

**REPORT OF THE
SPECIAL COMMITTEE ON THE EFFECTS OF THE ECONOMY
ON THE JUDICIARY
OF THE
AMERICAN JUDICATURE SOCIETY, HAWAII CHAPTER**

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SPECIAL COMMITTEE ON THE EFFECTS OF THE ECONOMY
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AMERICAN JUDICATURE SOCIETY, HAWAII CHAPTER**

March 7, 2011

Executive Summary

The Special Committee on the Effects of the Economy on the Judiciary (“the Committee”) reviewed the issues raised by the American Judicature Society Resolution establishing the Committee and reached the following conclusions:

1. The budget cuts have had a significant negative impact on the functioning of the Judiciary.

(The body of the report contains a lengthy description of the impacts based on material gathered by the Judiciary.)
2. The Judiciary performs a critical function in society, very much akin in standing to the so-called “safety net” programs and should be among the highest priorities for restoration by the Legislature.
3. The courts can probably, from a legal standpoint, insist on funding at some minimal level, consistent with the obligations imposed on them. Their choice to work within the overall budget and accede to, or stated otherwise to tolerate, substantial reductions is commendable.
4. Funding to the Judiciary should come in lump sum and the Legislature should not specify how the Judiciary specifically absorbs any reduction.
5. The State should seek an opinion on how budget reductions and especially their timing impacts or doesn’t impact on the pension benefits of judges, and in particular whether any changes can be imposed retroactively within a particular year.
6. It is important for the American Judicature Society (“AJS”), the Hawaii State Bar Association and others to provide as much public support for the Judiciary and its budget as possible.
7. The American Judicature Society should very specifically commend Chief Justice Mark Recktenwald (and former Chief Justice Ronald Moon) and the entire Judiciary for the way in which they have handled and are handling the reductions. They have maintained public confidence in the courts, and handled very difficult circumstances with grace and dignity.

The Committee believes that AJS should work closely with the Chief Justice on these issues and speak up when needed to support adequate funding for the Judiciary.

INTRODUCTION

The Committee has reviewed the information on the impact of the economy on the courts primarily as it is reflected in budget reductions imposed by the Legislative and the Executive Branches. Our review, based on information from the Judiciary and from members of the Committee finds that there have been and are significant and negative impacts on the services provided to the public as a result of these cuts.

The Committee fully appreciates the circumstances under which those cuts were and are being made. We also understand that the Judiciary has chosen to accept those cuts as necessary under the circumstances. The Committee does, however, believe that certain commentary needs to be made on the current situation and on the future of the Judiciary.

The Bottom Line

The budget of the Judiciary in the last two years has been reduced from \$150.4 million to \$130.7 million. This cut of \$19.7 million amounts to a 13% reduction. The reductions included the elimination of 79 positions and resulted in \$2.8 million in reductions of purchase-of-service (POS) contracts in FY 2010. This has also meant furloughs and with them the closure of the court system two days a month.

While there was some disagreement as to whether these reductions amounted to a fair share of the overall reductions in State spending, there is no question that the reductions have been difficult on the Judiciary and on the public which uses the court system.

The Impact of the Reductions: "Justice in Jeopardy"

The Judiciary produced a report entitled "Justice in Jeopardy" in December 2010. In addition, the Committee was provided with the results of a survey of judges conducted by the Judiciary members of the Committee. Both reports are attached.

The basic findings of the reports are best summarized by the Judiciary itself in a report entitled, "Justice in Jeopardy: The Impact of Budget Cuts and Furloughs on the Judiciary, State of Hawaii, December 2010."

