly noted the availability of recusal as an ex post remedy in lieu of the ex ante prohibition.15

**Republican Party of Minnesota v. White**

Republican Party of Minnesota v. White16 involved a provision of Minnesota’s code of judicial conduct known as the “announce clause” that prohibited candidates for judicial office from announcing their positions on disputed political or legal questions.17 The Court emphasized the states’ option to choose appointments rather than elections and held that [although states can choose whether to elect judges or appoint them], the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.18

White was a narrow decision. Justice Antonin Scalia’s majority opinion expressly stated that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”19 Justice Anthony Kennedy’s concurrence in White provided, though few recognized it at the time, a limiting principle and a dose of foreshadowing. According to Justice Kennedy, strict-scrutiny analysis was unnecessary in that “[t]he speech at issue” was not “within any of the exceptions to the First Amendment.”20 On the other hand, Justice Kennedy asserted that the state interest in maintaining the integrity of its judiciary is an interest of “vital importance”21 and, most notably, that states “may adopt recusal standards more rigorous than due process requires.”22 Indeed, such rules existed at the time of White, and still exist, in all 50 states.23 The most general, both in its terms and in its near-universal adoption with

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James Sample is an associate professor at Hofstra University’s Maurice A. Deane School of Law. He can be reached at james.sample@hofstra.edu.
only minor variation, is Rule 2.11(A) of the ABA’s 2007 Model Code (formerly Canon 3E(1)): “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”

Given the ubiquity of such standards, one might expect that Justice Kennedy’s “more rigorous” statement would be considered neither particularly complicated nor particularly controversial. But one would be wrong—in part because recusal rules are so widely misunderstood, and in part because of organized efforts to undermine them.

After White, luminaries among Justice Kennedy’s state colleagues, such as former Texas Chief Justice Tom Phillips, would cite Justice Kennedy’s statement for the proposition that “more rigorous” recusal standards are the proper response to concerns that unfettered judicial speech may undermine the real and perceived fairness of the courts,” and, further, that “now, as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice William Rehnquist called the ‘crown jewel’ of our American experiment.”

for suits challenging the cited provisions of the conduct codes. In response, many bar associations, judges, and groups concerned about judicial independence came up with recommendations for judicial candidates, such as “never use the pre-printed answers provided on the questionnaire” and “never rely upon a judicial Canon to justify a decision not to respond.” While this advice may be tactically sound, it also reflects and even promotes the marginalization of the codes themselves.

**Bauer v. Shepard**

In Bauer, the Seventh Circuit addressed a challenge to Indiana’s Code of Judicial Conduct, the genesis of which was an Indiana Right to Life (IRL) questionnaire for judicial candidates. IRL asked candidates for Indiana judicial office whether they subscribe to propositions such as “I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.” The plaintiffs, who were judicial candidates recruited by IRL, challenged reasonably be questioned.” The plaintiffs also challenged Indiana’s “partisan-activities clauses” and “solicitation clauses” that restrict the fund-raising activities of judicial candidates.

Judge Easterbrook, writing for the court, quickly disposed of the challenges to the solicitation and partisan-activities clauses, noting, in the case of the latter, that like Hatch Act restrictions on the political activities of government employees, “rules that keep judges out of active politics” are aimed at the “preservation of public confidence.” While these holdings are entirely consistent with the broader premise that judicial elections are different in constitutionally salient respects, it is Bauer’s analysis of Indiana’s “commits” and “recusal” clauses that offer a model approach for post-Caperton analysis of the canons of judicial conduct.

Bauer begins the analysis by noting that none of the questions in the questionnaire requires a “commitment” or “promise” on any issue in the sense that a judicial candidate who answers “agree” in response to the proposition regarding the “unborn child” has “committed to

Some groups include an option for candidates to decline to answer because of the jurisdiction’s applicable code of judicial conduct.

Other alternatives seem less compelling. One campaign practice that has waxed in the post-White era is the interest-group questionnaire for judicial candidates and then the dissemination of often grossly oversimplified interest-group literature based on those questionnaires. Some groups include an option for candidates to decline to answer because of the jurisdiction’s applicable code of judicial conduct. Although offering a fig leaf of protection for judicial independence, accepting the “decline” option has also created the predicate four provisions of Indiana’s Code.

The first challenged provision, the “commits clauses,” “forbid[s] judges and candidates . . . to make commitments that are inconsistent with the impartial performance of judicial office.” Under subsection 2.11(A)(5), “commitments” occur when the judge “has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” The second, the “recusal clause,” requires recusal whenever a judge’s impartiality “might defying Roe v. Wade and its sequels.”

Bauer further recognizes that White “holds that judges and judicial candidates are entitled to announce their views on legal and political subjects,” including views on issues such as those included in the questionnaire. Drawing the metaphorical line in the sand, however, Judge Easterbrook emphatically holds the provisions to be constitutional: “Although the Court held in White[ ] that judges may state their views on contestable and controversial subjects, such as whether the exclusionary rule is wise policy, or
whether mandatory minimum sentences should be repealed—it did not hold that judges may make commitments or promises about behavior in office.48

The critical distinction recognized by the Seventh Circuit, and either misunderstood or—less charitably—ignored by individual candidates and jurists akin to Justice Ketchum and Alabama Supreme Court Justice Tom Parker and by the judges themselves, is that because a state has chosen elections as its means of judicial selection, the remedy for bias is political rather than legal, Judge Easterbrook properly notes that “[i]t is small comfort for a litigant who takes her case to state court to know that, while her trial was unfair, the judge would eventually lose an election.”52

Post-White norms could scarcely be more starkly illustrated than via Justice Bauer’s affirmation of the world’s confidence in the system.51 According to Parker’s radio spot, “[m]ost people believe al-Qaeda is one of America’s biggest security threats. I think it’s time to add liberal activist judges like Judge Phillips to that list.”54

According to Parker, that comparison is justified because “liberal activists like Judge Phillips are overturning marriage laws, raising taxes, violating property rights, and now they are attacking our very national security.”55

Thousands of candidates and judges—elected and appointed—remain willing to swim against the currents, to approach the judicial role with a restraint reflective of rigorous respect for both the rule and process of law.

interest groups with whom they act in tandem, is that a “judge who promises to ignore the facts and the law to pursue his (or his constituents’) ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter.”49

Pivoting, Judge Easterbrook observes that the court’s commits clause analysis “implies the validity of the recusal clause. States have a strong interest in ensuring that judges come to their cases without precommitments. . . . But there is more to be said. The recusal clause does not present a constitutional issue at all.”50 A stronger post-Caperton affirmation of the relationship between Caperton’s validity as a constitutional floor and the State’s prerogative to protect its “vital interest” in maintaining the actual and perceived integrity of its judiciary is not to be found.

