

**POSITION PAPER ON
STATE JUDICIAL BRANCH BUDGETS IN
TIMES OF FISCAL CRISIS**

Conference of State Court Administrators

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State Judicial Branch Budgets in Times of Fiscal Crisis

Introduction and Context

State governments today are experiencing the worst fiscal crisis in many decades. As they attempt to close huge revenue shortfalls, many state courts are coping with deep budget cuts that are forcing court closures, suspension of jury trials, layoffs and hiring freezes. The immediate consequence is justice delayed, with untold economic and non-economic costs to litigants and society as a whole. Of equal concern is the possibility that courts may be compelled to forego important long term initiatives that will improve efficiency and the quality of justice.

State judicial systems, which are heavily reliant on the other branches of government for funding, have found it difficult to obtain adequate resources even in good economic times. Thus state courts were especially vulnerable to the recent economic downturn, which has been particularly severe. Court leaders today face enormous challenges in guiding their courts through the current fiscal crisis. How can they do so successfully? And what can they take from the experience that will better prepare their courts for the next downturn?

A judiciary with a demonstrated track record of good governance and accountability, including wise use of public tax dollars, is more likely to avoid unreasonable budget cuts and micro management by the other branches that undermines the system's ability to carry out its mission during difficult fiscal times.

Courts must operate from a position of strength in the budget process. This requires an environment in which the other branches of government and the public place a high value on the judiciary and its mission. Key elements of this environment include a high level of respect for the expertise, accountability and commitment to positive reform demonstrated by court leaders, confidence in the quality and professionalism of the bench, satisfaction with the courts' productivity and the quality of justice being provided, and a demonstrated ability to make efficient use of scarce resources. Such an environment is possible only if court leaders dedicate themselves fully to establishing a judicial reputation for excellence in the management of court business -- not just now but on a continuing basis.

While this paper acknowledges the judicial branch's obligation to be a good partner in government during a state fiscal crisis, there must be no misunderstanding about the absolute necessity and importance of providing the courts with adequate funding. Under our constitutional system, the courts are responsible for certain core functions of government: protecting the constitutionally enshrined rights of the citizenry against government encroachment, serving as the ultimate arbiter of inter branch conflict, and resolving the legal problems and controversies of citizens in criminal, family and civil matters. In short, the courts are responsible for upholding the rule of law upon which all our social and economic relationships are based. The other branches cannot deprive the judiciary of the resources required to carry out these functions without violating its constitutionally assigned status as a co-equal and independent branch of government.

The purpose of this paper is twofold: acquainting state court leaders with practical strategies and tools to help them meet the immediate challenges presented by the current fiscal crisis, and providing a theoretical framework and set of principles to guide them in meeting the longer term challenge of creating an environment conducive to budgetary success. This paper also issues a direct challenge to state court leaders to take greater personal responsibility for management of judicial affairs, attaining mastery of their states' budget machinery and process, and asserting the kind of visionary leadership that will position their courts to earn the confidence and respect of the other branches and the public.

This white paper should be read in conjunction with the National Center for State Courts Action Plan, which has been developed at the request of the Conference of Chief Justices and the Conference of State Court Administrators.¹ The Action Plan serves as a vital complement to the broader principles and guidance provided in this paper. It is formulated around four service categories: information dissemination, methods to deal with reductions, assessing the impact of funding shortfalls, and building constituencies to advocate for state courts. All court leaders are urged to make use of the up-to-the-minute information on specific state court budget strategies, cost-cutting measures, revenue generation techniques,

¹ The Action Plain is available at www.ncsconline.org/

opportunities for greater efficiency and cost-effectiveness, available federal revenue sources, etc.

Finally, a word about the tenor of this paper. It frequently urges the state court community to follow approaches and work toward conditions that are clearly optimal in nature. Obviously, not all such themes and recommendations will prove realistic or feasible given the wide variations among the states in their constitutional arrangements, political traditions, inter branch dynamics and personalities. Nonetheless, it is hoped that state court systems will find in this aspirational discussion some meaningful principles that will inspire them to rise above such limitations and guide them in the hard work of creating the long term conditions necessary for adequate and sustained court funding.

