

Daily Journal

January 19, 2010

It's Time To Step Up to the Plate

by Stacy D. Phillips and Ram Cogan

Every experienced litigator has had that poignant moment when defending a client's deposition at which he or she recognizes the need for immediate action. With heartbeat racing, we calmly ask for a break, summon our client into the hallway and, while out of sight, grab our client by the lapels (sometimes literally) and emphatically ask: "What are you doing?" It is with no less a sense of urgency, although far more graciously and politely, that Presiding Judge Charles W. McCoy Jr. has been trying to spread the word about the impending fiscal disaster confronting our judicial system. And if you have the opportunity to meet with the Presiding Judge, as we did, you will feel his urgency. You will walk away with great respect and admiration for this unfailingly polite, polished, and brilliantly communicative leader, but you will be dizzy and have a splitting headache. You will know that you need to do something - you will also know that the analogous question, which pertains to each and every attorney in this state, is: "Do you understand what is happening and, if so, why are you not doing something about it?"

Much has been written about the budget crisis and its impact on the judiciary. The intent of this article is not to reiterate that which has come before. Unfortunately, the disappointing reality of the situation is that despite many warnings and historical precedent, we have yet to see much, if any, action by the guardians of the system - the state's more than 160,000 active attorneys sworn to uphold and protect that system of justice. We have been here before and, therefore, should know better. Consider the following, written by Robin Meadow in the July-August 2003 edition of *Los Angeles Lawyer*:

I hope that it comes as no surprise to you to hear that California is in the midst of an unprecedented budget crisis, one that reaches into every corner of government operations and will affect everyone in a variety of unpleasant ways. What is surprising, however, is the widespread silence that has greeted the disproportionately disastrous effect that the crisis threatens to have on the judicial system. Even under the most optimistic assumptions about what the budget will ultimately look like, the courts will have to drastically scale back their services. The most pessimistic projections will send the courts right over the cliff.... [T]he broader impact will go far beyond inconveniences for lawyers and their clients: Families, children, and victims of elder abuse will suffer.... Emergency civil judicial relief will become increasingly unavailable.... Many in need will lose access to justice.... Courthouse and courtroom security will be compromised.

Sounds familiar? The difference this time around is the severity of the crisis. Lest anyone be under the misguided impression that having survived the past crisis, we will do so again, don't be fooled: 2003 was a foreshock to today's "Big One."



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By any standard, today's budget crisis and the potential ramifications on our court system is considerably worse than that which we confronted in 2002-2003. In a report issued Nov. 18, 2009, the Legislative Analyst's Office (the non-partisan agency that reviews and monitors budget issues for the Legislature) projects California's budget shortfall to be \$21 billion by June 30, 2011 (the end of the 2010-2011 state budget year). This is so despite spending cuts and temporary tax increases made this past year. While some see signs of an economic recovery, the Legislative Analyst's Office's report warns that any economic recovery by the state "will likely come too short and too late to help resolve the \$21 billion shortfall." (Far Northern Regional Center Web site, reported Nov. 30, 2009) "[T]he report also projects continued budget shortfalls of billions of dollars for the next several years especially when federal stimulus dollars and revenues from the temporary tax increases end." As for our court system, it is projected that by 2013 there will be a \$139 million deficit, which in turn, could result in the closure of "more than half of Los Angeles County's civil courtrooms, including a third of family law courtrooms." (Sept. 12, 2009, *Daily Journal*, "Top L.A. Judge Lobbies Interest Groups On Court Funding.")

As Presiding Judge McCoy points out, "[c]uts *already* imposed on the Los Angeles Superior Court, if unabated, will force the closure of over 180 courtrooms and layoffs of more than 1,800 employees in the coming years.... [N]early half the court's civil, family and juvenile courtrooms will be shut down permanently and the staffs let go." To put these figures into perspective, there are approximately 605 courtrooms operating throughout 50 locations in Los Angeles County. The closure of 180 courtrooms includes the closure of nine courthouses. The loss of 1800 employees constitutes a 34 percent reduction in the court's work force. While such closures would not all take place at one time, the impact is dramatic with 19 percent of Los Angeles Superior Court (LASC) operated courtrooms shutdown by 2011 and 30 percent by 2012. ("*Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court*" by Roy Weinstein and Stevan Porter, *Micronomics, Inc.*)