Noting that “a state may decide to assign each case to a judge whose impartiality is not in question,” Bauer acknowledges that “all [the recusal rule] does is allocate cases among judges. . . . States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward.”51

And speaking to the overstated notion Parker, who ran a radio advertisement in 2010 in which he likened U.S. Federal District Court Judge Virginia Phillips, who struck down the military’s Don’t Ask Don’t Tell policy, to the threat posed by al-Qaeda.53

According to Parker’s radio spot, “[m]ost people believe al-Qaeda is one of America’s biggest security threats. I think it’s time to add liberal activist judges like Judge Phillips to that list.”54

According to Parker, that comparison is justified because “liberal activists like Judge Phillips are overturning marriage laws, raising taxes, violating property rights, and now they are attacking our very national security.”55

Thousands of candidates and judges—elected and appointed—remain willing to swim against the currents, to approach the judicial role with a restraint reflective of rigorous respect for both the rule and process of law. To the extent that the canons protect and promote the judicial role, they serve a high purpose. After all, “impartiality is not an end in itself. It is an instrumental value designed to preserve a different end altogether: the rule of law.”56

Nearly a decade removed from White, financial and interest-group pressure, many state jurists and judicial candidates find themselves struggling with an increasingly challenging dilemma: to signal or not to signal? As the relative cost-benefit analysis for an isolated individual continues to diverge from the less favorable cost-benefit analysis for society writ large, jurists like Ketchum and Parker remain, for now, the exceptions. In White’s aftermath, however, the exceptions are increasing in both number and degree. This pushing of the envelope inevitably results in a feedback loop producing yet

Thousands of candidates and judges remain willing to approach the judicial role with a restraint reflective of rigorous respect for both the rule and process of law.
Call for Nominations

This award is named in honor of John Marshall, fourth Chief Justice of the United States, who is credited with establishing the independence of the judiciary and enhancing its moral authority.

The John Marshall Award was established by the American Bar Association Justice Center to recognize those dedicated to the improvement of the administration of justice.

The 12th annual presentation of the John Marshall Award will take place at the ABA Judicial Division Annual Dinner in Honor of the Judiciary in Chicago, IL.

Criteria for Selection

The John Marshall Award may be presented to any individual who has made a positive national impact on the justice system.

Nominees may be non-lawyers as well as lawyers. Eligibility is open to any individual responsible for extraordinary improvement to the administration of justice in the categories of:

• Judicial Independence
• Justice System Reform
• Public Awareness about the Justice System

Nomination Guidelines

Nominations should include:

• Resume or biographical sketch
• Description of the contribution and impact
• Letters of support (limit of 5) for the nomination
• Resume or biographical sketch

Nominations and supporting documentation should be sent to:

ABA Justice Center
John Marshall Award
321 North Clark Street
19th Floor
Chicago, IL 60654

Telephone: 312.988.5700  Fax: 312.988.5709

The deadline for nominations is February 17, 2012

A complete version of this article titled “Lawyer, Candidate, Beneficiary AND Judge? Role Differentiation in Elected Judiciaries” appears in the The University of Chicago Legal Forum.

Endnotes

2. Id. at 771.
5. Id. at 2257–58; see also Ian Urbina, West Virginia’s Top Judge Loses His Re-election Bid, N.Y. Times, May 15, 2008, at A25; Maggie Barron, Impartiality Still an Issue After WV Judge’s Riviera Scandal, Brennan Ctr. for Justice (May 15, 2008), http://www.brennancenter.org/blog/archives/impartiality_still_an_issue_after_wv_judges_riviera_scandal/.
6. See Roy A. Schland, New Challenges to States’ Judicial Selection, 95 Georgetown L.J. 1077, 1094 (2007); see, e.g., Chief Justice Catherine Stone & Wendy Martinez, Caperton v. A.T. Massey Coal Co.: The Texas Implications, 41 St. Mary’s L.J. 621, 623–31 (2010) (discussing several recusal cases in Texas that called into question the propriety of campaign contributions made by one of the parties to the presiding judge).
7. Massey Coal, 129 S. Ct. at 2257–58; see also Urbina, supra note 5, at A25; Barron, supra note 5.
9. Id.
14. See Jeffrey W. Stempel, Impeach Brent Benjamin Now!! Giving Adequate Attention to Failings of Judicial Impartiality, 47 San Diego L. Rev. 1, 64 (2010). Prompted by Caperton v. Massey, the Michigan Supreme Court in a 4–3 decision adopted new recusal rules requiring that a judge facing a petition for voluntary recusal provide a written opinion explaining his or her deci-


16. Id.

17. Id.


20. See id. at 794 (noting that states “may adopt recusal standards more rigorous than due process requires.”) (Kennedy, J., concurring).

21. 536 U.S. 765.

22. Id. at 770.

23. Id. at 788.

24. Id. at 783. Indeed, Tom Phillips recently wrote, “In and of itself, [White] was hardly a remarkable decision, as it affected only one obsole

25. White, 536 U.S. at 793.

26. Id.

27. Id. at 794.

ger ing lawsuits challenging provisions in the Code” and that “[s]uch lawsuits have been brought in Alaska, Florida, Indiana, Kansas, Kentucky, North Dakota, and Pennsylvania”).


30. See Bauer v. Shepard, 620 F.3d 704, 706–07 (7th Cir. 2010).

31. Id.

32. Id. at 707 (noting that, after an initial dismissal due to lack of standing, Indiana Right to Life “then recruited a candidate for judicial office (Torrey Bauer) and a sitting judge (David Certo) as plaintiffs to join in this new suit” and that “both say that they refrain from speaking about abortion, and other controversial topics, because they fear the prospect of sanctions under the Code”).

