Comment on the Report of the Strategic Evaluation Committee

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This comment is not submitted on behalf of any other person, or any organization.

1.

As many of my colleagues have noted, the Report is most welcome, a valuable wake up call for all involved in the administration of justice. The work product is the more remarkable given the handicaps endured by the committee- virtually no staff support, and difficulties in extracting some information from the AOC. There will be many who rightly applaud the Report, and I do not need to add much on that score.

But some have suggested an immediate endorsement or embrace of all of the Report's recommendations, and I write to provide some caution. The more one reads and re-reads the Report, the more one comes away with the sense that it must be only the beginning of a serious analysis of the work of the AOC, not the end. After the analysis – which the Report itself suggests we undertake—we will likely wish to move forward with many of the recommendations. And not with others.

Disclosure. I have been involved with some of the work of the AOC for many years. I served multiple terms on the Civil and Small Claims Advisory Committee, both as a lawyer and briefly as a judge, and chaired some of its subcommittees. I have worked with many working group and other ad hoc committees, generally on civil litigation matters such as rules for temporary judges, rules reform (the reorganization of the rules of court), electronic discovery, summary judgment, and so on. I served on the Court Technology Advisory Committee, and on a number of CCMS related groups, such as those working on the interface of the program, and the Case Management System Operational Advisory Committee. I am a member of the Leadership Group on Civics Education and Public Outreach. I think these contacts provide a good perspective on the work of the AOC; others may think they show a bias.

In any event, with one or two exceptions I do not plan on addressing the merits of the Report, arguing for or against any of its recommendations here. We can leave the merits to later. And that is one of my central points, which is that the Report does not itself provide a basis for the resolution many of the issues it raises; which is a nicer way to say something else, which is that the Report does not provide a basis for some of its recommendations. As I will repeat below, the recommendations may be right, or not, but we cannot always tell from the Report.

There is something else I will not address. That is the larger issue, perhaps almost a general policy issue, of the balance between local autonomy for the courts *vs*. the need to have a statewide, cohesive court system. I know this tug of war is, for some, really a war: there are passionate advocates among my colleagues on both sides of that issue. And while concerns on that balance might have, for some, been a reason to generate the Report, and maybe to endorse it, that general policy matter is irrelevant to my comments. I think it was irrelevant to the authors of the Report, too. The Report does not pretend to decide that balance, and as we think through the Report's recommendations, we too must put that policy matter aside.

Below, I criticize the report, not because the whole Report deserves it (it surely does not), but because I leave the endorsements to others. I am worried that many will seek to use the Report as a passport to thoughtless cuts in the AOC, in its staff and missions. I am worried about the bandwagon effect, where we hear only voices that support vast reductions, and opposing views are drowned out. I am afraid that we will throw the baby out with the bathwater.

Page numbers in the Report as given as plain numbers (41) and formal recommendations cited as e.g. #7-2.

2. **General Issues**

Core v. Discretionary. A central theme of the Report is to distinguish (i) core and mandatory functions of the AOC from (ii) those which are discretionary, and to urge it confine its business to the former. But it is difficult to drawn that line. "[T]he AOC's role must be limited primarily to those functions and duties reasonably flowing from the Constitution and statute, and to those core functions inherent in providing requested or needed assistance and services to the courts and to protecting the interests of the branch." (35). But what are those core functions? The Report notes: "The California Constitution established the Judicial Council. Its stated purpose is to set the direction for improving the quality of justice and advancing its consistent, independent, impartial, and accessible administration for the benefit of the public." (34)(notes omitted). Both what the Report seems to consider core *and* discretionary work fit within this ambit. Sometimes, it may be easier to determine that an activity is peripheral (e.g. the Educational Division's relationship with colleges, at 105). But usually, judgment is exercised as to whether the work should be undertaken; the general rule of adhering solely to core work often will not help.

Cost-benefit. A key mechanism urged by the Report in determining what work to do is to use a cost-benefit approach. There are a few specific comments below on this. But more generally, traditional cost-benefit analysis requires a model under which both the costs and the benefits of the questioned procedure are expressed in the same terms—so that a comparison can indeed be made. Money is the usual medium. Lawmakers have famously run into problems when trying to use the approach in areas which measure quality of life and other intangibles, such as medical procedures and environmental regulation. Many of the values underlying our work, such as access to the courts, speedy justice, and fairness, are not susceptible to the approach. We should I think interpret the Report's recommendation on cost-benefit analysis not in the traditional way, but rather as a more general insistence that the burdens and costs of proposed action, tangible or not, be considered; with that there could be no disagreement. But by the same token, urging that sort of cost-benefit analysis will not often dictate the result.

