To: Chief Justice Tani Cantil-Sakauye and the Judicial Council

From: María Rivera, Associate Justice, First District Court of Appeal

I write for myself only, and do not represent the interests of any other person or entity. I write from the perspective of my past experience as a trial judge, as a long-time member of the Legal Services Trust Fund Commission, and as a member of the Access and Fairness Advisory Committee of the Judicial Council. That is, I write from the perspective of one who has served in a busy trial court, and who prizes highly the notion of access to justice and public trust and confidence in the courts.

The SEC report is a remarkable document in its scope, ambition and candor. The members of the committee are to be commended for the breathtaking amount of work they must have undertaken to produce the report, no doubt at great personal sacrifice. For this effort I hold each member of the committee in the highest regard.

The question, now, is how best to use the Report and its Recommendations. As has been stated by Judge Karnow and others, the SEC report and its recommendations should not be viewed as an end, but as a beginning. I need not repeat Judge Karnow's thoughtful comments, but I agree that many of the recommendations appear to be based on perceptions rather than hard analysis of what is or is not needed for the AOC to carry out its core function.

My overarching concern about the report is its foundational premise that the AOC's proper role is limited to "be[ing] a service provider to the Judicial Council and the courts." [pp. 7; 35; 43; Rec. 4-2] All other activity is described as "discretionary" [pp. 4; 26] or criticized as an improper exercise of control. [pp. 35; 43] It is my understanding and belief that the core purpose of the AOC would be the same as the core purpose of the judicial branch, "to provide access to all for fair resolution of legal disputes and issues." [p. 35] That is, it is the task of *everyone* in the judicial branch, first and foremost, to ensure that the public is served as fairly, efficiently and effectively as possible in our judicial system. The AOC's customers are not just the courts, but first and foremost, the people of the State.

Recognizing that much of the AOC's work in enhancing or ensuring access to justice is done through the trial courts, there will inevitably be some tension between local control and statewide initiatives—much like the tensions inherent in the federal-state relationship. That tension has historically been resolved one way or the other on an issue-by-issue basis, depending upon the object to be achieved and the best way to achieve it. The report appears to assume, however, that maximum local autonomy is always preferred over AOC-generated activity (beyond servicing the trial courts in accordance with their expressed needs). Based upon this tacit assumption, the report generally argues for—but does not make the business case for—fewer statewide initiatives, fewer rule amendments, fewer form changes, fewer grants

and fewer AOC employees. For example, the report recites that "changes in rules and forms often result in costly adjustments to the courts' case management systems and create operational burdens for administrative staff," but it provides no analysis with respect to the benefit of these changes inuring to court users. We can expect that any initiatives designed to improve access to justice will involve adjustments to court operations and additional burdens, but there should not be a default mode of "no AOC initiatives" on that basis. The question should not be how to avoid burdens on the courts. The question should be how can we improve trust and confidence in the courts and access to justice while being mindful of the operational burdens involved.

I am also concerned that the report—as thorough as it was—does not adequately describe many of the AOC processes. I do not fault the authors for this, as it would be impossible for them to dig down into each and every function in that kind of detail. What I am suggesting is that we should be cautious about embracing recommendations that are based only on the perceptions, complaints and concerns expressed by some, rather than on a clear understanding of what the process in question actually is, and what it produces—both the positive and the negative.

I will use as an example the report's criticisms of the process of developing rules and forms, because it is a process with which I am familiar. The report states that folks perceive some of the new rules as being unduly burdensome and impractical. Concerns were also expressed that there are "simply too many rules, that rules are generated by AOC staff without adequate consideration of the impact on operations and resources in the court, and that the review process for new rules is limited or ineffective. Although the report acknowledges that most of the rules are generated by Advisory Committees, rather than staff, it points out that that the process does involve a substantial amount of staff time, and concludes that the current rulemaking process does not adequately ascertain the fiscal and operational impacts of new rules on the courts. The report recommends that the AOC "must develop a process to better assess the fiscal and operational impacts of proposed rules on the courts, including seeking earlier input from the courts before proposed rules are submitted for formal review;" and that the AOC should "recommend changes in the…process…to limit the number of proposals for new rules, including by focusing on rule changes that are required by statutory changes." [Rec. 6-8]

This discussion and recommendation regarding the rulemaking process raises at least four issues. First, it is my understanding that all of the Advisory Committees that generate rule proposals have members who are trial judges and court administrators. The committees rely on their members to provide their operational expertise during the discussion and development of any proposal. Additionally, committee members and staff are commonly tasked with making inquiries of other courts, judges, administrators or personnel concerning the practical effect of any proposal. As one example, in developing a proposed procedure to

ensure to all members of the bar the opportunity to serves as judges pro tempore, the judges and justices on the Access and Fairness committee undertook to call various judges in small counties around the state to find out what their current practices were and to ask what would be workable.

