SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

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CHAMBERS OF
WYNNE CARVILL
Assistant Presiding Judge
and Presiding Judge-Elect

CHAD FINKE
Executive Officer

November 15, 2017

Hon. Jonathon Conklin, Chair, Trial Court Budget Advisory Committee
Members of the Trial Court Budget Advisory Committee

VIA EMAIL

Dear Judge Conklin and Members of the Trial Court Budget Advisory Committee:

As always, we appreciated the opportunity to attend the meeting of the Funding Methodology Subcommittee (FMS) on October 26, 2017. We are heartened to see the increased interest and public participation in these meetings by multiple trial courts, which certainly speaks to the criticality of the work that FMS is doing.

However, we are troubled by one glaring omission from the October 26 FMS meeting, as well as the November 14, 2017, telephonic meeting that followed. In contravention of its own internal policies, the FMS failed to give any consideration to the Adjustment Request Procedure (ARP) submitted by the Alameda County Superior Court on September 21, 2017. We know the ARP was received, as it was included as Attachment C2 to the materials that were provided to the members of FMS as part of the meeting materials for the October 26 meeting, and again as Attachments 3(B) to the materials for the November 14 telephonic meeting.

FMS itself has clearly articulated a process for considering ARPs submitted by the trial courts. According to the memorandum from staff dated October 19, 2017, which memorandum was included as Attachment C1 to the FMS meeting materials for October 26, each ARP submitted by a trial court shall be subject to the following specific, three-step process:

a) initial review to determine whether the factor identified in a court's request should form the basis of a potential *modification* to WAFM [emphasis added];
b) evaluation of whether and how the *modification* should occur [emphasis added]; and
c) evaluation of whether, for those circumstances where it is determined that the factor should ultimately be included in the underlying Resource Assessment Study model (RAS), an interim adjustment should be made to a trial court's WAFM funding need pending a more formal adjustment to the RAS model.

(Memorandum included as Attachment C1 to October 26, 2017, FMS meeting materials, at p 2.)

It is true that the same memorandum goes on to note that the process detailed above may not be workable in all instances:

> The ARP presumes that proposals be made to change or alter the existing allocation methodology, WAFM. Currently, FMS in in the midst of reviewing WAFM to determine whether the formula should be updated or changed going forward. Since this work has not been finalized, it's currently impossible to review ARP requests against the funding formula in the way the ARP process envisions (although this process will be workable in the future once a funding model is finalized).

(Memorandum included as Attachment C1 to October 26, 2017, FMS meeting materials, at p 2.)

We would assume, however, that even if the specific steps articulated above are not directly applicable to a court's ARP, the FMS would nonetheless endeavor, in its public meetings, at least to adhere to the spirit of that process in evaluating requests made by the trial courts.

Unfortunately, however, this did not occur at either the October 26 or November 14 FMS meetings. Indeed, the Alameda ARP was not discussed at all at either meeting.[1] As FMS staff acknowledges in the memorandum attached as Attachment C1, Alameda's proposal had, as a key component, a change to WAFM that would "[a]llocate new funding in a way that would ensure that no court received less funding than the prior year . . . ." (Memorandum included as Attachment C1 to October 26, 2017, FMS meeting materials, at p 3.) We have referred to this interchangeably as the "hold harmless" or "no more cuts" model and, for reasons that we have repeatedly articulated, we believe that it is superior to the current "rob Peter to pay Paul" model under which certain courts are repeatedly cut to provide additional funding to others.

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[1] We note that the minutes from the October 26 FMS meeting, which were approved by FMS on November 14, give the incorrect impression that Alameda's ARP was in fact considered by FMS. Specifically, the minutes under the second bullet point of Item 2 note that "[s]ubmissions and letters were discussed in the context of the WAFM Decision Points." We interpret "submissions and letters" in that context as including Alameda's ARP, and we strenuously disagree with the characterization that that ARP was "discussed" by FMS in any meaningful way at the October 26 meeting.

Notably, at least one other large court—the Superior Court of Orange County—agrees with us, as that Court likewise submitted two separate documents requesting that FMS consider amending the allocation model to "hold all courts harmless from future reductions." (See letter included as Attachment C10 to October 26, 2017, FMS meeting materials, at p 2; written public commentary from the Superior Court of Orange County dated October 24, 2017, located online at http://www.courts.ca.gov/documents/tcbac-20171026-fms-publiccomment.pdf.) As with Alameda's ARP, Orange's request that FMS consider a "hold harmless" model was not addressed at the October 26, 2017, FMS meeting, despite the fact that the CEO of Orange, David Yamasaki, reiterated his court's request orally during the opening public comments that same day.

