Commission on the Future of California's Court System

Public Comment Session

August 29, 2016
10:00 a.m. – 5:00 p.m.

Los Angeles Airport Marriott
Chicago/Dallas Room
5855 West Century Boulevard
Los Angeles, California 90045

Agenda

To submit written comments in advance of the session, request in advance to speak at the session, or request Spanish language services, send an e-mail to: FuturesCommission@jud.ca.gov. (The deadline to request Spanish language services is **August 17, 2016**; the deadline to submit written comments is **August 23, 2016**.) For more information, please view the comment procedures.

Important Agenda Information

- *Check-in will be available beginning at 9:30 a.m.*
- *The public comment session will begin at 10:00 a.m.*
- *For each concept, a 5-minute presentation will be conducted, followed by a public comment period for a **maximum** of 30 minutes.*
- *The concepts will be presented in the order provided below.*
- *Timeframes for each speaker have not been provided because the number of speakers for each concept cannot be determined in advance. In the event that there are few speakers for a given concept, the public comment period may not take the full 30 minutes and the meeting facilitator will move on to the next concept.*
- *Breaks will be taken at the direction of the meeting facilitator.*

Monday, August 29, 2016 – 10:00 a.m.

Audio of the public comment session will be broadcast real-time through the Futures Commission webpage available at http://www.courts.ca.gov/futurescommission.htm. The audiocast link is posted approximately 15 minutes before the session.

Welcome and Opening Remarks

Justice Carol A. Corrigan, Chair
Justice William R. McGuiness, Vice-Chair

Concept 1 **Fines and Fees: Judicial Discretion and Court Adjudication –** Explore: 1) increasing judicial discretion to strike, modify, or waive criminal fees and civil assessments based on a defendant's ability to pay; 2) establishing an alternative means to pay fines, fees, and assessments, accessible 24 hours a day; 3) allowing conversion of fines, fees, and civil assessments to jail or community service; and 4) creating an alternative method to facilitate the conversion of fines, fees, and civil assessments to jail or community service. *Click here for additional information.*

Presentation (5 minutes)
Judge Carrie McIntyre Panetta, Criminal/Traffic Working Group Chair
Justice Tricia Bigelow, Criminal/Traffic Working Group advisory member

Public Comment (maximum of 30 minutes)

Concept 2 **Reduce Certain Non-Serious Misdemeanors to Infractions –** Explore recommending legislative changes to allow misdemeanors currently punishable by a maximum term not exceeding six months in a county jail to be charged as a misdemeanor or an infraction in the prosecuting attorney's discretion at arraignment or at the court's discretion with agreement of the defendant.
Click here for additional information.

Presentation (5 minutes)
Judge Andrew Sweet, Criminal/Traffic Working Group member

Public Comment (maximum of 30 minutes)

Concept 3 **Reduce Continuances in Criminal Cases –** Explore reducing the frequency of continuances by enforcing the use of existing tools to ensure that criminal continuances comply with statutes and rules.
Click here for additional information.

Presentation (5 minutes)
Justice Steven Perren, Criminal/Traffic Working Group member

Public Comment (maximum of 30 minutes)

Concept 4 **Decriminalize Traffic Infractions and Move to an Alternate Forum –** Decriminalize traffic infractions and move adjudication of these violations to a non-criminal judicial forum.
Click here for additional information.

Presentation (5 minutes)
Judge Mark S. Borrell, Criminal/Traffic Working Group member

Public Comment (maximum of 30 minutes)

Concept 5 **Increased and More Effective Assistance for Self-Represented Litigants –** Develop a comprehensive approach to facilitating access to justice by self-represented litigants (SRLs) in civil matters through the formalized integration of education and the enhancement of available self-help resources through the creation of an enhanced statewide Center for Self-Help Resources. This center will be dedicated to providing assistance to courts in addressing the needs of self-represented litigants.
Click here for additional information.

Presentation (5 minutes)
Justice Judith Haller, Civil Working Group Chair
Judge Michelle Williams Court, Civil Working Group member

Public Comment (maximum of 30 minutes)

Concept 6 **Revise Civil Case Tiers –** Consider methods of reducing the cost of litigation and providing increased access to justice, by increasing the maximum jurisdictional dollar amounts for limited civil cases to $50,000; creating a new intermediate civil case track with a maximum jurisdictional dollar amount of $250,000; and streamlining methods of litigating and managing all types of civil cases.
Click here for additional information.

Presentation (5 minutes)
Judge Jeffrey B. Barton, Civil Working Group member

Public Comment (maximum of 30 minutes)

Concept 7 **Complex Litigation Management: Repository and Other Shared Resources –** Establish an online centralized repository and educational resource containing information on the effective management of complex litigation to be shared and used by judges and research attorneys.
Click here for additional information.

Presentation (5 minutes)
Judge Patricia M. Lucas, Civil Working Group Vice-Chair

Public Comment (maximum of 30 minutes)

Concept 8 **Explore Court Reporters' Dual Status, Compensation Discrepancies, and Ownership of Transcripts –** Explore court reporters' preparation of transcripts as part of their court employment and compensation, resulting in court ownership of transcripts. Alternatively, provide that courts may, after purchasing an original transcript, make and sell copies of the transcript.
Click here for additional information.

Presentation (5 minutes)
Justice Kathleen E. O'Leary, Fiscal/Court Administration Working Group Chair

Public Comment (maximum of 30 minutes)

Concept 9 **Improve the Consistency, Predictability, and Portability of Trial Court Employment –** To bring greater consistency, predictability, and portability to the judicial branch and local trial court employment systems, consider: 1) a uniform classification and compensation study to develop common classification and salary structures across the branch; and 2) review and reconsider the Workload-based Allocation Funding Methodology (WAFM) formula including funding for each trial court's employee benefits.
Click here for additional information.

Presentation (5 minutes)
Mr. Michael Roddy, Fiscal/Court Administration Working Group Vice-Chair

Public Comment (maximum of 30 minutes)

Concept 10 **Digital Recording of Court Proceedings to Provide an Official Record –** Incorporate existing and emerging technologies in preparing an official record of court proceedings in a digital format that is cost effective and accessible, and envisions the record of the future.
Click here for additional information.

Presentation (5 minutes)
Judge Robert Trentacosta, Technology Working Group Chair

Public Comment (maximum of 30 minutes)

Concept 1: Fines and Fees

Explore: 1) increasing judicial discretion to strike, modify, or waive criminal fees and civil assessments based on a defendant's ability to pay; 2) establishing an alternative means to pay fines, fees, and assessments, accessible 24 hours a day; 3) allowing conversion of fines, fees, and civil assessments to jail or community service; and 4) creating an alternative method to facilitate the conversion of fines, fees, and civil assessments to jail or community service.

Why is this concept being considered by the Futures Commission?

Despite significant collection efforts by the courts and counties, the amount of outstanding court-ordered debt in fiscal year 2014-2015 increased to $9.3 billion from the $9.1 billion reported in fiscal year 2013-2014. With the exception of one-time-only allowances, such as the current Statewide Traffic Tickets/Infraction Amnesty Program (signed into law by the Governor on June 24, 2015, and effective from October 1, 2015 through March 31, 2017), there are no standards or guidelines that permit courts or counties to accept less than full payment to satisfy court-ordered debt.

The Criminal/Traffic Working Group (working group) is exploring concepts that acknowledge and balance the need for appropriate fines and fees with the reality of what a defendant can pay. Defendants' inability to satisfy court-ordered debt is reflected in the large amount of outstanding debt and the courts' inability to collect the entire amount of these fines, fees, and assessments. The working group believes that a defendant's ability to pay must be considered when assessing any fine, fee, or assessment, and that significant action must be undertaken to increase payment and collection of future court-ordered debt. The working group also considers it important that the means by which defendants may satisfy their court-ordered debt be expanded to avoid multiple civil assessments that inundate defendants with debt owed to the courts.

Limited judicial discretion to strike, modify, or waive criminal fees and civil assessments

One factor contributing to uncollected court-ordered debt is that defendants are charged a sizeable amount for violations, when considering the aggregate amount of the base penalty and fees. Fines and fees for infractions and misdemeanors in California are among the highest in the country. For example, the base penalty for a red signal traffic violation is $100, but after fees have been added, the total assessment is $490. If a defendant fails to pay the original amount due in a timely manner or fails to appear for the court date, a civil assessment of $300 may be added to the already sizeable amount due. In the example of the red signal violation, the total amount owed may quickly grow to $790.

Currently, judicial officers may strike, modify or waive criminal fines but their discretion to do the same to certain fees and assessments is limited. In the red light violation example, a judicial officer may modify the base fine owed by the defendant but may not be able to reduce all of the remaining $390 owed. For a defendant earning the minimum wage of $10 an hour, this amount would require 39 hours of work, almost a full work week, not taking into consideration any withholding of taxes on wages and any other employee contributions to benefits.

