

State of the Judiciary
Chief Justice Kay E. McFarland, Kansas Supreme Court
Written Message
2003

I welcome this opportunity to report on the state of the Kansas Judicial Branch to the Legislative Branch and to Governor Kathleen Sebelius pursuant to K.S.A. 20-320.

KANSAS SUPREME COURT

The past few months have seen major changes on the Kansas Supreme Court. Justices Ed Larson, Fred Six, and Tyler Lockett have retired and been replaced by Justices Lawton Nuss, Marla Luckert, and Robert Gemon. Scheduling of cases for oral argument has been quite challenging. We had 14 recusals out of 22 cases on the March docket. Because the new justices had some contact with these 14 cases at either the district or appellate court level, the new justices had to recuse themselves from hearing the cases. It required the services of three senior judges and two Court of Appeals judges to give us the full complement of seven on each case.

The Court also faces hearing three more death penalty appeals, which will severely strain our limited resources. So far only one such appeal has come through our Court since the reinstatement of the death penalty. This was *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001). This case was orally argued on December 6, 2000. Prior to that, our limited research staff had spent months doing research on the issues presented - taking time away from their regular work. Even with this advance preparation, a great deal more work was required. Thousands of pages of transcripts and other documents from the record were before us for review. The Kleypas opinion was filed on December 28, 2001 - over a year after the case was argued before us. I have been on the Court since 1977, and no other case is even a close second to the amount of time spent on that one case. Now the Court is faced with three more death penalty appeals within the next few months.

We have no record of how much time was spent on the Kleypas case by the Court, research staff, and clerical staff. Some indications of the increased complexity of such cases are the following figures from the Board of Indigent Defense Services (BIDS). The average non-death penalty case costs BIDS between \$10,000 and \$12,000. The last two death penalty cases cost BIDS over \$1 million each.

LOOKING BACK- COMPLETING FISCAL YEAR 2002

The Governor's recommended budget for the Judicial Branch for FY 2002 cut \$2 million from our basic maintenance budget. This was not restored by the 2001 Legislature. The budget of the Judicial Branch is over 97% salaries and wages. Of our salaries, 33% are judicial salaries and 67% go to nonjudicial personnel. Article 3, § 13 of the Kansas Constitution provides that the compensation of justices and district court judges "may not be diminished during their terms of office, unless by general law applicable to all salaried officers of the state." Thus, any shortfall in our maintenance budget falls on the nonjudicial employees of the court system. We started FY 2002 with a sixty-day hiring freeze and pinched pennies everywhere we could. By January 1, 2002, the hiring freeze had increased to 120 days. Numerous studies had shown we were already understaffed. Even with all of our efforts, it seemed clear we were going to be \$600,000 short,

and a supplemental appropriation was sought. The only alternative was shutting down the court system. Each day of such a shutdown would save about \$195,000.

Generally, trials and hearings are scheduled far in advance. If the court system were to be shut down, it could not be a last-minute decision. Also, our employees needed to plan for the loss of income. The last few weeks of the 2002 legislative session were a nail-biting time for the Judicial Branch. Should we gamble the supplemental appropriation would be forthcoming and not set close-down dates? We held off and, fortunately, the supplemental appropriation was made. This was all the result of a \$2 million cut in our maintenance budget.

THE CURRENT FISCAL SITUATION - FISCAL YEAR 2003

Let me turn to the current fiscal year 2003. Governor Graves' original budget proposal for FY 2003 underfunded the Judicial Branch by \$3.6 million, which would have forced extreme adverse personnel action in order to generate the savings necessary to pay the bills for the year. The reductions already implemented under the previous year's \$2 million cut were impacting the ability of the Judicial Branch to perform required, essential services. In mid-March 2002, as it became evident the Judicial Branch faced vastly inadequate funding for FY 2003, the Judicial Branch emergency surcharge order was issued. Effective April 1, 2002, the order implemented a \$5 surcharge on many court filings, a \$25 surcharge on marriage licenses, and a \$50 surcharge on expungements.

The Supreme Court, in issuing the surcharge order, exercised its inherent authority to do what is necessary to enable it to perform its duty to administer the constitutionally and statutorily required operations of the Kansas court system. The cumulative effect of underfunding over the past several years, when combined with the amount cut from the FY 2003 maintenance budget, left the Court with no alternative but to recognize the situation as an emergency and impose the surcharge as a funding device to make up the deficit in the maintenance budget. We did not have to speculate on what a \$3.6 million cut would do to our ability to perform our required duties - we knew in FY 2002 what a \$2 million cut was doing to us.

