

State of the Judiciary
Chief Justice Malcolm M. Lucas, California Supreme Court
Message to the California Bar Association Meeting
October 4, 1992, in San Francisco, California

Good afternoon. Let me first thank John Seitman and the outgoing members of the state bar's board of governors. Your efforts over this past difficult year for bench and bar have been invaluable. I also want to congratulate Harvey Saferstein, your new president, and the incoming board members. I predict that the next year will provide many opportunities for us to work together on issues of major significance for the judicial system, the bench and bar, and every Californian.

In my 25 years as a judge, I have never seen the judicial system faced with greater challenges and, perhaps, opportunities. We are at a crossroads in the judicial history of our state and nation,

In California, the courts, like other segments of government, have experienced the confusion and uncertainty flowing from the current financial crisis. The lack of stability has meant that the goals of unified funding for the courts have remained unmet. Various proposals have brought basic constitutional principles into the forefront of debate. Questions have been raised about how best to maintain California's ability to attract jurists of the highest quality.

The confluence of financial problems and policy debates has meant that people at both the state and national level are reassessing all facets of the administration of justice. In the flood of events, however, lies not only danger, but also, perhaps, opportunity. Our goal is not just to ride out the storm, but to promote a process that will result in a more robust and responsive justice system.

To do so, we must keep ever before us two fundamental principles: first, maintaining an independent judicial branch. Second, affording the judicial system adequate resources to perform its constitutional role. By resources, I do not mean only financial support. I include the authority to handle the affairs of the judicial system, to set a course for the future, and to meet needs in an environment where fiscal resources are unlikely to match increases in demand.

Success in sustaining these principles requires our shared understanding, broad participation, and committed support. To respond to the public we serve, we who are part of the justice system must identify danger and find and implement solutions. Together, we must be willing to risk, willing to experiment, and willing to fail -- and most important, we must be willing to lead.

California this year faced fiscal problems of a magnitude unprecedented since the great depression of the 1930s. The effects of fiscal constraints on the courts have grown more evident during the past few years. No new judgeships have been created since 1987. Increases in court resources have not matched those in filings. Yet courts are looked to for solutions to a broader and broader sweep of societal problems.

Throughout the judiciary, we have responded by more actively managing resources and planning for the future. Through innovation and hard work, and with the bar's great assistance, courts have made significant improvements. Trial court delay reduction programs reduced the time it takes

for a case to come to trial in many courts. Efforts in the appellate courts have seen similar success. Effective alternative dispute resolution programs are also helping to resolve cases expeditiously. Coordination and consolidation of administrative and other functions are leading to savings and better service.

But even as we move ahead, new challenges are being generated by fiscal forces beyond our control and by broad demographic and societal changes. These are not temporary phenomena. To be prepared, courts have embarked on what may prove to be their most important exercise in self-examination since our government was formed. Our goal is maintaining the judicial branch as a separate, equal, and independent branch of government, capable of performing its constitutional role, meeting the needs of the changing population we serve, and assuring the primacy of the rule of law in our society.

Let me explain what I mean by an independent judiciary. My primary focus is on systemic independence -- not on the autonomy of an individual judge or court. I mean independence in the sense of a branch free to resolve cases in accordance with the law. Free from fear of fiscal retribution for deciding cases in a particular way. And, of course, free and able to offer an impartial and accessible forum to all. Independence must be protected -- and it must be earned. With autonomy comes responsibility to manage judicial branch affairs in the interests of the public and the rule of law.

Why else is an independent judicial branch so important? Well, the constitutions of other nations, including, for example, China, often contain guarantees of rights greater or equal to those found in our own. The difference has been that our judiciary has had the autonomy and resources to adjudicate and enforce those rights.

There is no guarantee, however, that a balanced form of government will thrive. Challenges can come in many forms. One thing is certain: inextricably tied to true judicial autonomy is availability of sufficient resources. Judicial independence is theory without substance if no one is there to administer justice.

In California, our court system is staying afloat -- with some struggle. But we are not alone -- similar struggles are going on nationwide.