Limited ability to access courthouse to pay court-ordered debt

Years of significant budget cuts during and following the 2008-2009 recession negatively affected the California court system. As a result, over 200 courtrooms have been closed and staff has been reduced. Court users have encountered fewer open courthouses, many of which have limited counter hours resulting in longer wait times. Defendants must go to a courthouse to make payments at the clerk's counter during

hours that are considered traditional working hours, often resulting in loss of pay that is needed to contribute to the court payment. Some courts do offer online payment methods for traffic infractions, but do not always offer the ability to pay other fines and fees online.

Limited ability to convert all fines, fees, and assessments into community service or jail time

The inability to pay court-imposed fines can have adverse collateral consequences for those violators who try their best but cannot fulfill their financial responsibility. In some cases, the ability to modify the sentence to community service or jail time may be a more feasible and welcome alternative to both the defendant and the courts.

A defendant convicted of an infraction may be sentenced to perform community service instead of paying the imposed fine on a showing that payment of the fine would impose a hardship on the defendant or his or her family. But community service is not allowed in place of a civil assessment. In addition, some courts do not allow fines to be converted to community service if the defendant opts to attend traffic school or is employed full-time.

There is no statutorily set rate to convert fines and fees to community service hours. Many individuals whose offense carries a large fine and fee, and who are allowed to convert fines and fees into community service, find it difficult to complete the required hours. The conversion rate generally used by judicial officers is one hour of community service work for every $10 of fees imposed. The timeline to complete community service can often be short and may require individuals to work up to 40 hours a week, which is problematic for those with employment and family obligations.

To convert fines and fees into jail time for felony and misdemeanor convictions, an individual receives credit on the fine, at the rate specified in the judgment, for each day that he or she serves in jail. For felony and misdemeanor jail time for non-payment, the rate established is not less than $125 per day of jail time.

Conversion requests must be made in person

As stated above, the California court system has faced budget cuts due to the recession, resulting in statewide courtroom closures and staff reductions. Court users have encountered fewer open courthouses, limited available judicial officers, and longer wait times for a court date. If a defendant is unable to pay the fines and fees but would like to perform community service in lieu of payment, the defendant must make this request before a judicial officer. This process places an additional burden not only on the defendant, but also on the court's resources to make a finding that could appropriately be made by other means.

Goals and Strategies

Increase judicial discretion to strike, modify, or waive criminal fees and assessments and limit the number of civil assessments

The working group is interested in increasing judicial discretion to strike, modify, or waive fees and assessments based on a defendant's ability to pay. In addition, the working group is interested in limiting the court's ability to impose civil assessments to one time unless the court finds that a second failure to pay or failure to appear is willful.

Establish alternative methods of payment and make them accessible 24 hours a day

The working group is interested in expanding the means by which fines and fees can be paid.

At least one central location in each county that accepts all forms of payment should be accessible beyond traditional court hours for defendants to pay without having to take time off work and potentially lose wages or employment.

The working group is also interested in exploring courts accepting payments online. The online functionality might include payment via a mobile device application.

These alternative payment methods and means should be made available for fines and fees in all cases, including infractions, misdemeanors, and felonies, thus making it easier for defendants to pay fines and fees and comply with any court-ordered debt payment.

Allow conversion to jail time or community service for all fines and fees, including civil assessments, and increase the conversion rate

The working group is interested in expanding the types of fines and fees that may be converted to jail time or community service hours and increasing the rate at which conversion occurs. The working group is exploring making all fines and fees eligible for conversion to jail time and community service, except those associated with victim restitution. Under this concept, courts would use a conversion rate for community service of no less than the current minimum wage, for example, $10 credit toward fines and fees for each hour of community service. For jail time served, the conversion rate should be similar. For example, for every day served by the defendant a credit may be given for no less than $240 (24 hours at $10 an hour equals $240).

Create alternative methods to facilitate conversion of fines and fees to jail time or community service

The working group is exploring changes that would automatically entitle a defendant to a one-time right to convert fines or fees into jail time or community service, and vice versa, without having to appear before a judicial officer. The working group believes this would likely require statutory authorization and that a new Judicial Council form might be needed to facilitate such requests.

Further, the working group believes conversion requests should be accepted both at the clerk's counter and online. The working group is exploring whether a court clerk, rather than a bench officer, can be authorized to determine if a defendant meets the criteria for conversion and adhere to an algorithm for conversion that would not involve the exercise of judicial discretion.

If the first time conversion request is denied, the defendant would have the right to appeal the decision to a judicial officer. Any later request to convert would require the defendant to appear in person before a judicial officer. The defendant would have to show good cause for a second conversion.

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Concept 2: Reduce Certain Non-Serious Misdemeanors to Infractions

Explore recommending legislative changes to allow misdemeanors currently punishable by a maximum term not exceeding six months in a county jail to be charged as a misdemeanor or an infraction in the prosecuting attorney's discretion at arraignment or at the court's discretion with agreement of the defendant.

Why is this concept being considered by the Futures Commission?

Misdemeanors constitute a large percentage of the California criminal court caseload and command considerable resources from the court and criminal justice system partners, including pre-trial services, prosecutors, defense bar, law enforcement agencies and correctional facilities. In the last 5 years, there has been an average of 809,800 annual misdemeanor arrests in California. Between July 1, 2013 and June 30, 2014, approximately 915,568 misdemeanor charges resulted in a filing in superior court. Courts spend approximately $500 million per year on misdemeanors alone. Yet not all misdemeanors have the same significant impact on public safety. Several offenses classified as misdemeanors in California are treated as infractions (or their equivalent) in other states. Redirecting non-serious misdemeanor offenders away from the criminal justice system and the potential negative impacts resulting from a criminal record and incarceration has, without jeopardizing public safety, potential benefits for the public and the offender.

In exploring the reduction of less serious misdemeanors to infractions, the Criminal/Traffic Working Group (working group) considered various models to promote efficiency while maintaining public safety considerations and due process guarantees. Specifically, the working group examined certain less serious misdemeanors; the best practices of other jurisdictions; and the potential impact to the offender, the courts, and criminal justice partners.

Goals and Strategies

The working group is considering recommending legislative changes to allow misdemeanors currently punishable by a maximum term not exceeding six months in a county jail to be charged as either a misdemeanor or an infraction either in the prosecuting attorney's discretion at arraignment or at the court's discretion with the defendant's agreement. The working group is discussing whether the defendant may elect to have the charge brought as a misdemeanor, with all its rights and consequences, including the right to a trial in front of a jury and a public defender or court-appointed counsel for the proceedings.

Due to the serious nature of certain misdemeanors that are punishable by a maximum term not exceeding six months, exceptions to the recommended legislative changes would include:

- Misdemeanors that are imposed by an initiative statute that does not permit a lesser punishment
- Misdemeanor violations resulting in restitution being owed to a victim
- Misdemeanor firearms violations
- Misdemeanor sex offender registration violation
- Misdemeanor child endangerment or child abuse violation
- Misdemeanor elder abuse violation
- Misdemeanor domestic violence violation
- Misdemeanor driving-under-the-influence violation
- Misdemeanor sex offense
- Misdemeanor violations of Safety in Employment division of the Labor Code
- Misdemeanor violation of Air Resources division of the Health and Safety Code
- Misdemeanor violation of Water Quality division of the Water Code

- Misdemeanor violation pertaining to hazardous waste
- Misdemeanor violation pertaining to medical waste
- Misdemeanor violation pertaining to pesticides within Sections 12500 through 14103 of the Food and Agricultural Code
- Misdemeanor violation pertaining to a public nuisance
- Misdemeanor violation pertaining to pollution under the Fish and Game Code

It is critical that any proposed legislative changes promote consistency between jurisdictions and provide parameters regarding the use of prosecutorial discretion. For these reasons, the proposed language will include items to be considered by the prosecuting attorney in determining whether to charge the offense as a misdemeanor or infraction, including: the facts of the committed offense, the lack of prior criminality of the offender, the lack of the offender's need for supervision, and whether the misdemeanor can be effectively prosecuted as an infraction.

Offenders generally do not have the right to a public defender or appointed counsel for arraignment when charged with an infraction. But in light of the fact that the proposed language would allow the prosecuting attorney to modify the charge at the arraignment from an infraction to a misdemeanor, which does trigger the right, an indigent offender would be entitled to a public defender or appointed counsel for arraignment.

An offense charged as an infraction under this new language should be punishable by a fine that reflects the severity of the offense. The working group is aware of previous efforts in this area and concern that proposed fine amounts, similar to other infractions in a similar model, were not high enough to serve as a deterrent to an offense. The working group is furthering its examination of this area to ensure a reasonable fine is suggested that is in line with the severity of the offense.

The potential benefits of reducing certain non-serious misdemeanors to infractions include: court savings in judicial officer, staff, and jury time; other court appearance costs; reduced prosecuting attorney and defense attorney time and resources; reduced incarceration resources; and reduced probation costs. These resources can be redirected to other priorities, including to the processing of offenders charged with serious or violent crimes. Qualifying defendants would still be accountable for their violations but such penalties would be more reflective of the severity of the offense. The proposed recommendation should not compromise public safety but instead divert low-level misdemeanor offenders away from the criminal justice system and the stigma associated with it.