Inter Branch Relations and Court Budgets During a Fiscal Crisis

Judicial Branch Credibility

A solid reputation for accountability and credibility is the single greatest determinant of success in obtaining adequate judicial resources during tight budgetary times. Such a reputation, however, is not developed overnight or in the midst of a fiscal crisis. Rather, it is built up over a long period of submitting consistently prudent and transparent judicial budget requests that provide clear justification for the resources requested. Credibility grows when judicial budget priorities are consistent from year to year, when courts take steps to measure and report on their management performance, when courts demonstrate sound financial management over time, and when the judiciary routinely demonstrates how individual courts and programs have used resources wisely and in accordance with sound fiscal practices. To succeed in difficult economic times court leaders must be able to draw upon a store of credibility built up during good economic times. This requires a long term commitment to effective judicial governance and accountability as set forth in COSCA's 2001 white paper.

Sharing in the Sacrifices

Our tripartite system of government, premised on the concept of separateness but interdependence, means that no branch can proceed in isolation or without regard for the others' burdens and obligations. As an integral component of state government, the judicial branch should not decline to participate in the

sacrifices that the rest of state government is making during a fiscal crisis. It is possible, however, to submit austere court budget requests that satisfy this obligation and at the same time preserve the fundamental premise that the judiciary is a separate branch of government that cannot be treated like a department of the executive branch.

During a state budget crisis the judiciary should take the initiative by submitting proposals that are frugal, transparent and carefully structured to limit expenditures for nonessential and discretionary items or for items that would appear imprudent during a fiscal crisis. Court budget requests should impose, as appropriate, hiring controls, procurement restrictions, and travel limitations, among others. Some judiciaries may even find it wise to give back unexpended funds or voluntarily forego scheduled cost of living adjustments or salary increases. Where such measures are taken, the judiciary should not hesitate to publicize its frugality and sacrifices early and often to build public support for the request and to strengthen the courts' budget position with the other branches.

Self-imposed austerity must take place against the backdrop of the judiciary's unique obligations, which are different from the rest of state government. As discussed in the introduction, courts embody core governmental functions mandated by the Constitution. These cannot be ignored or shortchanged. Furthermore, courts must accept each and every case filed with them. They do not have discretion to turn people away or declare that they will not handle criminal cases or family cases for lack of resources. Particularly in times of crisis, the millions of cases that swell state court dockets involve the cohesion of families, the safety of communities, and our most cherished liberties. The courts are often the emergency room for society's worst ailments. Making real the promise of equal justice under law means turning no one away, and the judicial branch's budget must allow the courts to carry out that mission.

Leadership

The Chief Justice

The Chief Justice should be a visible and effective advocate for the judicial branch. The strength and quality of the Chief Justice's leadership and skills in administering the third branch during good economic times carry over into tough economic times. Even in states where there is frequent turnover in the office of

Chief Justice (whether constitutionally prescribed or otherwise), continuity of leadership can be maintained by a focused high court or a strong Judicial Council (or similar policy-making body) and through a commitment to the key principles outlined in COSCA's 2001 white paper on judicial governance and accountability.

The Chief Justice should be the inspirational leader of the courts, setting forth a compelling, positive picture of the judicial system at its best. He or she must be the principal advocate for that vision and articulate it with boldness and imagination, presenting judges and court staff with challenges, inspiring them with a shared sense of purpose, and calling upon the very best they have to offer in meeting those challenges.

In promoting the vision, the Chief Justice should think systemically in initiating innovative reforms that improve public satisfaction with the courts; provide judges and non-judicial staff with a clear sense of direction and concrete, achievable goals; educate the public and the other branches of government about the unique problems and needs of the courts; and mobilize support for the courts among the organized bar and other constituencies having a strong interest in the smooth functioning of the justice system.

Another key to surviving tough budget times is having court leaders who accept the reality that the courts operate in a political environment, who are closely attuned to the state's political culture, and who are willing and able to work productively within that culture to develop good relationships with leaders of the other branches.