Specific Budget Impacts on the Courts

Justice Delayed

- From FY2008 through FY2010, there was a 28.4 percent increase in pending Circuit Court civil actions and a 19.6 percent increase in the number of cases filed. Since the budget cuts and furloughs, the median age of pending Circuit Court civil cases increased by 41.8 percent.
- From FY2008 through FY2010, the number of pending court foreclosure cases increased by 80 percent. The median age of pending foreclosure cases increased by 44 percent.
- From FY2008 through FY2010, there was a 98.2 percent increase in pending District Court civil actions and a 36.4 percent increase in the number of cases filed.
- At the District Court of the First Circuit, furloughs and position reductions have resulted in substantial delays in scheduling hearings and trials. Traffic and DUI trials typically took 1-2 months to be heard prior to furloughs and now take 4-5 months to schedule. Trials in regular claims cases were scheduled within two weeks prior to the furloughs but now take 4-6 weeks to schedule.
- In the Family Court of the First Circuit, the time it takes to process an uncontested divorce has increased from 3-4 weeks to 6-8 weeks since furloughs and budget cuts were implemented. The wait to schedule a mandatory session with the Judiciary's Kids First program in Kapolei has increased from 4 weeks up to 10 weeks. Filing for divorce can be the start of a traumatic process for a child that may involve physical relocation, a new school, financial insecurity and the inability to see one parent. Delays in processing divorce cases increase the stress that children experience.

More Self-Represented Litigants

- More Hawai'i residents are entering the court system without the benefit of an attorney. Even with reduced hours and resources, the Judiciary's Ho`okele service centers on O'ahu assisted 103,009 self-represented litigants in 2009, a 5.6 percent increase from the year before.
- The Fifth Circuit Service Center in Lihue opened in March 2008 to assist self-represented litigants with court forms and questions about court procedures. It was closed in December 2008 due to staffing shortages.

Court Services Reduced

- In 2005, the Honolulu Traffic Violations Bureau was open five nights a week to serve the public after working hours. It is only open one night a week now. In the near future, it will probably close at night altogether, requiring more non-criminal defendants to take off from work to resolve their cases.
- Due to a staffing shortage by the Department of Public Safety's Sheriff Division, there were not enough sheriffs to provide security for Judiciary facilities on the Big Island. The Judiciary was forced to close the North Kohala, Hamakua, and Ka'u rural courts in October 2010, requiring court customers to make a 20-60 minute drive to a courthouse.

Probation Staffing Eliminated

- In the Client Services Division of the First Circuit, 24 positions were lost last year due to budget cuts, including positions in both the Sex Offender Unit and the Domestic Violence Unit. These units work with some of the most dangerous offenders who are at a higher risk than others to recidivate. According to the American Probation and Parole Association, the caseload standard is 30:1 to 120:1 depending on the risk level of the probationer. In Hawai'i, the ratio of cases to probation officers is as high as 180:1.
- Furloughs also are affecting public safety. Our probation officers have 24 fewer days a year to supervise offenders. As a result, revocations of probation are being delayed, and probation officers are unable to provide the level of supervision necessary for certain clients because there are fewer hours in the week to monitor the same, or increasing, numbers of probation clients.

Effect on Families and Victims

- To efficiently use public funds, the Judiciary contracts with external entities to provide services that are not performed internally. These contracts were cut by more than \$2.8 million in FY2010 to balance the Judiciary budget. The contracts involve the purchase of assessment and/or treatment services for substance abuse, child sex abuse, and mental health, as well as domestic violence emergency shelter services, juvenile client and family services, anger management, victim impact classes, and more.
- The reduction in purchase of service (POS) contracts has resulted in fewer social services for crime victims. For example, reduced Judiciary funding of Catholic Charities Hawai'i in FY2010 resulted in the loss of two positions which led to 165 fewer child sexual abuse clients being served compared to the previous year.

- Cutting treatment court budgets has resulted in taxpayers having to pay more, not less. As a result of the budget cuts, 5 of the 11 treatment courts have waitlists for admittance due to a reduction in the programs' capacity. Many people on a waitlist are incarcerated at a cost of \$137 per day to taxpayers as compared to about \$14 a day when they are in a treatment court.
- In FY2010, the Judiciary's Maui/Moloka'i Drug Court program lost four full-time equivalent (FTE) positions after it had its annual allocation cut over \$420,000. There is now at least a 13-month wait for men to receive drug treatment services on Maui. The wait for treatment was already between 8 and 12 months in May 2008 when the Legislature authorized four FTE positions to reduce the delay.
- Due to budget cuts, the O'ahu Adult Drug Court has had to reduce electronic and voice monitoring of clients by 30 percent. Since monitoring is used to ensure clients' compliance with curfew restrictions, the decrease in monitoring reduces community safety and increases the likelihood of clients relapsing. Furthermore, the court lacks sufficient funding to accept new clients who need residential treatment after March 2011 until the start of the next fiscal year.
- The budget cuts forced a reduction to the Judiciary's POS contract for mediation and other dispute resolution services. The Mediation Centers of Hawai'i are now expected to provide services for approximately 3,100 cases, as opposed to 4,000 prior to the reduction in the contract amount for the POS. Mediation is provided in many types of cases including domestic and family, landlord/tenant, temporary restraining orders, and neighbor disputes.