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Concept 3: Reduce Continuances in Criminal Cases

Explore reducing the frequency of continuances by enforcing the use of existing tools to ensure that criminal continuances comply with statutes and rules.

Why is this concept being considered by the Futures Commission?

William Gladstone, Great Britain's Prime Minister for nearly half a century, said it best: "Justice Delayed is Justice Denied." It is no less true today than in Gladstone's time. California Penal Code section 1050 includes legislative findings that criminal courts are becoming increasingly congested, resulting in adverse consequences to the public and the defendant, and includes increased court costs. Repeated continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses, and can lead to extended confinement for those defendants in custody.

The Penal Code also requires that the continuance request must be made at least two days before the hearing sought to be continued, and shall include supporting affidavits and declarations. Despite these requirements, continuances are granted too frequently and without any written motion or adequate showing of good, or any, cause. This may result in unreasonable and unnecessary delay. A continuance results in further appearances by both parties, further calendaring of the case, disruption to the lives of victims, witnesses, and the accused, and delay in the speedy resolution of the matter.

The Criminal/Traffic Working Group (working group), was originally optimistic in the numbers presented by the 2015 Court Statistics Report – Statewide Caseload Trends, Summary of Felony Cases. This report indicates that in fiscal year 2013-2014, 272,610 felony cases were filed in California, of which 88 percent were disposed of in less than 12 months. Although these statistics may indicate compliance with felony time goals and may seem encouraging, the numbers also indicate that of the total felonies filed, 91 percent were disposed of pre-trial and therefore the disposition numbers are not directly indicative of a "speedy trial." The working group recently surveyed a county with a population between 750,000 and 1,000,000 residents. The study disclosed that on 3 randomly selected days over the course of a year, a total of approximately 230 misdemeanor and felony cases were calendared for jury trial. Of that number, only 22 formal motions for a continuance were filed. Nonetheless, in the aggregate, those cases accounted for over 2,263 continuances--an average of 10 continuances per case, with the number of continuances ranging from 2 to 39. The numbers raised significant doubts about the correlation between disposition and continuances. The working group believes that there is a greater potential for disposition to be reached a short time after the matter is set for trial, if continuances were only granted in strict compliance with California statute and rule -- and not granted with unwarranted frequency in violation of guidelines established by these statutes and rules.

Calendar congestions and expended resources

Felony continuances have a ripple effect on misdemeanors and civil cases, using the resources of courts and justice system partners for repeated hearings in the same cases and delaying case resolution. Because criminal cases have statutory priority over civil cases, the use of courtrooms for unnecessary continuance hearings reduces the courtrooms that are available for civil matters, in addition to other criminal matters. Continuance hearings may involve costs for providing courtroom security, attorneys, staff for re-calendaring and reissuing subpoenas, and the transportation of in-custody defendants. A 2011 California study estimated the court operational cost of one continuance to be over $230. The granting of these continuances frustrates the public's reasonable expectation of the prompt and fair resolution of criminal cases as required by law.

Access to justice

The expeditious enforcement of laws and the disposition of criminal cases, while maintaining the due process rights of defendants, is necessary to maintain continued public confidence in the judicial branch.

In deciding requests for continuances, judges in many courts are not uniformly adhering to statutory mandates that require good cause, affidavits, and timely filing of motions - and presiding judges are not consistently ensuring adherence to these mandates. When cases are continued more than necessary and reasonably expected, the public's confidence in the speedy and fair administration of justice to victims, defendants, and the public at large is eroded. It is incumbent upon the courts and judges to uniformly adhere to the statutory mandates. Studies show that there is a correlation between the number of hearings in a case and the time to disposition: the more hearings per case, the longer to disposition for that case. Unjustified continuance requests, especially when granted, unnecessarily affect the timely resolution of criminal cases.

Goals and Strategies

The working group is exploring reducing the frequency of continuances by enforcing the use of tools that already exist to ensure that criminal continuances are only granted as allowed by law.

Enforcement of sanctions

California Penal Code sections 1050 and 1050.5 currently govern the granting of continuances and the monetary sanctions and reporting requirements when a party fails to comply with such requirements. Although oral motions are permitted under section 1050 (c), there is anecdotal evidence that the motions are too often granted and have become the cultural norm in some courts. Presiding judges can play a role—through education and monitoring—in ensuring that judges require continuance motions to meet the requirements of section 1050.

Judicial accountability

Judges often run into road blocks resulting from the local legal culture when denying continuances. Anecdotal evidence indicates that it is not uncommon for judges who strictly enforce the laws regarding continuances to be subject to peremptory challenges by the attorneys whose clients' motions to continue were denied. In order to ensure that access to justice and confidence in the judiciary is not weakened, meetings between local judges and justice partners (under California Rule of Court 10.952) must be expanded to include discussion of frequent continuances and the development of best practices. Solutions to the issue of frequent continuances require the input and support of all involved parties.

To also address this issue, presiding judges need information to share with their judicial colleagues. Courts should track: requests for continuances, the number of grants and denials, the reasons for each outcome, and any sanctions levied upon the requesting attorney. With this information, leadership will have the information necessary to address specific case areas that require more case flow management tools.

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Concept 4: Decriminalize Infractions

Decriminalize traffic infractions and move adjudication of these violations to a non-criminal judicial forum.

Why is this concept being considered by the Futures Commission?

Currently, minor traffic violations are adjudicated as infractions in the California criminal courts. These cases, although relatively minor in nature, make up a substantial part of the court's workload. In fiscal year 2013-2014, just over six million criminal cases were filed in the state of California. Of these, seventy-five percent were traffic infractions.

The adjudication of minor traffic cases under formal rules of criminal procedure places a tremendous burden on the criminal justice system and can impair access to justice. For many Californians, dealing with a traffic ticket may be their primary—or only–contact with the courts, and most will resolve his or her case without the assistance of an attorney. Criminal law procedures, developed to apply to more complicated and serious misdemeanor and felony prosecutions, may at times seem restrictive and confusing to the lay court user. These procedures, which serve as important safeguards in these other contexts, when applied to an unrepresented party in a minor traffic case may have the unwanted effects of impeding access to justice and impairing efficient court operations. A civil traffic adjudication model provides the flexibility to create a fair and much more user-friendly process.

In exploring how traffic infractions may be adjudicated differently, the Criminal/Traffic Working Group (working group) is guided by the goal of establishing a traffic adjudication process that preserves due process for motorists, while offering a more intuitive and efficient adjudication forum. Courts in other jurisdictions have achieved these goals by adopting adjudication models based on civil law for traffic infractions. The working group carefully examined and evaluated the procedures used in these jurisdictions. Among other things, the working group considered the following:

1. The appropriate role of judicial officers, law enforcement, prosecutorial agencies, and court administration in a civil adjudication model.
2. Rules of procedure and evidence for civil infraction trials, including the appropriate burden of proof, more intuitive rules of evidence, and alternatives to conventional court trials, such as trials by written declaration.
3. Best practices to address failures to appear and to avoid many of the penalties imposed under criminal law when a motorist fails to appear.

Goals and Strategies

Adjudication of traffic infractions should be processed in a civil forum. Appropriate legislative language and procedures should be created to facilitate these changes and to follow the guidelines below.

Law enforcement authority to stop a motorist

The adoption of a civil traffic adjudication model should not impact the authority of law enforcement officers to stop, temporarily detain, and cite a motorist suspected of a violation. The rules governing when and under what circumstances a law enforcement officer may stop and temporarily detain a motorist for a criminal traffic infraction are well established. Whether these rules apply in a civil model has been considered. California case law and case law from jurisdictions that have implemented a civil model suggest that, with appropriate enabling legislation, California law enforcement officers will have comparable authority under a civil model to stop and temporarily detain a motorist for a suspected civil violation as exists under current criminal law.

Motorist signature on citation and identification

Current law states that when a motorist is cited for a traffic infraction violation, he or she must either sign a written promise to appear in court or be taken before a magistrate. The vast majority of motorists cited are released upon a promise to appear; however, in rare instances in which a motorist refuses to sign a promise to appear, current law requires the citing officer to take the motorist before a magistrate.

Under a civil model, the current practice of requiring a motorist to sign a promise to appear in court or be taken before a magistrate is not necessary or appropriate. Instead, service of lawful process by the citing officer is sufficient to attain jurisdiction over the motorist. A civil infraction proceeding would be initiated by the issuance, service, and filing of the notice of civil infraction, which would act as both the summons and the charging document.

Under a civil model, as under current law, the state bears the burden to prove the identity of a violator. Law enforcement should retain the tools necessary to collect evidence of identity. Current law requires a motorist suspected of a violation to provide satisfactory evidence of identity (generally a driver's license) upon request and allows the officer to obtain a thumbprint when sufficient proof of identification is not produced. These provisions of existing law should be retained as part of a civil traffic adjudication system.