Historically, some Chief Justices have tried to remain above the political fray out of concern for preserving their independence and avoiding the perception that they are "political." One study has confirmed that "the highest rated funding strategies pursued by state courts are those that make them seem 'above politics.'"² On the other hand, the budget process is political by nature and courts should recognize the need to participate in it if they wish to compete effectively with agencies for funds. Furthermore, it is possible to recognize the political realities of the budget process and participate appropriately while still remaining above the fray. For instance, in addition to the individual state's formal method for

² James W. Douglas and Roger E. Hartley, *State Court Strategies and Politics During the Appropriations Process*, Public Budgeting & Finance, Spring 2001.

presentation of the judiciary budget request, it may be helpful for the Chief Justice to send along a personalized message to the leaders of the other branches. He or she may also want to call or meet with the Governor and legislative leaders to discuss the request. The optimal timing for such outreach will vary in different states and in different years and thought should be given to whether it is better at the outset of the budget process or during the later critical stages. The Chief Justice may even wish to lend the prestige of that office to the budget request by appearing personally at legislative budget hearings or by sending a distinguished colleague as his or her personal representative. Ordinarily, the State Court Administrator is better suited to the detail-intensive give and take of legislative hearings, which may run the risk of diminishing the Chief Justice's status.

The decision of who should advocate the judiciary's budget to the other two branches of government will depend greatly on the given state's political dynamics. However, a recent study of court budgeting strategies suggests that the most effective advocate for the courts may be the Chief Justice.³ Again, possible diminishment of the Chief Justice's status is a concern. Much depends on the history and political culture of the state and the present quality of relationships between the leaders of the branches.

Not every court budget crisis is connected to the state's poor fiscal condition. Unfortunately, unhappiness with state high court decisions can have a carryover effect with regard to court funding. A judiciary that is vulnerable to criticism on governance grounds will not be well positioned to withstand such attacks and will find it more difficult to distinguish between its adjudicative and administrative functions. In this regard, the Chief Justice should strive to stay above the rhetoric and project nonpartisanship, speaking and listening to all major political parties alike and responding to criticism and requests in a demonstrably nonpartisan manner.

The judicial branch is often not as skilled as it could be at identifying allies and mobilizing potential supporters. Chief Justices should consider whether they are doing enough on a continuing basis to identify and cultivate helpful allies in the other branches and to mobilize outside support for judicial branch priorities and funding among key groups such as the organized Bar, local governments, the

³ Id.

indigent defense community, judicial associations, district attorneys' associations, labor unions, etc.

While high profile political conflict with the other branches is generally not recommended, firm insistence on the constitutional prerogatives and obligations of the judiciary as a coequal branch of government is sometimes both appropriate and necessary, particularly when the power of the purse is being used punitively against the courts. Along with budget reductions there is great potential during tight budget times for the executive and legislative branches to attempt to micromanage the courts through the judiciary's budget. The Chief Justice must resist such attempts and push for increased rather than decreased budget flexibility to allow the judiciary to better manage its scarce resources. Again, the likelihood of success here is greatly enhanced when officials in the other branches perceive the courts as following exemplary management practices, meeting high performance standards, and serving as responsible stewards of the public resources entrusted to them.

When operating in a climate of scarce resources, it is critically important that the judicial branch speaks with one voice. When individual judges and groups of judges deal with the legislative and executive branches there is a strong risk that the judiciary will be perceived to speak contradictorily. The Chief Justice can help avoid this problem by clearly identifying, both externally and internally, the persons empowered to speak for the judiciary, usually the State Court Administrator (SCA). It should be made clear to officials in the other branches that their interest in the accountability of the courts is not served by conferring with unempowered judicial constituencies. If they want to be able to call the courts to account on judicial management and performance and have meaningful dialogue and input on such matters, they must come to understand that this can be accomplished only by working with the Chief Justice's designated management representatives. In the final analysis, the other two branches usually prefer to deal with a single team armed with a consistent, coherent message.

The Chief Justice, SCA and, where applicable, the Judicial Council need to work together to encourage unity and avoid the incidence of local judges pursuing inconsistent agendas. Whenever possible they should make a concerted effort to appropriately engage the participation of key judicial and non-judicial leaders in the development of the courts' budget, legislative program or both, and to keep them advised of developments throughout the budget process. Judges who have

invested themselves in planning and advocacy on behalf of the courts are much more likely to get behind the Chief Justice's message and priorities. Court leaders can also promote the goal of speaking with one voice by being strong and visible advocates for their judges, particularly on issues of judicial compensation and benefits. They must be conscious at all times of the need to bridge the gap between the central bureaucracy and the courts on the front lines where justice is administered. This is critically important in tough budget times where everyone needs to support the few priorities that remain. In states where an Administrative Office of the Courts is a relatively recent phenomenon, it may be necessary to overcome the antipathy of members of the other branches, who may recall a time when contact with the judicial branch was less formal.

