

**REPORT ON TRIAL COURT GOVERNANCE
AND A PROPOSED PATH FORWARD**

**RESPONDING TO THE CHIEF JUSTICE'S
CALL FOR A STATEMENT OF PROBLEMS
AND SOLUTIONS CONCERNING BRANCH
GOVERNANCE AND THE AOC**

Prepared by a Committee of
Los Angeles Superior Court
Judges, at the Request of the
Presiding Judge of the Los
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INTRODUCTION

We are grateful that the Chief Justice, through the Presiding Judges of the trial courts, has provided the opportunity to seriously reflect on the problems facing the Judicial Branch of the State of California. We do not see an enumeration of problems as an end in itself. Rather, recognizing that many judges currently have a negative perception of the Judicial Council's and the AOC's performance, this report seeks to identify the reasons for these attitudes. Understanding the reasons for judges' negative perceptions will suggest solutions for strengthening and guiding those institutions.

The goal, as we see it, should be to seek a path forward for the Branch. State court funding has created a coherent and unified statewide system of courts. Trial courts are no longer part of county governments. In all 58 counties, justice and municipal courts have merged with superior courts, unifying into single courts of general jurisdiction. Some see unification and state funding as a stage in the inevitable centralization of the California judicial branch – the apex of court reform. By contrast, others see recent changes as having set the stage for a distinctive and new phase of evolution – one that builds a unified *and* decentralized system strong enough to guarantee judicial independence and flexible enough to accommodate the wide range of California's diverse needs.

We see the voices of dissent across the State as calling for progress toward this next stage – not for a return to the previous one. As discussed below, scholars of court reform endorse coordinated decentralization as the optimum structure for state trial court administration.

In this Report –

We first recognize the fact that a significant number of judges across the state are quite critical of the Judicial Council and the AOC.

Second, in order to attempt to understand the reasons for these negative perceptions, we articulate a set of principles by which most of us, as judges, would evaluate our Branch governance institutions.

Third, we set forth examples, based on reports from judges of our Court, of the ways in which the Judicial Council and the AOC have fallen short of adherence to these principles.

Fourth, turning to proposed solutions, we briefly examine the scholarship that suggests coordinated decentralization as the most effective organizational principle for a state trial court system.

Finally, we suggest four immediate steps to start a new path forward.

I. PERCEPTIONS OF JUDGES REGARDING BRANCH GOVERNANCE AND THE AOC

Prior to the Chief Justice's request for judicial input on Judicial Branch governance problems and solutions, the California Judges' Association (CJA) conducted a survey of its members, who are broadly representative of the judges of the State. Almost 900 members responded. While the survey was not a scientific poll, any fair reading of the results leads to the inescapable conclusion that a large number of judicial officers are dissatisfied with the current governance structure.

Sixty-two percent of the CJA respondents said they were generally or somewhat *dissatisfied* with the Judicial Council's oversight of the AOC. When asked if they were satisfied with the Judicial Council's governance of the Branch overall, only 29% said they were generally satisfied and 14% said they were "somewhat satisfied." A majority, 53%, said they were generally or somewhat dissatisfied. Nearly 80% said they were generally or somewhat dissatisfied with Judicial Council oversight of the CCMS project.

In response to the current request of the Chief Justice for input from judges concerning Branch governance and the AOC, Presiding Judge Edmon asked the judges of Los Angeles County to respond to an anonymous survey through an internet web service. A total of about 125 responses were received through the internet survey and about 10 others were communicated directly. The responses indicate that judges are seriously concerned about the effectiveness of Branch governance and the AOC. The responses strongly suggest that the confidence, support and "buy-in" essential to effective branchwide leadership is lacking.

The following two sections of this Report attempt to analyze the reasons for these negative perceptions. In the next section, we articulate a set of principles that, we believe, most judges would expect to guide the persons and entities that make decisions affecting the Judicial Branch. Thereafter, we provide examples, gathered from the judges of Los Angeles County, of ways in which the Judicial Council and the AOC have not acted according to these principles.

II. PRINCIPLES OF DUE PROCESS, REPRESENTATION, ACCESS, FAIRNESS AND TRANSPARENCY MUST GUIDE BRANCH GOVERNANCE

Every day judges in their own courtrooms make decisions according to the rule of law. The court procedures they enforce permit parties to gather and present relevant information to a neutral decisionmaker and allow each side's arguments to be heard. Judges do their work in a public setting and their decisions are expected to reflect a reasoned analysis. Judges are proud of the work they do and strive for professional excellence.

We believe that judges do, and should, expect the Judicial Branch to be governed by the same principles that shape judges' work in their courtrooms. In the following paragraphs we briefly identify the most important of these principles:

Adherence to law should be expected. Judges are required to decide cases according to the statutes, rules and case authorities that are binding on them, regardless of the personal preference of the judicial officer. Judges should expect that governing bodies of the Judicial Branch and the AOC similarly adhere to the rules that have been adopted to define the reach of their authority.

Decisions should be based on an opportunity to consider all relevant facts. In litigation, discovery and other procedures level the playing field by making relevant information available to all parties. Similarly, those charged with making decisions for the Branch should have all of the information required for a thorough evaluation of any issue presented.

Decisions should be made after affected parties have an opportunity to be heard. Fundamental fairness requires hearing from both sides. Decisions for the Branch should be made only after all views of those who will be affected by the decision have been considered.

Deliberation should be based on candid, collegial communication. The expectation of collegiality in the appellate process is a model for group decision making. Judicial Council deliberations and interaction between judicial officers and the AOC should be open and collegial. Judicial Council members should be encouraged to communicate with judges, and judges should feel that Council members are responsive to their points of view.

Decision making should be transparent. Courtroom proceedings, with very limited exceptions, are open to the public. Judges are expected to articulate a reasoned basis for their decisions. Decisions affecting the Branch should take place in a similarly transparent environment.

