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July 22, 2012

To: Chief Justice Tami G. Cantil-Sakauye
Members of the Judicial Council

From: Michael A. Fischer
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I have previously submitted comments on the SEC Report as part of the public comment for the June 21, 2012 Judicial Council meeting. I have attached a copy of my earlier comments and incorporate them here. My former title is given for purposes of showing both knowledge and potential interest. I am writing for myself only.

I wish to focus on two specific issues that go to the heart of the SEC Report:

1. Unstated adoption of a complete policy reversal

Many of the report's major recommendations appear to be based on an assumption that the primary, if not sole, reason for existence of the AOC is to assist the trial courts and that the assistance should be provided without any corresponding effort to create statewide standards or principles. Indeed, the bias of the report appears to be that trial courts should be independent entities and that the only role of the state government should be to provide funding for the courts and then "get out of the way."

This premise is, of course, clearly wrong. The enactment of statewide trial court funding in the Lockyer-Isenberg Trial Court Funding Act of 1997 ("trial court funding act") reflected the consensus that the courts should be state-funded and that the state funding would provide a method of ensuring uniform and consistent statewide standards, principles, efficiencies and access.

The trial courts, vested with the judicial power of the state, were to become part of a cohesive statewide court system, administered locally, but under accountability and reporting obligations.
One need merely read the provisions of the trial court funding act to appreciate this fact. These provisions are still law.

If there is to be a movement toward administratively-independent trial courts funded by the state, in which the courts are not accountable to anyone, then, at the very least, this issue needs to be debated branchwide and the council needs to make this drastic policy recommendation to the Legislature. Rather than take the indirect method of "reorganizing" the AOC in a manner that makes it impossible for the council to establish and enforce necessary statewide policies and standards going forward, those who seek to create such a system—one in which courts are accountable neither to their counties (as they had been before the trial court funding act became law) nor to state government—should declare and pursue the goal expressly. It is disingenuous, at least, to hold the AOC as a proxy in this battle.

I would also note the comments by the Honorable Roger Warren, former Presiding Judge of the Superior Court for Sacramento County and President Emeritus of the National Center for State Courts, in which he noted that wholesale adoption of the SEC report would raise serious constitutional issues. I cannot say it better than Judge Warren did and I would like to emphasize his comment.

2. Micro-management

The report also makes many recommendations that are on the micro-management level. It includes, for example, recommendations about: elimination or modification of a wide variety of specific positions within each division; the proper size of each division; and personnel policies and procedures. These recommendations are based on a relatively superficial review of the functioning of the AOC and are not supported by adequate facts or analysis. I base this criticism of the report on the various factual errors in it, discussed in part in my previous comment.

Indeed, in many places, the report does not even purport to rely on facts or analysis. It simply and candidly reports unsupported "perceptions," relying upon them then as facts to make sweeping conclusions and recommendations. The authors in such instances do not claim to have requested or reviewed the underlying data. Given the scope of their task, perhaps we cannot expect them to have done so. But certainly we can expect the council to take responsibility for requesting and examining the actual facts, for distinguishing between perception and reality and determining where the boundary between the two lies before it takes action on the recommendation.

To make an informed decision on each of the report's recommendations, the council must consider the facts, particularly where the report does not provide them. It must resist the pressure from certain judges, many of whom appear to be writing from a provided script, to support with undue haste, an unstated agenda – one that does not actually further judicial decisional independence, but rather seeks judicial administrative autonomy. This agenda is concerned more with creating and protecting judicial power than with ensuring a system of equal and fair access to justice for all the people of California, whether they live in Los Angeles or Lassen.

Conclusion

In closing, I hope that the council will review the SEC report's various policy recommendations, and then ask the soon-to-be appointed Administrative Director of the Courts to undertake further investigation or implementation where appropriate, and report back to the council.

I thank the council for consideration of these comments and for the commitment it has demonstrated to the ongoing task of management of the Judicial Branch, a task that has become much more difficult in these terrible economic times, but, if anything, has become even more important.

I remain at your disposal to discuss any of these issues with you in person.

To: Chief Justice Tani Cantil-Sakauye, Chairperson of the Judicial Council
Members of the Judicial Council

From: Michael A. Fischer, Attorney at Law
Retired Senior Attorney, AOC, OGC

Subject: Comments on the Report of the Strategic Evaluation Commission

I want to share with you my preliminary views on the Report of the Strategic Evaluation Commission. I do this as someone who no longer has "skin in the game." As you know, I am now retired from the AOC after nearly 37 years of service. I think much of the report is a useful starting point for a thorough council review of the AOC, its staff agency. This is especially important in today's budgetary climate and with the soon-to-be fifth Administrative Director. It is a good time to bring greater consistency and productivity to the AOC. The report identifies some of these areas and I know from my experience that there are other areas that could benefit for a review.