I am a member of the American Bar Association Special Committee on Funding the Justice System. In August of this year we issued a report -- "a call to action" -- based on a survey of court needs nationwide. The report's executive summary observes that "the combination of increased demand and shrinking resources now threatens the quality and availability of justice in our nation. In short, the circumstances described in this report place in peril our most basic constitutional entitlement: the ability to adjudicate disputes and redress grievances in an impartial setting." The survey revealed a basic message: "the justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding."

Some, of course, may argue that things are bad all over; that businesses and other parts of government are cutting back -- no reason that the court system should be exempt any more than the department of fish and game. I agree -- up to a point. There is no reason the judicial branch

should be exempt from reductions -- as long as they do not threaten the courts' basic ability to perform their constitutional role.

I part company at the notion that the administration of justice can be shortchanged without fundamental detriment to society; that people should accept and expect less justice; that justice accessible only to some is enough. We should not break the promise contained in the Magna Carta: "to no one will we sell, to no one will we refuse or delay, right or justice."

Others may argue that cost efficient alternative dispute resolution methods and private judging can dispel any worries about inadequate funding. But I do not see them as comprehensive substitutes for a traditional court system.

A public court system has an absolutely essential role in a free society. Our traditional public court system assures people that government can and will dispense justice and provide an impartial forum. It provides continuity and stability. Public courts publicize developments in the law and reflect and mold shared expectations about how to conduct ourselves and our businesses. They encourage involvement in society and its aims by offering a fair forum and a chance to contribute as jurors. In short, they guarantee the preeminence of the rule of law.

In contrast to the traditional court system as we know it, consider this -- a court system that handles only criminal cases and basically serves as a way station to state prison. Our California Futures Commission is studying what lies ahead for courts. It has started developing scenarios of possible futures based on projections of trends in demographic, fiscal, and other areas. One scenario describes what is called a correctional model that is limited to the role I have just described. Is this the future we want for the third branch of government? If not, what do we want and how can we achieve it? We must consider how alternative dispute resolution and other techniques can best be incorporated into the existing court system to improve the delivery of services overall. We should not allow unplanned parallel development to occur.

Any path you follow in assessing the interaction of alternative and traditional methods of dispute resolution and the future structure of our system inevitably leads to resources. Learned Hand once said: "if we are to keep our democracy, there must be one commandment: thou shalt not ration justice." To put it another way, changing the pledge of allegiance to "with liberty and justice for some" won't do.

This may seem a bit grim. But, in California, courts remain remarkably vital and engaged in fostering important research, education, and advocacy. I can offer a menu of examples showing some of the many approaches to issues relating to independence and resources.

The ABA committee on funding had three specific suggestions. First, bar leaders and judges must together form "action committees" to address specific problems and become a central force for legislative advocacy for all elements of the judicial system.

Next, these groups must be expanded to include members of the general public, both to further education about the importance of the judicial system and to foster wider participation. Finally, and this is not a new idea, but it is important, these groups should prepare justice system impact

statements analyzing proposed legislative or executive actions to determine their effect on the courts. These can help in educating decision makers about the consequences of their actions.

In California, several projects are giving life to those recommendations. For example, Richard Chernick, president of the Los Angeles County Bar Association, fellow member of the aba committee, and long an impressive advocate of judicial independence, is establishing a group to bring together constituencies from both inside and outside the judicial system. Through education and advocacy, the coalition will support courts in their efforts to obtain sufficient funding and protect their independence. I urge you all to give your full efforts and cooperation to that group.

In-house, the Judicial Council, which I chair, is undergoing searching self-review. I suspect that to many of you the council is a mysterious entity that promulgates rules and forms and occasionally is mentioned in the legal press offering views on some obscure legal matter. In fact, the council is a constitutional body comprised primarily of judges from every court level. It also has state bar and legislative representatives, and advisory members.

The Administrative Office of the Courts is the council's staff arm. For the past five months William Vickrey has served as its director. After a remarkable job of getting up to speed, he has begun the process with the Judicial Council of rethinking how the council and AOC can better operate.

Changing demands on courts require the entire legal system to operate more cohesively. With my full concurrence, Bill Vickrey planted the seed of a program to evaluate how the council can become a more effective servant of and advocate for the whole judicial branch. Council members have responded with enthusiasm. Almost every one of them attended a very productive major strategic planning session in august.