Initial appearance by the motorist

Currently, a motorist accused of a criminal traffic infraction will, in some cases, appear at an in-person arraignment to plead and in some instances to have a trial date set. A motorist not wishing to contest a citation may deposit and forfeit cash bail with the clerk of the court and make no appearance. This practice is based on the premise that the money deposited with the court is considered bail, although in actuality it is not bail. A civil model of traffic infraction adjudication offers greater transparency. Procedures and supporting forms may be developed which will allow a motorist accused of a violation to admit or deny an allegation without an in-court appearance and without resorting to concepts of bail or forfeiture. These practices will allow courts increased flexibility to develop online resources to enable court users to enter pleas, pay fines, and set matters for hearing without physically coming to court.

Failure to appear and default judgment

Under existing law, a motorist who willfully violates a written promise to appear is guilty of a misdemeanor and, subject to restrictions, an arrest warrant may be issued for this offense. Alternatively, the motorist's driver's license may be suspended and/or a civil assessment of up to $300 may be imposed. Under a civil model, a defaulting party would be deemed to have submitted the alleged violation to the court for adjudication without opposition. Therefore, a failure to appear is not treated as a violation or a basis for additional punishment; instead, a party's failure to appear results in a default judgment and a determination of the charge without the imposition of driver's license suspension, a civil assessment, or any other punishments or penalties beyond that associated with the underlying infraction.

Under the general rules of civil procedure, a party who defaults with good cause may seek relief within a specified time. A civil traffic model should provide a similar process, allowing a motorist to move to set aside a default judgment within a reasonable time. This new procedure should be intuitive, user-friendly, and simple. The working group is examining current small claims procedures that address similar objectives. Under small claims procedures, a moving party may file a written motion to vacate a judgment entered in the moving party's absence within thirty days after the clerk has mailed notice of the entry of judgment. However, if service was improper, a motorist may move to vacate a judgment within 180 days after he or she discovers

or should have discovered the entry of judgment. Relief may be granted upon a showing of good cause. Standardized forms should be created for this purpose.

Burden of proof at trial

An important consideration in any adjudication process is the burden of proof. As used here, “burden of proof” refers to the burden of persuasion (the burden of proof is the degree of belief by which the evidence must establish the existence of a fact). The three most common burdens of proof are: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt.

California case law suggests that no one standard would be required or excluded from consideration in a civil model. Appellate courts have not mandated, on constitutional due process grounds, a burden of proof more demanding than proof by a preponderance of the evidence in similar contexts. The working group examined each level of burden of proof for an appropriate recommendation. Although the standard of proof by a preponderance of the evidence is applied in most civil matters, the working group recognizes that the higher standard of clear and convincing evidence may be more in line with public expectations.

Evidence at trial

In considering the changes required to move to a civil model from the current criminal model, the working group discussed what level of evidentiary rules would be appropriate and examined case types of similar nature to the proposed model, including relevant rules in other jurisdictions that currently have a civil model. The working group also considered the rules of evidence applied in small claims court, and, although those rules met the objective of being user-friendly, the working group concluded that a more structured set of rules was required given the nature of the proceedings contemplated.

The working group is considering the language found in Government Code section 11513 (oral arguments in administrative adjudication formal hearings) as a basis for the proposed evidentiary rules in a civil model. This code section offers rules of evidence that are more easily understood by non-attorney court users. The working group, however, is considering two modifications to these rules to better tailor them to the unique nature of a civil traffic court trial.

First, the working group believes that a more flexible and intuitive rule of hearsay evidence is appropriate. Government Code section 11513 puts the burden on the parties to assert objections based on general rules of hearsay evidence. However, in most traffic trials, there is no prosecuting attorney and law enforcement officers do not have standing to raise evidentiary objections. Moreover, non-attorney court users are likely not familiar with the highly technical rules of hearsay evidence and, therefore, cannot reasonably be expected to assert proper, timely hearsay objections. The working group believes that a hearsay rule which vests the bench officer with greater discretion to admit or exclude hearsay evidence based on considerations of trustworthiness is appropriate. However, such a new rule should not allow an element of a charged offense to be established solely on the basis of hearsay evidence which would not otherwise be admissible in a civil action over objection. Thus, the rule contemplated would not substantially lessen the state’s burden of proof.

In addition, Government Code section 11513 subsection (b) allows a respondent to be called as an adverse witness by the opposing party. The working group recommends language be adopted that grants a motorist the statutory right to refuse to be compelled to testify.

Role of judge and law enforcement in adjudication

Existing law defines the role of both judicial officers and law enforcement officers in criminal traffic infraction proceedings. For example, the law allows law enforcement officers to determine the charges to be alleged through the filing of a notice to appear and to request charges be dismissed. Existing case law establishes the role of law enforcement officers and judicial officers in contested traffic infraction court trials. It is not intended that these practices and procedures would be affected by the adoption of a civil traffic adjudication model.

Trial by Written Declaration

Under current law, a motorist may request a trial by written declaration in lieu of an in-person court trial. If the motorist is found guilty, the motorist may request a trial de novo and receive a new trial before a bench officer. In a civil model, the right to the trial by written declaration should continue as it offers a valuable alternative to coming to court to obtain a trial. However, the working group recommends that, under a civil model, the right to a trial de novo not be retained. Trial de novo is, in a civil context, an unnecessary procedural safeguard because trial by declaration is entirely at the election of the motorist. In other words, in a civil model, the motorist should only be able to have his or her case tried once by either means as he or she chooses. A motorist will retain the right to appeal a judgment from either form of trial.

Sentencing

Under existing criminal procedures, limitations exist to prevent multiple punishments for the same criminal conduct. The working group will consider whether it is appropriate to adopt a comparable restriction under a civil traffic adjudication system in order to assure fairness in determining fine amounts where multiple violations are proved based on the same wrongful act or omission.

Alternative resolution procedures

Many jurisdictions with a civil model have successfully implemented some process to facilitate early resolution. These processes are varied among jurisdictions and influenced by, among other considerations, individual court resources and the involvement of local law enforcement. For example, some jurisdictions encourage pretrial disposition by offering hearings where motorists may discuss the disposition of a violation with a law enforcement officer from the citing agency, while other jurisdictions allow hearings with a bench officer where liability is admitted and the only issue is the amount of the fine to be imposed.

California courts may take advantage of the flexibility of a new civil traffic model to develop early resolution programs tailored to the unique circumstances of that court and community. Rules adopted to implement a civil model should allow for innovation in developing such programs.

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Concept 5: Increased and More Effective Assistance for Self-Represented Litigants

Develop a comprehensive approach to facilitating access to justice by self-represented litigants (SRLs) in civil matters through the formalized integration of education and the enhancement of available self-help resources through the creation of an enhanced statewide center for self-help resources. This center will be dedicated to providing assistance to courts in addressing the needs of SRLs.

Why is this concept being considered by the Futures Commission?

High number of self-represented litigants in limited civil cases

On an annual basis there are approximately 1.2 million SRLs seeking assistance in the California courts for a wide variety of case types. An increasing number of these are appearing in civil courts, especially in high-volume case types such as unlawful detainer actions, auto accident cases, and debt collection cases. As many as a third of the limited civil cases in fiscal year 2014 – 2015 had a self-represented defendant, with the numbers significantly higher in landlord-tenant cases. Almost 10 percent of the limited civil cases were brought by self-represented plaintiffs. To provide SRLs with improved access to the judicial system, and allow courts to be able to continue to operate smoothly as the number of SRLs increases, it is imperative that SRLs are provided with more information and better education, and that court staff and other self-help providers are given adequate support and technical assistance, including sufficient funding, to deliver the help SRLs need.

Need for assistance for self-represented litigants in limited civil cases

In many cases, SRLs do not understand a court's rules and procedures. This can result in litigants losing the opportunity to make informed decisions regarding their cases, thus impairing their access to justice. In addition, the SRLs' lack of knowledge results in inefficient case processing which can be burdensome to the courts and detrimental to the litigants' court experience. Although currently there are some self-help programs provided by the courts, most of these programs focus on family law matters or on small claims cases. There are few programs currently focused on providing assistance to SRLs in limited civil cases. A focus on providing assistance to those litigants, and especially to providing it early in the litigation process, is important to ensure litigants are sufficiently knowledgeable to make well-informed decisions throughout the litigation process.

Enhanced resources needed for courts and other self-help providers

Currently, resources for self-help providers outside of the court are not centrally located and have limited support. Similarly, courts do not have all the necessary information in a single location to most effectively assist SRLs. Judicial branch resources, such as the Equal Access website, provide some assistance in the form of video tutorials, instructional materials, access to smart forms, and creating self-help programs, but this assistance should be expanded. Moreover, there is not sufficient staff support to consistently provide updated information on this website, or to provide individualized assistance to courts in this area. In addition, current resources such as the Equal Access website are static, and do not provide the means for users to ask questions, communicate with each other, and share information.

While there is some centralized information and support within the judicial branch to assist courts in providing self-help services, it is limited and inadequate, particularly in the civil area. There is currently a single senior attorney who devotes only a part of her time to providing coordination and subject matter expertise for self-help programs, and a few individuals who provide various types of support on a part-time basis. This limited staff support restricts self-help providers' ability to maximize even those resources that are currently available. Staff is insufficient to allow easy dissemination of information about the current activities and

programs that are providing self-help services throughout the branch or to help implement similar programs elsewhere. In addition, many judicial officers and court staff lack the knowledge or means to provide information to SRLs as to what assistance or resources are available.