Second, the need for a new rule or form often is best ascertained by AOC staff, because they tend to be the "point persons" on a particular subject for gathering information, or receiving complaints and questions from all over the state. For example, there is an individual in the AOC who is responsible for coordinating all of the ADA trainings and for fielding questions about Rule 1.100 and the ADA from the courts and court users. As a result she is probably the single most informed person in the state with respect to the operational impacts of Rule 1.100, as well as its problems and glitches. It is her responsibility to bring this information to the Access and Fairness committee, and the committee then determines whether some action—such as a rule amendment, a form change, or an information card—should be developed. Accordingly, it would be unwise, in my view, to discourage or limit AOC staff from suggesting rules, amendments or forms that appear to be necessary to respond to comments and concerns communicated by the courts and court users.

Third, the rulemaking process is an extraordinarily painstaking one. I have seen a relatively non-controversial rule take five years to go through the full panoply of vetting, both informal and formal, before it is actually adopted. The public comment process is very effective, and has resulted in many changes to proposed rules where practical impacts were not fully understood. The SEC report concludes that this process is inadequate, and that a new process must be developed to "seek[] earlier input from the courts before proposed rules are submitted for formal review." But this would generate more work for AOC staff, not less. Further, as a practical matter, the rules that have the potential for significant operational or fiscal impacts are invariably reviewed by trial court working groups before they are put out for comment. Adding yet another round of input from the courts at some earlier stage would slow down the process even more, and would rarely add information that would not be garnered from the Presiding Judges committee, the Court Administrators committee, the authoring advisory committee and the public comment process.

Fourth, as previously noted, there is no discussion or even acknowledgement of the benefits to court users resulting from the new rules and forms. The report proposes that the AOC seek input from the courts earlier in the rulemaking process so that "some new rule proposals can be nipped in the bud, and burdens placed on courts [can] be avoided." This approach makes sense only if the proposed rule would not provide any significant benefit to lawyers or litigants. Our *primary* concern in rulemaking should not be court impact but user benefit. For example, Rule 1.100 established a statewide policy to "ensure that persons with disabilities have equal and full access to the judicial system." It required the designation of at least one person in each court to be the ADA coordinator, created a process by which persons

with disabilities can request accommodations, and provided standards to be applied by the courts in response. Unquestionably, this rule imposed significant new demands on court personnel; there can be no doubt, however, that the rule's benefit to court users with disabilities far outweighs the added burden.

With respect to the Center for Families, Children and the Courts, the report provides the following criticisms:

> "Many courts have expressed a concern that the CFCC has perpetuated its own reach and influence. In particular, those in the trial courts direct criticism toward the proliferation of rules, procedures, and forms that, in some instances, hinder and does [sic] not help the trial courts. The CFCC drafts mandatory forms and rules of court that some describe as aspirational, burdensome, or opaque. In some cases, the drafting of forms and rules has been extended beyond a reasonable application of any mandate. The CFCC reports at least 13 of its employees devote some of their time to the drafting of forms and rules. …. Others question the number of publications and legislative proposals that emanate from the division. [¶] … Many trial courts complain that the CFCC makes requests for information that appears to the courts to be a waste of time and that produces data that appear never to be analyzed or made available in a useful fashion. … Essentially, trial courts, already burdened by financial constraints, express concern that they are burdened with information-gathering tasks related to grant applications, renewal and administration. …."

