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REPORT TO THE CHIEF JUSTICE

Date of Report

April 12, 2016

Title

The Commission on the Future of California's Court System Proposes Legislation to Authorize the Council to Reallocate Vacant Judgeships

Recommended by

Hon. Kathleen E. O'Leary, Chair

Commission on the Future of California's Court System Fiscal/Court Administration Working Group

Executive Summary

The commission recommends that Chief Justice Tani G. Cantil-Sakauye refer this proposal to the Judicial Council for its consideration to draft and sponsor legislation authorizing the council to reallocate vacant judgeships from courts with less judicial workload needs to courts with greater judicial workload needs. The commission recommends that the legislation:

- be structured similar to Government Code section 69614, which authorized 50 new judgeships in 2006, and Government Code section 69615, which authorized the conversion of subordinate judicial officers;
- direct that vacant judgeships be reallocated by the council under a methodology approved by the council; and
- retain the Legislature's authority to create and fund judgeships and the Governor's authority to appoint judges.

Once such legislation is enacted, the commission recommends that the Chief Justice also refer the proposal to the council for its

consideration to develop a reallocation methodology. The commission recommends that the reallocation methodology:

- incorporates the principles of the council’s biennial *Judicial Needs Assessment Report* and the methodology for the subordinate judicial officer conversions under Government Code section 69615;
- minimizes court disruptions;
- addresses changes in judicial workload needs; and
- ensures appropriate funding to support reallocated judgeships.

Background

In August 2001, the council approved a statewide methodology for determining the number of trial court judges needed based on workload standards developed by the National Center for State Courts.¹ Two months later, council staff completed the first statewide judicial needs assessment. This assessment identified a need for 365 new judgeships and proposed a method to prioritize those positions.²

Since 2001, the council has supported many legislative efforts to establish 150 new judgeships, which were considered to be the most critically needed. Only two bills have been successful: SB 56 (Dunn, ch. 390) in 2006, which authorized the first 50 of the 150 critically needed judgeships, which were then funded in the 2007 Budget Act (and the positions have been filled); and AB 159 (Jones, ch. 722) in 2007, which authorized, but did not fund, the second 50 of these judgeships. Various council-sponsored bills in the following years to fund all or portions of the second set of 50 judgeships or to authorize the third set of 50 critically needed judgeships have failed.³

When it created and funded the first set of 50 new judgeships, the Legislature directed that new judgeships would be allocated according to the assessed judicial need and prioritization methodology approved by the council. In addition, Government Code section 69614(c)(1) required that the council report by November 1 of every even numbered year “on the factually determined need for new judgeships in each superior court using the uniform criteria for

¹ Judicial Council of Cal., *A New Process for Assessing Judicial Needs in California* (August 24, 2001),

<http://www.courts.ca.gov/documents/judneedsreview.pdf> (as of March 2016);

Judicial Council of Cal., *JUDICIAL COUNCIL MEETING Minutes of August 24, 2001, Meeting* (August 24, 2001),

<http://www.courts.ca.gov/documents/min0801.pdf> (as of March 2016).

² Judicial Council of Cal., *Results of statewide assessment of judicial needs including list of recommended new judgeships* (October 26, 2001), <http://www.courts.ca.gov/documents/stateassess.pdf> (as of March 2016).

³ Sen. Bill 1150 2007-2008 Reg. Sess., (Cal. 2008); Sen. Bill 377, 2009-2010 Reg. Sess., (Cal. 2009); Assem. Bill 1405, 2011-2012 Reg. Sess., (Cal. 2011); Sen. Bill 1190, 2013-2014 Reg. Sess., (Cal. 2014); and Sen. Bill 229, 2015-2016 Reg. Sess., (Cal. 2015).

allocation of judgeships” established in the judicial workload model. Reports have been submitted as required in 2008, 2010, 2012, and 2014 and can be found in the Legislative Reports section at www.courts.ca.gov.

These biennial reports show that the statewide need for judicial officers has remained consistently greater than the number of authorized judicial positions (AJPs). The most recent *Judicial Needs Assessment Report (2014)* estimates that nearly 270 additional judicial officers are necessary to manage court workload.⁴ These reports also show that there is an uneven statewide distribution of judgeships; some courts have proportionately fewer judges than others to handle their assessed needs. For example, the trial courts in Riverside and San Bernardino have only 60 percent of the judicial officers they need. But the trial courts in Alameda and Santa Clara have more judges than necessary to handle their assessed needs, 14 and 19 more judicial officers, respectively. Currently, Alameda has three vacant judgeships and Santa Clara has two.