In addition, the report provides in many cases complaints and recommendations that are not well founded and likely would be damaging to implement. This comment will concentrate on those issues because I think the pressure is likely to be to implement all or many of the recommendations without further analysis. I've presented some information below that shows why I think this would be a mistake. But I don't want my focusing on what I consider to be failings of the report to be taken as a universal condemnation of all the recommendations in that report.

As one of the relatively few people alive today who served under all four Administrative Directors (and the only one with recent service in the AOC), I do believe I have an invaluable historical perspective on the issues raised in the report. As such, I want to offer my assistance in this process if you think it would be helpful.

I would suggest that if the report is to have truly lasting value for the branch, it would be important for people with views as to the proper role and function of the AOC to discuss this in a public setting with appropriate give and take. And those who are either critical or complimentary of what the AOC does and how it does it should be willing and required to provide factual bases for their statements. We would require no less in any trial.

As I mentioned above, I believe there is much of value in the SEC Report. It makes a number of suggestions that should be carefully considered, and much of the value comes from these being recommendations of "outsiders." This is both the strength and weakness of the recommendations. They need to be carefully considered, by both the council and the soon-to-be-selected new Administrative Director as to their appropriateness and efficacy. It would also be valuable to compare the facts as offered by the SEC with the factual findings of the recent Accountability and Efficiency Advisory Committee review of the AOC, to determine if there are any discrepancies and if so, how they can be resolved. To that end, it may be valuable to have the Executive Office of the AOC prepare a response to those sections of the SEC report that the council is considering. That is the typical for procedure used in an audit.

Given the significance of the proposed recommendations and the importance of the work of the AOC to the branch, it is important that the Judicial Council's review of the SEC report be based on well-established facts, not perceptions (discussed further below).

There are a number of issues that, on a very quick and cursory review, leap out of the report as problematic. The remainder of this email discusses these issues.

As I see the appropriate response of the council itself to the SEC report, there are basically two questions:

1) Which functions are appropriate for the AOC?

In this regard the council needs to determine what it wants its staff agency to do and what resources should be provided to do this. Because if the council is to do a function, the only appropriate ways to do so are (1) by means of the AOC as its staff, (2) by members of the council itself, or (3) by contracting with a third party – usually a more expensive alternative. The reason that service to trial courts has become an important role for the AOC is because the council has determined that is what the AOC is to do. In my view, the report of the SEC is most deficient in regards to discussion of this matter.

2) Which functions that are appropriate to the AOC are being done in a manner that is deficient?

The report focuses a good deal of attention on this issue and uses perception more than hard facts to raise issues and complaints. If there is a perception that the AOC is not performing a function as it should, then the response to the perception should vary depending on whether the perception is fact-based. Unfortunately the report does not distinguish between facts and perceptions, and includes recommendation to resolve what may be inaccurate perceptions. That does not mean that inaccurate perceptions should go unaddressed. Rather, if a complaint or perception is not based on fact, the problem is one of communication, and an appropriate recommendation would be to improve communication, not to change the way in which the AOC carries out a particular function.

Let me give an example based on something with which I am familiar -- the length of time to produce a legal opinion sought by a trial court. Some complaints were registered concerning the length of time it takes to get an opinion from the OGC. And the SEC reached a conclusion that that the perceived delays were in part the result of the General Counsel's micromanagement of the wording and style of opinions. First, as someone who used to do that work, I know the conclusion of the SEC is wrong. And a review of the wording and style of opinions should dispel this notion. The SEC's solution for the problem seems to be to let not only wording and style go, but to let the quality of the underlying research also drop. We can argue whether that is an appropriate remedy but I would raise several other questions here:

(i) How long does it, in fact, take to produce an opinion within the AOC as opposed to the time in private law firms or the Attorney General's office? There is no such information in the report.

(ii) Does the OGC provide a variety of responses for opinions based on the urgency of the need for the opinion and the complexity of the opinion? Is there evidence that OGC is not appropriately prioritizing these requests?

(iii) Is it relevant that the OGC also provides opinions to the Judicial Council and other AOC Divisions? How does the council expect these opinions to be prioritized with respect to those for the trial courts?

