JUDICIAL COUNCIL OF CALIFORNIA

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Director, Governmental Affairs

March 23, 2015

Hon. Jimmy Gomez, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: AB 267 (Jones-Sawyer), as introduced – Fiscal Impact Statement

Dear Assembly Member Gomez:

We respectfully request that AB 267 be assigned to the Assembly Appropriations Committee where the costs to the judicial branch and trial courts can be considered in detail.

AB 267 requires the court, when a defendant first appears at arraignment, to inform the defendant of a specified but not exhaustive list of collateral consequences that may occur for accepting a plea of or being convicted of a felony. AB 267 will result in costs to the judicial branch as well as to every trial court in California. The costs, which will be discussed in greater detail below, include the costs associated with a more significant arraignment procedure, the delays that will be experienced by arraignment courts throughout California as a result of the new procedures that will be required to comply with the letter and spirit of AB 267, the likely need of the Judicial Council to implement one or more rules of court to address implementation of AB 267 should it be enacted, potential exposure of the courts to litigation due to the vague language of AB 267, and the differential between the cost of a plea and the cost of a trial.

Fiscal Impacts

More lengthy, and therefore costly, criminal arraignment procedures. As a result of the vagueness of the language pertaining to how the court is to deliver the information of collateral

consequences to defendants charged with felonies, and taking into consideration the desire to avoid exposure to future litigation because of the notice requirement, courts would be right to err on the side of caution, and provide lengthy and detailed notice to each defendant. This would add significant costs to an existing criminal procedure with no additional efficiency. In fact, AB 267 creates significant inefficiencies within the court system by placing the requirement to provide information on the court rather than on the person more reasonably expected to engage in strategy discussions with the defendant (defense counsel). In a small-medium court like Contra Costa (county population est. 1 million), the court averages 20 felony arraignments per week. At an additional five minutes per 20 arraignments, that's an additional 100 minutes (5 minutes x 20 arraignments) per arraignment calendar per week, every week. 100 minutes is equal to over an hour and a half (100 minutes/60 minutes per hour). An additional hour and a half (nearly two) to hear the same number of arraignments is inefficient and costly. The current cost of an hour in a criminal court for the judicial officer and attendant staff, including salaries, benefits, and OE&E, is $600 per hour. For an additional two hours, the cost in staff time is an additional $1200 per arraignment calendar without any increase in efficiency, with a decrease in the number of defendants who are able to make a court appearance, and resulting in delays in other court procedures. In other words, any increase in procedural hurdles without adding to the efficiency of the process creates delays and adds to costs, even for small courts. For California's large courts (county pops. over 1 million, such as Alameda, San Diego, Santa Clara, Riverside, San Bernardino, Orange, and, of course, Los Angeles), the delays become substantial (maybe more than a week, definitely threatening the constitutional limits an in-custody may be detained without being arraigned) and the costs significant.

The costs of delay. Unfortunately there is no exhaustive calculus of the costs to society for delayed access to the courts. No research entity has, to our knowledge, undertaken let alone completed an analysis of how much business revenue is lost, how much additional costs escalate, how legal fees, insurance premiums, health and other costs are impacted by the inability of people to access their courts in a timely fashion. Nevertheless, such costs are a burden, and underscore the Legislature's repeated call for court efficiencies and restored funding for the trial courts to enable a restoration of public access to their halls of justice. In its current form, AB 267 promotes inefficiency within the courts, and leads to additional delays of justice. The bill language is vague, likely to result in litigation that will clog the already overburdened court filings pipeline that requires $600 million to $800 million in new revenue simply to address current filings levels. These amounts do not contemplate increased filings. Rules of court will take at least a year to implement because they are required, once drafted, to be publicized for feedback and public comment before being finalized. If they are amended substantially, additional time for public comment will be required. All of this adds to delay in justice. If the information is delivered inconsistently from one court to another, or if the list of collateral consequences as listed in AB 267 is insufficient to provide appropriate notice of potential harm to a defendant, the subsequent civil actions and appeals will add to delays and cost burdens to the

judicial branch and the trial courts, as well as add to the delays resulting from inconclusive notice language and methods.