Presently, it is unclear what mechanism is available for the Chief Justice to transfer existing authorized judgeships from one court to another. Courts with more AJPs than their assessed needs have, over many years, absorbed the full availability of judicial resources into their court operations. And courts with fewer AJPs than their assessed needs have had to spread their workload among their existing authorized judicial officers and rely heavily on the Assigned Judges Program.

The lack of judicial officers was a top concern mentioned by branch-affiliated stakeholders who responded to a widely distributed commission survey that sought recommendations to improve the California court system. Many responses stated that the lack of judicial officers, particularly for family law and civil cases, creates a backlog and limits the time that a judge can spend on each case.

Governor Brown has been reluctant to fund new judgeships until action is taken to distribute judge positions based on workload needs. In his veto message for SB 229 (Roth 2015), which would have appropriated \$5 million from the General Fund to fund 12 of the second set of 50 authorized judgeships, Governor Brown stated the following:

I am aware that the need for judges in many courts is acute—Riverside and San Bernardino are two clear examples. However, before funding any new positions,

⁴ Judicial Council of Cal., *The Need for New Judgeships in the Superior Courts: 2014 Update of the Judicial Needs Assessment Required Under Government Code Section 69614(c)(1)&(3)* (December 17, 2014), http://www.courts.ca.gov/documents/lr-2014-judicialneedsassessment-gov_69614-c-1-3.pdf (as of March 2016).

I intend to work with the Judicial Council to develop a more system-wide approach to balance the workload and the distribution of judgeships around the state.⁵

Also, in June 2015, Governor Brown's administration signaled its desire for the commission to address reallocation of judgeships when Keely Bosler, the chief deputy director of the Department of Finance told a legislative budget committee that with regard to new judicial positions:

[w]e think that the Commission should do their work and report back to the Legislature and the administration when their work is complete about what additional modifications may be needed.⁶

In his proposed budget for FY 2016-17, the Governor reiterated his goal of promoting the redistribution of judgeships based on workload need:

[T]he Administration is proposing to work with the Judicial Council to reallocate up to five vacant superior court judgeships and the staffing and security complements needed to support and implement the proposal. This will shift judgeships where the workload is highest without needing to increase the overall number of judges.⁷

Recommendation

The commission recommends that the Chief Justice refer this proposal to the Judicial Council for its consideration to sponsor legislation to reallocate existing judgeships that would incorporate the following elements:

- The legislation should be structured similarly to both Government Code 69614, which created 50 new judgeships in 2006, and Government Code section 69615, which authorized the conversion of subordinate judicial officers, to delegate implementation authority to the council in accordance with specific parameters.
- The legislation should apply only to vacant judgeships, i.e., no sitting judge will be required to move jurisdictions.
- The legislation should maintain the Legislature's authority over the creation and funding of judgeships and the Governor's authority to appoint judges.

⁵ Office of the Governor (October 8, 2015), https://www.gov.ca.gov/docs/SB_229_Veto_Message.pdf. (as of March 2016).

⁶ Cheryl Miller, "Governor Gives Thumbs Down to New Judgeships," *The Recorder*, June 4, 2015.

⁷ Edmund G. Brown Jr., Governor, State of California, *Governor's Budget Summary – 2016-17* (January 7, 2016), 116, <http://www.ebudget.ca.gov/2016-17/pdf/BudgetSummary/JudicialBranch.pdf> (as of March 2016).

Once the legislation is enacted, the commission recommends that the Chief Justice refer the proposal to the council, and specifically the council's Workload Assessment Advisory Committee (WAAC) to develop a reallocation methodology to help implement the legislation that incorporates the following factors:

- The data, criteria, and principles underlying the council's biennial *Judicial Needs Assessment Report* and the methodology for the subordinate judicial officer conversions under Government Code section 69615.
- Flexibility to accommodate judicial needs fluctuations that occur over multiple years.
- Funding for necessary staff and facilities.
- The maximum number/percentage of reallocations per court per designated time period.
- The minimum number of judgeships a court should have.