In Opinion No. 2002-17, in response to a legislative request, the Attorney General recognized the Court's inherent authority to take the actions needed to address such a fiscal crisis and to maintain court operations. The surcharge was designed to merely address the underfunding issue, not to be an additional revenue generator or enhancer. Our strong preference was and is that the Kansas court system be maintained from the State General Fund. In the current session, the Judicial Branch is once again seeking adequate maintenance-level funding from the State General Fund.

Certainly, I am holding the line on Judicial Branch expenditures. Left alone, the Judicial Branch can get through the balance of FY 2003. The surcharge continues to fill in the \$3.6 million hole in our FY 2003 maintenance budget.

LOOKING FORWARD - FISCAL YEAR 2004 MAINTENANCE BUDGET

In the last several years, the Judicial Branch has engaged in a continuing effort to delete from current law the Director of the Budget's claimed authority to review and make recommendations for proposed changes to the Judicial Branch budget, which would allow our budget to be presented directly to the Legislature without the budget cuts made in the past by the Director of the Budget and the Governor. Shortly after her election, I was pleased to meet with Governor-

elect Sebelius to discuss several issues. During that meeting, the Governor stated she did not feel it was appropriate for the Executive Branch to make recommendations on the Judicial Branch budget before it was submitted to the Legislature. Specifically, we agreed that the Judicial Branch maintenance budget would be submitted without alteration. As far as enhancements were concerned, it was up to the Judicial Branch to make such requests directly to the Legislature. We much appreciate Governor Sebelius's position on direct submission of our budget to the Legislature.

In her budget submission, the Governor stated, "Beginning in FY 2004, the Executive Branch will not presume to review or adjust the budgets of the Judiciary and Legislature, but will simply include as a 'placeholder' the exact budget passed by the Legislature in the previous year." Therefore, although a number has been assigned to the Judicial Branch budget, it clearly should not be presumed to be the amount recommended by the Governor for Judicial Branch funding.

The "placeholder" must be adjusted to properly address the maintenance budget needs of FY 2004. One item requiring adjustment is the amount needed to fund the judicial retirement contribution. In the efforts to balance the budget at the end of the 2002 legislative session, it was determined that \$500,000 could be safely reduced from the proposed employer contribution amount to the Judges' Retirement System. However, this has not proven to be the case and the actuarially determined rate requires about \$1 million more than has been budgeted for the employer contribution in FY 2004. Because nearly all of our budget is for personnel expenses, over which we have little control, fringe benefit rate changes materially affect our budget. The main areas included in this are health insurance, KPERS, and workers compensation.

Another increase in our budget is the statutorily mandated expansion of the Court of Appeals. K.S.A. 20-3002 establishes one additional judge for the Court of Appeals each January 1, from 2003 to 2006. Thus, the FY 2004 budget needs to fund a full year of the eleventh judge as well as a half year of the twelfth judge, including start-up costs and remodeling. However, with our support, a bill has been introduced in the current legislative session which would delay the addition of Court of Appeals positions 12, 13, and 14 by one year. If that bill passes, the equivalent portion of those costs would be delayed by one year.

In addition, two of the Governor's proposals applicable to all state employees would require funding adjustments to our budget. The first is the additional funding necessary for the 1.5% cost of living adjustment. The second is a reduction to reflect the moratorium on Death and Disability insurance premiums during FY 2004.

The chart below summarizes these adjustments necessary for maintenance funding for the Judicial Branch.

Figure 1

\$870,965,866	State General Fund 2003
<u>\$3,317,028</u>	Surcharge Implemented due to Underfunding of Maintenance Budget
\$84,282,894	Adjusted FY 2003 Base

FY 2004 Mandated Cost Increases:

1,001,744	Judges' Retirement
263,927	KPERS
833,815	Group Health Insurance
24,784	Unemployment Compensation Insurance
<u>58,165</u>	Workers Compensation Insurance
2,182,435	Mandated Increase in Fringe Benefit Cost
391,557	Mandated Court of Appeals Expansion

FY 2004 Gubernatorial Recommendations:

1,194,662	1.5% COLA
<u>(378,000)</u>	Moratorium on Death and Disability
\$87,673,548	State General Fund FY 2004

I want to reiterate that these are adjustments necessary to fund only our maintenance budget and are not enhancements. Although it may seem obvious, the maintenance budget is merely the amount needed to continue the existing staff and programs, nearly all of which are mandated by the Kansas Constitution, federal or state statutes, court rule, or case law.