The independent adjudicatory function of the courts should be primary. Branch governance institutions should assist the trial and appellate courts in their adjudicatory functions. Judges understand that, in judicial decision making, they cannot act to favor their own interests or the interests of any particular person or group. Similarly, judges expect that the principal function of the Judicial Council and the AOC is to assist the courts so that judges can perform their core, primary function: adjudicating the disputes within their jurisdiction.

Accountability for stewardship of funds should be expected. The integrity of the court system absolutely requires that funds entrusted to the Branch be used prudently and for duly authorized purposes.

The court system should strive for excellence. Just as judges take pride in striving for professional excellence, court operations should perform at a high level of excellence.

With these principles as a guide, we turn to a review of past functioning of the Judicial Council and AOC.

III. EXAMPLES OF THE MANNER IN WHICH THE JUDICIAL COUNCIL AND THE AOC, IN THE PAST, HAVE NOT ACTED IN ACCORD WITH PRINCIPLES THAT SHOULD GUIDE BRANCH GOVERNANCE

The goal of this analysis is not criticism for its own sake. Rather, we seek (1) to shed light on the reasons for judges' perceived lack of confidence in the Judicial Council and AOC and (2) to provide a basis for recommending a way forward. With this in mind, we address below examples of problems in three areas: Judicial Council decision making; Judicial Council oversight of the AOC; and AOC operations.

These examples and observations are based on the personal experiences of judges of the Los Angeles County Superior Court. While some of the examples are reflected in responses to the internet survey of judges, other examples have been supplied directly to the authors of this Report.

Many of the examples below involve failures to adhere to multiple principles. The problems are difficult to categorize, because the specific examples often demonstrate shortcomings in both the operations of the Council and the operations of the AOC. One theme that emerges, however, is the overwhelming sense that AOC staff, under prior leadership, has felt that it could do whatever was required to reach a certain presupposed result, regardless of the means employed to reach those ends. Governance of the Branch should be based on a stable system of principles and rules, not the force of the personality of the day. It is not surprising that judges, both rationally and instinctively, resist being manipulated to a predetermined result.

A. Judicial Council Decision Making

(1) Judicial Council deliberations have not encouraged candid, collegial communication. To the contrary, Council members have felt ignored or subjected to ridicule when attempting to express dissenting views.

- At a public Council meeting, a judge who served as an advisory member of the Council stated that he believed there should be greater oversight of the AOC.

At that public meeting, AOC staff criticized this judicial member's position as being "wrongheaded."

- At a public Council meeting, a Council leader referred to judges who had been publicly taking a position adverse to the AOC as "clowns."
- At a Council meeting, a Council member stated that there had not been sufficient notice of a particular agenda item. This member abstained from the vote, stating that he personally was in favor of the motion, but that there had been insufficient notice to allow affected persons to be heard. In the Council's public meeting, this member's views were called "stupid" by a Council leader. The Council member who abstained was not reappointed to the Council's Executive and Planning Committee.
- At an issues meeting of the Council in approximately 2008, Justice Chin and AOC staff made a presentation about the technological goals of CCMS. At the outset of this presentation, Chief Justice George told members of the Council that he "did not want to hear any discussion of slowing down CCMS."
- In 2008, four members of the Council, from three counties, worked together to outline modest and constructive steps that the Council could take to "achieve judicial officer and individual court buy-in" for Council and AOC initiatives. These four Council members met with the Administrative Director and presented a written summary of their assumptions and suggestions. The Administrative Director was grim and non-communicative. Later he termed the proposals "insulting." Despite further polite requests that these views be considered, there was neither change nor further discussion of the suggestions. (The proposal presented by these four Council members is Attachment B hereto.)
- In June 2009, at a two-day Judicial Council planning meeting, only one time segment was set aside for discussion among Council members. Council members were to discuss specified topics in groups that also included AOC staff. The group discussions were facilitated by an outside consulting firm.
In one such "breakout group" several Council members raised constructive questions about the direction of certain AOC and Judicial Council policies. The consultant who moderated the group resisted writing down those comments.
Although time remained for discussion of the results of the small group sessions, the discussion was cut off. The session leader promised that the groups' comments would be typed up and distributed – but that was not done.

(2) In significant matters, the Judicial Council has not shown concern for compliance with the law and its own governance policies.

- Article VI, section 6(d) of the California Constitution provides that, "the council shall survey judicial business, make recommendations to the courts, make

recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute.” Despite these limitations, the Council has directed trial courts take certain actions without rulemaking and without analysis of the Council’s authority. For example, the Executive and Planning Committee, purportedly on behalf of the Council, directed the Sacramento Superior Court to cease its efforts to host its own database, when that Court had difficulties with the out-of- state service center engaged by the AOC. Moreover, no Council vote pursuant to Government Code section 68508 ever was taken with respect to that directive.

- The Council in 2007 and 2008 went through an elaborate process to draft new Governance Policies. These policies are referred to in California Rule of Court 10.1(a)(3) and are published as Appendix D of the California Rules of Court. The last paragraph of subpart I.A.6 of the Governance Policies states that the Administrative Director is to report yearly to the Council on “actual expenditures” in the budget of the AOC. To the best of our knowledge, such reports have never been made.
- One of the underlying principles of the “Carver model” of corporate governance, on which the Council Governance Policies are based, is regular review by the Council of the performance of the Administrative Director. Subpart II.C. of the Governance Policies states that the Administrative Director is “accountable to the council and the Chair” for the performance of the AOC and that the Administrative Director is to report to the Council at least once annually on progress toward the Council’s goals. To the best of our knowledge, the Administrative Director has never reported to the Council on the overall performance of the AOC or on progress toward the Council’s goals.
- California Rule of Court 10.57 provides for a Judicial Service Advisory Committee to make recommendations for improving judicial service, retention and compensation. Subsection (c) of the Rule specifies that membership of the Committee shall consist of judicial officers, court executives and one retired judge. In August 2007 that Committee ceased to exist. Subsequently, the Administrative Director himself formed a “Judicial Recruitment and Retention Working Group,” with a Regional Director of the AOC (not a judge or court executive) as Chair of this “Working Group.”