33. Id. See also Ind. Code of Judicial Conduct Canon 2.10(B), 4.1(A)(13) (2010).

34. Bauer, 620 F.3d at 707.

35. Id.

36. Id. at 707 (noting that, after an initial dismissal due to lack of standing, Indiana Right to Life “then recruited a candidate for judicial office (Torrey Bauer) and a sitting judge (David Certo) as plaintiffs to join in this new suit” and that “both say that they refrain from speaking about abortion, and other controversial topics, because they fear the prospect of sanctions under the Code”).

37. Id. See also Ind. Code of Judicial Conduct Canon 2.10(B), 4.1(A)(13) (2010).

38. Bauer, 620 F.3d at 707.

39. Id. See also Ind. Code of Judicial Conduct Canon 2.11(A) (2010).


42. Bauer, 620 F.3d at 709–10. Note that the Sixth and Eighth Circuits reached contrary results in Carey v. Wohntitzek, 614 F.3d 189, 206 (6th Cir. 2010) (concluding that Kentucky’s solicitation clause was unconstitutionally overbroad), and Wersal v. Sexton, 613 F.3d 821, 842 (8th Cir. 2010) (striking down Minnesota’s no-political endorsement rule). Judge Easterbrook, recognizing these decisions, noted in particular that the Sixth Circuit panel in Wersal concluded that it was bound by that circuit’s decision on remand in White to apply “strict scrutiny to all ethical rules that affect either judicial campaigns or judges’ participation in campaigns for other offices,” but Judge Easterbrook noted, “[w]e are unpersuaded and shall stick with Siefert’s analysis, which differentiates what judges can do in their own campaigns . . . from how judges can participate in other persons’ campaign[s].” Bauer, 620 F.3d at 713.


44. Id. at 712.

45. Id. at 714.

46. Id. (citing Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002)).

47. Id.

48. Id. at 715. See also Stephen Gillers, “If Elected, I Promise [_______]”—What Should Judicial Candidates Be Allowed to Say? 35 Ind. L. Rev. 725, 725 (2002) (noting that “[w]e have assumed the popular election of judges and we must now find the right balance between voter information and the values of the judicial process and therefore due process”).

49. Bauer, 620 F.3d at 715–16. With respect to the plaintiffs’ allegation that the canons are, like the announce clause in White, overbroad, Bauer recognizes the possibility that Indiana might, in a future case, read the commits clauses so broadly as to sweep in protected speech, noting that “there is an irreducible risk that a promise may be misunderstood—or that the Commission and the Supreme Court of Indiana may treat it ‘inconsistent with the impartial performance of the adjudicative duties of judicial office’ even the sort of statements that are squarely protected by White,” but Bauer maintains that the “best way to find out is to wait and see.” Id. at 716.

50. Id. at 718 (emphasis added) (citations omitted).

51. Id.

52. Id. (quoting Siefert v. Alexander, 608 F.3d 974, 985 (7th Cir 2010)).


54. Id.

55. Id.


59. Bauer v. Shepard, 620 F.3d 704, 718 (7th Cir. 2010).
After the June 2011 Supreme Court case of Turner v. Rogers, the questions about judicial intervention in cases with self-represented parties have become: When must judges intervene and how most effectively can they do so? An article that appeared in the fall 2011 issue of The Judges’ Journal (at page 16) described 29 best practices for relatively civil simple cases in which both parties are self-represented. This one offers approaches in more challenging civil case situations.

Best Practices for Cases Involving One Represented Party

When one party has counsel, the task of the judge remains to apply the techniques described in the earlier article while guarding against due process distortion from the presence of counsel for one party. A clear and consistent focus on the need to get appropriate information to the fact-finder best protects against error and will be given great respect in any appellate or ethics committee review. Moreover, attorneys generally welcome clear guidance from the judge.

1. At the start, reassure the attorney that procedures are designed to ensure that both sides are fully heard and that the attorney will be permitted to play the traditional role.

   Attorneys are anxious about self-represented cases, in part fearing that the judge may take over the case, rendering them irrelevant (particularly in the eyes of the client), and in part fearing that the judge may “lean over the bench” to help the self-represented party.

   It is helpful to explain what will happen, including that the attorney will play the traditional role, including that of presenting evidence and cross-examining, and the self-represented litigant’s right to be heard will be protected. It is rarely necessary to limit the attorney’s role unless the attorney has failed to follow the judge’s instructions.

   Example: I want to tell you how I am going to make sure that I hear fully from both sides. As we move through the case, I will explain what is going on and am likely
to ask questions of both sides when I need more information. But I want you to know, Counsel, that you will absolutely be able to do your job of representing your client in this case. The case will proceed like this:

2. If necessary, control direct testimony to keep out inadmissible testimony or prevent its being given improper weight.

On direct, the judge normally may ask questions about the direct testimony presented by the party with counsel, treat testimony as objected to, and rule on these objections. This does not put the judge on the side of the self-represented litigant. Unless there has been formal objection to this direct testimony, the judge may evaluate the answers without formally ruling on the evidence. It is fairer to be explicit, however.

Example (where testimony might be subject to hearsay objection): I need more information about where this evidence comes from before I can decide what weight to give it. Counsel, can you have your witness explain how he/she heard that information? Or would you prefer me to ask the question directly?

3. Require greater specificity and explanation in objections and explain rulings where helpful.

Concise objections are likely to confuse the self-represented litigant. Judges can request greater specificity and explanation, ask additional questions about the evidence, explain the process and the ruling, and possibly indicate another way to make the point.

Example: Counsel, please explain your objection. . . . Mr. Litigant, Counsel reminds me that we need to know where you got that information. Did you see it directly or did you hear it from someone else?

4. If necessary, stop counsel from interrupting the self-represented litigant’s story.

Sometimes attorneys disrupt the self-represented litigant’s presentation with repeated objections. Initial objections should be treated respectfully. But if counsel appears to be making objections for tactical purposes, rather than to exclude inappropriate evidence, permit a standing objection and warn counsel to limit the frequency of objections, stating the reason for this instruction. Giving the attorney an opportunity at the end of that phase of the proceeding to identify any particular harm that the modified proceeding has caused should then fully protect the record.