Crafting rules of court. If the Judicial Council takes it upon itself to implement one or more rules of court in order to add clarity and uniformity to AB 267 should it be signed into law, the Judicial Council will incur costs of a minimum of $4,000 per rule in staff time, resources, dissemination, and training. A minimum of two rules – one for the method of delivery, and another to discuss the substance of the information to be delivered – would likely be crafted, although additional rules might be required for other nuances that the bill's language fails to address.

While the crafting of rules of court is one way to address the vagueness of the language contained in AB 267, it is limited by the fact that it would be an interpretation of a legislative mandate that would be better amended now by the Legislature. Moreover, the mere existence of a rule of court will not protect the court from potential legal action by unhappy defendants. While a series of rules of court may provide some uniformity among California's 58 trial courts, there still exists a likelihood that a state appellate court or the California Supreme Court will be required to make a final determination on the issues that arise because of the implementation of AB 267. It should be noted that at least one of the issues of vagueness – the exemplary but not exhaustive nature of the list – would be impossible to overcome with a rule of court. A defendant's suit against the court would be ripe simply by claiming that the injury caused him/her by the felony conviction was not included in the list delivered by the court, and as a result, he/she suffered a significant harm.

Exposure of the courts to litigation. The mandate of AB 267, though on its face very simple, is vague and calls into question an important criminal procedure, specifically the arraignment, in other words the time at which a defendant, whether in custody or not, appears in court and has the charges against him/her read into the record. This is also a time when a defendant may be appointed counsel and, in some cases, bail set and/or the defendant remanded to custody to await trial.

AB 267 is vague for two reasons. First, by its own terms, the list required to be shared with the defendant of possible consequences to a felony plea or conviction is not exhaustive. The language of AB 267 states, "When the defendant first appears for arraignment on a felony charge, the court shall inform the defendant that accepting a plea or suffering a conviction for a felony may result is various consequences to the defendant, *including, but not limited to, the following...* " (Italics added.) Second, the method by which the court is required to "inform the defendant" is not specified.

Both of these points suggest that a defendant, if he or she accepts a felony plea or suffers a felony conviction, could sue the court for failing to adequately inform him/her of the consequences. Significantly, the exposure to a law suit would not end upon accepting the felony plea or suffering the conviction. A defendant court could determine, well after the fact—years after the conviction/plea, sentence and release—that harm has been suffered either as a result of the way the information was provided in court, or because the list did not capture every possible harm. Since a lawsuit isn't ripe until an injury occurs, it could be many years after the sentence is pronounced that a defendant brings a suit against the court. This uncertainty is ill-advised, especially because it allows for significant legal exposure to lawsuits by disgruntled and unsatisfied defendants many years after the arraignment.

A lawsuit against a court for the inappropriate delivery of information about collateral consequences of a felony conviction, or for failing to identify applicable collateral consequences of the conviction, would be filed in superior court. There exists the possibility that the defendant would challenge the venue (the court that provided the challenged testimony) and thus, a court hearing and possible trial would have to be undertaken in a different court, which incurs additional court costs. Multiple courts in California could be subject to suits from multiple defendants, all challenging the manner of the information, and or the completeness of the list of possible consequences; if multiple trial courts are sued, some sort of determination by a court of appeal, and possibly the State Supreme Court, will be required.

While the majority of civil cases (a law suit filed against a trial court by a defendant would be a civil suit requesting damages) settle prior to trial at little expense to the court, those cases that require trial could take many days to reach a conclusion. The Judicial Council does not calculate the cost of new or expanded causes of action because it would be highly speculative to attempt to calculate a cost of a trial that may occur. What is known is that the exposure to the court of a trial—and likely multiple trials by disgruntled defendants—would be an inefficient use of existing court resources.

Rejection of the plea equals higher court costs. Under current law, courts are required only to advise defendants of direct consequences of their pleas. Those consequences are set forth in judicial decisions and PEN section 1016 as follows:

a) A no contest plea has the same effect as pleading guilty.
b) The possible requirements for parole and post-release community supervision.
c) A conviction may constitute a violation of other orders.
d) Registration (e.g., as a fire offender, a sex offender, a gang member, a narcotics offender).
e) Submission of fingerprints and DNA samples.
f) Strike consequences.
g) Impact of felony on future convictions.

h) Driver's license/vehicle forfeiture if the felony involved the vehicle/driving.
i) Deportation consequences for alien defendants.
j) Fire arms prohibition.