On average, it takes 10 individuals (including those "behind the scenes") to support each operating courtroom. The additional cuts in staff along with the priority given to criminal cases, will result in an increase to the already existing backlog of cases, which will slow the movement of virtually all civil cases to a snail's pace. As noted by Micronomics in its analysis, the anticipated reductions "will significantly impact LASC's ability to dispose of cases in a timely manner. Based upon the observed relationship between lost LASC courtroom operating days and average caseload clearance rates, clearance rates are expected to fall by no less than 19 percent by 2011...by no less than 30 percent by 2012... and by no less than 35 percent by 2013." Significantly, "[c]aseload clearance rate losses can be used to estimate increases in the number of pending cases and thus increases in the duration of time between case filing and disposition. As caseload clearance rates decline,...more cases remain pending...[and] the backlog of cases to be disposed of grows.... Given the anticipated losses, the average time between filing and disposition will increase by more than 150 percent...[and the] average time-to-disposition [for cases filed in 2012-13] will be nearly four-and-a-half years" - more for civil cases. If you think that waiting three or four months to have a motion or an order to show cause heard is a long time, just wait.



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If corrective action is not taken (and taken quickly), we will look back with longing for the present delays.

As usual, those who are most vulnerable - children, juveniles, single parents, and those in abusive relationships - will be particularly affected. While every courtroom and every litigator will feel the impact, there will be a disproportionate impact on the family law courts and those protected by them. There are currently 43 family law courtrooms in Los Angeles County. If projections hold, 14 of them will be closed! It is not an exaggeration to say that litigants will go unprotected and people will lose their lives as a result. Justice delayed truly is justice denied. "By jeopardizing prompt access to our courts for those in need of domestic violence and child welfare protective orders or protection from elder abuse, reduced funding will expose those most defenseless in our community to potentially life-threatening harm. It will curtail the availability of custody and visitation orders that protect children from parental conflict and from parental resort to such crude self-help tactics as abduction and concealment. And hearing delays and diminishing court supervisory powers will provide elder abusers with unprecedented opportunities to dissipate estates and commit fraud against the elderly." (Meadow, July-August 2003 edition of *Los Angeles Lawyer*)

There can be no denial: a strong, independent, and well functioning judiciary is critical to the proper operation of our state government. As California Chief Justice Ronald M. George stated in his State of the Judiciary delivered on March 23, 2004: "Drastic reductions in resources require courts to ration their services among those who need them. Some who look to the court system in order to vindicate their rights simply will have to look elsewhere - but for most there will be nowhere to go. Government without a functioning judicial system is not government as we know it, nor is it the type of government that the public expects and deserves. Our nation and our state were founded on the basic principle of liberty and justice for all. That principle cannot be realized if our courts cannot function and provide fair and accessible justice.... If we abandon the goal of accessible justice for all, we surrender not only our court system but one of the most fundamental compacts of our democratic system of government."

To suggest that the adverse impact on our judicial system will not also slow California's economic recovery and cost the state hundreds of millions of dollars is, simply put, naive. Without efficient and expeditious recourse, businesses will turn elsewhere. Our economic recovery will depend, in no small part, upon a strong, expanding tax base. Without the participation of new business and investment in our state, any such recovery will be significantly slowed. There is no debate here. Chief Justice George's warnings ring louder and clearer than ever: "An underfunded judicial system...will impede our state's economic recovery. If civil cases cannot be resolved in a reasonable time, or if court services decline so that public safety and security suffer, business establishments and individuals simply will go elsewhere."

Should there be any doubt, the adverse economic impact on the state as a result of a slowed judicial system is dramatic. In December 2009, Micronomics, Inc. completed its *"Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court."* Micronomics concludes that reductions in funds previously made available to the LASC will



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result in: declines of \$13 billion in business activity from decreased utilization of legal services; uncertainty among litigants resulting in approximately \$15 billion in economic losses; damage to the Los Angeles and California economies, including close to \$30 billion in lost output and more than 150,000 lost jobs; and, lost local and state tax revenue of \$1.6 billion. The reason is relatively simple: "As confidence in LASC for dispute resolution erodes, the choice will be to continue to operate in Los Angeles, a region of relatively high uncertainty, or to move to locations where greater certainty exists.... If only [5] percent of local economic activity were removed from Los Angeles and went out of state, annual California output losses would exceed \$104.1 billion, and job losses would reach beyond 560,000."