Example: Counsel, your objections are disrupting this testimony. Can you limit them to the exclusion of inadmissible testimony, remembering that I am capable of applying common sense to the weight of the testimony? Your standing objection is noted. There is no need for ongoing objections. (To the self-represented litigant) Let me explain what is going on here. I have found that counsel’s objections are not proper. Mr. Litigant, I have reviewed the transcript of your argument and found that I should not be stopping him. That will be taken down and might be considered by an appeals court.

5. Control cross-examination to prevent mistreatment of the nonrepresented party, and use escalating responses if necessary.

Counsel is entitled to be exploratory in cross-examination and to make helpful factual points, not to humiliate or deter a witness. Judges should put counsel on notice of the problems with their approach and escalate their interventions. The judge can request the basis of cross-examination or representations that the questions are based on a good-faith belief in the possibility of their leading to relevant testimony. (Similar techniques are appropriate with a self-represented party who is engaging in similar behavior.)

Example: Counsel, stop right there. How does the witness’s family situation bear on whether he kept his contract for plumbing work? (After a general assertion about “credibility”) I am going to need more detail about the relationship of your question to lack of credibility. (After lack of result and repeated dubious questions) I find that there is a pattern of cross-examination without sufficient foundation, and I am ordering that there be no more questions without a representation of foundation. (Later . . . ) I have asked you to stop those harassing questions. If they continue, I will have to consider sanctions. Let’s take a 10-minute recess to allow counsel to consider his position.

6. To the extent that the judge is significantly modifying traditional processes, or the attorney is unhappy with the new procedure, explain the scope of judicial discretion and the reasons for the modification. Allow the attorney to be heard and to object on the record.

A clear, early explanation of what is being done will make it more likely that the attorney is not caught unawares and that he or she will go along without objection. Many attorneys do not initially understand that the rules and practices in most states give judges flexibility to modify procedure where appropriate. An explanation may well mollify the attorney. A record is critical to protect all parties.

Example: After you handle the direct testimony of your main witness, Ms. Attorney, because I see in the pleadings some matters that may need clarification, I will probably ask some questions myself rather than go immediately to cross-examination. Counsel, I understand that you are unhappy with my...
A calming understanding will help litigants get over their anxiety and focus on the substance.

neutral forum notwithstanding the fact that one side has counsel, and makes a finding that it is impossible to do so.

Example: The facts and the foundations needed for the evidence are so complicated in this case that I cannot both maintain my judicial neutrality and adequately protect the litigant's right to be heard. I would have to know too much about the case to remain fair and neutral. I am therefore adjourning this case to investigate solutions such as appointing counsel, provided the litigant can show indigency, or other services, including for referral to lawyer referral or discrete task services.

Best Practices for Cases Involving Atypical Self-Represented Litigants

This section explores certain difficult types of self-represented litigants, describing in narrative form some of the techniques that have worked best for dealing with them.

and cannot do, and being respectful of the litigant’s emotions, may help at least to move forward. A calming understanding will help litigants get over their anxiety and focus on the substance.

Many such litigants are highly anxious. The more anxious the litigant, the more important is a case structure that is manageable and understandable for all. Breaking the case into small steps, explaining each one, while repeating where necessary, can be very helpful. The litigant is less likely to lose track of the issue at hand, and the other parties will be better able to understand and address the anxious litigant’s position.

Example: I have decided that the eviction proceeding was properly started. Now we move to the next step. I must decide if the landlord is right that he has not been paid rent since May. Remember, even so that does not end the case because we then look at possible reasons for nonpayment and what they might mean.

With a disturbed or challenged litigant, the risk of unintentional noncompliance after the court's decision may be greater. Judges have found it helpful to make sure that such litigants understand both what has happened and their obligations. It can be helpful to ask them to restate what they understand their obligations to be and to suggest the possibility of getting help from family or friends. There is a major risk that this population will run afoul of the law through inability to understand, recall, or comply. Appropriate referrals can help avoid such a disaster. While ideally the clerk's office or a self-help center will have performed this function, sometimes the authority of the judge is needed to achieve the diversion.

Angry Litigants

Maintaining a respectful environment in the face of a litigant's out-of-control, or nearly out-of-control, anger is, of course, much harder when the judge does not have the lawyer to rely on to restrain the litigant. Appealing to the litigant's sense of fairness may be of help. Similarly, expressing sympathy with the intensity of the emotion may reduce the litigant's alienation. Such statements may help the litigant feel less anger at the judge as a person, thus helping the litigant focus on the process as a whole.

A potent consideration for the litigant may be that the case cannot proceed at the expressed level of emotion. Generally, litigants want a decision and want to be able to move on. They do not want to be seen as obstructionist.

If none of this works, the judge can offer a brief “cooling off” period, like a child's “timeout,” to let the litigant get a grip and then participate fully in the process. Some judges have also found that offering a talk with a staff member works well, if available staff (not necessarily senior) are particularly good at calming the more.

More stringent measures include adjournment, which must, of course, not be allowed to prejudice the nonresponsible party, or a range of sanctions for
noncompliance, including the drawing of adverse inferences against the responsible party, particularly for behavior that threatens the integrity of the process and summary contempt. Some judges use a three-step process of explaining the concept of contempt, the sanctions authorized, and only then imposing the sanction (which can later be waived if the litigant then complies).

**Determined Self-Represented Litigants**

Some self-represented litigants embrace their self-represented status in ways that complicate case management. Appellate courts and judicial conduct bodies are sympathetic to the challenges faced by judges dealing with these cases and are highly deferential to their choices in such cases.

It may be helpful to be explicitly respectful of the litigant’s right to self-represent and avoid any rush to judgment when a self-represented litigant appears to be making a choice based on perceptions of the profession or the system. It is appropriate to consider that the litigant may indeed have had a bad experience justifying his or her attitude. Bearing this in mind, reaffirming a commitment to neutrality and fairness, and not just focusing on cautions and problems, is more likely to lead to a mutually respectful relationship between judge and litigant, and therefore a smoothly running court. When litigants become dismayed because a judge does not follow their requests, it is usually helpful to explain that there are requests to which a court cannot accede if it is to remain neutral. It can be helpful to remind the litigant that the court cannot be a particular party’s attorney. Litigants will normally be respectful of refusals when explained in terms to which the litigant can relate, such as the need for neutrality.