The State Court Administrator (SCA)

The individual typically charged with day to day administration of the courts is the SCA, particularly in states with a unified court system and centralized court administration. Under the direction of the Chief Justice and through the AOC, the SCA performs a number of critical functions, translating the Chief Justice's vision and priorities into the yearly budget request, articulating the Chief Justice's budgetary and legislative priorities to the other branches and the public, providing the courts with strong support in budgetary and legislative matters, and skillfully working with court leaders within the state to implement judicial branch policy decisions. The SCA bears major responsibility for the effectiveness and efficiency of court operations and for how the other branches perceive the management performance of the courts, including whether they have been spending the public's tax dollars wisely.

It is vital that the other branches perceive the SCA (as well as other judicial branch administrators designated by the Chief Justice) as credible, highly knowledgeable representatives of the courts with a solid conceptual and functional grasp of all budget related matters. They must be able to simplify numbers and explain the budget to any and all constituencies in a succinct but meaningful way. They must have reputations for being responsible stewards of public funds. It is critical that they develop positive working relationships with leaders and key officials of the other branches, particularly budget committee chairs and high level staff in the legislative and executive chambers. This in turn requires the Chief Justice to adequately empower and support the SCA or other representatives in their dealings with the other branches so that they can be forceful and effective advocates

for their courts. It is equally vital that the SCA is perceived as credible and effective by judicial and court administrative leaders within the state. The SCA's most challenging role may be building consensus and support for the processes needed to implement the policy decisions reached by the Chief Justice during difficult times.

In those states where administration of the courts is partly or largely decentralized, it is vital that there be a clear understanding of the roles of the various individuals involved in administering the courts – both externally by the political branches and internally among the affected individuals. An integral theme of modern judicial management is the issue of accountability to the rest of state government and the public for the effective management of judicial affairs. The Chief Justice must assign roles clearly and delegate responsibilities in the manner most conducive to promoting judicial branch accountability. From the executive and legislative perspectives, a judiciary that sends inconsistent messages and/or speaks with multiple voices may be perceived as divided and weak. Another serious risk is the possibility of competition among different sectors of the judiciary for the limited resources available.

Especially in states with a strong central administration, the SCA must be capable of developing and pursuing sound and creative recommendations during difficult fiscal times. Depending on the extent of the SCA's powers, these recommendations may include politically unpopular ideas such as reassigning judicial and staff positions and funds to understaffed or underfunded counties. SCAs must hold underperforming courts accountable, demand that they meet high expectations, and where necessary recommend changes when expectations are not met. In states with decentralized operations, the SCA must actively build consensus and support for sound and creative recommendations through his or her powers of persuasion.

Strong leadership means avoiding delay in making hard budget choices. Failure to act promptly can result in the need for deeper cuts later. Setting priorities and cutting or reallocating funds results in perceived “winners” and “losers” and potential conflict within the organization. The SCA must be prepared to handle and minimize disappointment by working actively to gain the support of both judicial officers and administrators for plans to cut spending throughout the system. In this regard, the SCA can set the example and tone for the entire court system by

demonstrating that the AOC is run in an exemplary manner and, when reductions are necessary, by cutting costs first at the central administration level.

Legislators, executive branch officials, the press and other constituencies interested in the work of the courts make regular demands on the SCA and AOC for information and explanations concerning, among other matters, the quality of justice, expenditure of funds, productivity of the courts, and behavior of judges and court personnel. Each and every one of these contacts must be welcomed as an opportunity to improve external relations, provide meaningful information, and promote the judicial branch's reputation for good governance and accountability. The SCA who has been assiduously taking advantage of these opportunities, particularly in good economic times, is well-positioned to serve as an effective leader and advocate of the courts during a state budget crisis.