(3) Decisions of great importance have been made by the Executive and Planning Committee rather than by the Council. Such delegation avoids transparency of decision making, accountability and an opportunity for affected parties to be heard. E&P also has established de facto rules for Council membership which tend to suppress consideration of varying viewpoints.

- Until 2009, the Executive and Planning Committee, by itself, approved the AOC’s proposed allocation of the monies in both the Trial Court Improvement

Fund and the Modernization Fund. No report was made to the Council prior to these allocations, which together could total as much as \$190 million in a particular year. It also was not discussed with the Council that (1) allocations of these funds were not approved until the middle of a fiscal year; (2) it was unlikely that all allocated funds could be spent before the end of the fiscal year; and (3) funds that were unspent at the end of the fiscal year could be reappropriated by the AOC. Thus, this delegation of authority to E&P not only avoided public scrutiny by the Council, but also created a mechanism by which funds that were to serve the needs of the trial courts were placed within the control of the AOC.

- The Executive and Planning Committee sets the Council agenda. While this might be an appropriate function for a Committee of the Council, E&P does not seek input from other Council members as to appropriate matters for consideration by the Council.
- The Executive and Planning Committee screens applicants for appointment to the Council and to Council Advisory Committees. The Chief Justice may not appoint persons who fail to survive this screen. While making recommendations about Council membership might be an appropriate function for a Committee of the Council, there is the perception that E&P has used this power to screen out persons who might insist on closer scrutiny of Council and AOC actions. E&P has created de facto criteria for Council membership. Applicants ordinarily must have served on Advisory Committees. This requirement permits AOC staff to evaluate the applicant's level of support for AOC initiatives. In addition, E&P has articulated a rule that Presiding Judges are not eligible for Council membership. However, this supposed rule has been ignored for certain Presiding Judges who are viewed as favorable to AOC initiatives.

(4) Council members lack sufficient opportunity to talk directly with each other without being "overseen" and managed by staff. Opportunities for debate are minimized. Council members' opportunities to hear directly from fellow judges are minimized. Flow of information to the Council is carefully controlled. Thus, opportunities for candid, collegial communication are minimized, Council members are not exposed to all relevant facts and they do not hear from affected parties.

- At the time the Council's current Governance Policies were being drafted, AOC staff proposed that the *staff* of an Advisory Committee, rather than the bench officer who chaired the Committee, should make presentations to the Council regarding Committee recommendations. This proposal was withdrawn only after the Chair of E&P insisted that judges who chaired Advisory Committees should communicate directly with the Council. (Nevertheless, as discussed below, AOC staff to Advisory Committees attempt to control Advisory Committee deliberations and outcomes.)

- Although Council members have suggested that a portion of each issues meeting be set aside for Council members to be able to address each other directly, the suggestion was rejected. There is no opportunity for Council members to discuss items that might be included on future Council agendas. Council members never meet without staff. There is no opportunity for Council members to discuss openly with each other issues concerning AOC operations.
- No agenda for issues meetings is provided to Council members until shortly before such meetings. No materials for issues meetings are provided before the meetings. Issues meetings most often are scripted presentations. Because Council members often do not have advance notice of the topics to be covered at issues meetings, or materials to consider in advance, Council members are not able to prepare for meaningful discussion of the issues presented.
- The principal means for trial courts to have direct input into the statewide budget process is through the Trial Court Budget Working Group. However, that Working Group reports to the Administrative Director, not to the Council. Insofar as that important Working Group has any input into Council deliberations, representations are made by AOC staff as to the views of the Working Group.
- Presentations made at Council meetings usually are made from predetermined scripts. Presentations on issues of importance or controversy typically are organized to analyze only reasons supporting the recommended action.
- Written information that is provided to Council members comes in thick binders provided to Council members on a schedule that allows insufficient time to consider important issues. Lengthy materials are provided on topics that are only of symbolic importance, distracting attention from issues on which there might be important interests to be considered. Materials concerning issues of greatest significance, particularly on financial matters, are provided only days or hours before the Council meeting, and sometimes only at the beginning of a Council meeting or during the meeting itself.
- Council meetings are held infrequently, are short, and are organized to rush through discussions. Significant portions of Council meetings are devoted to reports on routine activities and to lengthy presentations that are of symbolic importance but are not part of the deliberative work of the Council.
- Because judicial officers have not felt that they have available and responsive mechanisms for input into Council deliberations, some judicial officers have requested to speak to the Council as a “member of the public.” (*See* CRC 10.6(d).) These judicial officers have been subjected to the restrictions that would apply to a member of the general public who wishes to speak to the Council, including being required to provide a script of what they intend to say

before being permitted to speak. Moreover, the Executive and Planning Committee flatly denied one judge's request to address the Council.

B. Judicial Council Oversight of the AOC

(1) The Judicial Council has failed to follow its own rules requiring oversight of the AOC. As a result, proper stewardship of Branch funds has been overlooked, and standards of excellence have not been set or measured.

- California Rule of Court 10.80(b) provides that “the Administrative Director is accountable to the council and the Chief Justice for the performance of the Administrative Office of the Courts.” The performance of the Administrative Director never has been reviewed by the Council.
- As discussed in section II.A.(2), *supra*, the Council also has failed to oversee the AOC budget as required by the Governance Policies.
- The failure to oversee the AOC budget has allowed the AOC to grow and to take on new functions without full, deliberative consideration by the Council of (1) the desirability and appropriateness of those functions and (2) the quality and cost-effectiveness of those functions.