Rationale

Legislation with Delegation to the Judicial Branch

Legislation is required to clarify that the Chief Justice has express authority to transfer existing judgeships from one court to another. The legislation should direct that reallocations be implemented by the council. The council already compiles the biennial *Judicial Needs Assessment Report*, which contains most of the data necessary for reallocation (e.g., number and type of case filings per county and the workload associated with each case type).

There are two recent precedents in which the Legislature delegated authority regarding judgeships to the council. In 2006, when the Legislature created and funded 50 new judgeships through Government Code section 69614, it delegated authority to the council to allocate the judgeships according to "uniform standards approved by the Judicial Council in August 2001, and as modified and approved by the Judicial Council in 2004."⁸ Similarly, in 2007, when the Legislature authorized the conversion of subordinate judicial officers under Government Code section 69615, it again delegated to the council the authority to develop uniform standards for the allocation of those conversions. Thus, there appears to be an acceptance by the Legislature and the executive branch that the judicial branch, under the direction of the council, is in the best position to determine the allocation of its judgeships. Given these recent precedents, it

⁸ In 2014, this section was amended to require use of the most current Judicial Needs Assessment rather than the one from 2004. (See AB 2745 (Chapter 311, Statutes of 2014).) The section now reads as follows, "The judges shall be allocated, in accordance with the uniform standards for factually determining additional judicial need in each county, as approved by the Judicial Council in August 2001, and as modified and updated and approved by the Judicial Council in August 2004, pursuant to the Update of Judicial Needs Study..."

would now be appropriate for the Legislature to enact a statute that clearly establishes the Chief Justice's authority to transfer an existing judgeship from one jurisdiction to another.

Furthermore, as with Government Code section 69615 (conversion of subordinate judicial officers) and Government Code section 69614 (creation of 50 new judgeships in 2006), the legislation need not affect the Legislature's authority to create and fund judgeships or the Governor's authority to appoint judgeships.

Only Vacant Judgeships Should Be Reallocated

Judgeships should be reallocated only when a position is vacant. Forcing a sitting judge to move jurisdictions would be disruptive, and possibly unconstitutional.

The rate of judgeship vacancies is unpredictable because vacancies occur for reasons over which the judicial branch has no control (e.g., retirements, elevation to another court, career or life changes). The council is in the best position to effectively respond to this unpredictability by implementing reallocations in a manner to minimize court disruptions. If several judgeships become vacant in any year, the council can minimize disruptions to the affected courts by appropriately timing the reallocations. If no judgeships become vacant in any year, no positions will be reallocated. In Alameda and Santa Clara, for example (the two courts with the greatest number of judges in view of their assessed judicial needs), the judicial vacancy rate during 2015 ranged from two to five vacancies per court.⁹ Although judgeship vacancies will occur at an unpredictable rate, they will occur, and allowing these vacancies to be reallocated will provide real, and currently unavailable, relief to counties that have the greatest workload needs.

Workload Assessment Advisory Committee

As a standing advisory body of the council, the WAAC¹⁰ is charged with making:

recommendations to the council on judicial administration standards and measures that provide for the equitable allocation of resources across courts to promote the fair and efficient administration of justice.¹¹

⁹ Judicial Council of Cal., *Judicial Vacancy Reports*, <http://www.courts.ca.gov/15893.htm> (as of March 2016) (a full list of vacancy reports for each California court with current vacancies).

¹⁰ The Judicial Council established the Judicial Branch Resource Needs Assessment Advisory Committee (JBRNAAC) as a standing Judicial Council advisory committee on December 13, 2013. The JBRNAAC succeeded the Senate Bill (SB) 56 Working Group, previously established by the Administrative Director of the Courts in 2009. In April 2014, the JBRNAAC was renamed the Workload Assessment Advisory Committee (WAAC).

¹¹ Cal. Rules of Court, rule 10.66(a).

WAAC is responsible for overseeing the models that are used to measure judicial need and workload need in the trial courts. Given its charge and past and current responsibilities, WAAC is the council body best suited for developing the reallocation methodology.