All but one of these notifications implicates a constitutional issue. (The notification of a driver's license/vehicle forfeiture does not implicate a constitutional issue, but is required only in those cases in which a vehicle was used in the commission of the offense.)

It is the obligation of defense counsel to notify the defendant of those collateral consequences appropriate to the circumstances and meaningful for the defendant. In fact, consequences not relevant to the defendant's circumstances are likely to make issues far less clear resulting in a greater likelihood of confusing the defendant. A confused defendant is more likely to be fearful that accepting a plea is problematic, and may therefore seek a trial. According to the 2014 Court Statistics Report, 98% of felonies are disposed of without the need for a trial. It is possible that the implementation of AB 267 could result in an increase in felony trials by making defendants less likely to accept plea deals. Trials are far more costly than plea deals. A plea arrangement may require several hours of court's time over one to three months, whereas a felony trial will require a minimum of several court days (and likely more) over the course of a year. A single day in court, taking into consideration the time of the judicial officer, appropriate staff, and court infrastructure costs (OE&E), is calculated at $5,700. A plea deal that requires four hours of court time would cost the courts $2,850 whereas a trial could cost ten times that amount ($28,500) or more. There is, however, no way for the Judicial Council to estimate the number of plea opportunities that may be rejected as a result of the burdens placed on courts by the enactment of AB 267 in favor of trials (nor does it take into consideration the difference in costs between a court trial and a more costly jury trial).

Also worth noting is that the defendant risks more severe penalties by going to trial as opposed to accepting a plea arrangement. While the costs of a more severe penalty (jail time, prison time, post-release community supervision, etc.) would not be additional court costs, a more severe sentence would certainly place higher costs on law enforcement, corrections, probation and parole.

For all of these reasons, the Judicial Council believes that AB 267 as introduced should be heard in Assembly Appropriations for fair and reasonable consideration of its costs to the trial courts specifically, and the judicial branch more generally. Please note that the information contained in this request does not constitute a position in favor or against the proposed legislation by the Judicial Council of California, and sets forth only the considerations related to the fiscal burdens that would be faced by the branch and branch entities should the bill be enacted into law.

Please contact me if you have questions about the information contained in this letter.

Sincerely,

Andi Liebenbaum
Senior Governmental Affairs Analyst

AL/yc-s
cc: Members, Assembly Appropriations Committee
Hon. Reginald Jones-Sawyer, Member of the Assembly
Mr. Pedro Reyes, Chief Consultant, Assembly Appropriations Committee
Mr. Alan Cooper, Fiscal Consultant, Assembly Republican Fiscal Office
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Ms. Madelynn McClain, Budget Analyst, Department of Finance

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CORY T. JASPERSON
Director, Governmental Affairs

April 20, 2015

Hon. Reginald Jones-Sawyer
Member of the Assembly
State Capitol, Room 4126
Sacramento, California 95814

Subject: AB 267 (Jones-Sawyer), as amended April 7, 2015 - Oppose

Dear Assembly Member Jones-Sawyer:

The Judicial Council regretfully opposes AB 267, which requires the court, prior to the court accepting a plea of guilty of nolo contendere, to inform the defendant of a specified but not exhaustive list of collateral consequences that may occur for accepting a plea of or being convicted of a felony.

The council is concerned that the list of consequences not only includes the direct consequences that may fall within the purview of the court, but indirect consequences that are the responsibility of defense counsel to inform the defendant. It is the obligation of defense counsel to notify the defendant of those collateral consequences appropriate to the circumstances and meaningful for the defendant. In fact, consequences not relevant to the defendant's circumstances are likely to make issues far less clear, resulting in a greater likelihood of confusing the defendant.

Further the bill is vague for two reasons: (1) by its own terms, the list required to be shared with the defendant of possible consequences to a felony plea or conviction is not exhaustive. The

language of AB 267 states, "[t]the court shall inform the defendant that a conviction for a felony offense may result in various consequences to the defendant, including, *but not limited to*, the following…" (Italics added.) (2) the method by which the court is required to "inform the defendant" is not specified.