The State Budget Process

The constitutional and statutory status of the judiciary within the state's overall budget process can greatly exacerbate or minimize the impact of the state's fiscal crisis on the courts. There are some states in which one or both of the other two branches are inappropriately involved in the judicial branch budget process. In some states the judicial branch send its proposed budget to the Governor, who is empowered to cut it before including it in the overall state budget and sending it on to the legislature. Legislatures use restrictive language in judicial budgets to limit flexibility in the way funds can be spent. These structural conditions result in the other branches inappropriately treating the judicial branch like an executive branch department rather than a sovereign branch of government. The goals of judicial independence and self-governance are undermined in states where the Executive can alter the judiciary's budget proposal prior to submission to the legislature and the legislature establishes restrictions on the judicial branch's budget flexibility. Budgets should be a single line item so that courts have the flexibility to fund their own priorities and manage their own affairs.

State funding of the courts along with attendant unification of budgeting and finance at the state level through the Administrative Office of the Courts (AOC) can also be a beneficial reform. This allows the judicial branch to speak with one voice and pursue its budget goals on a single front rather than across numerous localities. A central administrative office with a statewide perspective is in the best position to

rationaly develop the judicial branch's budget priorities and convert these priorities into a proposed budget with significant participation by courts around the state. It is well positioned to serve as an effective spokesperson, advocate or negotiator on behalf of the courts' budget, and to act strategically behind the scenes or publicly to limit or even preempt budget cuts by the executive branch. Unification of the courts' internal budget process can avoid competition between individual courts and avoid the problem of politically influential courts prevailing at the expense of courts with actual greater needs. Of course, state funding is not necessarily a panacea. Much depends on the individual state's political traditions, personalities and peculiar inter branch political dynamics. In a particular jurisdiction it may prove counterproductive to shift budget politics from the local to the state arena if there is a strong executive branch empowered to revise court budgets or use the line item veto.

Potential Strategies for Court Systems Dealing with a Budget Crisis

In determining how best to deal with a court budget crisis, a threshold question involves the expectations and demands of the executive and/or legislative branches. Have the courts been directed or requested to contain costs and achieve spending reductions? Have there already been one or more reductions to the judicial budget in the same fiscal year? Have the courts been asked to raise additional revenues to offset shortfalls? What are the appropriate judicial branch responses to such requests and directions?

Cutting Costs and Services

It is essential that courts, to the maximum extent possible, cut costs without cutting services. Layoffs and hiring freezes inevitably result in under staffing. This means backlogs and delay, with collateral consequences to litigants and society, including higher legal expenses for individuals and increased incarceration and civil commitment costs for state and local governments. It takes people – judges, court managers, calendar clerks, interpreters – to resolve disputes. To the extent that fewer people are less involved in each case, there is a risk that the quality of justice being dispensed will suffer. Court leaders must ask themselves: at what point do courts stop delivering justice and become little more than case processing centers? Case dispositions are not just statistics but resolutions of often complex human

dramas and disputes that litigants have brought to the courts as the venue of last resort. Such resolutions, to be lasting and effective, require the application of substantial human judgment and intelligence.

Nonetheless, in the current fiscal climate, state judiciaries should take appropriate steps to cut costs. When faced with insufficient resources, court leaders have an obligation to the public and rest of state government to think creatively and make hard choices, whether it be closing underutilized courthouses, eliminating inefficient or outdated programs, or introducing cost saving measures such as audio or video recording of court proceedings. In so doing, judicial branch leaders send the message that they are willing to take charge of their operations and make tough business decisions for the public good -- no matter how unpopular. They may run the risk of alienating labor unions, localities and other parochial but powerful interests, but in a time of extreme budget austerity such decisions will be upheld if they fit into a coherent overall policy response to the funding crisis.

The NCSC Action Plan offers an array of helpful strategies revolving around added flexibility for personnel and procurement practices, elimination of inefficient and unnecessary activities, and enhanced use of technology. A few specific examples include: increased use of video conferencing to reduce personal appearances; expanded electronic filing, electronic communications and electronic document distribution to reduce the costs of paper storage, copying, printing and postage; increased use of court-annexed ADR programs; and increased use of temporary employees and volunteers.