3. **Specific issues**

<u>Rhetoric & Staffing Issues</u>

The report is a mixture of (i) rhetoric and (ii) observations based on data. Much of its rhetoric frankly reports observations, feelings, and perceptions. We see phrases such as "widespread view" (1), "the perception that…" (5) "feeling in the trial courts…" (5), "not … believed to be valued by the AOC," (5), that the AOC is "perceive[d] [as] grown too large" (41), and so on, throughout. These are valuable for at least two reasons, but they are no good at all for a third purpose, one to which many readers may try to

put them. These observations are valuable because we need to know how the AOC is perceived. We want to know what its customers (courts, the public) think. The Report make the point that the AOC lacks transparency, that we do not know how things work; and perceptions obviously evidence that. Also, these perceptions might lead us to discover problems: the perception that there is too much staff, or that legal opinions don't get out in time, points us to potential problems: we should look at staffing, and the time it takes to get out the opinions. But these perceptions may or may not be accurate, and the Report is not always careful. It slips too easily from its notation of perception to assume the truth. As I say, sometimes this is one and the same: If courts don't feel "valued," then that's a problem. But if the perception or "concern" is that judicial college or NJO is too much (105), that doesn't make it so.

So for example the report notes many views that the AOC is "top heavy and unwieldy" (35 et passim). This may be true, but the recordation of the views, alone, does not establish that. Sometimes the Report is able to specify a material *source* of the views, such as AOC management (35-36), in which case we would think the report of views as something more, i.e., fair evidence that the statements are accurate. But many of the sources are not that obvious, probably for very good reasons related to confidentiality. E.g., 65 ("court leaders"); 5 ("A pervasive feeling in the trial courts"); 95 ("Many courts have suggested"); *id*. ("Multiple judicial officers and court executive officers recommend"); 105, 106 ("many judicial officers"), etc.

When reading about perceptions, we should recall the reported universe, too. About 15.2% of the trial judges provided input to the Committee (30); and I assume that those upset with the AOC are more likely to have communicated than those who were not. So it remain entirely unclear how widespread these perceptions are. They are important, yes, and we must follow up on these reports, but to call certain perceptions "widespread" or otherwise imply (as the Report often does), a general consensus on trial judges' views, may not be warranted.

There are other examples, too, of rhetorical devices which require our caution. The Report says of certain staffing assignments that "it may be a questionable priority" (164) and that "it has not been established" that certain personnel are needed (165). I suppose this is true, but as logically (and consistently) we might say that "it may *not* be a questionable priority" and "it hasn't been established-either way". Again these are good leads to further analysis, but we can't conclude that the Report has established the implicit conclusion. The Report (166) notes the "sheer number of attorneys in the AOC is eye catching" (there are 100 of them, the Report concludes about 10% of the staff). I know what the implicit conclusion is – 100, or 10%, is much too high—but the Report doesn't establish that. Maybe, for an organization that deals almost exclusively with laws, justice, courts, judges, legislation, rules (with the force of law) it should be *more*, say 12%? I don't know, and the Report doesn't tell me. So when we get to the corresponding recommendation (#7-72) to reduce the number of attorneys, we don't know why. The Report, as I say, might be right; or not.

The Report provides "perspective" on staffing levels (187 et seq.) by noting the rise from 1992-93 through 2000-02 to 2010. The perspective is muddy. It is useful only if we also have some understanding of the reasons for the rise. The reasons are not found in context in the Report's discussions at p.187 *et seq*., but we do see this at 19:

> The AOC workforce grew from 225 in 1992 to over 1,100 in the last fiscal year. Some of the growth is directly attributable to the monumental changes in the judicial branch, beginning in 1997 with state funding of the trial courts. State funding of the courts was followed by other landmark shifts in responsibility, including court employees shifting from employment by the counties to the courts, and by the transfer in the 2000s of court facilities and responsibility for

> their ongoing maintenance from counties to the judicial branch. However, these new responsibilities do not account for all of the steady growth of the AOC workforce. Some growth is attributable to the AOC expanding its activities and programs to areas that are discretionary and nonessential.
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> See also Report at 1 (more detail on statutory related growth).

The problem is that the Report does not provide a basis to determine how much of the growth is attributable to the "monumental changes," population growth, or other factors, and how much to waste and inefficiency. Therefore, simply to provide the raw numbers (i.e. rise from 1992 to 2010) is not helpful and it doesn't provide "perspective;" the numbers (alone) are as consistent with a good picture as a bad one.