In addition, the language of AB 267 suggests that for pleas accepted *after* January 1, 2016 the court's failure to provide the required advisements may require the vacating of judgment and withdrawal of the pleas or constitute grounds for finding a prior conviction invalid. This suggests that a defendant, if he or she accepts a felony plea or suffers a felony conviction, could sue the court for failing to adequately inform him/her of the consequences and that harm has been suffered either as a result of the way the information was provided in court, or because the list did not capture every possible harm. Since a lawsuit would not be ripe until an injury occurs, it could be many years after the sentence is pronounced that a defendant brings a suit against the court nor would the statute of limitations potentially begin to run until an injury is discovered. This uncertainty is problematic, especially because it allows for significant legal exposure to lawsuits by disgruntled and unsatisfied defendants many years after the arraignment.

For these reasons, the Judicial Council opposes AB 267.

Sincerely,

Sharon Reilly
Senior Attorney

SR/yc-s
cc: Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor

JUDICIAL COUNCIL OF CALIFORNIA

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Director, Governmental Affairs

June 2, 2015

Hon. Loni Hancock, Chair
Senate Public Safety Committee
State Capitol, Room 2082
Sacramento, California 95814

Subject: AB 267 (Jones-Sawyer), as amended April 16, 2015 – Oppose
Hearing: Senate Public Safety Committee – June 16, 2015

Dear Senator Hancock:

The Judicial Council regretfully opposes AB 267, which requires the court, prior to the court accepting a plea of guilty of nolo contendere, to inform the defendant of a specified but not exhaustive list of collateral consequences that may occur for accepting a plea of or being convicted of a felony.

The council is concerned that the list of consequences not only includes the direct consequences that may fall within the purview of the court, but indirect consequences that are the responsibility of defense counsel to inform the defendant. It is the obligation of defense counsel to notify the defendant of those collateral consequences appropriate to the circumstances and meaningful for the defendant. In fact, consequences not relevant to the defendant's circumstances are likely to make issues far less clear, resulting in a greater likelihood of confusing the defendant.

Further, the bill is vague for two reasons: (1) by its own terms, the list required to be shared with the defendant of possible consequences to a felony plea or conviction is not exhaustive as AB 267 states, "[t]the court shall inform the defendant that a conviction for a felony offense may

result in various consequences to the defendant, including, *but not limited to*, the following…" (Italics added.) and (2) the method by which the court is required to "inform the defendant" is not specified.

In addition, the language of AB 267 suggests that for pleas accepted *after* January 1, 2016, the court's failure to provide the required advisements may require the vacating of judgment and withdrawal of the pleas or constitute grounds for finding a prior conviction invalid. This suggests that a defendant, if he or she accepts a felony plea or suffers a felony conviction, could sue the court for failing to adequately inform him/her of the consequences and that harm has been suffered either as a result of the way the information was provided in court, or because the list did not capture every possible harm. Since a lawsuit would not be ripe until an injury occurs, it could be many years after the sentence is pronounced that a defendant brings a suit against the court nor would the statute of limitations potentially begin to run until an injury is discovered. This uncertainty is problematic, especially because it allows for significant legal exposure to lawsuits by disgruntled and unsatisfied defendants many years after the arraignment.

For these reasons, the Judicial Council regretfully opposes AB 267.

Sincerely,

Sharon Reilly
Senior Attorney

SR/yc-s
cc: Members, Senate Public Safety Committee
Hon. Reginald Jones Sawyer, Member of the Assembly
Ms. Mary Kennedy, Counsel, Senate Public Safety Committee
Mr. Eric Csizmar, Consultant, Senate Republican Office of Policy
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

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Director, Governmental Affairs

September 16, 2015

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: AB 267 (Jones-Sawyer) — Request for Veto

Dear Governor Brown:

The Judicial Council regretfully opposes AB 267, which requires the court, prior to the court accepting a plea of guilty of nolo contendere to a felony, to inform a defendant of a specified list of collateral consequences that may occur as a consequence of such a plea. While the council appreciates that the August 26, 2015 amendments narrow the scope of the bill, the council remains opposed to AB 267 because it still requires the court to provide information to a defendant about those potential collateral consequences. The council believes that not only is it the obligation of defense counsel to notify the defendant of those collateral consequences, defense counsel is in the best position to determine what advisement is appropriate and meaningful to the individual circumstances of the defendant. In fact, the council is concerned that informing a defendant of potential consequences not relevant to the defendant's circumstances are likely to make issues far less clear, resulting in a greater likelihood of confusing the defendant.

For these reasons, the Judicial Council requests your veto on AB 267.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs

CTJ/SR/yc-s
cc: Hon. Reginald Jones Sawyer, Member of the Assembly
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California