(2) The Judicial Council has failed to oversee the conduct of the AOC with respect to the Judicial Branch legislative agenda. The AOC has been allowed to contravene the Rules of Court regarding the Branch legislative agenda. This failure of oversight also has circumvented opportunities for the Council to consider all relevant facts and to hear affected parties.

- Rule 10.12(a) of the California Rules of Court provides that the Policy Coordination and Liaison Committee of the Council is responsible for “[t]aking a position on behalf of the council on pending legislative bills, after evaluating input from” Advisory Committees and the AOC. However, AOC staff has taken positions on important legislation without approval by the PCLC.
- AB 109, recently passed by the Legislature and signed by the Governor, transferred all parole review functions to the Judicial Branch, a massive and unprecedented shift of Executive Branch responsibility with the potential to overwhelm trial court operations. Although AOC staff had been alerted months before to the potential transfer of these functions to the Judicial Branch as part of the Governor's overall realignment plan, AOC staff did not bring this issue to PCLC until days before the legislation passed.
- AOC staff drafted and “floated” to the Legislature a proposal to remove the selection of Presiding Judges and trial court CEOs from the control of the local courts. When this legislative proposal came to light, AOC staff incorrectly

contended that the Department of Finance had made the proposal. PCLC never was consulted on the proposal.

- After the release of the CCMS audit authorized by the Legislature, the Council waited almost two months before meeting to discuss the findings. Prior to the Council having had an opportunity to discuss the audit findings, AOC staff made numerous statements in reaction to the audit and testified before a legislative committee.

(3) The Council has not insisted on a complete business case analysis for significant initiatives undertaken by the AOC. Thus, decisions have been made without affected parties having had an opportunity to be heard, accountability for stewardship of Branch funds has been avoided, and court operations have not been supported consistent with standards of excellence.

- The Council Governance Policies (subsection I.A.3) require that policy proposals submitted to the Council should address, *inter alia*, costs, benefits and risks, and alternative options. For the most part, this analysis has been presented only in a cursory manner, especially with respect to long-term expected costs and alternatives.
- At its December 14, 2010 meeting, the Council received a report from AOC staff recommending the allocation of approximately \$87 million from the Trial Court Trust Fund plus an additional \$55 million from Special Funds for “statewide technology infrastructure” projects. A substantial portion of these funds were to be used for development of CCMS. In the section of the Council materials entitled “Alternatives considered and policy implications,” the staff wrote, “None.” Given the controversy and concerns surrounding CCMS at the time, there certainly were alternatives and policy implications for the Council to consider. Staff’s representation that there were “none” was incorrect and a disservice to the Council.
- When the Council Governance Policies were being considered, a Council member proposed that the Policies provide for a complete business case analysis before initiatives requiring an on-going, significant investment of Branch funds would be undertaken by the AOC. This proposal was strongly opposed by the Administrative Director, and only two Council members voted in favor of it.
- A business case analysis for major infrastructure projects has not been considered by the Council before making major, long-term commitments.
- The Council Governance Policies (subsection II.C) provide that when AOC projects or programs “require more than one year to complete, the Administrative Director will report back to the council at regular intervals on status and significant developments.” Insofar as the Administrative Director did present information to the Council with respect to CCMS, such presentations did not

permit the Council to identify the concerns that now have been acknowledged with respect to the CCMS program and its funding. The Administrative Director does not make yearly reports on the status of ongoing AOC projects and programs.

(4) When Committees are formed to oversee AOC operations, they have not operated independently of the AOC. Consequently, such Committees do not consider all relevant information and opposing views or ensure a thorough review of AOC stewardship of Branch funds.

- The Council has allowed the Administrative Director to appoint or to influence significantly the selection of persons for committees that have oversight over AOC responsibilities. One example of this practice is the CCMS oversight committee.
- When the Accountability and Efficiency Committee was created, the Administrative Director was given authority to bring matters to the Committee for their review, while individual Council members and individual Committee members were given no such authority. This Committee, charged with holding the AOC accountable, was staffed by the AOC.

C. Performance of AOC Operations

(1) AOC staff often take over the management of court committees in a manner that diminishes judicial input. In those instances, committee recommendations may not take into account relevant facts and committee deliberations do not respect the primacy of the Branch adjudicatory function.

- The Court Technology Committee undertook an extensive study, led by judges, to recommend how CCMS should be structured. The Committee then was informed by AOC staff that the contract for CCMS had been let with no input from the Committee.
- The Access and Fairness Committee was tasked with studying the appropriate position of the Branch on membership in the Boy Scouts or any other association having a stated policy of discrimination against homosexuals. After months of work and comments from the Bar and judges, the Committee was about to release its recommendation and report to the Council. AOC staff then told Committee members that their report would not be forwarded to the Council.
- AOC staff decided not to list the judicial members of the governing committee of the Continuing Judicial Studies Program on materials announcing CJSP programs; not to announce who was teaching the courses; and not to provide a list of CJSP attendees. AOC staff stated that these actions were taken because of a restricted budget. These actions undercut opportunities for judicial collegiality

and downplayed the contributions of judicial members of the CJSP governing committee. (Subsequently some of these policies have been reversed.)

- A member of the Judicial Council Ethics and Fairness Education Committee states: “If [the Committee] is at all representative of the [Judicial Council] committees, it is not very effective – just a rubber stamp for AOC staff. It met telephonically a few times last year to establish curriculum policies. I have no idea what became of the work we did.”
- Many judges who have served on statewide Committees, such as Civil and Small Claims Advisory Committee, complain that voluminous material prepared by staff reach committee members too late to adequately prepare for meetings. (The experience of judges who have served on the Judicial Council Advisory Committee on Civil Jury Instructions demonstrates that it is possible for AOC staff to provide excellent and timely support for Committee members’ deliberations.)
- Judges who have participated on statewide committees have observed that AOC staff attempts to control committee membership so as to direct the work of these groups toward results favored by staff. As one example, a member of an Advisory Committee describes that s/he and another judge had volunteered to serve on a subcommittee to address a developing area of criminal law. They were excluded from the subcommittee and believed that this represented an attempt to exclude their views.