As the number of SRLs increases, so does the need to find ways to create efficiencies that provide assistance to this population while easing the corresponding demand on judicial time and resources. The implementation of a holistic approach that provides early and meaningful opportunities for education and access to resources for SRLs as they navigate the litigation process, while at the same time providing courts with significant leadership, guidance, and technical assistance, will improve the ability of courts of all sizes to offer enhanced assistance to the SRL population of court users and maximize the efficient use of administrative and judicial resources.

Goals and Potential Strategies

The Futures Commission is considering two proposals to address the needs in this area:

1. Develop an early education program for SRLs in small claims and limited civil cases
2. Create a center for self-help resources to aid courts in their role as self-help providers

In exploring the concept of an early education program for SRLs, the Futures Commission will focus on recommending that courts provide educational programs and tools from which litigants can learn about the case process and substantive law to make better informed decisions regarding their case and how to either settle it or proceed to trial. The goal is to educate, inform, and respond to SRLs' questions, and to do so in a manner in which individuals are accustomed to obtaining information in today's world—online and at any time of the day or night. Some strategies being considered include:

- Developing an education program at each court for SRLs in small claims and limited civil cases, designed to be completed before the case is filed or within 30 days of filing a complaint or answer. The program should be available online, via video and text, as well as in the courthouse for those without access to technology.
- Creating course curriculum for the program that includes information about available alternative dispute resolution processes and an overview of civil procedure before, during, and after trial; providing more individualized information made available for high-volume case types (unlawful detainer, auto accident, and debt collection).
- Providing a summary of available self-help resources to all SRLs upon request and at the time of filing or service of the complaint.
- Developing virtual self-help centers with "real-time" interaction via chat or phone backup and access to electronic resources such as video tutorials and online clinics.
- Increasing education partnerships with law libraries, law schools, bar associations, volunteer attorneys, and legal services organizations.

In exploring the concept of a center for self-help resources, the Futures Commission will focus on recommending the creation of a statewide resource center that will: provide a wide variety of technical assistance to courts in the area of serving SRLs, assist in maximizing available resources, and advocate for additional resources as needed. Specifically, proposed activities of the resource center could include the following:

- Develop and publish best practices and guidelines for providing assistance to SRLs
- Provide substantive and technical assistance to courts wishing to create or expand self-help resources

- Assist with maximizing available technology
- Provide expert consultation to courts in person and remotely via telephone, video, or online
- Coordinate with local and national legal services providers and support centers in the development and deployment of resources and approaches to serve the SRL population
- Coordinate services provided to courts in grant-funded and partnership programs
- Assist courts in developing and expanding relationships with local legal and self-help providers, such as law libraries, law schools, other graduate programs, and legal services groups
- Create a virtual clearinghouse of self-help resources covering all applicable case types
- Continue to maintain and update the Equal Access website, providing self-help materials, videos, and other online resources
- Provide language access information and assistance for self-help providers
- Provide education and training to court self-help providers
- Assist courts and self-help providers with utilizing volunteer attorneys and provide incubator training
- Encourage courts to communicate and share lessons learned and best practices
- Maintain a forum where courts' self-help providers can communicate and share information
- Develop conferences to share substantive and technical information among self-help providers
- Advocate for increased funding for self-help programs and assistance to SRLs as appropriate

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Concept 6: Revise Civil Case Tiers

Consider methods of reducing the cost of litigation and providing increased access to justice, by increasing the maximum jurisdictional dollar amounts for limited civil cases to $50,000; creating a new intermediate civil case track with a maximum jurisdictional dollar amount of $250,000; and streamlining methods of litigating and managing all types of civil cases.

Why is this concept being considered by the Futures Commission?

High cost of litigation

Litigation at all levels has become increasingly expensive, resulting in decreased access to justice due to diminished access to legal representation. This increase in cost is largely due to the length of time cases are taking to process through the system and the time attorneys spend in discovery and discovery disputes. Because the high cost of litigation can outweigh the benefits of pursuing or defending a case, the procedure for adjudicating cases should be made consistent with the value of the case. Currently, attorneys are frequently reluctant to take lower value cases because the costs of representation outweigh the expected financial benefits of the litigation. Zealous advocacy by counsel has long been a hallmark of civil litigation. The lack of representation can result in meritorious cases being kept out of court or, when cases are filed, resolution on the basis of the cost of litigation instead of on the merits of the dispute. A majority of attorneys surveyed believe that potential litigation costs can inhibit the filing of cases or force cases to settle that should not settle based on the merits.

Increase in civil self-represented litigants

An increasing number of parties appear in civil cases without attorneys. There is a substantial number of self-represented parties in limited civil cases, especially in unlawful detainer actions, small auto accident cases, and debt collection cases. It is important to simplify proceedings for such parties, and to provide sufficient information to make sure they have realistic access to justice.

Jurisdictional limits in relation to higher cost of living

In light of inflation and the higher cost of living since the jurisdictional amount of limited civil cases was last raised in 1986, the current jurisdictional maximum for such cases of $25,000 may no longer be a reasonable limit. The equivalent value of that dollar amount in today's economy would be approximately $57,000.

Goals and Potential Strategies

In exploring the expansion of the limited civil case tier, developing a new intermediate civil case tier, and streamlining procedures for all smaller cases, the Futures Commission is looking at proposals that focus on increasing access to justice while decreasing the cost and time for getting a case to judgment. Some strategies and considerations include the following:

Small claims cases

- No change in jurisdictional limit or procedures generally (focus will be on greater educational and self-help efforts)
- Provide more alternative dispute resolution (ADR) options, including online ADR programs
- Allow remote appearances by parties and witnesses via telephone or video
- Develop pilot programs for optional online resolution of small claims cases

Limited civil cases

- Raise jurisdictional level to $50,000

- Provide information sheet to all plaintiffs at time of filing, which must also be served on all defendants, including the following:
    - Description of early education program for limited case parties
    - List of other available self-help resources
    - Flowchart/checklist of applicable civil procedures for limited civil cases, with targeted versions for high-volume case types (unlawful detainer, debt collection, and auto accident cases)
- Ensure discovery is proportional to case value, as outlined below:
    - Mandate early disclosure of factual information supporting claims or defenses and identity of known witnesses, and production of key documents and records, by both plaintiff and defendant. Include statutory provisions that specify the information to be provided in high-volume civil case types (unlawful detainer, debt collection, and auto accident cases).
    - Decrease current limits on written discovery requests in limited cases, in light of the information to be provided in the initial exchange (written discovery to total no more than 15 – 20 requests).
    - Develop form interrogatories expressly directed to each of the high-volume case types, to make it easier for self-represented litigants, especially those with limited English proficiency, to seek further information if needed.
    - Continue to limit depositions to one per side.
- Alternative dispute resolution
    - Provide more opportunities for ADR and/or early neutral evaluation of cases
    - Provide different types/times for ADR based on the type of case, particularly for the three types of high-volume cases (day-of-trial mediation for unlawful detainer cases; self-help for defendants regarding potential options prior to ADR for debt collection cases, etc.)
    - Provide options for online ADR to make it easier for parties, but provide oversight to avoid abuse resulting from imbalance of parties
- Mandatory expedited jury trials—expand to include unlawful detainer cases

Intermediate civil cases (new tier)

- Create new tier for cases with value over $50,000 and up to $250,000
    - Parties may seek to opt out for good cause, as provided for in limited civil cases
- Ensure discovery is proportional to the case value, as outlined below:
    - Mandate early disclosure of factual information supporting claims or defenses and identity of known witnesses, and production of key documents and record, by both plaintiff and defendant
    - Limit each side to taking 20 hours of depositions
    - Limit written discovery requests to a total of 35 (interrogatories, requests for production of documents, and requests for admission)
    - Develop additional form interrogatories expressly directed to specific case types, which may be used as part of the total of the 35 written discovery limit
    - Apply current general proportionality provisions for discovery of electronically stored information within the limits listed above
    - Allow parties to seek leave of court for additional discovery on showing of good cause and that is proportional to value of case

- Expert witnesses
    - Limit to two expert witnesses per side (subject to expansion for good cause)
    - Provide longer time before trial for disclosure of experts, to facilitate depositions if needed
- Alternative dispute resolution
    - Provide more opportunities for ADR and/or early neutral evaluation of cases
    - Provide different types/times for ADR based on the type of case
    - Provide options for online ADR to make access easier for the parties

Unlimited Civil Cases

- Expert witnesses
    - Require experts to provide a report of all opinions on which they intend to testify and description of all facts in support, to be produced at time of disclosure of experts
    - Provide longer time before trial for disclosure of experts to facilitate depositions if needed

The working group is still considering issues relating to case management conferences, motions for summary adjudication, and filing fees for the new intermediate tier.

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Concept 7: Complex Litigation Management: Repository and Other Shared Resources

Establish an online centralized repository and educational resource containing information on the effective management of complex litigation to be shared and used by judges and research attorneys.