In some cases, determined self-representation is a consequence of failure to find appropriate counsel. It might make sense to inquire as to the reason for lack of counsel and to make an appropriate referral to a referral service.

**Political Litigants**

Perhaps the most difficult cases are those in which the litigant uses the case to make a political point about the legal system and the Constitution. The judge has to maintain accessibility and the dignity of the courtroom and avoid abuse of the legal system. Limiting the focus of the proceedings to those appropriate to the particular court while maintaining a respectful and nonconfrontational attitude to the litigant is the best policy. Even counsel on both sides is the best guide for self-represented litigation as well.

2. Use pretrial conferences.

Pretrial conferences allow questions of admissibility, organization of evidence, and courtroom procedure to be resolved without the formality, pressure, and time of the courtroom. The conference can resemble a “dress rehearsal” of the trial, going over the principal elements of testimony beforehand. It should be on the record, serving procedurally as comprehensive motions in limine deeming the self-represented litigant to be moving for a ruling on the admissibility of planned testimony. Discussion during the conference of the witnesses and expected testimony can help ensure the relevance and admissibility of testimony. Such conferences may also play a discovery role and help to simplify discovery proceedings. Federal court judges have been among the leaders in experimenting with this technique.

3. Focus on documentary evidence and hearsay.

Evidence that requires foundation—documents and hearsay—seems to produce the most time-wasting confusion in trials. A focus on the required foundations in a pretrial conference will improve trial efficiency.

Example: To decide about admitting the financial records you want to present, we must know where they came from and how they have been kept. Maybe we can agree here which will be entered?

4. Encourage getting assistance from law libraries, self-help programs, and trustworthy online resources to identify the governing law and understand courtroom procedure.

**Some self-represented litigants embrace their self-represented status in ways that complicate case management.**
The more complicated the case, the more important it is that self-represented litigants understand the governing law and procedure. Increasingly, resources are available. Law librarians can assist the self-represented with research into the more complicated areas of law with which self-help center staff are not necessarily familiar.

Example: You are asking for damages, but you do not have a witness for the amount of damages. You should have a plan for getting testimony on this. The self-help center or law library might be able to give you information on this.

5. Suggest the use of pretrial forms to organize testimony. Such forms help judges identify and resolve problems in advance.

The form might ask for the points that the litigant intends to prove, a list of witnesses and what they would testify to, a list of the documentary evidence to be introduced and where it came from, and a list of problems that the self-represented party would like the judge to resolve.

6. Use court staff to screen pleadings so that technical requirements, like joining necessary parties, are properly dealt with.

Early screening saves courtroom time. In complex litigation, a technical failure in the pleadings can demolish the entire case and waste judicial resources.

Example: Clerks could screen for issues, such as failure to join necessary parties and give them to judges for immediate action, rather than waiting for the delay and complexities of adversarial back and forth.

7. Use pretrial conferences to make discovery less burdensome for both parties.

Discovery can be a major pitfall for the self-represented. Through discovery conferences and pretrial orders, courts can simplify and manage discovery, minimizing the requirements on both parties. They can also include an approach to the handling of sensitive information that might normally be restricted to the counsel, but in which the judge might have to play a more assertive role.

Example: Lawyers could review these documents but would have to keep them confidential. Because there are no lawyers, just tell me what you are looking for, and I will look. I will also tell you generally what else is in the documents, so you can tell me if I may be missing something to which you are entitled.

**Jury Trials**

Because the judicial role is so different in jury trials, the management of a self-represented jury trial offers additional challenges to keep jury selection fair and ensure that only admissible evidence reaches the jury. Judges must take special care that steps to control the courtroom and to ensure the appropriate receipt of evidence do not impact the jury. When the law requires a greater burden of proof to be carried by a particular party in order to protect the opposing party, the judge may need even more caution to ensure fairness. Moreover, when the self-represented litigant has the extra burden, it may well be inappropriate for a judge to assist in carrying the burden.

**Pretrial Conferences**

Pretrial conferences allow questions of admissibility, organization of evidence, and courtroom procedure to be resolved without the formality, pressure, and time of the courtroom.

1. Explain very early the general concepts of motions in limine and offers of proof, and establish clear procedures for resolving issues outside the presence of the jury, including the making and resolving of objections.

It is critical that the self-represented litigant understands and knows how to follow the procedures that ensure jury insulation. Those procedures should be as simple as possible. (Note: Most states have various forms of pattern jury instructions. It may well be the best practice to apply and/or adapt such approved language, where relevant, to the situations below.)

Example: We are going to go over the testimony in advance to make sure that if there is anything that either of you think the jury should not be hearing, I decide about it as soon as possible. When you tell me of something you want to show, that is called an “offer of proof.” If during proceedings you think we are going to get into a dangerous area, please stand, and I will stop the proceedings. You both will come up to me so we can discuss it outside the jury’s hearing.

2. Use chambers conferences at all stages for legal and procedural questions that might require discussion. Such conferences should obviously be on the record, or, if not possible, summarized later for the record without the jury present.

As in nonjury complex cases, the ongoing use of pretrial and chambers conferences provides an opportunity for almost a “dress rehearsal” of the trial, including full offers of proof. It removes most objections from the presence of the jury and minimizes the jury’s exposure to inadmissible testimony.

Example: Okay, the next planned witness will say what? (Overhearing an argument between the neighbors about where the property line really was) How is that relevant to who is responsible for the damage caused by the falling tree?

3. Tell the jury pool of the party’s self-represented status and the jurors’ responsibilities not to draw inferences from it or from whatever might occur during jury selection.

It will be very hard for the jury not to develop prejudicial interpretations from the litigant’s not having a lawyer.
Example: Ladies and gentlemen of the jury, one side in this case does not have a lawyer. That is their absolute right, so don’t treat the parties in any way differently because of that.

4. Explain (possibly in writing, and as early as possible) the party’s jury selection rights and procedure, and allow their full exercise.

Where the litigant merely suggests questions and makes challenges, this will be relatively simple. Where the litigant may ask questions directly, consider alternative procedures possible under governing law.

Example: You may now tell me if you don’t want some of the jurors selected so far. If you think they will not be fair to you, tell me why, and, if I agree, I will exclude them from the jury and will not reduce the number of people you can exclude without reason.