(2) AOC staff lacks expertise in court operations. Staff also has displayed a lack of respect for the contributions of judicial officers. Thus, branch governance institutions do not appropriately respect the independent adjudicatory function of the courts or adequately assist the trial and appellate courts in performing this function.

- Very few AOC staff have had actual courtroom administrative experience. Although suggestions have been made to the Administrative Director to rotate AOC staff through trial court operations, this has not been done.
- A former Chair of RUPRO has commented that, during RUPRO deliberations, judicial views on rules proposals often seemed to be disrespected by AOC staff.
- A high level AOC executive commented seriously that he doubted Advisory Committee Chairs were “up to” the task of making reports to the Judicial Council.
- Judges who have served on statewide committees often state that they feel treated like “window dressing” – used so that AOC staff can say that judges have been consulted.

(3) *The AOC does not operate with appropriate business expertise, analysis and controls. This undermines Branch excellence and accountability.*

- The independent CCMS audit points to embarrassing inadequacies in AOC planning and oversight.
- The AOC has not adequately planned to ensure that resources are available to maintain court facilities taken over by the Branch.
- As discussed in section B(3) above, the AOC has resisted application of business case analysis when undertaking major initiatives, and has failed to fully assess costs, benefits and risks, and alternative options in its decision making.

D. Concluding Remarks Concerning These Examples

We are aware that the foregoing presents a negative assessment. It is appropriate to recognize that many AOC staff are talented and truly believe that they are acting to create a better system of justice as they see it. However, an independent judiciary does not serve constituencies – judges are charged by their oath to follow the law and the Constitution without regard to how their decisions may please or displease certain groups. Until court governance and administration act in accordance with principles that judges accept – adherence to law, opportunity to be heard, candor, collegiality, transparency, accountability and respect for the judicial office – there will be widespread judicial dissatisfaction with Branch governance.

IV. THE SCHOLARSHIP OF RECOGNIZED EXPERTS SUPPORTS CONSIDERING CENTRALIZATION AS A STEP TOWARD THE GOAL OF COORDINATED DECENTRALIZATION

In planning for the next phase of California court governance, it is appropriate to focus broadly on what can be learned from the experience of others. According to Robert Tobin, a scholar who is recognized as the architect of the modern court reform movement, “[i]t is a truism that you have to centralize in order to decentralize rationally.” (Robert Tobin, 2004, Creating the Judicial Branch: The Unfinished Reform.) Work done over the past few decades by the National Center for State Courts (NCSC) and the Institute for Court Management (ICM) supports the conclusion that centralization is a means to achieve rational decentralization, rather than an end in itself.

Throughout the seventies and eighties, organizations in the for-profit, non-profit and public sectors all have made the same discovery: coordination, efficiency and effectiveness can be best achieved through decentralized management. Scholars from the NCSC and the ICM have consistently recognized the relevance of these findings for court administration.

Geoff Gallas, formerly Dean of ICM, has observed that hierarchical centralization ignores the fact that courts are necessarily intertwined in complex and diverse relationships in their local justice systems. Gallas concludes that: "Negotiation, consensus and compromise, rather than power, are the essential instruments of management in [the courts'] environment." (Geoff Gallas, "The conventional wisdom of state court administration," *Justice System Journal*, 1976, v. 2 at 23.) Professor David Saari (who ran one of the two major judicial administration programs in the nation, at American University) agrees that trial courts are better managed by an "open systems" perspective that rejects the approach of bureaucratic centralization. (Saari, "Modern court management," *Justice System Journal*, 1976, v. 2 at 19.)

In the 1980s, Donald C. Dahlin, an ICM fellow and professor of American government and constitutional law at the University of South Dakota, observed that judicial independence could be threatened by bureaucratic constraint, even if that bureaucracy is itself within the judicial branch. For this reason, he argued that courts' own administrative capacity "must be structured in such a way as to provide a strong central authority but an authority that encourages widespread participation in the making of major decisions and widespread decentralization and delegation in the operation of the court system." (Donald C. Dahlin, *Models of Court Management*, 1986, at 101.)

Robert D. Lipscher (then the Administrative Director of the New Jersey Courts) and Samuel D. Conti (formerly the Administrative Director of the Illinois Courts) characterize this model as "coordinated decentralization:" a "balance between centralized and decentralized operations; innovative ways to network and link the entire organization together both vertically and horizontally; new approaches to judicial governance; and above all, increased sensitivity to participative leadership and consensus building as a basis for policy development and action." (Robert C. Lipscher and Samuel D. Conti, "A post-unification approach to court organizational design and leadership," *Justice System Journal*, 1991, v. 15, no. 2, at 668.) In this administrative mode, "post-unification judicial leaders are now reshaping the role of AOCs from traditional regulatory agencies to service organizations with trial and appellate courts as their clients." (*Id.* at 672.)

Support for this model recently was reaffirmed in California by the TCPJAC/CEAC Joint Working Group on Presiding Judge and CEO Roles and Rules. The Working Group, a cross-section of California PJs and CEOs, recognized that the concept of coordinated decentralization affirms the need for uniform court rules. The Working Group summarized their views on statewide governance through the words of Chief Justice Edward Pringle of Colorado, from his 1971 address to the National Conference on the Judiciary:

Administration, in my view, must be decentralized as much as possible. But decentralization does not mean that each judge may administer his court at will. Trial courts must operate under delegated authority, in accordance with accepted principles which lead to the efficient and economical administration of justice. No system, no matter how well

designed, will function properly without the cooperation of the trial bench. To achieve this cooperation, the chief justice and administrative office must go out of their way to demonstrate their understanding of and sympathy for trial court problems.... (Straub and Associates, *Framing the Issues: A Background Report of Conditions for the PJ/CEO Rules and Roles Analysis Project*, California Administrative Office of the Courts, June, 2009, 7-8)

The Working Group thus joins a decades-long rejection of top-down bureaucratic administration, in favor of more participative structures for state court administration, while preserving the value of uniform court rules.