I am certainly aware of the terrible fiscal crisis which faced the 2002 Legislature. That situation pales when compared to the State's problems in trying to end FY 2003 in the black and doing the same in FY 2004. The fiscal picture continues to deteriorate. I certainly do not envy your tasks in these trying times.

However, the solution to the massive deficit does not lie in the Legislative or Judicial budgets. In litigation, plaintiff's attorneys frequently seek a defendant with "deep pockets" - they follow the money. Neither the Legislative nor Judicial Branch has deep pockets, as shown by the following pie chart.

Figure 2

[Pie graph showing FY 2003 State General Fund Budget; Executive Branch 98%, Combined Judicial & Legislative Branches 2%]

We seek funding of our maintenance budget in FY 2004 and urge your support thereof.

REQUESTED ENHANCEMENTS

I know that funding for any enhancements is highly unlikely in these tough fiscal times. However, I believe I would be remiss in failing to include herein our requested new positions and the justifications therefore.

Due to increasing caseloads, a number of districts need additional resources. We have included three additional judicial positions in our request. The 7th Judicial District (Douglas County) is requesting the addition of a district judge. The caseload filings between fiscal year 1994, when an additional judge was last added, and fiscal year 2002 have shown a 37% increase in all case filings, a 40% increase in all non-traffic case filings, and a 58% increase in total criminal and civil case filings. Their caseload can only be expected to increase.

Two other judicial districts are requesting district magistrate judges: The 8th Judicial District (Marion, Morris, Dickinson, and Geary Counties) and the 9th Judicial District (McPherson and Harvey Counties). They are among the districts with the highest caseloads per judge.

We have included in our request twenty new nonjudicial positions in the district courts, primarily for the court services offices and for judicial support. From FY 1993 through FY 2002, felony cases in Kansas increased by 32 percent while court services officer positions increased by 6 percent. Misdemeanor filings increased by 21 percent during the same period. The increase in criminal filings without a proportionate increase in staff, combined with increased duties resulting from new legislation, means increasingly heavy caseloads for the court services offices.

Although these enhancements are unlikely in the current budget situation, the need for additional judges and nonjudicial personnel has existed for several years and has not been addressed. The need continues.

Before concluding this section on FY 2004 budget issues, I wish to bring up a related matter. In late September 2002, I received a well thought-out letter from five legislators expressing concern for the court's chronic underfunding and exploring means for remedying the situation. Several ideas were mentioned, including a potential future reorganization of the Kansas court system. In my reply, I thanked these legislators for their concern and support and stated my three main areas of concern: first, avoiding cuts in FY 2003 funding; second, securing basic maintenance funding for FY 2004; and finally, developing a program to eliminate the chronic underfunding that the Judicial Branch has struggled with for at least the last 10 years. I further advised that the Office of Judicial Administration stood ready to provide them with statistical or technical assistance in their search for improved court funding and operations. The Judicial Branch is always receptive to more effective utilization of resources.

ADOPTION AND SAFE FAMILIES ACT - FEDERAL IV-E AUDIT

Let me turn to just a few internal updates that reflect more cheerful news. Kansas learned last fall that it passed the federal IV-E audit on the Adoption and Safe Families Act with flying colors. Thanks to the very hard work by stakeholders in this process, there were no court record errors in the 150 cases reviewed by federal auditors. That is a very significant change from the audit in August 2000. The impact of passing this audit is Kansas will retain millions of federal IV-E dollars that would otherwise have to be returned. The prospect of having the State return such vast sums to the federal government was unacceptable.

The success of this audit was not accidental, it did not occur through the efforts of one person, and it did not happen quickly or without some discomfort. When the results of the failed first audit were presented to the Supreme Court in September 2000, we resolved that the Judicial Branch would take all actions within its power to ensure that the state of Kansas would not fail the next audit. Following the recommendations of the Kansas Supreme Court's Permanency Planning Task Force, a three-pronged plan was launched:

1. The Judicial Branch issued standard form orders for custody and permanency hearings for child in need of care, juvenile offender, and domestic relationship cases.
2. The Judicial Branch created and offered statewide, regional, and district workshops for judges, prosecutors, guardians ad litem, and nonjudicial personnel.
3. The Judicial Branch conducted periodic reviews of court records and provided feedback to judges on the review findings.