5. In initial instructions to the selected jury, address the litigant’s status and its consequences.

The jury should know that the litigant is entitled to this status as a matter of law, that the judge may intervene to make sure that the evidence provided is appropriate, and that the jury should not draw any inferences about the judge’s views from that engagement. It must decide the case on the evidence.

Example: One party represents himself. That’s his right, and why is not relevant to your decision. Please do not speculate about the reason. I will make sure that all parties get their evidence before you. At various times we may have to talk out of your presence, and sometimes I will have to talk about what is going on or stop the proceedings to make a ruling. Regardless of what I do and when I do it, you should not come to any conclusions as to what I am doing, or why, or what evidence or actions of the parties that I may be talking about.

6. Make sure that the self-represented party knows and understands the governing rules for opening and closing statements. It might be helpful to review in chambers planned statements for appropriateness.

Sometimes the self-represented get carried away and have difficulty limiting themselves to what is to be or has been shown by the evidence. Chambers conferences may be useful to review the key points to be made, minimizing the risk of judicial interventions before the jury, which could be highly prejudicial.

Example: Let’s go over both opening statements, if you want to make them. As I will tell the jury, the opening is not evidence. You may describe to the jury what you expect the evidence to prove, who they will hear from, and what they will say. You can tell the jury what you will be asking them to decide at the end of the case. If there is any problem, much better to resolve it here than for me to have to interrupt and correct either of you. That might confuse the jury.

7. When the judge does intervene, consider mentioning the prior reference to the likelihood of intervention and repeating the
importance of lack of inference.

Example: Remember how, at the beginning of the trial, I told you that I might be telling you to ignore particular things that you might have heard. This is one of those moments. Please ignore what Mr. Smith might or might not have said, as well as the discussion about it at the bench.

8. Consider how best to protect the self-represented litigant’s right to cross-examination.

There are those who believe that the protection of the right of effective cross-examination is, as a practical matter, the hardest thing to do in self-represented litigation. The core problem is that cross-examination has to be in the right form, but that any prior interaction as to form may reveal the content of the cross. In administrative proceedings, it has become relatively standard for the administrative law judge, when an unrepresented party is having difficulty in cross-examination, to ask the party what point they are trying to make, rephrasing the question to obtain that information, and then checking if that was the question they wanted asked.

Such a discussion would have to be at the bench. The judge may want to explain to the jury that because the question is complicated, he or she is asking it, not endorsing it, and that the asking of the question should not be viewed as an expression of sympathy. (Please note that this particular solution may well be controversial in some quarters, particularly if it is considered as demonstrating to the jury that the judge has personal feeling about the case.)

Example: Can counsel and Mr. Litigant approach the bench? You seem to be having difficulty with this. If you like, you can tell me what you are trying to find out, and I will ask the question in the right form. (After rephrasing) Is that what you wanted? Ladies and gentlemen of the jury, I want to ask some questions on behalf of Mr. Litigant. Because they are complicated, I ask them for him. These are his questions, not mine. What weight to give is for you and you alone.

9. Give self-represented litigants plenty of notice about their right to present requested jury instructions. Let them know of available pattern instructions.

Litigants may not realize that they have to request jury instructions, if that is the case. The assistance of a law library might be particularly important here.

10. After any verdict, make sure that the self-represented litigant is aware of procedural requirements to preserve and pursue appellate rights or to protect against loss of their victory on appeal.

Example: I should tell you that if you want to appeal, there is a rather complicated procedure that you have to follow. The first thing that you have to do is file a notice of appeal within 30 days (depending on governing law) of the verdict in the clerk’s office and send a copy to the opposing attorney. There are lots of other steps you have to take, some with deadlines. You can get a booklet in the clerk’s office and can get help in the law library.

Conclusion

These two articles are intended to show useful and helpful examples of how to deal with the core idea, strongly, if implicitly, supported by Turner, that while judges must indeed apply the same substantive and procedural rules, regardless of whether a person has a lawyer, they are absolutely not forbidden from taking—and may indeed in some cir-
Introduction
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should bring judges in line by cutting court budgets, eliminating law clerks for judges, not paying the court’s electric bills, and denying the court a library. Such a statement by someone who may become president of the United States lends credence to the idea that an appropriate political response by executives and legislators to court rulings with which they disagree is through the budget process.

In 2011, the House of Delegates Resolution and Report by the ABA Task Force on Preservation of the Justice System stated that the courts of our country are in crisis, and the failure of state and local legislatures to provide adequate funding is effectively—at times quite literally—closing the doors of our justice system. In addition, the Task Force noted that Congress has also reduced its support for both the federal courts and other programs that directly and indirectly support our justice system at the state, county, and municipal levels. Observing that even the most eloquent constitution is worthless with no one to enforce it, the Task Force concluded that the prevalent underfunding jeopardizes the overall stability of the justice system. Such dire conclusions were based on findings like these:

Over the last three years, the courts of most states have been forced to make do with 10 to 15 percent less funding than they had in 2007 . . . 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 case-loads on an immediate basis.

The Task Force further reported that 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 states have furloughed clerical staff, with commensurate reductions in pay (and nine have extended those furloughs to judges as well); and
- Fourteen states have laid off staff and have been forced to curtail the hours and even entire days they are open.

News reports also are replete with some of the undesirable effects on society of inadequate court funding. Only a few examples are necessary to make the point:

- Disputes over the custody of children are being delayed for years, so that the aggrieved parents lose the opportunity to build a relationship with their children during the most formative years, and children in some custody disputes suffer additional neglect and abuse;
- Meritorious victims are being forced into unconscionably inadequate settlements of their lawsuits for pennies on the dollar because of moratoriums or extended delays in civil lawsuit processing;
- Innocent persons languish in jail due to overcrowded court dockets; and, conversely, preventively detained defendants in substantial criminal cases are being released due to the court’s failure to meet statutory speedy trial requirements, and subsequent to their release are involved in repeat or more serious criminal conduct; and
- Court-provided services to indigent persons, crime victims, homeless persons, non-English-speaking persons, and persons with disabilities are being curtailed or eliminated.

In light of the above few examples, an exhaustive list is not necessary to make the point of the devastating impact of inadequate court funding on the fabric of society. To publicize the danger of inadequate court funding.