Because the scope of the report is so broad, I understand fully the difficulties in providing specifics with regard to the issues raised. On the other hand, the lack of details or even examples, makes useful comment all but impossible. It is said that "some" describe CFCC-generated forms and rules as "aspirational, burdensome, or opaque" and that, "in some instances" the rules, procedures and forms "hinder" rather than help "the trial courts." The report also describes complaints from the courts about the burdens of information gathering required for grant administration. But no examples are provided, no specifics are given and, again—and most critically—no consideration or description is provided of the value to court users of any of the rules, forms, procedures or grants. I would be wary of adopting any recommendations relating to these matters (e.g., Recommendations 6-8, 7-5 and 7-6) until there has been an analysis of the actual rules, procedures, forms and grants about which concerns have been expressed. It could well be that the complaints pertain only to one or two procedures, rules, forms or grants, and no wholesale changes are necessary.

The report also comments on the fact that the CFCC employs 29 attorneys "some of whom perform work that could be done by lower-paid analysts who are not attorneys," for example, those who conduct audits in dependency matters need not be attorneys. I cannot speak to the issue of whether audits in dependency matters can or even should be conducted by non-attorneys, as I have no expertise in this area, and little is provided by way of specifics. But as to the report's conclusion that, in general, the CFCC should have fewer attorneys on

staff [p. 86; Rec. 7-4], I could find no facts or data in the report to support it. Much of the work of the CFCC, as the report itself notes, involves expertise in substantive areas of the law. CFCC staff are not merely scriveners or record-keepers; they are legal analysts, case file analysts, legal researchers, and creative problem-solvers who draw upon their legal skills, knowledge and experience to improve outcomes for children and families in the courts. While it is always worthwhile periodically to review the staffing levels of any organization, the assumption that fewer attorneys are needed to adequately staff the CFCC does not appear to be warranted.

With respect to the report's recommendations for the CFCC, I briefly mention two other concerns:

The report states that consolidation of CFCC's support function (to Judicial Council committees and task forces) under the direction of the Chief of Staff will "present opportunities for efficiencies and resource reduction." [Rec. 7-4] If the report is suggesting that the number of persons staffing the advisory committees and task forces should be further reduced, I would strongly oppose this recommendation. Over the past few years, the Access and Fairness advisory committee staff has been stripped down to the bare minimum. As a result our work has slowed and our staff are severely overburdened. While I would welcome a streamlining of the AOC's *bureaucracy*, which has sometimes added unnecessarily to staff's workload, I would question the wisdom of additional reductions in staff for committee support functions. If the goal is to inhibit the work of the advisory committees so that fewer rules and forms are proposed, that should be a separate discussion.

Recommendation 7-9 proposes that self-help resources should be combined with other resources from "similar subject programs" such as the Justice Corps and the Sargent Shriver Civil Counsel program. As the report itself notes, however, only a few courts are involved in the Justice Corps program and, more importantly, Justice Corps volunteers are not attorneys and therefore have limited ability to guide court users through complex legal forms and procedures. The Civil Counsel program, of course, is designed to provide legal representation to some indigent individuals, and is specifically *not* intended to be a self-help program. As we all know, assistance to self-represented litigants, particularly in family law, but also in landlord-tenant, consumer and small claims cases, has become an indispensable resource for our trial courts and our court users. Combining self-help programs in different substantive areas may produce better outcomes for both the courts and the court users, but reductions in these programs would, in my view, result in greater hardships not just for the court users but for court staff and judges. In any event, I could not find any discussion or analysis of the self-help programs at all in the report, and therefore could not find the basis upon which Recommendation 7-9 was made.

One final comment:

It has been my great honor to work with AOC staff in numerous subject areas, including judicial elections [CIC], judicial education[CJER], and access and fairness [A&F Adv. Comm.]. Without exception, each individual has been diligent, professional, thoughtful, and highly skilled. Opinions as to the value of AOC projects and programs will always be varied, but no one can question the professionalism and hard work of the vast majority of the AOC employees. Certainly, a comprehensive review of the AOC organization, staffing levels and programs should be undertaken regularly. Just as certainly, each part of the judicial branch must bear its share of the massive budget cuts. But both should be done carefully, giving due consideration to the exceptional resources provided by AOC's staff, and with an eye—always with an eye—to the needs of our diverse population who come to the courts seeking justice.

Thank you for this opportunity to comment on the SEC report. I am hopeful that, as each recommendation is fleshed out with specific proposals, the branch and the public will have an opportunity to provide additional comments and ideas.