This plan contributed to what can only be described as an amazing outcome of the most recent federal audit. Kansas received the equivalent of an "A." The joint efforts of members of the Judicial Branch, staff of the Department of Social and Rehabilitation Services (SRS), and other entities involved should be highly commended. The Judicial Branch was under no obligation to stretch its meager resources to assist in what was basically an issue between SRS and the federal government. We became involved because a good result was important to the people of Kansas.

ELDERS AND THE LAW WEEK

The budget shortfalls of the past several years have translated into a struggle merely to maintain vital court operations. Without funding, very few new and innovative programs can be introduced. However, there is one program with which we have achieved some success, without the requirement of an outlay of scarce resources. This past fall, we marked Kansas' second Elders and the Law Week. The project's goal has been to improve the connection between the courts and the local community and to increase public confidence in the judicial and legal system. More than two-thirds of our judicial districts participated in Elders and the Law Week, and 75% of the state's population resides in judicial districts that scheduled various events.

In this joint program involving the Department on Aging, the Kansas Bar Association and local bar associations, and Kansas Legal Services, local courts worked with many partners in their own communities to inform older Kansans, as well as their families and caregivers, about how our court system works and what related services are provided by other local and state agencies. Courts across the state set up a variety of projects over the past two years to work toward this goal.

Elders and the Law Week is an example of the courts and their local partners reaching out to each community in a very low-cost program, providing meaningful information, and exhibiting a spirit of volunteerism, even in the face of the budgetary crisis we are facing. Those who were able to participate found the program satisfying and successful. Central planning for the statewide event brought the Judicial and Executive Branches together in a unique way with the lawyers of Kansas, to present valuable information to our citizens.

IMPAIRED ATTORNEYS PROGRAM

The Kansas Supreme Court's new Kansas Impaired Lawyers Assistance Program is a success story. The program, authorized in late 2001, became fully operational in 2002 and is wholly funded from attorney registration fees.

The program is aimed at early intervention and assistance to attorneys suffering from substance abuse, depression, or other mental or physical problems which are interfering with or are likely to interfere with their ability to practice law. The primary goals of the program are to protect clients from harm, to assist impaired attorneys in recovery, and to educate attorneys and judges as to the causes of and remedies available to impaired attorneys.

The program has been very well received, and its expansion is being urged. Recently, the program was honored by the American Bar Association.

NEW CASE MANAGEMENT SYSTEM FOR DISTRICT COURTS

The Judicial Branch is implementing a new district court accounting and case management system primarily through federal funding. The system will move the courts toward a uniform technology infrastructure that supports the collection and maintenance of critical court information. Several court locations are currently using the new program and the reports are positive. Remaining courts will begin using the new software over the next several months as the phased-in project continues.

CONCLUSION

In recent weeks, I have heard many old expressions trotted out, presumably to give cheer to those in government who are struggling with the State's enormous fiscal problems. Sayings like "when the going gets tough, the tough get going" and "adversity builds character" seem very inappropriate. The State's fiscal situation is appallingly bad and continues to get worse - that is reality. Nevertheless, the Judicial Branch must be funded at a level to enable it to maintain the present level of services.

Public confidence in the Judiciary is a cornerstone of our system of government. The courts are frequently the last bulwark of freedom as guaranteed by the Bill of Rights of the United States of America and the State of Kansas. A fully functioning court system is essential to the American way of life. Although much of the most important work of the Kansas courts includes matters that directly impact the lives of Kansas families and public safety, a high quality court system is also vitally important to the Kansas economy. Each year, innumerable business matters are resolved in our courts. Without just and efficient court operations, these cases would not receive timely attention and resolution, costing Kansas businesses money and creating a burden on the Kansas economy. Interestingly, the January 23, 2002, issue of USA Today contained the results of a survey conducted by the United States Chamber of Commerce which rated each state's court

system on reasonableness and fairness from a business perspective. Kansas ranked in the top five in that survey.

We have an excellent court system that would be in grave danger of irreparable harm if underfunded for performance of its essential operations. You have many difficult decisions to make as to what will and will not be funded and as to how to fund the essential state services. I urge you to remember that, while there are things the people of Kansas may have to give up in this fiscal crisis, justice cannot and must not be one of them. The cost of its loss would be far too high.