And if you believe that other states do not recognize as much and are using aggressive measures to attract businesses that may be looking to move, you are sadly mistaken. As a singular example, the following commentary appeared in 2008 in the *Concord Monitor*: "Without a well-supported court system, our ability to engage in commerce with one another is seriously jeopardized. Efficient, final, predictable adjudication of commercial disputes makes business happen; without confidence in a judicial system, investors grow wary about putting money into New Hampshire businesses. An underfunded court system chills investment, slows job creation and reduces tax revenue in our state." (Jeremy Eggleton, *Concord Monitor*, Dec. 14, 2008)

In the past, we were able to look to the Legislature for aid. Not so this time around. The Presiding Judge is not being magnanimous when he writes that persuading the Legislature to appropriate more money for the courts or shift new cuts onto others "was not possible last year, and nothing suggests a different outcome in the years ahead...." (*Daily Journal*, Dec. 1, 2009) Ever pragmatic, the Presiding Judge's conclusion is simply the reality of the situation. There is no simple solution based either upon further cuts, reallocation, and/or generating revenue.

Consider the following from the Legislative Analyst's Office: California's budget for the 2009-2010 fiscal year totals \$119.25 billion. Of this amount, \$47.86 billion (40.1 percent) is earmarked for education (\$35.65 billion for K-12 and \$12.20 billion for higher education); \$32.83 billion (27.5 percent) for health and human services; \$12.55 billion (10.5 percent) for business, transportation and housing; \$8.24 billion (6.9 percent) for corrections and rehabilitation; and, \$4.60 billion (3.9 percent) for the legislative, judicial, and executive branches (of which \$2,372,156 is allocated to the "judicial branch"). That leaves roughly 10 percent of the budget for all other agencies.

Worse yet is the following: the Analyst's Office's forecast of the state's general fund revenues and expenditures shows that the state must address a general fund budget problem of \$20.70 billion between now and the time the Legislature enacts a 2010-2011 state budget plan (a \$6.3 billion projected deficit for 2009-2010 and a \$14.40 billion gap between projected revenues and spending in 2010-2011). Moreover, the forecast takes into consideration no COLAS and no salary increases for state employees through 2014-2015 and further assumes school funding at the minimum guarantee level for Proposition 98. The outlook for the not too distant future continues to be bleak as a result of the loss of federal stimulus funding and the state's need (in 2012-2013) to pay back its loan from local governments pursuant to Proposition 1A (2004). It appears inevitable that the state will experience multi-billion dollar



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deficits for years to come - \$21.30 billion in 2011-2012, \$23 billion in 2012-2013, and \$18.40 billion in 2014-2015.

Because the Legislature has already used every tool available to it (e.g., spending cuts, tax increases, borrowing, federal funds, and one-time budgetary maneuvers), to reduce approximately 90 percent of the 2009-2010 budget gap, addressing the existing budget problem and future deficits is that much more difficult - the same options are simply not available. As the Presiding Judge writes: “[t]he shortfalls are so large that we cannot cut our way out of the crisis.” (Presiding Judge Charles W. McCoy, *“We Need a Creative Solution to the Superior Court Funding Crisis”*, *Los Angeles Lawyer*, November 2009) Nor can we rely on increased taxes. The Legislature is, understandably, reluctant to increase taxes any further, especially in a poor economy. Of course, a strong economic recovery would help. However, while everyone looks forward to an economic recovery, such a recovery is forecasted to be slow in coming and not as robust as we would like. Further, according to the Analyst’s Office, even with a strong economic recovery and resulting deficit reduction, “the scale of the deficits is so vast that we know of no way that the Legislature, the Governor, and voters can avoid making additional, very difficult choices about state priorities.”

Are there any solutions? Yes and no. Certainly the diversion of bond money from SB 1407, as the Presiding Justice suggests, presents an immediate source of funds that can be used to minimize and even prevent some courtroom closure and certain cuts. And such results do help and buy time, in hopes that with time the economy will improve which, in turn, will minimize and/or prevent further courtroom closures and cuts. However, no one suggests that diversion of SB 1407 funds is a long term solution; the potential use of SB 1407 funds should not lull us into a false sense of complacency nor detract from the inevitable conclusion that there is no way of preventing additional cuts and the resulting dramatic impact on the judiciary. Looking beyond SB 1407, there are ways of mitigating the impact of the present budget crisis that will provide both immediate and long term solutions. In a companion piece, we will explore in greater depth some of the proposals that may help. However, the following observations are appropriate herein. Admittedly, some of these suggestions are family law specific (no surprise given that we are family law attorneys). Nonetheless, most of the concepts can be expanded to apply to civil departments generally.