(iv) Is the amount of resources for opinions adequate and, if not (and I believe it is not), how can this be addressed?

(v) Should there be a prioritization of opinion requests that is developed by the OGC in response to council input and trial court comment and then clearly communicated to the trial courts?

Finally, there is the "perception" that the OGC twists the opinions issued based on a hidden political agenda that is AOC based. Frankly, of all the "complaints" about legal opinions, this one is the most troubling. In fact, it amounts to a charge of malfesance or unethical conduct on the part of the attorneys involved. Anyone who would make such an allegation should not do so lightly and should have clear and convincing proof of the truth of the assertion. Instead, the report merely raises this as another "perception."

(I would also note that this single point, by itself, is enough to overcome the recommendation -- discussed below -- that the General Counsel should be relegated to a non-policy, non-executive position with the AOC management. The legal effect of proposed policy is vitally important in any organization and even more important in an organization to is involved in assisting in making law.)

I focused on the small area with which I am most familiar -- legal opinions. While I am not as familiar with the work of the other units in OGC or the other divisions, I am concerned that there might be similar inadequacies in the facts supporting recommendations in those areas. I would not, in passing, that the report also inaccurately conflates the units within the OGC that work on (i) transactions and business operations and (ii) real estate.

I have not yet reviewed the full report in detail but in my skimming of it, there are several recommendations that I'd like to briefly comment on in addition to the subjects discussed above. I will do this in abbreviated, bullet form .

Moving the AOC to Sacramento:

- Cost is not only issue.
- Much of the same considerations apply to Supreme Court moving to Sacramento.
- Did not discuss the issue of split locations with Supreme Court in SF and AOC in Sacramento.

- Did not compare the cost and convenience of travel facilities in Sacramento vis-a-vis SF.

- Any such decision should be handled as part of a cohesive discussion of movement of all "central" branch functions currently in San Francisco including the Supreme Court, the Commission on Judicial Performance, the Habeas Corpus Resource Center, CAP, as well as the AOC.

Regional offices:

- Supervision seems to be an issue of perception, rather than one documented by evidence of issues arising from actual experience. In any event can be remedied by modern technology.

- Bringing everyone to Sacramento / SF will cause an increase in travel expenses involving direct service to courts.

- An implication would necessarily arise that service to local courts is less important.

- Moving to Sacramento will significantly diminish the pool of employees willing to work at the AOC, and therefore, might reduce the overall quality of AOC employees.

Use of attorneys:

- Is important to determine where attorneys should be used and where not.

- Cost is not important issue unless using attorneys where should not be.

- Important to recognize the JC is a law-making entity.

- AOC works with judges and attorneys all the time. Important to have attorneys interfacing with judges and other attorneys in many cases.

- If substituting paralegals for attorneys is appropriate in the AOC, is it not also appropriate in the appellate courts or in the trial courts? Similar considerations apply.

- Until William Vickrey, there was a long standing statutory requirement that the Administrative Director should be an attorney with 10 years experience; with the removal of that requirement, the need for attorneys in other parts of the AOC seem stronger.

- The General Counsel position is an important policy making position in terms of the AOC. Similar to many situations in corporate America.

The SEC did not appear to consider over-arching tenets of judicial branch policy and the philosophy underlying many of the council's existing policies. Instead it merely accepted many perceptions / complaints. Two examples (one big and one small):

- Telecommuting: the extent to which that was discussed, with a one-sided discussion only, indicates a preconception on the part of the SEC. If AOC is to do cost-benefit analyses (and it should), then shouldn't the SEC do likewise here? Or at least the JC in reviewing this should do so. And among the items to be considered here is why is telecommuting, which is being used with increasing frequency in the corporate sector, not a viable model for the public sector. (I should also note that I am familiar with a person who worked for the Attorney General – in a litigating capacity – who was allowed to telecommute from across the country for two years because of his perceived value to the office.)

- Staffing size: The report throws out some numbers as to "right-sizing" of the AOC. But there is no analysis as to where these numbers came from. In listening to reports of council members from their court visits, even those who want the AOC downsized, don't want programs "they" need/use taken away. What should have been done is to make some sort of estimate as to what the essential functions/roles/duties/services the AOC should provide and then discuss how many people are needed for each of these. By beginning with numbers, the SEC takes the opposite -- and illogical -- approach of suggesting there is a right number without really figuring out what functions those individuals should serve.

Thank you for your consideration of this email and for the work you are doing and have done for the branch that we all hold dear.