The Action Plan also provides fresh insight about programs that take on greater importance and should not be cut even in hard times, such as employee training, investments in technology and routine facilities maintenance.⁴

Increasing Revenues

Courts in many jurisdictions have the unique ability to raise revenue through the promulgation of court rules. In a tight budget environment, increasing fees and fines by rule may be a viable option, particularly where there have been no

⁴ The NCSC Action Plan is available at www.ncsconline.org/

increases over a significant period of time and where the alternatives involve eliminating essential services or staff. However, there are serious risks here, including the perception of the courts as a “pay as you go” enterprise. The judiciary must guard against sending the message that courts are somehow responsible for funding themselves and generating revenue to support their own operations. Additionally, unduly pressuring the courts to raise their own funds can quickly cross over the line into interference with the internal functions of another branch. Another serious risk involves impairing access to the courts by lower income litigants, an important concern that must be balanced against the prospect of increased revenue. Finally, revenues from fees and fines fluctuate from year to year and do not provide a dependable funding source upon which to base court budgets.

As a good partner in government that wants to be part of the solution to the state’s fiscal crisis, the judiciary can obviously discuss raising revenues; but the bottom line remains that the executive and legislative branches are constitutionally obligated to adequately fund the judicial branch. Thus, where fees are increased, it is important to emphasize the exigencies of the fiscal crisis and the need to respond to the needs of the other branches in meeting a shared challenge.

The NCSC has compiled a comprehensive survey of revenue generation strategies, including enhanced collection of uncollected fines, penalties and surcharges through interception and garnishment of federal and state income tax returns, suspension of vehicle licenses or registrations, and institution of mail and credit card payment methods. These and other efforts have the salutary effect of promoting compliance with court orders. Courts are also developing new sources of revenue by implementing special service charges for electronic access to court records or other information by nonlitigants or for requests that require special handling. Other alternatives may involve one-time infusions rather than financial support for ongoing programs or personnel positions, including public-private partnerships aimed at introducing court innovations that are at least partially privately subsidized, and increasing efforts to obtain grant monies available from governmental, non-profit or private sources.

Negotiation with the Other Branches

It may be possible to soften the pain of proposed court budget cuts through negotiation with other branches, including counter suggestions for making

reductions elsewhere in the judiciary budget, identification of new revenue sources, and arguing that the reduction goal is inappropriate given the judicial branch's unique constitutional obligations. Such discussions provide a good opportunity to educate the other branches about the unique status of the judicial branch and why courts should not be treated like executive branch departments. Sharing in across-the-board cuts hurts the judiciary disproportionately because they have very little spending flexibility. Unlike executive branch agencies, courts have few "programs" that can be cut in times of crisis. Court budgets go overwhelmingly to pay salary and personnel costs (75% or more) for the courts' primary resource – the judicial and non-judicial personnel who make the justice system work. Indeed it may not be possible to effect across-the-board reductions in court budgets without cutting mandated costs like salaries for judges, court attorneys and court staff.

The fact that the judicial branch's appropriation reflects a relatively insignificant share of the state's overall appropriation – usually characterized at about 1% to 2% – can serve as an advantage in negotiations. The state's budget woes will not be solved through cuts in the judiciary budget; yet, even a small cut in the judiciary budget can have dire consequences for the administration of justice and public safety. Court leaders must impress these points upon the other branches during negotiations and convey the sense that there is so little to gain and so much to lose that it is simply not worthwhile to pursue unreasonable budget cuts over the objections of court leaders.

While judicial budgets are typically low visibility affairs, court leaders must be prepared to command the broader attention of the public by emphasizing the disproportionately negative impact of court budget cuts. Even a small cut in the judiciary's budget can result in huge layoffs, court closures and the inability to process cases in a timely manner. This could have potentially severe consequences in criminal and family matters where defendants may be subject to release on constitutional speedy trial grounds and vulnerable children may languish in foster care indefinitely.

State judiciaries are increasingly finding themselves in debates over what are and are not core functions of the courts. By their very nature, these debates tend to create an adversarial environment in which the judicial branch is inevitably on the defensive. Court leaders can quickly find themselves bogged down in defensive item by item negotiations with the other branches concerning which programs or

staff support constitutionally mandated functions. In this context, it can become difficult to justify new or continued expenditures for “innovations” like problem solving and specialty courts. Yet the state court community has increasingly come to view these reforms as essential, as they stand to improve the quality of justice and provide dramatic savings for government and society.⁵ Eliminating them now would prove extremely counterproductive. When resisting reductions, it may be preferable to present a broader description of the functions of the courts – protecting cherished liberties, no discretion to turn people away, serving as society’s emergency room, etc. – rather than debating core and non-core functions.