Data, Criteria, and Principles Underlying the Biennial Judicial Needs Assessment Report

The data, criteria, and principles underlying the council's biennial *Judicial Needs Assessment Report* have been vetted and accepted by the Legislature, the Executive Branch, and the superior courts. The methodology developed for reallocating judgeships should incorporate these elements where appropriate.

Staff and Facility Funding

Reallocating a judgeship to an under-resourced court will help ease that court's workload only if necessary funds for support staff and appropriate one-time costs are transferred or otherwise provided. Judges require a minimum complement of support staff. Budget Change Proposals for new judgeships have always included funding for a complement of staff to accompany a new judgeship, which might include such position types as court reporters, research attorneys, judicial secretaries, courtroom and back office clerks, court interpreters, and security staff. Also, facilities such as a courtroom and chambers need to be outfitted for the judge.¹²

Currently, the calculation for individual trial court funding under the Workload-based Allocation and Funding Methodology (WAFM) is based on the level of funding needed for a trial court to be fully staffed to handle its workload. In addition to providing the allocation methodology for new state funding for trial courts, WAFM provides for the incremental shifting of funds from better resourced courts to historically under-resourced courts over a five-year period starting fiscal year 2013-14.¹³ Under WAFM, by fiscal year 2017-2018, a minimum of 50 percent of a court's funds will be allocated pursuant to WAFM and the remaining percentage will be allocated pursuant to fiscal year 2013-14 historically based funding methodology.¹⁴ Although WAFM is causing funds to be shifted to under-resourced courts to address workload needs, a court that receives a reallocated judgeship may require additional funding sooner than the incremental approach provided for under WAFM. Consideration should be given to if and how much additional funding a court would need to provide adequate staff support to a reallocated judgeship as well as the source of this funding.

¹² Estimated facility costs should include possible reasonable accommodation entitlements of state court judges with disabilities.

¹³ Judicial Council of Cal., *Trial Court Budget Working Group: Recommendation of New Budget Development and Allocation Methodology* (July 1, 2013), <http://www.courts.ca.gov/documents/jc-20130426-itemP.pdf> (as of March 2016).

¹⁴ *Id.*

Furthermore, WAFM does not address the allocation of funding for the one-time facilities costs associated with a reallocated judgeship. Nor does it address the allocation of funding for any potential increase in court security costs, which is largely the responsibility of sheriffs, funded separately and apart from judicial branch funding. Therefore, WAAC will need to work with other council bodies such as the Trial Court Budget Advisory Committee, the Court Executives Advisory Committee, the Court Security Advisory Committee, and the Trial Court Facilities Modification Advisory Committee to determine potential costs and funding sources.

Maximum Number or Percentage of Reallocations per Court per Designated Time Period

Even if a court is deemed to have more judgeships than needed for its assessed needs, reallocating judgeships from that court could negatively impact its operations. And courts receiving reallocated judgeships may need time to absorb them effectively. At a minimum, these courts will need to hire or reassign staff to support the reallocated judgeship and outfit a courtroom and the judge's chambers. This consideration was first conveyed to the commission by Presiding Judge Harold Hopp of Riverside County Superior Court in his comment at the commission's December 8, 2015 public comment session in which he thanked the commission for tackling the shortage of judicial resources in the state but also asked that reallocation of judgeships be incremental and deliberate so that under-resourced courts have stability and predictability in their court operations. The commission agrees that reallocation of judgeships should not overwhelm an under-resourced court so that the additional resources are underutilized. Accordingly, in developing the reallocation methodology, the commission recommends that any methodology that is adopted should consider the pace of the reallocations so that courts gaining and losing judgeships can manage the transition with the least possible disruption to court operations.

Minimum Number of Judges

Currently, the smallest number of judicial officers allocated to a superior court is 2.3 full-time equivalent (FTE) AJPs. (This FTE figure includes a federally funded AB 1058 child support commissioner.) Of the 14 courts with 2.3 AJPs in the state, 10 are deemed by the 2014 *Judicial Needs Assessment Report* to be "over-resourced." However, a closer examination of the *Judicial Needs Assessment Report* shows that in five of those ten courts, the excess AJP is less than one AJP. Thus, in these courts, reallocation of one judgeship would actually result in making the court under-resourced in terms of judgeships.