The current judicial expressions of dissatisfaction with the status quo reflect the recognition of many judges that California is uniquely situated to avoid both the problems of uncoordinated localism and the problems of stifling centralization. In a state where the population of the smallest county is 1,000 and that of the largest county is 9.8 million, a one-size-fits all, centralized approach can never work. Rational decentralization, adapted to the diverse circumstances of this large and diverse State, is essential. Having achieved a solid foundation of unification, it is time for the Branch to progress toward a system of coordinated decentralization.

V. THE BRANCH SHOULD TAKE FOUR STEPS IN THE SHORT RUN TO START A NEW PATH FORWARD

Any comprehensive list of proposed solutions to the problems outlined in section III. of this report would be lengthy. Attachment A to this Report is an attempt at a thoughtful compilation of solutions. Although we believe that many judges would agree with most of the solutions in this compilation, there is no doubt that any one of us might disagree with one or more of the proposals. Additionally, if we are to embark on a more pluralist approach to Branch governance, proposed solutions should be widely vetted.

More importantly, a comprehensive list of proposed solutions is daunting. One rightfully could ask where logically to begin a process of reform, even if one is convinced that reform is necessary.

For this reason, we have undertaken below to suggest four “next steps.” These “next steps” are not intended as exclusive nor as a substitute for the reforms identified in Attachment A, which should be thoughtfully analyzed and considered.

STEP 1. Adopt the 2006 KPMG recommendation that the AOC be headed by a Chief Executive Officer (CEO) and a Chief Operating Officer (COO).

STEP 2. Define the roles of CEO and COO as follows:

CEO: A judge or retired judge of the California courts who is recognized as a leader and consensus-builder.

The CEO would ensure that the AOC serves the policy direction set by the Chief Justice and the Council.

The process for selection of the CEO should be designed to seek a person who can be successful in meeting the following goals, and performance of the CEO would be evaluated by the Judicial Council yearly against these goals:

- a. Ensuring that the work of the AOC serves the adjudicatory function of the trial and appellate courts and respects the constitutional officers' responsibility to serve the public in their defined judicial roles.
- b. Ensuring that the AOC staff appreciate that their function is to assist the trial and appellate courts, not to displace the judgment of the bench officers or to impose the views of staff.
- c. Creating mechanisms for seeking meaningful, thoughtful and honest input from judicial officers with respect to any policy or initiative. Decisions should be made openly and explained fully. Recognizing that one cannot always create consensus, the CEO as leader must be pro-active in explaining that dissenting views have been taken into account and in continuing to invite input as the decision is implemented.
- d. With the Chief Justice and the Council, determining the appropriate scope of centralized powers in the Branch and moving toward rational decentralization. The process should seek within a reasonable time to clearly define the functions that will be done centrally, whether those functions will be done centrally for some or for all courts, and the functions to be decentralized or to remain with the trial courts.

COO: A leader who has the skills to oversee business operations within a judicial branch setting.

The COO would ensure that the AOC performs, within the limits set by the CEO in collaboration with the Chief Justice and the Council, in a manner that ensures a high level of excellence.

The process for selection of the COO should be designed to seek a person who can be successful in meeting the following goals, and performance of the COO would be evaluated by the Judicial Council yearly against these goals:

- a. Presenting reliable cost-benefit analyses in support of any major enterprise or infrastructure initiative.
- b. Operating with transparency and accountability vis-à-vis the Council and the Legislature.
- c. Planning to ensure that funding meets the needs of the Branch.
- d. Ensuring that AOC staff are properly trained to understand the primacy and nature of the Branch's adjudicatory function; cross-training AOC staff in courtroom operations.
- e. Making an operational plan for the AOC to fit its functions to the actual needs of the Branch.
- f. Planning administrative operations consistent with a template for coordinated decentralization, as defined by the CEO in conjunction with the Council and the Chief Justice.

STEP 3. Conduct a statewide search for the CEO and a nationwide search for the COO, assisted by an independent, well-recognized executive search firm.

As stated above, the CEO should be a judicial leader from this State. The COO position will require a nationwide search.

STEP 4. Ensure that the Judicial Council serves its Constitutional function and works with the Chief Justice to assist the trial and appellate courts in their work.

In the *short run* this would require:

a. Selecting Judicial Council members in a manner that ensures the Council consists of recognized Branch leaders who are representative of the judiciary and who have the confidence of their peers. Council members should be judges or justices who have demonstrated that they are recognized leaders of their peers, not persons who have distinguished themselves only by having previously been appointed to statewide committees.

b. Authorizing the Council to hire for itself a small staff of highly qualified persons, separate from AOC staff, to advise the Council in its policy functions and in its oversight of the AOC.

ATTACHMENT A

IDEAS FOR IMPROVING BRANCH GOVERNANCE AND AOC OVERSIGHT

Judges have expressed a variety of ideas for improving Branch governance and AOC oversight. The following is a list of some of those ideas; this is not meant to be an exhaustive compilation. It should be emphasized that discussion and vetting of proposed solutions are important parts of a reform process.

