THE STATE BAR
OF CALIFORNIA

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To: The Judicial Council of California
From: Jon B. Streeter
President, The State Bar of California
Re: Comment on Strategic Evaluation Committee Report
Item SP 12-05

I write on behalf of the State Bar of California to comment on the report of the Strategic Evaluation Committee ("SEC Report" or "Report").

I.

At the outset, I join the chorus of praise for the tireless and thorough work of the distinguished judges who prepared the SEC Report, conducted the many interviews on which the Report is based, and spent so many hours meeting and deliberating over the findings and recommendations that they have presented in it. Their profound dedication to the best interests of the judicial branch is abundantly evident in the quality of their work. The wisdom that our Chief Justice showed in appointing this group is clear.

The SEC Report documents in a powerful way an array of criticisms of the Administrative Office of the Courts ("AOC") that many of us in the Bar have seen building for years. Since the late 1990s, any lawyer who appears regularly in the courts on behalf of clients and interacts with judges frequently, as I do, has been hearing complaints that the AOC is top-heavy and over-staffed, suffers from a culture of control rather than service, and lacks of responsiveness to the concerns of the trial courts. The issues are familiar.

I have always found these intramural frictions to be troubling, but given the profound changes within the California courts over the last twenty five years and the festering and unresolved issues around local court autonomy, they have never been surprising to me. The SEC Report makes clear, however, that there are real managerial problems within the AOC that cannot be chalked up to mere growing pains or the perceptions of a few. Whatever one thinks of the specific recommendations of the SEC, its Report demonstrates in compelling terms that reform is needed, and needed urgently. The SEC, and the Chief – by giving the SEC its charge – have done a great service by framing up issues and insisting that now is the time for action.

I have read the entire SEC Report and its exhibits, more than once. I have listened to the testimony that accompanied its presentation to the Judicial Counsel on June 21st (I would have attended that meeting but for an unavoidable trial conflict) and I have read every single one of the written comments that has been submitted to date. The exhaustive detail in the Report is impressive, but the outpouring of responses to the Report in the written commentary over the last month is even more remarkable.

Like many of the commenters, I see much of great value in the Report, but I am concerned that an atmosphere is building that will make a rush to judgment hard to resist. The demands for immediate action that we see in the comments of so many judges may well be cathartic, but if literally followed may lead inadvertently to decisions that do more harm than good. If immediate, sweeping changes to the AOC are made without careful deliberation *by the Council itself*, the result could well be exacerbation of the crisis in civil justice that so many of our citizens currently face as a result of budget cuts to the branch

Despite the many strengths of the SEC Report, it is important to bear in mind its acknowledged limitations. While the Report is impressively thorough, it is also a document that was produced solely from the perspective of judges. The SEC included no public members, no representatives of any legal service organization, and no lawyers. Nor was anyone from the State Bar included or consulted, even though the Bar is an agency whose mission focuses heavily on public protection, and we deal routinely with the AOC, at all levels, just as much as or more than many county courts do.

Some of the most outspoken judicial commenters who demand immediate adoption of each and every one of the recommendations in the SEC Report have said that all stakeholders in the judicial branch now have a unique opportunity to come together, to rally around the Report, and to “speak with one voice” for the first time in many years. That may be right in the end. But it can happen only if the Council proceeds deliberately and, as the Vice Chair of the SEC testified on June 21, treats the Report as a “tool,” the “beginning of a dialogue“ about reform, not a set of instructions to be rubber-stamped.

As we move forward toward reform, we must bear in mind that the citizens of California - the users of the courts, those who have the most to lose from massive layoffs and elimination of services - are the most important stakeholders here. To cognoscenti of the branch, the findings in the SEC Report have a familiar ring. But to the public at large, those findings are new. Plenty of time should therefore be allowed for taking public input. While I am heartened that the Council has, to date, resisted calls for immediate adoption of the entire Report, giving the public a full and fair opportunity to provide input will require much more than a brief 30-day comment period.

II.

The recommendations of the SEC begin with a focus on governance (Nos. 4-1 through 4-4), organizational structure (Nos. 5-1 through 5-6), and management structure, systems and processes (Nos. 6-1 through 6-9). I will not comment on these recommendations, except to offer some general observations about our own experience at the Bar in recent years with governance reform, major changes in senior staff, internal reorganization, and the challenge of trying to restore public confidence following a series of events that drew heavy criticism from the political branches. I do not suggest any equivalence to the problems at the AOC as described by the SEC, certainly by order of magnitude and effect, but there are some points of broad similarity.

Until this year, the Bar carried a large and persistent backlog of discipline cases. That problem alone did not force major internal reforms – perhaps it should have, much sooner than it did -- but by allowing our chronic discipline backlog to persist, the Bar exposed itself to charges of inefficiency, lack of responsiveness, and a concern for lawyer self-protection at the expense of public protection. The backlog was, in short, a credibility drain that built up over the course of many years, and finally created a crisis, much as CCMS did for the AOC.