Furthermore, although five of the ten courts with 2.3 AJPs are over-resourced by at least one AJP, as a practical matter these courts need two judges to provide timely judicial coverage during absences by one of the judges due to illness, vacancy, or a conflict of interest, which is common in small communities. Given the practical need to have two judges and the small

number of judgeships that can be reallocated from these 2.3 AJP courts (five judgeships collectively), the methodology ultimately developed may want to establish 2.3 AJP as the minimum number of judges that should be allocated to each court, even if its assessed judicial needs does not quite reach that number.

Flexibility

The number and/or composition of filings can fluctuate unpredictably from year to year. It would be too disruptive to a court to take a judgeship away one year, only to have to reallocate one back the next year. Accordingly, the reallocation methodology may want to incorporate a margin of error to the assessed judicial needs of a court that would buffer against workload fluctuations over a short period of time. This margin of error would mitigate against the premature reallocation of judges from any one court by holding back from reallocation a small proportion of judgeships over and above a court's assessed judgeship need.

Over longer periods of time, demographic, population, and workload shifts may once again alter a court's judicial needs in ways currently unpredictable. Courts that are currently assessed as having a deficit in judicial resources may eventually have their judicial needs stabilize or even be deemed overly satisfied. Whatever methodology is ultimately developed, it should allow for continual reassessments and reallocations.

Public Comment

Public Comment Session Comments

The commission solicited public input on the concept of the reallocation of judgeships through both a public comment session held at the council office in San Francisco on December 8, 2015, and an invitation to submit written comments.

At the public comment session, two individuals spoke on the reallocation of judgeships concept, Presiding Judge Harold Hopp of Riverside County Superior Court and Ms. Kimberly Rosenberger, a representative from the Service Employees International Union (SEIU).

In addition to asking that reallocation of judgeships be conducted at a deliberate pace that avoids overwhelming affected courts, Presiding Judge Hopp suggested that the principles underlying where to place newly funded judgeships be used in reallocating judgeships (see *Maximum Number or Percentage of Reallocations per Court per Designated Time Period* on page 8 of this report for additional comments from Presiding Judge Hopp). The commission appreciates and agrees with Presiding Judge Hopp's comments and has incorporated his suggestions into this report.

Ms. Rosenberger expressed concern that a reallocation of judgeships may corrupt existing “checks and balances in place with judgeships through elections and the legislative process.” However, Ms. Rosenberger did not elaborate on how these checks and balances would be corrupted. Instead, she asked that SEIU be apprised of developments concerning this concept. The commission appreciates SEIU’s comments and has incorporated in its recommendations the principle that the reallocation of judgeships should not usurp the Legislature’s authority to fund and authorize judgeships or the Governor’s ability to appoint vacant judgeships.

Written Comments

The commission received written comments regarding the reallocation of judgeships from the following entities and individuals: the California Judges Association (CJA), California State Senator Richard D. Roth, and a coalition of five Interest on Lawyer Trust Accounts-funded California disability advocacy organizations. In one comment, the CJA asked to be included in the commission’s work, adding that:

while [the branch’s] decimated budget is often measured in bricks and mortar, crumbling, dilapidated and shuttered courthouses, what is truly at risk is justice itself. Our people depend on our courts, the best legal talent on the bench and at the bar, and sufficient staffing to assist them through physical danger, unpermitted financial harms, unconstitutional over-reaching, and much more.

The commission appreciates and agrees with the comment by the CJA that adequate funding of the judiciary is necessary to provide access to justice.

Senator Roth, whose State Senate District 31 includes western Riverside County, expressed his concern regarding access to justice given the insufficient numbers of judicial officers. He reminded the commission that the reallocation of judgeships alone will not resolve the ongoing, critical need for additional judgeships throughout the state. Senator Roth also asked the commission to keep judicially underserved communities in mind when making its recommendations regarding reallocation. The commission appreciates and agrees with Senator Roth’s comments. Reallocating judgeships is an inexpensive measure that will provide some critical relief to underserved communities.

In their written comments, the disability advocacy organizations urged the commission to build into the mechanism for reallocation of judgeships an “efficient mechanism for anticipating and implementing the ‘reasonable accommodation’ entitlements of state court judges with disabilities.” The commission appreciates these comments and understands that the

development of a reallocation methodology must include an appropriate consideration of the needs of judges with disabilities.

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