

Daily Journal

www.dailyjournal.com

WEDNESDAY, AUGUST 3, 2011

Slashing the courts' budgets has its own steep price

By **Laurence Hutt** and **Sharon Mayo** of
Arnold & Porter LLP

California has a long and venerable tradition of integrity and innovation in its judiciary: it has provided leadership to courts nationwide since at least the days of the intellectual and forward-thinking Chief Justices Phil Gibson, Roger Traynor and Donald Wright; it was one of the original court systems to embrace "fast track" for civil cases; it has created "specialty courts" as needs have arisen to expedite and streamline the handling of various types of matters from landlord-tenant to drug cases; it has one of the most diverse benches in the country; and it has served as a model for countries around the world seeking to improve their own court systems. Most importantly, California has worked hard to keep its courts, and access to justice, readily available to its increasing and ever-changing populace. Now, drastic budget cuts threaten to undermine and pervert this legacy, possibly forcing many counties to close their courthouse doors to Californians who most need access to the judicial system.

In one sense, it may not be surprising that the judiciary is such an attractive target for the budgetary axe. Courts are associated with lawyers, and the American public has never held the legal profession in particularly high esteem. Still, equating a functioning and accessible court system, which is mandated by the Constitution and inherent in our system of government, with the "fat" that usually comprises the fodder for budget cuts, is discordant and highly anomalous, to say the least.

Not surprisingly, the budget cuts to the courts will have the most impact on the poorest and neediest members of society — those who cannot always hire lawyers to represent them; cannot seek justice in other venues out-of-state; and cannot hire expensive former judges to adjudicate their disputes. The manner in which the

latest budget cuts will be implemented will vary from county to county, but the initial outlines of the changes in store are beginning to emerge. Simply stated, courts will abolish or drastically reduce all services and functions deemed non-essential, including the elimination of small claims court and complex case departments, contraction of family law and traffic courts, and diminished supporting services. As the presiding judge of the San Francisco County Superior Court has already warned, in the future, traffic offenders may have to wait hours to pay tickets, and spouses may have to wait years for divorces and property settlements.

There are undoubtedly other subtle and indirect consequences of the intended cuts, as well:

Loss of experienced court personnel. In some counties, court commissioners are being terminated; their existing judicial duties will then have to be filled by sitting judges. However, the prospect of a long-term assignment to traffic court or to a department that handles subordinate judicial functions, such as validation of wills, entries of default, and simple writs and orders, may be enough to impel more experienced and highly regarded judges to leave the bench, especially given the enhanced lure of "private judging" where compensation is vastly higher and budget cuts are not an issue.

As the presiding judge of the San Francisco County Superior Court has already warned, in the future, traffic offenders may have to wait hours to pay tickets, and spouses may have to wait years for divorces and property settlements.

By the same token, these issues will also likely operate as a deterrent to motivating smart and talented jurists to seek judicial appointment or election.

Increased case loads and turnover: If a county like San Francisco is only going to have a total of three departments handling civil trials, the case loads for those judges will be crushing, and the likelihood of trial



Associated Press

As San Francisco's top judge, it fell to Katherine Feinstein to close the court's \$13.75 million budget hole by laying off 40 percent of the work force and shuttering 25 of 63 courtrooms.

in less than five years, highly dubious. This will not make for good working conditions or foster the retention of judges.

Lack of resources for the adjudication of larger commercial cases: Over the last decade, courts in the larger counties have established special departments for handling complex business and commercial cases. Those judges, often selected from among the most experienced and capable jurists, tend not to rotate assignments annually or bi-annually but, instead, retain their case loads from start to finish. They become directly familiar with the parties, issues, and intricacies of their cases, and they are well situated to craft individual case management tools, special procedures, and schedules. They push cases along, and deter the gamesmanship that can occur when opposing lawyers are in control of

Slashing the courts' budgets has its own steep price

the case schedule. These departments have been successful in their approaches and are generally highly regarded among members of the State Bar. The demise of these "complex" departments is likely to mean that these difficult, time-consuming cases will further contribute to the backlog in the few remaining civil departments, or they simply will not receive the case management oversight and attention they need for a fair and reasoned resolution. Indeed, it is difficult to envision how the court will have the time or resources to try to conclusion any long or complicated civil case.

Disparate treatment of litigants based upon their financial means: When California adopted "fast track" in its civil courts many years ago, one premise was that, in most instances, litigants would not make a serious effort to resolve their disputes until the eve of trial; therefore, trial dates had to be both firm (not subject to continuances) and as early in the case as possible. That impetus to settlement will be lost, as trial dates become neither early nor firm. And with the loss of the "push" to settle, litigants will be forced to wait extended periods to have their matters decided. The individual consumer, tenant, worker, or accident victim may well not see any compensation for their claims, regardless of how meritorious they may be, for five years or more, since corporate defendants are prone to hold onto their money and wait for the press of an actual trial before considering settlement.

In contrast, in business-to-business disputes, particularly those between larger companies, the problem of court congestion and delay is easily avoided: They can retain private judges and have their mat-

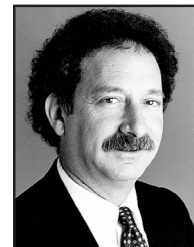
ters decided outside the public system on whatever schedule or timetable they agree upon. This will re-ignite the inherently problematic issue of having a two-tiered judicial system — one for corporations and the wealthy that is accessible, quick, and highly capable, and another for everyone else that is not. Furthermore, the development of our common law will be seriously truncated, as the larger and more complex civil cases that justify full development of legal and procedural issues in the trial courts and on appeal are weaned from the system and decided privately without published orders or opinions.

In addition, the person seeking a divorce or making a claim against a local merchant generally must file in state court; there is likely no other court of law with jurisdiction over their dispute. The state has an obligation to provide an accessible and fully functioning court system for its citizenry. Indeed, one may wonder whether two branches of government have the power under any circumstances to put the third branch of government partially out of business by cutting its funding to the virtual vanishing point. And it would not be entirely surprising to find public interest or other groups resorting to the courts in an attempt to vindicate the right to have meaningful access to the courts, much as some groups are trying to do with funding for public primary education.

While the court budget cuts may be billed as a temporary response to an economic crisis, experience teaches us that "temporary" changes have a way of quickly becoming permanent. It is difficult, at best, to remember a temporary law or a tax or a surcharge

that actually expired. In this instance, the changes being wrought by the budget cuts amount to dismantling much of the judicial infrastructure. While infrastructure may be demolished almost overnight, it takes years, if not decades, to rebuild. Departments closed, commissioners furloughed, judges who become frustrated, under-used or under-valued and retire, are changes that cannot be easily reversed. And that does not even begin to measure the cost in terms of peoples' lives. That impact can never be reversed or compensated for.

Everyone involved in the administration of justice — from the Legislature and the governor, to the Judicial Council, to the presiding judges and judges, to the members of the State Bar — have a special obligation and responsibility to work to ensure that the cuts affect the public-facing functions of the courts as little as possible and that they remain accessible and available for the fair, just, and timely resolution of disputes for all citizens.



Laurence Hutt is a business litigation partner in the Los Angeles office of Arnold & Porter LLP.



Sharon Mayo is a business litigation partner in the San Francisco office of Arnold & Porter LLP.