This leads me to the recommendations on staffing reductions (192 et eq.). The Report understandably suggests that the basis for such a recommendation is in aide of "fitting the number of staff to its [AOC's] mandatory and core functions" {although, as noted elsewhere in these comments, I personally disagree that the AOC should be so limited}. But the Report does not do that (and given the resources available to its authors, I can't imagine how they could). We do not actually have an analysis of the number of people needed to do the core or mandatory functions. Instead, we have something else here, very different—indeed important—but very different: We have (i) the observation that the AOC does too much now and (ii) AOC staff themselves say the AOC is too big. But the recommendation of significant reductions (#9-1) is as yet unsupported, because it requires an analysis the Report doesn't do. The Report might be right; we just don't know yet. A few of the other recommendations in this section (194) suffer from the same problem. For example, the Report at #9-2 adopts as the right number of staff the currently authorized positions; but we do not know why. Perhaps that number is too high, or too low. (I refer to this emphasis on 'authorized positions' five paragraphs below while discussing the long term use of temporary staff.)

Specific Staffing Issues

The Report expresses concern on the number of rules and forms, and seems to conclude that there are too many staff for the committees and working groups. Perhaps. The working groups and committees are composed of judges and lawyers, all of whom have other full time jobs. I have been on groups with and without staff, and I can attest that without staff, there are generally few written reports, and little research, drafting of rules, or investigations of the effects of one rule change on e.g. others.

The Report wisely suggests a good deal of new work, such as doing real business case analyses, developing and applying performance metrics, and personnel policies, doing cost-benefit analyses (of almost everything), workload analyses, and evaluating the impact of rules and forms on the courts (that is, all 58 of them, which is likely to require many different reviews). This work takes people (staff).

The Report devotes a good deal of attention to re-organization, noting the problems with 'silo' offices and divisions (9), recommending far fewer reports to the Director, and so on. There are many benefits to such reorganization, such as more efficient meetings and probably a better use of the Director's time. But we must recall that re-organization, alone, does not entail a reduction in staff. It might do so, where overlapping functions are collapsed, but there are only a few places where the Report suggests such overlap. Future analysis may well locate more.

With respect to staff compensation (69), the Report does not explain itself. It directly implies that maximum salaries of $75,000 or $100,000 are too high (see also at 14, 116). I don't know if that's true. It might be, but without a comparison to other entities and some analysis of comparable salaries, it's not obvious. If the salaries are for lawyers, and if the average in this state is $83,000 (http://www.indeed.com/salary/q-Attorney-l-California.html), then perhaps these salaries are reasonable.

It is of course reasonable to criticize the long term use of temporary staff, and to criticize the AOC's misleading report of staffing levels which leave out various categories. But noting temporary staff in excess of authorized positions is not alone enough to tell us that the staff is not needed. The Report seems fixated on the number of 'authorized positions' (e.g. 103), but analysis may show that the number of authorized positions for some tasks should be increased (or decreased). For example, the Report states "The use of temporary employees, consultants, and contractors should be reviewed and reductions made accordingly." (#7-46) Here as it often does, the Report anticipates the results of the analysis it urges us to do; perhaps reductions will be wise, and perhaps especially with those previously dedicated to CCMS; but perhaps not. (I understand the entirely separate criticism that departures from authorized levels, especially when coupled with inaccurate reporting of actual head accounts, does not [to put it mildly] promote transparency and accountability.)

Projects and proposals

The Report says the AOC undertakes too many projects and proposals, and recommends cutting back to only those required by law (#6.8). This seems like a bad idea. We have already seen the Judicial Council in effect take this step, halting a variety of projects not mandated by law. As I understand it, one example is the issuance of a form stipulated order for expedited jury trials. The legislature did not require the development of the form, but it would be extremely helpful, allowing lawyers and judges some comfort level that they thought through all the possible issues, and providing a level of formality which will reassure clients and lawyers new to the procedure, perhaps increasing its use, which in turn will provide real benefits to the courts. The form is not burdensome. So too the form created some years ago for attorneys withdrawing from cases: the mandatory use of the form now ensures far fewer motions need to be rescheduled because the lawyer forgot to cross the "ts" and dot the "i's" (required by law) on his or her handmade forms. These are trivial example, but the point is that stopping all initiatives not literally mandated by the legislature paints with too broad a brush. Yes, the impact of proposal must be evaluated, and the Report is right to call our attention to an early such evaluation; and yes, budget cuts and concomitant staffing reductions might well counsel a reduction in proposals, but the work of the Council's committees over the years has included a wide range of remarkably useful – but not mandated—work, with the effect of reducing the burdens on litigants and allowing judges to focus on the merits of the disputes before them. The Report is generally silent on these achievements.