Survey of Judges

A survey of judges, conducted by the Judiciary members of the Committee, yielded the following finding:

Judges feel that the budget cuts and furloughs have reduced productivity, slowed dispositions of cases and left facilities in less than optimum condition. While most judges do not feel that they are under undue criticism or public pressure, there is increasing congestion, a push to move cases and some public sense that the courts "don't care" about people.

The judges are virtually unanimous in their views that there is a clear impact on their effectiveness. The major issues are timely handling of cases and the impact on paperwork of having less work days for staff to manage what is a significantly increasing workload.

The judges did not view the reductions as affecting their independence to make decisions. What the reductions have done is make very clear the inter-dependent nature of the Judiciary and outside agencies such as the Public Defenders Office in the State Department of Budget and Finance, the various County Prosecuting Attorney's Offices, the Sheriff's Office in the Department of Public Safety, and the Honolulu Police Department.

(The survey had a response rate of 26% from the full-time judges.)

The Economy and the Judiciary

At one level, the obvious relationship between the economy and the Judiciary is the loss of tax revenues from a weakened economy leading to reduced appropriations to carry out the mission of the Judicial system.

It is also a sad and very real truth that the shrinking of the economy has an inverse impact on the courts; it increases the workload and increases it dramatically.

The strongest influences of the economy on the Judiciary are in the increase of poor economy-related cases such as foreclosures and contract disputes and the caseload that comes from the human consequences of the poor economy such as domestic violence.

On the first issue, the foreclosure and other business-related disputes such as contract cases will increase in a tough economy as the pool of money decreases and parties fight for their share. Our court system is the arbiter of those disputes and needs to have adequate funding to serve in that role. Failure to do so leaves the tensions and angers of those disputes in the community.

On the second issue, as with other social service "safety net" organizations, the courts are among those institutions where the human impacts of the poor economy are felt most intensely. Not being able to address these issues aggressively, especially when children and/or family violence are involved, compounds already difficult situations.

The Committee believes strongly that the Courts' role in a tough economy grows and that in the priority-setting for budget appropriations, the Judiciary's needs should be high on the list. That is particularly critical in the case of the human impact issues where the Judiciary is often the ultimate safety net.

The Law of Budget Reductions and the Judiciary

There is in fact not much legal precedent in the area of legislative budget-cutting and the Judiciary. There have been some cases, and there will likely be more, but the Judiciaries around the country appear to have significantly gone along with or tolerated some level of budget cuts as a matter of sharing burdens with the other branches of government. The Courts have gone along with these reductions as a practical matter, though more in the form of acquiescence than explicit agreement, in part because there

are limits to the tolerance for reduction. In addition, and again from a practical standpoint, setting firm resource lines would be particularly difficult.

There are, however, principles that emerge from what cases exist and they are worth noting:

1. The Judiciary has constitutionally mandated functions which it must be allowed to meet.

The Constitution mandates the courts' role in deciding criminal and civil cases and the right of citizens to access the courts for those purposes cannot be abridged. Even in tough economic times, and perhaps particularly in tough economic times, the Judiciary must be given enough resources to carry out its constitutionally mandated functions.

The Judiciary is also carrying out a number of very successful and important programs in family law such as Girls' Court and in restorative programs such as HOPE and Drug Court. Funding for these programs cannot, however, be in lieu of the funding necessary to meet mandates; it must be in addition to such funding.

2. The Judiciary has the inherent right to determine its need for resources and to obtain them.

This principle obviously could lead to a very serious conflict between the branches of government, and is not a desirable outcome. Nonetheless, our Constitutional structure is predicated on three co-equal branches of government and there is a point at which the Judiciary could find itself compelled to ensure it had the means to carry out its functions.