Unfortunately, notwithstanding such an admonition from a founding father revered by all current political factions, the budgetary assaults on our nation’s courts have brought many of us to a point in our country’s history where the harsh consequences this country will suffer if we do not address the problem require us to sound an alarm. And in support of this effort, The Judges’ Journal joins the call with this issue, titled The Real Danger of Inadequate Court Funding. We trust you will receive this issue with the same enthusiasm that our Editorial Board and contributing authors experienced from conception and preparation of the magazine through its printing and distribution to you.

Endnotes
The French author, philosopher, and poet François Marie Arouet, whose pen name was Voltaire, is credited with writing, “the perfect is the enemy of the good.” Over 260 years later, and an ocean away, I have adopted Voltaire’s pronouncement, at least as it relates to giving a wireless iPad presentation. Last year, I purchased my first Apple computer product, an iPad 2, and have been consumed ever since with the concept of giving wireless presentations using the device. For some unexplained reason, I imagined the ultimate power presentation as the occasion when I could walk around the room during my presentation, iPad in hand, and wirelessly project the image from my iPad to the large video displays being viewed by the audience. Finally, I achieved my goal, but the result is only good—not perfect.

I discovered during my research that others were trying to achieve the same goal, often raising the issue on blogs and in tweets and finding no solution. I assume Apple knew of these inquiries, but I am not aware they ever gave a corporate response. In hindsight, it seems they were keeping secret a new feature they planned to introduce at a later time.

Along the path to my goal, I found a way to configure my iPad as a second monitor and wireless touchscreen for my laptop (showing the same image on my iPad as on the laptop), which gave the appearance of wirelessness as I operated the slide presentation on my laptop from my iPad. I have included an author’s note at the end of this column describing the process to achieve this result.

A few months after my iPad purchase, Apple introduced a new operating system for the iPhone and iPad, iOS 5. Upon installing this new operating system on my device, I suddenly had the capability to accomplish the desired task, but only if I were willing to do extra work to reach my desired goal. Once again, the results were good—not perfect—but I’m happy.

Here is what you need to make a wireless presentation by iPad:

- An iPad 2 with iOS 5 installed;
- An Apple TV device (second generation) (a small “black box”—accurate description—slightly larger than a deck of cards that costs approximately $100);
- A wireless network (this was a real learning experience that I shall describe later);
- A video display (projector or monitor); and
- A digital HDMI (high definition multimedia interface) cable to connect the Apple TV to the video display.

However, if you’re like many of us whose equipment does not have an input port for a digital HDMI cable, and there exists only a port for an analog VGA (video graphics array) cable to connect your laptop to the video display, you’ll also need:

- A powered HDMI to VGA converter ($40 minimum, approximately).

I first set up this system at home using my HD TV that has a port for HDMI input. My home wireless network is secured by a password, which did not present a problem. The Apple TV has a remote control and an onscreen feature that allows password input.

I will not bore you with the full setup procedure contained in the accompanying Apple TV instructions, but there is one part of the process that took a while to figure out. I don’t know why I had to do this, but there are others that have described the need for a similar process. After everything is connected, play a video on your iPad (a YouTube video will work just fine if you don’t have another video on your iPad). Next, double tap the home button to reveal the task manager (showing all the apps that are open on your iPad). Swipe the task manager from left to right as many times as it takes to get you to the player controls. Press the
I must admit, there is a certain thrill to walking around with an iPad making a wireless presentation.

AirPlay button (between the forward and volume controls), select Apple TV, and click the Mirroring button to change from "off" to "on." Close out the video and go back to the controls (double tap the home screen, swipe the task manager from left to right, etc., as explained above). The purpose behind all of this is to mirror on your iPad the same image that you are transmitting to the Apple TV over the wireless network. The rest of the setup process can be gleaned from the instructions that come with the Apple TV.

The Apple TV setup display took up the full screen of my home HD TV, the same as happens with a presentation from my laptop, but my iPad display was closer to a square image, centered on the TV screen—so far, so good—but not perfect.

Next, I attempted to set up the system to display my iPad images on a computer monitor that did not have a digital HDMI port but was equipped with a standard VGA input cable. This required me to connect the HDMI cable from the Apple TV to the powered HDMI to VGA converter, and the monitor's VGA cable to the converter's VGA output port. The Apple TV setup display took up the monitor's full screen, but the iPad display, once again, was closer to a square image. Inexplicably, a new issue arose. The image was not centered on the screen. It was aligned on the left side of the screen.2 Once again, good—but not perfect.

Now I was ready to attempt my setup in my assigned D.C. Superior Court courtroom where I frequently give presentations. The setup in this courtroom is very similar to other venues in which I have presented, where the input is solely by way of a VGA connection. This was another learning occasion.

There is Wi-Fi available through most of the courthouse that is greatly appreciated by the public, and the Wi-Fi signal reaches my assigned courtroom. After I connected all of my devices, I turned on the Apple TV. It connected to the courthouse Wi-Fi with no problem to that point. As with many public Wi-Fi services, however, your browser will first incur a "terms of use" page that the user must agree to accept before the Internet can be accessed. I could not find a browser or any other feature on the Apple TV that would allow me to see and accept the terms of use. Accordingly, my Apple TV was stuck on the terms of use page and could not communicate with my iPad. I thought I had hit a permanent roadblock, but the solution was simpler than I expected. I powered up an old wireless router in the courtroom. This router, without need for a connection to the Internet, provided the wireless network that allowed the Apple TV and my iPad to communicate (both the Apple TV and the iPad must sign on to the wireless network provided by the router). Many folks are amazed to realize that the "wireless network" between the Apple TV and the iPad does not mean Internet connection. I used an old wireless router, but you can also use Apple's AirPortExpress device to accomplish the same result, which is another outlay of funds if you don't already have the device.

Good—but not perfect—is how I describe my results with wireless iPad presentations. There are still other issues to tackle, including finding an effective way to transmit sound from the iPad to the Apple TV. Also, the screen resolution is not as crisp as when the presentation is done with my wired iPad connection or my wired laptop. It would have been nice if the Apple folks had built in a VGA port or DVI port (which is easily converted to VGA) to avoid the need for the user to purchase a powered HDMI to VGA converter, even if that extra feature added to the price of the Apple TV unit. And it would likewise have been wonderful if the Apple TV included its own Wi-Fi access point to avoid the purchase of a spare Wi-Fi router and the problem of public or other unreliable Wi-Fi.