Why is this concept being considered by the Futures Commission?

Complex court case management techniques have proven successful in promoting effective decision making and expeditious resolution of complex cases. During the nearly fifteen-year Complex Civil Litigation Program (program), judges in the six participating courts developed case management techniques, including early judicial management tailored to the needs of the particular cases, continued judicial supervision, and focused progress toward resolution. Using Judicial Council funding under an allocation from the State Trial Court Improvement and Modernization Fund, the six courts handled complex cases through dedicated complex litigation departments and judges in the program participated in annual workshops presented by the Center for Judicial Education and Research (CJER). With that funding allocation no longer available, there is a greater need to make the complex litigation case management techniques and other strategies employed by large courts available to small- and medium-sized courts that may occasionally have complex cases. Judges in the program have developed specialized case management orders and a body of knowledge that can be shared. The Commission on the Future of California's Court System's Civil Working Group (working group) is exploring how to do so through an online repository of information.

Although complex cases are more often filed in large courts and assigned to dedicated complex litigation departments, for various reasons they are sometimes filed in small- and medium-sized courts. Judges in those courts who may have less experience handling complex cases would benefit from an online repository, available when needed, where case management orders, research memoranda, and other resources can easily be found. Access to these materials will allow other judges to benefit from the knowledge developed by program judges over many years of handling complex cases.

Goals and Potential Strategies

In exploring the development of a repository and educational resource for judicial management of complex cases, the working group is focusing on: 1) content; 2) maintenance; 3) access. The repository should contain current materials and information to assist all judges handling complex cases—those who are new to complex litigation or to specific types of complex cases; those seeking information on aspects of managing and resolving cases, such as phased discovery or notice of class certification; as well as experienced complex litigation judges. This concept is also intended to provide helpful tools for any judge—in a small, medium, or large court—who may be assigned a complex case.

Content

The working group has identified the following information and materials to include in the repository:

- Materials on management of pretrial and trial preparation process
    - Case management orders (CMO)
    - Roadmaps for document discovery, percipient witness discovery, and expert witness discovery
    - Orders on discovery, including orders on the discovery of electronically stored information (ESI)
    - Other orders
- Judicial Council coordination proceedings (JCCP)
    - Log of JCCPs (name, number, venue, assigned judge, list of included actions)

    - CMOs and other orders
- Current list of judges who regularly are assigned to complex cases and their contact information, on an opt-in basis, to facilitate communication

The format considered by the working group for complex case materials includes:

- Orders to serve as samples
- Editable orders
- Templates for specific orders (to ensure compliance with requirements)
- Forms
- Research memos

In addition, the complex case repository webpages would include links to relevant CJER course materials and benchbooks that are available on the Judicial Resources Network (JRN) or CJER Online.

Maintenance

Maintaining the repository will be crucial to its utility. Judges and other users, such as court research attorneys, will need and expect repository materials to be current and reflect proven successful case management techniques. To the extent that materials are based on or cite to statutes, rules, and case law, they will be most useful if they are recently drafted. Maintaining updated materials will require Judicial Council staff responsible for this task. Alternatively, all materials should be dated and the repository website or individual materials will need to include a caveat stating that since the materials were prepared, statutes and rules affecting the particular order or other matter may have been amended or subsequent court decisions affecting it may have been issued. Judges and research attorneys who submit materials for posting will be encouraged to provide any updates to these materials. It may be helpful to establish criteria for when materials should be removed or replaced with more current materials. To the extent that automation can be used to identify “old” materials by date of posting or changes in rules and statutes and subsequent of treatment of cases, it should be used.

There will also be technical aspects of maintenance that will require staffing and funds to support it. Judicial Council staff who maintain and manage the technical aspects of the existing JRN would be most qualified to support the repository.

Access

The working group is considering locating the repository on the JRN, which is accessible to current California judicial officers, court professionals, and Judicial Council staff upon verification. A dedicated site on the JRN would be developed for the complex case repository. This has the advantage of easy access to judicial officers and others who already use JRN. A judge searching for complex case materials could find them on the JRN without having to access another website and use another name and password. In addition, the cost of adding to the existing JRN webpages is likely to be relatively inexpensive compared to the cost of developing and maintaining a new secure website.

Those with access to the repository and its database could easily search for and use the materials. Users would be encouraged to add content, under specific criteria to be developed.

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Concept 8: Explore Court Reporters' Dual Status, Compensation Discrepancies, and Ownership of Transcripts

Explore court reporters' preparation of transcripts as part of their court employment and compensation, resulting in court ownership of transcripts. Alternatively, provide that courts may, after purchasing an original transcript, make and sell copies of the transcript.

Why is this concept being considered by the Futures Commission?

In most criminal and civil cases, an official record of court proceedings has traditionally been prepared by a court reporter who attends the proceeding; records and takes notes of the testimony and statements of the parties witnesses, attorneys, and judicial officers; and (when required) prepares a verbatim transcript of the proceedings. Court reporters must be certified by the Court Reporters Board of California. They purchase and maintain their own computerized stenographic equipment, court reporting software, and necessary supplies. If a transcript is requested by the court, a party, or other person, the court reporter prepares a transcript using computer-aided transcription software to translate stenotype keystrokes into a digital file, which, after any necessary research and proofreading, editing, and correcting, results in a verbatim official record. A court reporter may employ support staff to assist in this process. The use of court reporting equipment and software that produces electronic transcripts and notes has greatly increased the ease and speed of preparing final transcripts compared to previous methods.

Cost to purchase original transcripts and copies

The cost to purchase a transcript from a court reporter is statutorily set. Under the Government Code, any person or entity—including a court—ordering an original transcript pays the court reporter a set fee per one hundred words or other measurement that represents the number of words on a typical transcript page. The amount is currently eighty-five cents per one hundred words. A copy purchased at the same time by a purchaser of an original transcript is fifteen cents per one hundred words. The fee for a copy is slightly higher (twenty cents per one hundred words) for a purchaser who does not simultaneously purchase the original. In addition, a court reporter may add a fee for the actual cost of delivering the transcript on a medium other than paper. A purchaser may not provide or sell a copy of the transcript to any other party or person. A copy of the transcript (or excerpts thereof) can be used only as an exhibit or for internal use.

The cost to the courts to provide court reporters and, for certain case types, to purchase original transcripts and copies is considerable. The cost to provide court reporters is partially offset by fees paid by parties in civil proceedings. In fiscal year 2014-2015, an estimated $215 million was spent by the trial courts to provide an official record of proceedings. This includes $19.3 million spent by courts to purchase transcripts in criminal and juvenile (delinquency and dependency) cases, as required under current California law. The cost to courts for the purchase of transcripts varied among the courts ranging from zero dollars annually to over $6 million annually. Naturally, the cost for transcripts was higher in larger courts. However, the cost also varied between courts of similar sizes. As an example, the cost to purchase transcripts for courts with four to eleven judges ranged from $20,363 annually to $323,360 annually.

Under Assembly Bill 2629, currently pending in the Legislature and opposed by the Judicial Council, the cost to purchase an original transcript would increase from eighty-five cents to ninety-three cents for every hundred words and the cost to purchase a copy at the same time would increase from fifteen cents to seventeen cents for every hundred words, increases of 9.4 percent and 13.3 percent, respectively. Beginning in 2019, the fees would further increase to $1.03 and 23 cents per 100 words. The Legislature finds and declares in AB 2629 that the fees for original transcripts have not been adjusted in twenty-six years. With the

improvements in technology over that time making the production of transcripts less time consuming and making it easy to copy and transmit them electronically, it may be time to change the way transcripts are produced and owned.

Compensation estimates for court reporters

Court reporters may be employees of a court, independent contractors for the courts, or hired by litigants as official pro tempore reporters in civil cases. Most court reporters are court employees and occupy a unique dual status: they are considered court employees when they take notes in recording a proceeding, but they operate as independent contractors when they produce and sell the certified verbatim transcript. Hence, these reporters receive a salary from the courts as court employees for recording the proceedings and earn a separate income from the sale of the transcripts they produce from their notes, which are made in their capacity as independent contractors. This dual status has led to disagreement and ambiguity with respect to ownership of the transcript. Many courts have a practice or policy of allowing court reporters to work, during the court day, on tasks involved in preparing a final transcript, such as preparing the index, determining due dates, preparing requests for extensions, and other efforts to ensure the record is timely and accurately prepared and submitted. This occurs during court hours when a reporter is not needed to take notes in recording a proceeding. A court reporter who does such work is thus acting as a separately compensated independent contractor while simultaneously working as a court employee.

The salaries of court-employed reporters—received for attending the proceedings and recording and taking notes of the testimony and statements—varies substantially among courts. Comparing the beginning and last step of the reported salary ranges for court reporters, monthly salaries vary from $3,654 – $4,897 at the first step to $8,978 – $9,509 at the highest step. The reasons for the disparate compensation are unclear as they do not appear to be related to court size or differing duties or assignments. Further, the disparities are greater than would be expected to account for geographical differences in costs of living and labor. In addition to receiving salaries, they also receive benefits as court employees and have the potential to earn transcript income as independent contractors. After factoring in average salary, average benefits, and average transcript earnings, court reporters may make an estimated yearly income ranging from $90,379 to $194,809. Once again there is considerable variance in this estimated yearly income among courts of similar size and this variance increases when you consider the potential income for high earners. For court reporters with high transcript earnings, the estimated yearly income ranges from $95,567 to $251,120 annually.