One formulation for this distinction is that the courts must always have "serviceability" even if not "optimality".

3. The Judiciary ultimately must be in charge of its own house and there are, therefore, limits to how much another branch can dictate how it functions or its priorities.

The Legislature has the power and right to control many aspects of the Judiciary's functioning through the laws it passes. For example, it can impose procedures and criteria for case handling and disposition, it can assign new areas of work, and it can change employee salary and benefit terms. There are, however, some limits to what it can do. It cannot, for example, tell the Courts in absolute terms which cases it can hear and which it cannot.

4. The Judiciary's budget needs to be treated on its own merits, not simply lumped together with all other parts of the budget.

This may seem like a distinction without a difference but as a matter of respect for the independence of the Judicial Branch its budget needs to receive independent review. Failure to do so again raises the uncomfortable prospect of inter-branch conflict and is easily avoidable.

One additional consideration that was raised was whether the Judiciary should receive a mandated percentage of the budget no matter what else is occurring. This type of mandate has been the subject of discussion in other states, primarily in the funding of education.

It is highly unlikely that the Hawaii Legislature would agree to such a mandate, particularly given other needs, and for the same reason that the Judiciary has accepted reductions to date, it is unlikely the Judiciary would ask for such special treatment.

Making the Budgetary Reductions

Given the above, the Committee believes that any reductions to the Judiciary should be as low as possible and in a lump sum. This gives the Judiciary the maximum discretion on how to spend the amounts given to ensure that it is best able to carry out its various functions.

The Impact of Collateral Reductions

The Judiciary's functioning is also dependent on the budgets of other organizations. Specifically, the funding for the County Prosecutors, the Public Defenders Office (under the Department of Budget and Finance), and the Attorney General's Office impacts the functioning of the Courts. The latter two fall under the same appropriations process as the Judiciary so there should be an ability to budget appropriately.

Can the Judiciary Mitigate the Budget Cuts by Generating Revenue?

There appears to be very little ability to do so under current law. Most fees charged by the Court go into the general fund. That could be changed and the Judiciary could be given the right to raise and keep revenues though it is not clear that the Legislature would be agreeable. Further, there are access limitation issues that go with large processing fees so this source has real limits.

One Unintended Consequence

During the course of Committee discussions, one consequence of the budget reductions was noted that while certainly unintended had significant consequences.

In 2009, the year in which budget reductions were announced, 9 judges representing 161 years of judicial experience retired. Reasons varied but one element was a concern with how the budget reductions would impact pensions. As pension is salary based, a reduction in salaries can lesson pension amounts.

One related question that arose was whether pension benefits changes, other than the salary impact question, can be applied on a "retroactive basis" within a calendar year. If they cannot be, then judges can retire prior to the impact of any pension change. If they can be, then judges may retire before the end of a calendar year in an effort to avoid any possible impact from activities in the next year. It is clear that pension benefits cannot be changed retroactively. The limited issue appears to be whether a legislative act in a particular year can apply from January 1st of that year without being considered "retroactive".

It was the general consensus that pension changes can only be prospectively applied. and yet the concern remains.

Telling the Story

It is the strong sense of the Committee that those interested in the health of the Judiciary need to speak up, particularly at the Legislature.

The Chief Justice presents his State of the Judiciary every year and this year he presented the Legislature with the material he provided to the Committee and presented his case for budget restoration. He will presumably lead the work to present the Legislature with the information to support it.

The American Judicature Society, the Hawaii State Bar Association, and others interested should also provide input to the Legislature on the importance of adequate funding for the Judiciary.

Public Confidence Remains High

There remains strong confidence in the overall quality of justice in Hawaii; and in the decision-making itself. That remains great news for Hawaii.

Conclusions

1. The budget cuts have had a significant negative impact on the functioning of the Judiciary.
2. The Judiciary performs a critical function in society, very much akin in standing to the so-called "safety net" programs and should be among the highest priorities for restoration by the Legislature.
3. The courts can probably, from a legal standpoint, insist on funding at some minimal level, consistent with the obligations imposed on them. Their choice to work within the overall budget and accede to, or stated otherwise to tolerate, substantial reductions is commendable.
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