If budget cuts cannot be averted, court leaders should take every opportunity during budget negotiations to maximize flexibility in applying those cuts. Restrictive language in appropriation bills that limits flexibility over court spending is counterproductive, particularly during a fiscal crisis. Flexible use of appropriated funds enables court leaders, who best understand internal needs and priorities, to make the most efficient possible use of limited resources. The ability to quickly move limited funds between accounts during a fiscal emergency enables court leaders to respond effectively to problems as they arise by applying salary savings to other priority areas like public safety. Similarly, the ability to transfer budget savings from one year to the next is a critical advantage during tough budget times, as it cushions budget fluctuations and actually creates an incentive for courts not to spend all of their allotted funds.

When arguing for flexible use of allocated funds, no area is more important than personnel – the courts’ single largest resource. Many court budgets contain significant restrictions on reallocating funds to create new positions. State courts should always strive to gain or retain maximum flexibility in creating or reducing staff positions. They must educate members of the other branches that tying the hands of court leaders with regard to deployment of scarce personnel resources

⁵ Northwest Pacific Consortium and California Administrative Office of the Courts, *The Statewide Cost Evaluation of California's Adult Drug Courts*. Study published in 2003 found that drug courts saved an average of \$2,000 per year per participant based on drug court program costs, court processing costs, and incarceration costs.

Michael Finigan, *Assessing Cost Off-Sets in a Drug Court Setting*, National Drug Court Institute Review II: 2 (Winter 1999), at 59-91. Study found savings of \$5,629 per person based on criminal justice costs (law enforcement, prosecution, public defenders, adjudication, and corrections), as well as health care and public assistance costs.

during a budget emergency is counterproductive and potentially harmful to the administration of justice.

It may be useful during negotiations to point out the extent to which prior legislation has created higher caseloads and additional adjudicative and administrative responsibilities for the courts.

Confrontational Approach

Confrontation and litigation are politically risky options. Much depends on the peculiar dynamics of the jurisdiction and each judiciary must determine for itself whether confrontational tactics are appropriate. Taking a strong stand protective of the judiciary's constitutional prerogatives may be necessary in response to positions or actions taken by the other branches. Inherent in every court budget cut is a potential firestorm of controversy given the potential impact on the courts' critically important constitutional roles as the ultimate arbiter of disputes between the branches of government, the bulwark against governmental encroachment on individual liberties, and the dispenser of justice in highly sensitive criminal and family matters vital to society's well being. Court leaders are in good position to demonstrate to the public how funding reductions pose grave threats to the judiciary's ability to carry out these roles effectively. If they are able to make a strong case in this regard, then litigation or the threat of litigation becomes a powerful weapon that can shift public opinion and budget politics in the judiciary's favor.

In the past, courts that have pursued litigation have generally relied on the "inherent powers" theory, which derives from the separation of powers doctrine, and provides that the judiciary has the inherent power to compel reasonably necessary funding to allow it to discharge its constitutionally mandated functions and preserve its status as a co-equal branch of government. Some courts have also resorted to writs of mandamus to compel adequate funding.

High-profile confrontation, even if successful, may exact a high cost over the long run. A positive relationship with the executive and legislature is a critical factor at all times in obtaining adequate funding, having flexibility with that funding and avoiding micro management and intrusive oversight. Different states have had different experiences in this regard. There are states in which the judiciary's

willingness to stand firm despite all the risks has had long term benefits, establishing a historical precedent that serves as a powerful deterrent on funding questions, and there are states where prior conflict between the branches still casts a negative shadow on inter branch relations. Each judiciary must evaluate its current position and assess the likely long and short term impact of a dispute with the other branches.

Opportunities Presented by the Fiscal Crisis

In crisis there is opportunity. State judiciaries may now be able to effectuate changes that were not possible in favorable economic times. In some jurisdictions, the prospect of significant savings may open the door to long delayed reforms such as elimination or modification of mandatory minimum sentencing schemes. Studies have concluded that states potentially can save millions of dollars by diverting appropriate offenders to drug treatment.⁶ Court merger can save some jurisdictions tens of millions of dollars through administrative streamlining and elimination of jurisdictional overlaps. Other states may be able to accomplish the move from local to state funding, particularly where localities are in bad fiscal shape and cannot support the courts adequately.