Court reporters provide a valuable service to the courts and parties by producing a timely and accurate record. Their compensation should be appropriate and uniform in courts across the state.[1] Uniform salary levels and benefits would advance the goals and objectives of the Trial Court Funding Act, including uniform standards and procedures, structural efficiency and simplification, increased access to justice, and fairness and portability in employment.

Goals and Strategies

The Futures Commission's Fiscal/Court Administration Working Group (working group) is exploring making court reporters' preparation of transcripts part of their court employment, resulting in court ownership of transcripts and ending the purchase of transcripts by courts. The overarching goals of this concept are to reduce the cost to trial courts for the production of transcripts and gain efficiencies through court ownership of, and the right to reproduce, transcripts. This would eliminate the dual status of court reporters as court

[1] The lack of consistency is not unique to the court reporter classification. The Fiscal/Court Administration Working Group is also recommending that the trial courts undertake a uniform classification and compensation study to create common classification and salary structures across the branch. For more information, see Concept 9.

employees and independent contractors. This concept should inform and influence consideration of AB 2629. The disparate compensation of trial court employees, including court reporters, across the branch is a focus of Concept 10.

This concept requires an analysis of: the cost of all transcripts (originals and copies) purchased by courts from independently contracted reporters and the projected costs in salaries for employee court reporters to produce the same transcripts; cost of court ownership and maintenance of the computerized stenographic equipment and software used by court reporters; and the ongoing costs of supplies for printing and binding of transcripts. The ongoing supply costs may be reduced over time as the courts continue to increase the use of digital processes. Also, even if additional court reporters are needed, cost savings may result from having court reporters produce transcripts during the court day when they are not reporting proceedings, rather than courts purchasing the transcripts.

As an alternative to ending the dual status of court reporters and making them court employees for all purposes, the working group is considering allowing courts to gain ownership rights to the transcripts they are required to purchase with the right to reproduce them.

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Concept 9: Improve Consistency, Predictability, and Portability of Trial Court Employment

To bring greater consistency, predictability, and portability to the judicial branch and local trial court employment systems, consider: 1) a uniform classification and compensation study to develop common classification and salary structures across the branch; 2) reviewing and reconsidering the Workload-based Allocation Funding Methodology (WAFM) formula including funding for each trial court's employee benefits.

Why is this concept being considered by the Futures Commission?

The current system of trial court employment and labor, which was established after the transition to state funding of the trial courts, is a hybrid between a local, county-based system and a state system. Each superior court is an independent employer responsible for its own employees, yet state funding supports trial court operations including staffing costs. This concept does not seek to change day-to-day management of employees, which is the individual responsibility of each trial court's management.

Governing laws of trial court funding and employment

State funding of the trial courts began with The Lockyer-Isenberg Trial Court Funding Act of 1997 (Trial Court Funding Act) which shifted financial responsibility for all trial court operations from individual counties and established the state as the primary funding source. The legislation included strongly articulated goals of standardization and the elimination of different levels of service to provide an improved court system and equal access to justice. Though the Trial Court Funding Act shifted financial responsibility for court operations from the counties to the state, it did not change the employment relationship between the superior courts and court staff, whose status as county employees was unaffected by the act.

In 2000, in recognition that it did not make sense to have state funding of court operations but county employees, the Trial Court Employment Protection and Governance Act (TCEPGA) changed the status of the courts' 17,000 workers from employees of the county to employees of the respective courts. Under the TCEPGA, each trial court is an independent employer with all responsibilities of an employer, such as overseeing hiring, establishing and managing workers' compensation and benefits programs, and providing personnel rules and regulations. Thus, even though the trial courts are state-funded, there is no corresponding, state-based employment structure for trial court employees such as the current one for executive branch employees.

Much has been accomplished to achieve the goals of the Trial Court Funding Act and TCEPGA; however, consistency, predictability, and equity is lacking in many areas relating to employment, and significant differences remain in these areas. This affects how the courts' business is conducted and how courts' users are served.

Disparate classification, compensation, and health benefits among the trial courts

The Trial Court Funding Act required, and the council adopted, recommendations for a Uniform Model Classifications (UMC) Plan. The UMC Plan was intended to provide benchmarks for the trial courts to assist with position classifications, employee selection, training, and other human resource needs. Despite the intent of the Trial Court Funding Act and the UMC, there are significant differences among the courts in the positions that are matched with a specific classification and the compensation of individuals within the classification. It is unclear how these differences support a uniform statewide personnel system.

The Legal Process Clerk classification provides an example of the differences that exist in classifications and compensation levels even with the UMC benchmarks. With 3,252 trial court employees matched to this

classification in Fiscal Year (FY) 2014-2015, there is a wide variety in the different titles used for the positions within the courts. Some titles are followed by numbers or letters suggesting classification series defining different levels of responsibility or duties. It is unclear how the duties and responsibilities of a Court Clerk II in one jurisdiction compare to those of Court Clerk I through Court Clerk IV positions in another jurisdiction. It is also unclear if the duties and responsibilities of a Court Services Assistant compare to those of a Legal Clerk or even an Information Processing Specialist. Given the differences in the titles of the positions that are assigned to the Legal Process Clerk classification, it is unclear if these individuals within a court or even across courts have the same duties and level of responsibility. For courts with more than 50 judges, the monthly salary of positions matched to this classification range from $1,790 to $4,285 at the beginning step and $1,992 to $5,274 at the highest step. These differences further suggest that there may be variation in the level of responsibility or duties of the positions matched to the classification. Although this paper discusses only the Legal Process Clerk classification and compensation, this trend is replicated in other classifications.

It appears that although the UMC Plan was designed for uniformity in employee classifications, there is variability in the classifications and salary levels for the same apparent work among trial courts. The recommendation for a classification and compensation study is to ensure consistent pay for like work across the judicial branch and an improved court system that meets the needs of the public in every community, consistent with the tenets of trial court funding.

The core health benefits (medical, dental, and vision) provided to employees among the trial courts is another compensation factor to consider. While a comparison of the exact plans offered to employees has yet to be done, the employer costs for such plans provides some insight into potential differences in plan benefits. For fourteen sampled courts, employer-paid core health benefit costs for FY 2014-2015 ranged from approximately $7,500 to $23,800 per filled full-time equivalent (FTE) position. Reasons for this variance may include: 1) The percentage of plan costs paid by employees of different courts. For some employees, plan costs are paid 100% by the employer while for others, the employee percentage of the cost may be hundreds of dollars each month; 2) Trial court employees with lower salaries may receive greater core health benefits. The relationship between salaries and benefits are bargained locally within each trial court. Despite the reasons for the differences, the variance in cost suggests there are disparities among the trial courts in the core health benefits provided to employees.

Trial court employees are supported by state funding and the intent of the Trial Court Funding Act is to achieve consistency and stability across the state. Given that we continue to see employees in one trial court receiving different compensation and core health benefits than employees in another court performing the same duties, the time has come to explore whether these differences are appropriate.

Workload-based Allocation Funding Methodology

The WAFM, approved by the council in 2013, allocates funding, consistent with the intent of the Trial Court Funding Act, in a manner that improves equal access to justice; supports the ability of the courts to carry out their necessary functions; and is guided by the principles of uniformity, equity, accountability, and flexibility. WAFM calculates an estimate of funding needed, by court, for non-judicial, filings-driven functions. It is based on the number and type of cases in each court. Need is estimated primarily by: 1) developing an estimate of workload expressed in numbers of FTE positions needed to staff the court's particular mix of cases; 2) converting needed FTE positions into dollars using the average salary cost for all positions, adjusting for cost-of-labor differentials by region (using U.S Bureau of Labor Statistics data), and including the actual retirement and health benefit costs of the particular court.

The funding of retirement and health benefits at actual cost provides no incentive to work towards improved consistency, predictability, and equity among courts in the benefits provided to state-funded trial court employees. It is unclear if the disparate benefits are artifacts of historical funding inequities or an unintended result of the WAFM funding allocation.

Goals and potential strategies

In support of advancing the tenets of the Trial Court Funding Act, the Futures Commission's Fiscal/Court Administration Working Group (working group) is considering recommending that:

1. The trial courts undertake a uniform classification and compensation study to create common classification and salary structures across the branch.
2. The Judicial Council reconsider the part of the WAFM formula including funding for each trial court's employee.

The current system of trial court employment and labor has resulted in differences across the judicial branch in terms of employment classifications and associated responsibilities, salaries and wages, and core health benefits.

These differences impact trial court employees and are inconsistent with and fail to advance the goals and objectives of the Trial Court Funding Act, including uniform standards and procedures; economies of scale; structural efficiency and simplification; a uniform and equitable court system; increased access to justice; and equal access to the courts. With total personnel costs constituting 79 percent of a court's operating costs, these costs have a very significant effect on what programs and services a court can provide to court users.