While we anticipated that some members of FMS might disagree with our proposal, imagine our shock and dismay when that subcommittee failed, on two separate occasions, even to discuss the concept. Rather, at the October 26 meeting the FMS discussion of how to proceed in "flat" budget years began at approximately 1:05 p.m. with the assumption already in place that there would be a funding "band" that would apply in those years. In other words, it appears to have been predetermined, outside of the public meeting, that FMS would move forward with a model under which some courts' budgets will continue to be cut so that other courts' budgets can be enhanced in "flat" budget years. The discussion that followed delved deeply into how often these cuts would recur, e.g., whether they would occur in every flat budget year. There was also some discussion about the appropriate size of the "band" that would determine which courts get cut and which courts get enhanced at their expense. And there was discussion about a potential percentage "cap" on those courts that will continue to get cut, such as Alameda, Orange, San Diego, San Francisco, and Santa Clara. There was not, however, any discussion about the "no cuts in flat years" proposals made by Alameda and Orange.

We were troubled by this omission, as we received multiple assurances over the past several months that any and all proposals submitted to FMS would be given full and fair consideration by the subcommittee. And while FMS appeared to indicate, at its November 14 meeting, that its charge was limited to considering "workload-based" alternatives or amendments to WAFM, we were never informed of such a limitation. In fact, we originally submitted an alternative to WAFM that was based not on workload, but on population; at no point were we told that such a model would be outside the scope of FMS's charge, and therefore not eligible for consideration. That point proved moot, however, because when we were asked if we would be willing to withdraw our population-based model in light of the limitations on staff resources, we agreed to do so. As we stated then—and as I said again at the October 2, 2017, FMS meeting—we agreed to withdraw our alternative model in reliance on good faith consideration being given to our "hold harmless" ARP. As I stated in October, we believe that the "hold harmless" alternative is critical if courts are not to be put at risk of being cut based on a "workload model" that uses unaudited and perhaps inconsistently reported data. Until such data can be verified through an

audit process to be reliable—a solution advocated by Judicial Council executive management at the October 26 FMS meeting—we strongly object to any "workload-based" model that relies on such data unless that model also includes the protection of a hold harmless provision, and we assumed that FMS would at least consider that concern in making its recommendation to TCBAC; it did not.

Perhaps even more disturbing than FMS's failure to consider our "hold harmless" proposal, however, is that fact that there was no meaningful discussion of the impact on access to justice of the model that FMS appears to have predetermined to recommend. This concern—that continuing to cut some courts to fund others will have a disastrous impact on access to the public served by the "donor" courts—was a significant factor underscoring Alameda's ARP. As we have repeatedly pointed out, while redistributing trial court funds via WAFM for the last five years may have improved access in some of the "recipient" courts, it has done so directly at the expense of greatly limiting access to justice in the "donor" courts. Courts like Alameda, San Francisco, and San Diego are, among other things, reducing clerk's office hours, furloughing staff, and making operational decisions that will increase wait and case processing times. The Budget Advocacy Grid that was handed out at the TCPAC/CEAC Executive Meeting on October 18, 2017, a copy of which is attached, supports this conclusion, showing urgent levels of funding need in the perennial "donor" courts for all manner of public access-related issues.

When WAFM was proposed to the Judicial Council in April 2013, the group then known as the Trial Court Budget Working Group explicitly stated, in its report to the Council, that WAFM would have two outcomes:

> The funding methodology proposed will result in a more systematic, transparent, and equitable allocation of trial court funding and address issues of disparities in court services for California's court users. Subsequently, *it will further the branch's commitment to provide equal access to justice for all Californians.*

(Emphasis added.)

Judicial Council staff has acknowledged that they also view "equitable access to justice" as one of "the two principal objections of WAFM." (See Report To Trial Court Budget Advisory Committee dated December 4, 2017, and included as Item 1 to November 14, 2017, FMS meeting materials, at p. 3.) Staff go on to note that some FMS members preferred to characterize access to justice as a "secondary objective" of WAFM, and that "policy decisions made concerning the funding methodology were not done explicitly to increase or change access to justice – the hope was that equalizing funding would in turn improve access to justice." (See *id.* at pp. 3-4.) Nothing in the April 2013 WAFM report itself, however, suggests that access to justice was a "secondary" objective, and certainly there is nothing to suggest that the Council

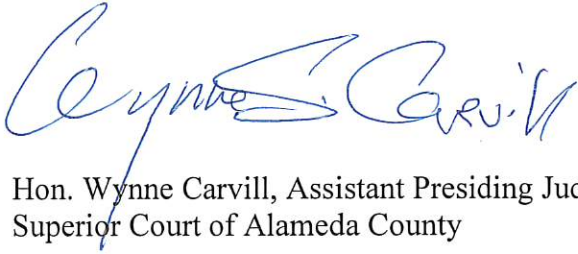
members who approved WAFM in April 2013 would have considered a significant reduction in access in the donor courts to be an acceptable outcome.