The necessary extra equipment that I have described in this column to accomplish the goal of making a wireless presentation with an iPad is a nuisance. However, if I were to wait for a perfect system, I'd end up doing nothing. And, I must admit, there is a certain thrill to walking around with an iPad making a wireless presentation. The process is new and amazing to
many in the audience who have not previously seen a wireless iPad presentation. The novelty factor will exist long into the future. I’ll accept the good for now—even if I know it’s not perfect.

**Author’s note:** At the beginning of this column, I mentioned my early search to accomplish a wireless iPad presentation during which I found a way to configure my iPad as a second monitor and wireless touchscreen for my laptop (showing the same image on my iPad as on the laptop). This gave the appearance that I was making a wireless presentation as I operated the slide presentation from my iPad. But, in reality, it was my laptop that was connected to the video display being viewed by the audience.

To accomplish this setup, obtain an app called AirDisplay for your iPad from the Apple App Store (approximately $10). Next, use your favorite Internet search engine to find AirPlay for Windows (or MAC) and then download and install AirDisplay on your laptop. Ensure that both your iPad and laptop are logged onto the same wireless network. Open the AirDisplay app on your iPad and select your iPad from the AirDisplay menu on your laptop. Now your iPad is mirroring the screen on your laptop. If not, go to System Preferences to confirm that the “Mirror Displays” box is checked. At this point, your iPad is a second monitor and wireless touchscreen for your laptop. Now you’re ready to make your next presentation giving the illusion that you are doing this wirelessly from your iPad.

**Endnotes**

1. You can try a $3 passive (not powered) HDMI to VGA cable, but every report that I read said this will not work because a passive cable will not convert the Apple TV signal from digital to analog.

2. I tried at least two powered HDMI to VGA converters, both of which gave similar results. I’ve also read reports of the same result using other powered HDMI to VGA converters. As one writer described it, there must be some issue that prevents the converters from properly aligning the image on the screen.

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Since the 1987 appearance of A Dictionary of Modern Legal Usage, Bryan A. Garner has proven to be a versatile and prolific writer on legal linguistic subjects. This compilation of his essays shows the great breadth of his scholarship, covering subjects as wide-ranging as learning to write, style, persuasion, contractual and legislative drafting, grammar, lexicography, writing in law school, writing in law practice, judicial writing, and all the literature relating to these diverse subjects.

Some have called Garner a controversialist, and he doesn’t shrink from controversy here: he takes aim at legal academia, word-bungling law reviews, writers who intersperse citations within the main body of their writing, judges who use extremely arcane words, and the many conventions that tend to mire legal writing in perpetual mediocrity.

There are moving tributes to Professor Charles Alan Wright, Judge Thomas Gibbs Gee, and Sir Robert Megarry (whose last book Garner finished). There are piquant book reviews that damn the work of some famous writers, such as Lynne Truss (Eats, Shoots & Leaves) and the linguist Stephen Pinker, as well as enthusiastic recommendations of books that Garner finds meritorious. In her preface, Justice Ruth Bader Ginsburg declares the book to be a “must read” primer for her law clerks. Anyone with a lively interest in language, writing, and law will find this book hard to lay aside.

In the Midst of a Court Funding Crisis, What Can a Judge Do?

By Marla N. Greenstein

Facing staff furloughs, reduced court hours, and increasing demands for court services, judges know better than anyone the harm that is created by a rapid decline in needed funding for the courts. A judge's expertise and on-the-job experience can convey important information to the public and budget decision makers, but many judges may be reluctant or unsure what actions they can take while conforming to the ethical standards set out in the Code of Judicial Conduct.

The states that have addressed the issue of judges' appearances before legislative bodies on court funding issues have uniformly found those activities to be appropriate judicial activities. Under all versions of the Code of Judicial Conduct, judges are permitted to speak about issues concerning the law or the administration of justice. Funding of the courts and court-related projects are within the scope of the "administration of justice." Addressed by Rule 3.2 in the 2007 Model Code, there is a clear exception to the general prohibition against appearing voluntarily at public hearings and executive or legislative bodies for matters concerning the administration of justice. And while many court administrators prefer to coordinate legislative testimony by judges within their administrative district, judges can often provide the detailed practical impacts of budget reductions on their courts.

So, too, efforts to inform the public and the various users of the courts not only are permitted but are encouraged by the Code. In the commentary to Rule 1.2 "Promoting Confidence in the Judiciary," judges are directed that they "should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice." Not only does outreach of this kind promote public confidence in the courts, it can raise awareness of those with the power and ability to act. Speeches before local Rotary International groups that highlight the impact of budget reductions on the courts' ability to respond to public needs could stimulate those in attendance to contact public officials to change budget priorities.

Can a judge advocate for court funding? Yes. In fact, a judge may be the best advocate for court funding, with the daily court experience and the knowledge of how the courts are unable to serve the public. It is always a question of how that advocacy takes place. Advocacy by a judge should be public, impartial, nonpartisan, and focused on court administrative concerns.

Can a judge build constituencies to support the courts? Again, the answer is yes. Judges should ensure that those constituencies are broad-based with a common concern of improving access to the courts and the efficient administration of justice. As set out in Peter Koelling's article on page 22, the constituencies may be lawyers, jurors, and community members.

Can a judge express concern over the administrative responses to budget reductions? Once again, the answer is yes. Any public criticism of those tough government choices should be done cautiously and from a place of knowledge and interest in the public's access to the courts. The best expressions of concern are those that also include alternative solutions.

Judges should partner with court administration to address concerns in this harsh economic climate.

In brief, a judge may be the best resource to convey the impact of budget cuts on access to the courts to the general public as well as to executive and legislative officials. There are few ethical restrictions on a judge's ability to advocate for court funding. A judge's thoughtful expression of the people harmed by a shortened court workweek or delay in orders affecting families and businesses that are a result of court staff cutbacks can have a real impact on executive and legislative decision makers. Judicial experience is the best response to the courts' fiscal crisis.

Marla N. Greenstein is the executive director of the Alaska Commission on Judicial Conduct. She is also the past chair of the ABA Judicial Division's Lawyers Conference. She can be reached at mgreenstein@acjc.state.ak.us.