What is obvious is that there is no single solution. Rather, in order to alleviate the impact of the fiscal crisis we confront and do so in a manner that will insulate the judicial system as best as possible from the inevitable future crises, an amalgam of possible “solutions” is needed. First, revenue can be generated by additional filing fee increases. The question is: how much of an increase can be tolerated? Second, we, as the guardians of the judicial system, need to better organize. Ultimately, funding for our court system becomes a political issue. We need to organize, present a united effort, and flex our “political muscle” in order to achieve greater security for the judicial system generally. Some lawyers and organizations already do a terrific job at lobbying for their particular type of litigation (e.g., the plaintiffs’ bar). Each group of litigator/trial lawyer (from family law, personal injury, labor, health care, commercial, business, environmental, tax, probate, and everything in between) needs to do its part for its group



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as well as for the court system as a whole. We all need to learn, and learn quickly, how to work with the Legislature as the plaintiffs' bar, and certain leaders of the plaintiffs' bar, does so effectively. Third, we need greater participation not only in the political process, but in the system itself. For example, greater input for implementing corrective methods is required. Will it take time and effort? Of course. But we cannot sit on the sidelines waiting for others to devote their time and expect to garner the fruits of their labor. As a beacon, we should consider the Los Angeles County Bar Association (LACBA) and its exemplary efforts (as spearheaded by its president - Don Mike Anthony) to spread the Presiding Judge's message and help our courts. The LACBA has provided enormous support to the Presiding Judge and the courts with regard to this issue and has heightened the legal community's awareness (including by circulating the Presiding Judge's article to nearly 100,000 members) of the dramatic changes that we confront. As individuals, we need to follow the LACBA's lead, become involved, and help the cause. Further, the many organizations (including local bar associations) should begin and/or continue their efforts in this regard and encourage their members and committees to become involved in this cause. In this way, we become united in our endeavor to help the courts and our efforts become that much more persuasive and effective. This is akin to the concept of a "surround" - i.e., a means of persuasion by which various constituencies come together, express the same view point, and persuade an individual or group of individuals to think similarly (or, at least, seriously consider the matter). In addition, to the extent that solutions include volunteer efforts (whether it be on committees, judging pro tem, or at clinics for self-represented litigants), we must participate.

Fourth, and perhaps most fundamental, we must reorganize the available resources (as limited as they may be, and may become) in order to achieve greater efficiency. Perhaps something akin to the old master calendar approach for purposes of assigning cases would help. That is not to say we would not have direct calendaring, but the cases would not necessarily be distributed on an equal basis simply by filing. In other words, the Presiding Judge or Supervising Judge of each department or someone designated to handle this function would oversee the workload in each courtroom. Cases would be assigned to departments most capable of taking on new matters. Maybe, because of the dire circumstances we find ourselves, and we even greatly dislike this suggestion, some form of law and motion departments could be reinstated. Why do we dislike this suggestion? Because we believe that direct calendaring is very helpful, even critical, to the "most appropriate" disposition of the case. But maybe some form of a law and motion department will better distribute existing resources and help alleviate congestion.

In family law proceedings in particular, issues could be bifurcated with custody related issues being assigned to certain judges and financial matters to others - even if raised within a single case. Self-represented litigants could be given the opportunity to opt into a "pro per route." Family law cases designated as complex, could be assigned a different track (with perhaps more seasoned jurists somewhat similar to how civil complex cases are handled). A "buddy system" could be instituted so that if a particular department becomes overburdened, the possibly less burdened buddy department could absorb some of the load. Long cause department(s) can perform similar functions if the judge is not engaged in a trial. Similarly, a sharing plan can be implement so that if one courtroom is without



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sufficient staff, the judge can maintain his or her calendar by sharing resources with more “fortunate” courtrooms that have adequate resources. Finally, in order to ease the congestion on the court system, the court should establish a “self-represented litigant” day (or days) during which volunteer attorneys would guide self-represented litigants through the system. In our follow up article we will explore each of these possibilities in greater depth.

Given the severity of the budget crisis confronting this state and the impact it will have on its judicial system, several things are clear: the time of crisis is upon us and drastic times call for drastic action. Maintaining the status quo is not an option. As some cases are “bet the company” litigation, this crisis could be termed “bet the courts” administration or even “bet the courts’” very existence. The figures quoted in this article are not hypothetical. The question is not one of prevention, but of mitigation. A fundamental reorientation in our way of thinking and change in how the system operates is required across the board. While there are various measures that can be implemented to mitigate the potential consequences, let’s not kid ourselves, there are no easy solutions. What we need is thinking outside the proverbial box. We need action and we need all attorneys (as guardians of the system) to “step up to the plate.”

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