The working group's objective in recommending these actions is to bring greater consistency, predictability, and portability to the judicial branch and the local trial court employment system for the benefit of court users, court employees, and the public. The working group believes that the disparities affecting trial court employment are inconsistent with the purpose and intent of the Trial Court Funding Act, especially if they result in different levels of service in different courts. The differences in classification and compensation also create unnecessary and potential barriers to the ability of court employees to move to and between other county courts within the judicial branch. Addressing these components will provide greater uniformity, consistency, and predictability to trial courts, consistent with the purposes of the Trial Court Funding Act.

Once the judicial branch has established uniform classification and compensation for its employees, the judicial branch may wish to evaluate whether it is beneficial for the courts to continue to bargain individually or bargain on a regional or statewide basis for the purposes of bringing greater consistency, predictability, and portability in trial court employment; gaining possible efficiencies in the bargaining process; and improved access to justice.

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Concept 10: Digital Recording of Court Proceedings to Provide an Official Record

Incorporate existing and emerging technologies in preparing an official record of court proceedings in a digital format that is cost effective and accessible, and envisions the record of the future.

Why is this concept being considered by the Futures Commission?

A record of court proceedings is a fundamental component of access to justice. Court records of proceedings show what the parties said and what the court did throughout a proceeding. Without a court record of a proceeding, the parties and the public know only the final outcome of the proceeding; they do not have a complete or accurate account of court or party actions throughout the proceeding. A party, especially a self-represented party, is less likely to understand or be able to finalize a court's orders or to pursue an effective appeal without a court record. Further, a court record of proceedings memorializes a judge's disclosures to the parties made during the proceedings. Despite the importance of court records of proceedings, many factors have come together to impede the right of all parties, including the court, to have a record of most court proceedings.

Under current California law, verbatim reporting of proceedings by a certified court reporter is required in only some case types (i.e., felonies and juvenile proceedings). In other case types (e.g., civil and family law), no record of proceedings is required at all. The use of electronic recordings as the official record of a court proceeding is prohibited except in misdemeanor cases, infraction cases (e.g., traffic citations), and limited civil cases. If an official court reporter is not provided by the court in an unlimited civil or family law proceeding, a party may arrange, at its own expense, for a certified shorthand reporter to transcribe the proceeding. However many litigants, especially family law litigants, are not able to pay these fees or do not make timely arrangements for a court reporter. Since electronic recording of most civil and family law proceedings is not permitted by statute, the result is that transcripts are not available as a record of an increasing number of court proceedings, including those proceedings that decide important issues of custody, support, visitation, and division of assets.

Technological advancements in digital recording of proceedings

The technology available to provide a digital record has evolved rapidly over the last five years. Since the Judicial Council's pilot projects in the early 1990's to assess the costs, benefits, and acceptability of audio and video recording as a means of producing a verbatim record of proceedings, today's digital recording systems, when well designed and properly implemented, are more than capable of addressing earlier concerns. Digital recording can provide a more comprehensive record of proceedings, including high definition audio and video of the proceedings, speech to text capability, voice recognition, and in the near future the potential for streaming rough transcripts that will be useful to both trial courts and parties, even if not as the official record. Additionally, while more and more courts, and businesses in general, move to paperless systems, the production of records of court proceedings has not. Given the technology available today and court users' expectation of online services, the ability to order and deliver records of court proceedings electronically should be available. Further, the use of in-court electronic technology by litigants has grown, for example document and exhibit displays, videos, remote witness appearances, and 3-D animation. The universe of in-court technologies can only be expected to grow in the future. This rapid, exponential change in technology in the courtroom is evident in the increase of body camera videos from cameras worn by police officers. Digital recordings of court proceedings will better capture the evidence presented by these technologies in the courtroom.

Need for a record of court proceedings

Facing budget cuts, California's superior courts have eliminated or reduced court-provided court reporters even in unlimited civil and family law cases. A record of the courtroom proceedings often is essential to obtaining equal access to the courts, both access to full participation in trial court proceedings—so that a party can understand the court's ruling when preparing an order—and access to appellate review. Settled and agreed statements are often inadequate substitutes for verbatim records of the trial court proceedings, and may exceed the abilities of many self-represented litigants. Often self-represented litigants do not understand the court's ruling from the bench. Without a record of the courtroom proceeding, a self-represented litigant may have difficulty drafting an order based on the ruling. Even when parties have lawyers who may understand a ruling at the time, matters can carry on over several months, and memories and notes of the rulings from the bench may not retain clarity over time. Providing a record for parties allows them to obtain factual information about what was said during a respective hearing and will assist with developing orders after hearing or recollecting prior court rulings.

To obtain appellate review or a writ from a judgment or order, a party must generally provide a record of the proceedings in the courtroom to the reviewing court. Absence of such a record can doom an appeal. Parties can try to prepare a settled statement, but doing so is often beyond the abilities of self-represented parties who may not know they exist or may fail to comply with the procedural requirements. To fairly allow parties the option of appeal, a court record is required. In addition, the lack of a record in unlimited civil and family law matters results in a disservice to the public who could benefit from a record that shows what the court did throughout the proceedings as opposed to merely the final determination at the end. In many cases, parties can make accusations about the judicial officer and others during the proceedings, and without a record, judicial officers and litigants are left without a means to respond to or defend these accusations. Providing a record of what occurred during a hearing or trial is beneficial to all involved.

Obtaining verbatim records of proceedings

The transcripts of court proceedings are owned and sold to the court and the parties by the court reporter that transcribed the proceeding. To receive a transcript or copy of a transcript, the court and the parties must seek out the court reporter and arrange for payment. Also, this practice limits the courts' ability to provide records of proceedings online; a service that litigants have come to expect in this increasingly digital world with remote services.

Courts that currently use digital recording for eligible case types are able to provide copies of the recording for all or parts of proceedings quickly, often on the same day, if not within hours of the court event. Technology also exists to access recordings electronically. Those recordings can be used by litigants to better understand what occurred, or as the initial step to preparing a transcript.

Expense and difficulty in providing a record of court proceedings

With over $200 million spent each year by the trial courts to provide an official record, the branch's fiduciary responsibility over public funds and its need to ensure access to justice dictate evaluating the effectiveness of the current system. In Fiscal Year 2014-2015, that figure included $19.3 million for the purchase of transcripts for criminal cases, and just over $196 million to provide court reporter services. Most of the court reporters services were used in proceedings where a court record is required by law—few courts can provide court reporters in any other cases in the current economy. With the unlikelihood of increased budgets in the near future, it is unlikely that courts will be able to return to providing court reporters in cases where they are not mandated to do so, even though records of courtroom proceedings are vital in many of those cases. In

addition, a trend that bears tracking is the decreasing numbers of skilled court reporters. Since the early 1990's, California's court have experienced a steady decline in the number of available qualified shorthand reporters. This decline in court reporters is projected to continue in California with an expected shortage of 2,320 court reporters in 2018. With the continued shortage of court reporters, it is unlikely that court reporters would be available to return to courtrooms they are currently missing from, even if court budgets should increase. Courts must look for other ways to ensure parties can obtain records of proceedings.

Goals and potential strategies

The Technology Working Group is considering recommending legislative changes to permit a pilot program that would allow courts to use digital recordings of proceedings to serve as the official record in those cases in which court reporters are not currently mandated.

Digital recordings of proceedings would result in other significant non-monetary benefits, most importantly, improving access to justice by providing a record in cases which currently do not usually have a record. This would especially benefit self-represented litigants who could use the recording as a reference to finalize a court order or to pursue an appeal. For attorneys, a digital record may be referenced as a complete and accurate account of court or party actions throughout the proceeding, providing details that may not be captured in notes or forgotten during lengthy cases. Given the limited financial constraints of trial courts, which is not expected to improve, permitting digital recording ensures access to justice for all parties within all case types. Other benefits of digital recordings of proceedings include: use for mentoring judicial officers; secure efficient storage and preservation of the record; electronic delivery of the record; and protection of the record in the case of disability or retirement of the court reporter. Courts would own the digital recording of proceedings and could better manage the process of providing the official record to parties, as requested. A first step in this direction would be to permit electronic recording for civil and family cases.

If the digital recording pilot programs are successful in the non-mandated case types, the expansion of these pilot programs to all case types in the future may provide cost savings to the trial courts and address expected court reporter shortages. In FY 2014-15, over $196 million was spent by the trial courts to provide court reporter services, with the great majority of these services provided in proceedings where a court record is required by law. Providing digital recordings of proceedings in all California courtrooms would result in substantial potential savings in the amounts now spent on court reporter services in only those cases where such service is mandated by law. The savings to the trial courts could be as much as $60 million to $120 million as courts transition and deploy systems, with even greater ongoing savings in subsequent years. With the unlikelihood of increased budgets in the near future and continued shortage of court reporters, digital recordings could provide the courts with another method to ensure that all parties can obtain records of proceedings, at a cost substantially less than what is currently spent to provide transcripts in mandated case types.

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