Based on its results, a planning committee is working on ways to enhance the council's responsiveness and to incorporate wider participation. The committee will present proposals to the full council at its November meeting.

We anticipate that a newly focused Judicial Council will better serve the judicial system by disseminating and collecting information, providing an arena for airing views and reaching consensus, and advocating policies to promote the administration of justice and advance the interests of all Californians.

On other fronts, some concrete steps are making a difference. For example, last year's trial court funding and realignment act required trial courts to submit to the Judicial Council coordination plans to achieve concrete savings and effectively use resources.

The response of almost all courts has been excellent and the range of their creativity and participation truly exciting. For example, judges on the superior and municipal courts in Stanislaus, Sacramento, and Napa Counties, and in the El Cajon branch in San Diego, are exchanging assignments to fully use all available judicial time. Superior and municipal court administrators' offices are being combined to reduce duplication in Sacramento, Shasta, and San

Francisco. Some courts, including San Bernardino, are coordinating activities such as use of court reporters and interpreters. In short, courts across California are scrutinizing and improving all aspects of judicial administration.

Reaching across federal/state jurisdictional lines, several joint commissions are trying to improve administrative cooperation in areas such as plea bargains, juror selection, indigent representation, and shared resources. They are also looking at jurisdictional matters such as habeas corpus, abstention, and diversity. As Chief Justice Rehnquist recently said, our nation "no longer can afford the luxury of state and federal systems which work at cross purposes or which irrationality duplicate each other's efforts."

Even projects as diverse as the new Supreme Court Historical Society and the American Inns of Court Program play a role. By preserving court history, the society will provide a sense of context as we look to the future. The Inns offer a forum for those experienced in the legal profession to pass on knowledge and skills and high ethical standards to new generations of lawyers.

In short, our judicial system is working hard to meet the difficult demands placed on it. And, as touched on earlier, we are also looking even further ahead. Under the auspices of the Judicial Council's Commission on the Future of the Courts, chaired by Dr. Robert Dockson, a project called 2020 vision is developing a preferred future for California's courts. To forecast what courts must do to meet the needs of its constituencies, a poll will ask members of the public how they perceive the courts and what values they deem important. A survey of experts in assorted fields will provide data on how different factors will bear on courts.

Noted specialists are writing papers on civil and criminal law, alternative court structures, court technology, and family and juvenile law. Some will use broad data to predict the potential influence of demographic, economic, sociological, and scientific developments on courts. Others will specifically address court funding, judicial independence, and court administration.

As you can see, there are a number of ways to influence the immediate and long-range future of the courts and to ensure the continued independence of the branch. Preservation does not mean stagnation. Maintaining the status quo isn't the goal. We are aiming for responsible and responsive planning and change in an environment of an educated and involved public.

As I end, I want to list some issues and activities that I hope you will consider and contribute to. First, we need to think about ways to institutionalize planning. The refocused Judicial Council will be part of that process -- as will the 2020 Project. These are not academic exercises -- they will affect the future and fundamental direction of the courts.

We must confront the conflicts raised as we move to state trial court funding: the shift to a statewide system will require some basic changes in mindset about how we do business.

Alternative dispute resolution programs need to be integrated into the judicial process. They should not be treated as appendages or unwanted stepchildren.

We must be willing to explore the use of technology and to experiment with new procedures in areas such as case calendaring.

A study of the status of the bar is under way. What kind of bar will best serve the interests of the administration of justice?

We must set priorities -- does it make sense to push civil cases out of the court system while we spend so much of our time resolving traffic violations?

We need to be willing to develop and refine the ability of the judicial system to manage its own affairs and to take responsibility for itself in every sense of the word.

In summary, we need to study all aspects of the justice system to assure that we are functioning in the highest public interest. And then we need to act on what we learn. By doing so, we can best ensure the continued independence and necessary support for a branch of government whose vitality is essential to the interests of everyone.

I hope I have given you some sense of where we are aiming, the tools we are using, and how you can get involved. As participants in the justice system, we are each responsible for its continued health and vitality. The state of the judiciary is still sound in the face of enormous stress -- let's make sure it stays that way!

Thank you for the chance to speak to you, I hope you enjoy the rest of your time in San Francisco.