Governance

1. All judicial members of the Judicial Council should be selected in a manner that ensures broad democratic representation.
2. The scope and limits of the Judicial Council's lawful authority should be precisely defined in writing. The definition should include, among other things, an express statement that the Judicial Council does not govern courts - trial, appellate or supreme. Existing policy documents and Rules of Court inconsistent with the resultant definition should be revised.
3. All requests and recommendations for Judicial Council action should be required to state the jurisdictional basis for the action requested or recommended.
4. The authority of the Executive and Planning Committee to act without prior Council approval should be defined precisely, and doubt as to such authority thereafter should be resolved against its exercise.
5. The Judicial Council should establish an Audit and Finance Committee made up of Judicial Council members appointed by majority vote of the Judicial Council. The Committee's staff should include at least two independent persons not associated with the AOC: one fully conversant in government finance; and one expert in auditing government entities.
6. All Branch initiatives requiring substantial, long-term funding and other resource commitments should be supported by an analysis addressing, at a minimum: benefits expected; projected costs and cost savings; critical assumptions; assessments of risk; reasonable alternatives; interested stakeholder positions; impacts on existing operations and organizations throughout the Branch; timing and schedule; management and governance of the initiative; and, where practical, measurable outcomes for assessing success. The Judicial Council should be required by rule to publicly debate and vote on each such initiative. Subsequent status reports on approved initiatives should include a discussion of any significant changes in factors that have occurred since the last report.

7. The practice of routinely supplying Council members with crucial or potentially controversial written materials only at the last minute must end. Specific deadlines for providing materials to Judicial Council members should be instituted.
8. A thorough and independent analysis should be required each time Judicial Council approval is sought for a program or procedure centralizing functions under AOC control. The analysis should include a full discussion of alternatives for preserving local control, and it should account for possibilities that preserving local control could be more efficient, less costly, more productive, more innovative, and/or more responsive to local public needs than the proposed centralized solution.
9. The Judicial Council should be required by rule to allow any active judicial officer a fair and reasonable opportunity to address the Council in public session on request. No person should be required to submit a script before addressing the Judicial Council or any other administrative body of the Branch. Notice and opportunity to be heard must be guaranteed as an inviolate Branch governance policy.
10. Term limits should be considered for Judicial Council members, Council committee chairs, and advisory committee chairs.
11. Because of the complexity and number of issues that must be considered and decided by the Judicial Council, its meetings should be more frequent and/or longer.
12. Every Judicial Council issues meeting, and every committee meeting staffed by the AOC, should include a segment that permits members to discuss subjects of interest without AOC staff present.
13. The Council should be authorized to hire for itself a small staff of highly qualified persons, separate from AOC staff, to advise the Council in its policy functions and in its oversight of the AOC.

Oversight

14. The scope and limits of the AOC's lawful authority should be defined precisely in writing.
15. The AOC should be headed by a Chief Executive Officer (CEO) and a Chief Operating Officer (COO)

16. The primary direct reporting relationship of the head of the AOC to the Judicial Council should be precisely defined in writing, and any exceptions (*e.g.*, where he or she reports directly to the Chief Justice rather than the Judicial Council) should be explicitly stated. The Judicial Council should thereafter fulfill its proper role as the primary supervisor of the head of the AOC.
17. The Judicial Council should be required by rule to conduct annual, comprehensive, formal performance reviews of the head of the AOC.
18. The Branch should reevaluate the merits of the Carver non-profit governance model in light of past experience with using that model for structuring Judicial Council oversight and governance policies.
19. Staffing of the Accountability and Efficiency Committee should be entirely independent of the AOC.
20. Only the Judicial Council should appoint members of committees or groups charged in whole or in part with AOC oversight responsibilities.
21. The fundamental right of local trial court consent for spending TCTF and related trial court funds on statewide initiatives should be expressly reaffirmed.
22. Neither the head of the AOC nor AOC staff should be permitted to appoint any judge or commissioner to any AOC or other committee. Further, the head of the AOC should not be permitted to appoint any local court staff to any AOC committee or other activity without first obtaining approval from that person's local presiding judge.
23. The Judicial Council should annually publish a statement of: (1) fund balances held by the AOC; and (2) the sources, amounts and purposes of any funds paid to any trial court above those originally allocated by the Judicial Council. The annual statement, covering the immediate preceding fiscal year, should be published in December of each calendar year.
24. The Trial Court Budget Working Group should be reconstituted with a local presiding judge serving as chair, and the Group should not be managed as an entity of the AOC. While the Group may be staffed by the AOC, it should report directly to the Judicial Council and not to the head of the AOC or through the AOC Director of Finance.
25. Committees that include judges as members should be chaired only by judges, not AOC staff.

26. AOC staff should be precluded from taking any position on legislation that has not been approved by the Council or by its authorized Committee.
27. The Judicial Council should receive and approve a detailed budget for the AOC.

ATTACHMENT B

PROCEDURAL FAIRNESS AND COURT LEADERSHIP – UNITY OF VOICE

- A. The Issue:** How to achieve judicial officer and individual court buy-in for the initiatives of centralized court leadership so that we speak with one voice.
- B. The Problem:** Some judicial officers and individual courts do not feel they have an effective voice in branch-wide decision making.
- C. Underlying Assumptions:**

1. Effective judicial branch leadership requires judicial officer buy-in. Not only is it a truism that to lead means others must follow, but the buy-in of judicial officers is particularly critical given political exigencies (speaking with one voice vis-a-vis other branches), the heavy reliance of the branch on the individual contributions of many judges (task forces, advisory committees, teaching, etc.), and the fact that justice is delivered through appearances before these judicial officers. From the standpoint of effective leadership, “speaking with one voice” cannot be demanded – it must be earned.
2. The Judicial Council and AOC leadership share a deep desire to do the right thing, to achieve the lofty goals of equal access and justice for all, and to be the best stewards we can of our system of justice.
3. The Judicial Council, with constitutional mandate, is the policy-making body for the judiciary. It must reflect and be a voice for the responsibility that the constitutional officers of the Judicial Branch have to ensure that they can perform their constitutional responsibilities in the courtroom. It is the responsibility of the council to make sure that the constituents of the Judicial Branch (judicial officers and individual courts) have been heard. It is also the responsibility of the council to take steps to ensure that the Branch can speak effectively, with “one voice.”
4. Over the last decade or two, we have undergone revolutionary change and the council and AOC have led the way to enormous achievements and innovations making California the leading court system of the nation.
5. There is a disparity between the successes achieved and the trial courts’ perception of the council and the AOC.
6. We are emerging from an “entrepreneurial startup” and must transition into a “fully matured management model, as headquarters of a decentralized company with 58 subsidiaries”. (KPMG Report, p.4).
7. We have examined the council’s governance model and commissioned the KPMG Infrastructure Review. We have recently met to talk about leadership. Emerging from these discussions are the following principles:
 - a. Decision making by the council must be structured so that there is an opportunity for input by council members before decisions are made.
 - b. Mechanisms must exist to gather and present the input of those affected by decisions (and those with information about the effects of the proposed decisions) before the decisions are made.