Further, the characterization of access to justice as a "secondary" concern does not appear to harmonize with the Chief Justice's strong public advocacy in support of her admirable "Access 3D" initiative. Given the prominence of Access 3D as the Chief's vision for our branch, we simply cannot believe that the Judicial Council's position is that it is acceptable to significantly cut access for some Californians in order to somewhat improve access for others. Further—and even if there is good faith disagreement over what was intended in April 2013—it is unfathomable to us that FMS did not even make a token consideration of access to justice issues at its October 26 and November 14 meetings, despite our explicit request that it do so. We would assume that considerations regarding limiting access to justice, particularly among our most vulnerable populations, would be a foremost consideration in the discussion of post-WAFM funding models.

It is difficult for us to understand FMS's decision not to consider our ARP. We realize that Alameda has been an outspoken court over the last year, and we acknowledge that we have not been hesitant about making our views regarding the current allocation model known. At times, we have been accused of allegedly not following proper processes and procedures in advocating for our point of view. We believe that we have always advocated respectfully, transparently, and within every appropriate venue afforded to us. Here, we have gone to great lengths to work firmly within the bounds of the processes approved by the Judicial Council, including the ARP process. And yet we are now confronted with FMS doing the very thing for which we have been castigated: not following approved procedure. We are, frankly, at a loss as to how to interpret this, as well as how to proceed with advocating for our position respecting future trial court allocations.

Like all of the trial courts, we are anxious to have a definitive answer to the question "What comes next after WAFM?" We too want to begin the modelling and fiscal planning that will be necessary if we all find ourselves in another year without meaningful new funding for the trial courts. Notwithstanding our desire for resolution, however, we do not feel that we can sit idly and allow our proposal not to be considered. Thus, we respectfully request that the members of TCBAC not approve the forthcoming recommendation of FMS, and that TCBAC instead insist that FMS schedule another meeting to give all courts' proposals complete consideration on the record before moving any recommendations on to TCBAC. To do otherwise will, we fear, greatly erode our and other courts' confidence in the process.

Yours Very Truly,



Hon. Wynne Carvill, Assistant Presiding Judge and Presiding Judge-Elect
Superior Court of Alameda County

cc: Hon. Morris Jacobson, Presiding Judge, Superior Court of Alameda County
Chad Finke, Executive Officer, Superior Court of Alameda County

Court	Reduce/eliminate backlogs for processing civil judgments.	Reduce/eliminate backlogs for processing criminal judgements, orders sealing juvenile records, probation transfers in/out, etc.	Reduce Family Court Services wait times for emergency custody orders and custody mediations	Restore hours for public access at clerk's office	Restore service hours at Self Help Center/Family Law Facilitator's Office	Restore case types in courthouses where they previously had been heard
Alameda						
Alpine						
Amador						
Butte						
Calaveras						N/A
Colusa						
Contra Costa						
Del Norte						
El Dorado		N/A				
Fresno						
Glenn						
Humboldt						
Imperial						
Inyo						
Kern						
Kings						N/A
Lake						
Lassen						
Los Angeles						
Madera						
Marin						
Mariposa						
Mendocino						
Merced						
Modoc						
Mono						
Monterey						
Napa						
Nevada						
Orange						
Placer						
Plumas						N/A
Riverside						
Sacramento						
San Benito						N/A
San Bernadino						
San Diego						
San Francisco						N/A
San Joaquin						
San Luis Obispo						
San Mateo						
Santa Barbara						
Santa Clara						
Santa Cruz						
Shasta						
Sierra						
Siskiyou						
Solano						
Sonoma						
Stanislaus						
Sutter						
Tehama						N/A
Trinity						
Tulare						
Tuolumne						
Ventura						
Yolo						N/A
Yuba						

Color Assignments
Indicates an "urgent" level of need.
Indicates a "high" level of need.
Indicates a "moderate" level of need.