In another questionable use of rhetoric, the Report described as "staggering" (71) the number or proposals- 50 or 55 formal proposals a year is far too much, the Report implies. Why is that? We do not know. If these 50 are divided among the four main sources (Civil, Family, Juvenile, Criminal) we have about 12 proposal per group a year; too many? The Report notes that "many" of the proposals are in fact mandated, but we don't know how many, and so we could as easily conclude (given the information from the Report) that the number of proposals is generally reasonable; we just don't know. The Report does say that the changes "often" (71) create burdens, but this is too vague as a conclusion, and we don't know if the burdensome proposals are those required by law. The point is, again, is that the

Report is a starting point for further analyses of these issues; it is an insufficient basis, on its own, for action.

CCMS

The CCMS computer project plays an interesting role in the Report. It is at page 149 that the Report notes CCMS "as the best example of many of the issues and themes discussed in this report." The authors of the Report did not themselves conduct an investigation into CCMS, and did not have the capacity to do so. They rely on impressions and perceptions of others. For example, the Report notes the State Auditor's report on the project (150), but does not note the responses to that Auditor's report. The Report suggests that there is a "well documented" "lack of acceptance" of the CCMS (27); but we must be careful, because the full version of the software was not rolled out to the courts, but was instead suspended just as it was about to be rolled out. We don't know if the program would have been 'accepted' or not. It is true that some courts expressed great skepticism, and it is true that earlier versions of the software met with both acceptance and rejection; but all of these things are different from the general statements in the Report.

As with the other perceptions and impression passed on to us by the Report, it is important to distinguish the value of such reports from an authoritative statement that the CCMS project was in fact a failure. Perhaps it was; or perhaps rolling out CCMS would be cheaper than fixing the various case management systems now at risk; the Report does not provide an independent basis to say. And the CCMS project, even as described by the Report, both is and is not emblematic of other work at the AOC, depending on the work; the analogy is in the end not helpful. That said, the Report's specific recommendations (#7-57 et seq.) are important, and I would think are likely to be adopted.

IT

The Report suggests (133) a single platform as opposed to the multiple platforms now being used for certain software programs. The Report does not have a basis for the suggestion. It does not have access to the costs of re-training, data conversion or other costs, and it did not investigate reasons for the various platforms. When it comes to the formal recommendations, the Report understands this, and simply urges a look at the issue (#7-50).

Office Of Emergency Response and Security

It may be wise to collapse the functions of this office with others (#7-54), but it is not clear this will result in savings if the same functions are to be carried out. The suggestion that "reductions are feasible" (#7-56) seems to be based on some weird logic: i.e. that the office cannot protect all 2000 judicial officers- but as the Report notes earlier (146), the office doesn't do that anyway, so stopping it won't eliminate positions.

CJER

The Report does not identify any serious issues in the education arm, but nevertheless argues for reductions (105 et seq.). It implies that 60 employees is too many, but does not tell us why; numbers like this do not speak for themselves. Aside from employees dedicated to CCMS (109), the suggestion of "overlap" and "redundancies" (106) is unexplained. California probably has the best judicial education in the nation, and probably among the best in the world, and perhaps it takes 60 people to do it. The fact that the staffing is "one of the highest in the AOC" (#7-20) does not help; no matter what we do with

staffing, there must be *some* Divisions with "some of the highest" numbers, somewhere. No basis is provided for this (#7-20) recommendation for reductions.

No one could argue against the Report's recommendation that we look carefully at the costs and benefits of various modes of teaching, such as online vs. in person (107-08), but we must be alert that the Report does not purport to resolve those issues, and it should not be taken as an endorsement of more online training, for example. I suspect most judges know the benefits of in person training; I will not argue them here, but note the benefits are generally intangible, and it may be difficult to do the recommended "cost/benefit" analysis (in any strict sense of the phrase) of these learning modes. (#7-21)(Compare 105, recommending "strict cost-benefit analysis".)

Conclusion

I have not discussed the strengths of the Report, and the many, many recommendations which seem to make good sense. The committee members have their deserved thanks. But anecdotally I have heard of many (not all of whom had read the full Report) who have uncritically endorsed the Report and urged others to do the same. We should be as stringent with the Report as it is with the AOC. It will doubtless turn out to be right on many, many issues. We just don't quite know which ones, yet.