- c. Information about proposed decisions (and about ongoing projects) must be presented to the council in a timely manner and in a manner that facilitates council discussion and input.
 - d. In fluid situations, stakeholders must be provided with up-to-date information so that any necessary reevaluation can take place before outcomes are determined.
 - e. There must be an atmosphere that allows free council discussion, that welcomes and respects divergent views, and where members keep an open mind. Outcomes should not be pre-ordained, and the council should be making decisions rather than consenting to decisions that have already been made.
 - f. Council members must have an opportunity to provide input into agenda-setting for council meetings.
 - g. Selection of council members must ensure that they can speak as persons who are recognized as leaders by their judicial colleagues.
8. These principles mimic those of procedural fairness: neutrality of decision-making (unbiased and transparent), opportunity to be heard, treated with respect, and trustworthiness (caring, explaining, trying to help).
 9. It is inimical to our system if there is undermining, disparagement and distrust.
 10. We must understand the sources of any antipathy, and put into place an infrastructure that ensures trial court leaders and judicial officers feel they belong, their views are heard, their involvement is encouraged, relationships are collegial, and trust and mutual respect reign.
 11. Gaining broad judicial agreement is paramount- “you don’t sink ships you help build.”
 12. In the spirit of ushering our branch into the next phase of its maturation, and exercising the judicial leadership that we have accepted, we would like to join forces and resolve some of the issues that exist so that we can speak with one voice, and gain (in some instances) and retain the trust and confidence of the trial courts and judicial officers.

D. Suggestions for Addressing the Problem as Defined Consistent with the Articulated Underlying Assumptions

Suggestions Addressing the Relationship with Local Courts

1. Provide trial court judges and CEOs with an anonymous survey/evaluation to learn from them what we are doing right and where we can improve and what suggestions they have for us.
2. Meet with PJs and CEOs to establish better lines of communication and a forum to air any outstanding issues.
3. Provide formal statewide leadership training and development.
4. Provide training for AOC staff so that they have relationships with judges and trial court staff and have a practical understanding of court operations and the demands of courtroom work.

5. Consider lengthening the term of PJs to three years. (If implemented, this should not affect the terms of current PJs or APJs.)
6. Consider establishing a full-time, judicial administrative position within the AOC (not a “statewide PJ”) to enhance communication with trial court judicial officers.
7. Select Judicial Council members who have the trust and confidence of judicial officers statewide, and who have the capacity to assist in resolving issues and communicating with local trial courts.
8. The newly revised governance policy requires E&P to establish a plan for communications between the Branch and council. Establishing that plan with input from the Branch should be made a top priority. One approach would be to assign each judicial officer on the council a liaison role (to give and receive information) for a proportionate share of the 58 counties.

Suggestions Addressing Judicial Council Leadership

1. A portion of each issues meeting should be set aside for council members to be able to suggest agenda items for subsequent meetings. This portion of the meeting should be structured so that council members can address each other directly in a meeting format – not as a presentation by others.
2. A portion of each issues meeting should be set aside for a report from the Administrative Director outlining what issues are foreseeable over the next six months.
3. Any planning for anticipated issues should include a discussion of stakeholders, how their input will be obtained, and how the issue will be best disseminated to the branch.
4. The agenda of an issues meeting should be provided to council members in advance.
5. E & P should actually set both the issues meeting agenda and the business meeting agenda, taking into consideration input from council members (see item 1). Staff should suggest agenda items, but E & P should ultimately set these agendas.
6. Deadlines should be established for getting information to council members.
7. In order to fulfill the council’s responsibility under CRC 10.101, the council’s responsibility for approval of budgetary issues must be fully understood and all information necessary to make these decisions must be presented to the council. We should have a clear understanding about what is operational and needs no council approval and what is more akin to policy and ought to be decided by the council. The council should receive recommendations directly from a budget working group that (1) can reliably reflect the views of the trial courts, and (2) has the responsibility to consider budget and spending decisions about all trial court funds (including the Trial Court Trust Fund, Trial Court Improvement Fund, and Modernization Fund).
8. Consider lengthening the term of council members.

E. Conclusion: Optimistic Outlook

California is the envy of every state's judicial system, and we have great strengths to build upon. Moreover, we believe that on the vast majority of issues facing our Branch, there is substantial consensus within the courts as to the direction the Branch should take.

The Administrative Director of the Courts recently has stated in a letter to Presiding Judges: "When our budget is in hand, input from all court leaders will be needed to help inform the decisions the Judicial Council must make to implement the budget. Again, there is room for differing views and opportunity for vigorous debate within the court system as part of the decisionmaking process. When decisions are made, we should then focus on our common goals and how to attain them without undue harm to individual court needs or to the judicial branch as a whole."

We applaud this approach to decisionmaking and appreciate the Administrative Director's leadership on this issue. We hope the approaches outlined above are a constructive addition to this effort.

Hon. Jamie Jacobs-May
Hon. Carolyn B. Kuhl
Hon. Charles W. McCoy
Hon. Michael Welch