Even where a judiciary has no choice but to accept reduced funding, this may be the opportunity to secure greater flexibility in how the courts can spend their appropriations. In some jurisdictions this could mean eliminating politically popular but outdated or inefficient facilities, systems or programs; obtaining key labor concessions in order to avoid layoffs; replacing court reporters with electronic means of keeping the official court record; promoting greater uniformity of practice among courts; initiating new automated case management systems; and securing or encouraging increased pro bono participation from the Bar. Initiatives like ADR, which have been slow to catch on in some jurisdictions, may have increased appeal to the bar and public at a time when courts are experiencing delay and backlogs.

Common sense solutions to resource needs often demand elimination of

6. Id.; The National Conference of State Legislatures ranks among its top 10 legislative issues for 2003 sentencing reform and the reduction of corrections costs via treatment and rehabilitation for certain offenders instead of incarceration.

unnecessary procedural barriers. Judicial workloads frequently change or shift among different courts or areas of the state, yet the creation of additional judgeships is probably not a viable option when funds are scarce. Better solutions may involve consolidating judicial districts or the temporary assignment of judges. The legislature may be willing to eliminate legal obstacles to these expedients, particularly where significant savings would result. Courts should establish commissions to think creatively about these issues and identify new funding sources.

Planning for the Future

Despite the difficult budget environment, state judiciaries should not cease planning, policy development and program evaluation efforts. These are actually more important in tough budget times because they serve to inform the courts about which programs work, which should be eliminated or cut, and which should receive priority for preservation and expansion. Data collection should continue, as it is essential for reporting, policy making and planning purposes and provides courts with the means to prioritize and justify their budget requests and expenses.

Court leaders must give careful consideration to the efficacy of their short term planning and tactics. Much can be gained by looking to the NCSC's information database for current strategies and tactics that have been successful in other states. What are effective messages when presenting or "selling" the budget? What figure should the budget request come in at? Is it wise to present an austere request if the other branches are clearly intent on cutting the courts' budget irrespective of self-imposed austerity? Or is there a legitimate chance that such a proactive stance by the courts will stave off significant cuts?

The current fiscal crisis also presents an opportunity for critical self-examination. Court leaders should engage in a thorough and frank analysis of the courts' governance structure, particularly from a fiscal perspective, and consider how their long term management philosophies have contributed to the courts' budgetary successes and failures. Is it possible to give greater autonomy to individual courts and judges without diminishing the benefits of judicial branch accountability and unity? Empowering local courts can produce greater efficiencies inasmuch as they are closer to the day to day problems on the front line and are better able to prioritize and allocate the limited fiscal and human resources available

to them.

It is also important to learn from the budget experiences in other states, particularly those that are faring well, and apply the lessons learned in preparing for the next economic downturn. How can they obtain greater spending flexibility so as to better implement future budget reductions? What is the state of relationships with leaders and key officials in the other branches and how to improve upon them? What steps must be taken to develop a more stable funding stream? What processes should be centralized to improve efficiency and coordination? Which courts, offices or functions can be combined to eliminate redundancies and overlap? How to achieve greater cross assignment flexibility? Judicial branch leaders need to grapple with these questions day after day, year after year – well in advance of any fiscal crisis.

Conclusion

With state budget shortfalls reaching alarming levels around the country, state court systems today face unprecedented budget crises. As responsible partners in government, the courts have an obligation to share in the sacrifices being made at all levels of state government. At the same time, however, the judiciary is an independent branch of government that performs constitutionally mandated functions that are critical components of our nation's democratic system. Courts must have sufficient resources to perform these functions.

Only by fostering an environment in which the other branches and the public place a high value on the work of the courts can the judicial branch be assured of the resources necessary to carry out their constitutional obligations – in good times and in bad. A key to getting through these difficult fiscal times is the judiciary's store of managerial and fiscal credibility. A court system with an established track record for making wise and efficient use of its resources during good economic times operates from a position of relative strength during tough economic times.

This paper challenges judicial branch leaders to make a personal commitment to the fundamental principles articulated here and in COSCA's 2001 white paper on judicial governance and accountability. It takes strong, visionary judicial branch leadership to produce the conditions conducive to long term budgetary success.