Beginning in 2008, a series of apparently unrelated events occurred at the Bar -- a major embezzlement, a breach of confidence in a particularly sensitive case in the JNE process, a scathing report from the State Auditor, a mishandled senior staff termination, and the Governor's veto of the Bar's annual few bill -- that forced the Bar's then Board of Governors (now Trustees) to begin instituting major internal reforms.

From 2009 through 2011, the Bar saw a complete turnover in its senior leadership team – most importantly in the key positions of Executive Director and Chief Trial Counsel – and the board, at the insistence and ultimately the direction of the Legislature, took a newly proactive role in its oversight of staff. Without detailing exactly what we did, which is beside the point here, by 2012 we had eliminated the discipline backlog and begun reorganizing the agency in ways that made it much more efficient, transparent, and accountable.

Prior to the reforms that we instituted beginning in 2009, critics of the Bar claimed that was a highly staff-driven organization, that the reliability of the information provided by staff to the board was sometimes suspect, and that, structurally, the organization was inefficient and "bloated." I do not weigh in here on whether these accusations had merit, but there was certainly a perception that they did. Time will tell whether we have addressed those perceptions effectively, but most observers would agree that we have made great strides toward doing so.

I make no claim to exclusive credit for what we did at the Bar to bring about reform over the last three years because the steps that we took were adopted during

the terms of a series of State Bar Presidents working with a changing board. All of us would certainly agree on one thing, however. Even while re-building the entire senior staff leadership team, we sought to respect the boundary between the board's overall role as policymaker and senior staff's operational role. That is a basic tenet of effective governance, whether in the public or private sector.

The hiring of a new senior staff team at the Bar was absolutely critical, and in retrospect the time the board put into the executive search process, which included a great deal of discussion of the Bar's mission with candidates and what they felt needed to be done to address past problems, was some of the most important reform work that we did. Notably, however, as a board, we avoided the kind of micromanagement that so many judicial commenters seem to be suggest here when they urge the Council to adopt the entire SEC Report at once, and then, presumably, to hand the Report, like some kind of "cookbook," to the next Administrative Director.

In the comments on the SEC Report that have been submitted to date, commenter Alexander Aikmen -- an expert in judicial administration -- comes in for a great deal of criticism from some of the judge commenters as a biased and unreliable interloper. The fact is, however, that he has it right on one particular point. Whether the setting is public or private, a board's first priority in bringing about fundamental reform ought to be choosing new staff leadership.

The new Administrative Director must "own" the plan of reform. That plan, developed in close consultation with the Council, must rest on the new Administrative Director's assessment of the strengths and weaknesses of individual staff members, and cannot simply be an exercise in moving boxes around an organizational chart in a logical way. Thus, Mr. Aiken suggests, and I agree, that to adopt the Report in whole immediately, before hiring a new Administrative Director, puts he cart before the horse.

I agree with those commentators who suggest that the recommendations having to do with the mission of the AOC and the governance role of the Council (Nos. 4-1 through 4-4) could be acted upon right away, regardless of when an Executive Director is hired. But beyond that, virtually everything that the SEC Report recommends is operational in nature and should be acted upon only when a new Administrative Director is in place. Certainly, whatever the Council can do in the meantime to continue to vet the many recommendations of the SEC Report publicly will facilitate rapid action once a new Administrative Director is on board, but because that hire is so critical, most decisions about which recommendations to implement should be deferred until after it occurs.

III.

I urge the Council not to destroy the foundation that we have worked so hard to lay in this State for uniform justice across all 58 counties, with courts that are open and

equally accessible to all of our citizens. The process for bringing reform to the AOC should not be allowed to become an excuse to shelve the many visionary innovations for which prior leadership of the branch will always deserve our admiration and praise. That is a precious legacy to be built upon. It must not be allowed to become a casualty of the process of administrative reform that is now under way.

With this in mind, I am particularly concerned about the SEC's recommendations 7-1 through 7-24, 7-47 through 7-51, and 7-54 through 7-56, a large set of recommendations that, in many ways, is the heart of the Report, yet it is the least well explained and justified. I agree with the comments of those who have expressed the view that the reforms proposed by the SEC in these areas may well undermine the effectiveness of the AOC's work in diversity and the elimination of bias; judicial education; self-help centers; family law courts, collaborative justice courts, and drug courts; the assigned judges program; court security services; civic education; the Justice Corps; TCAS; the Kleps Award program; court interpreter services; and many other areas where the AOC improves access to justice and enhances the quality of justice for Californians.

I have less concern about the recommendations 7-25 through 7-45, 7-52 and 7-53 through 7-87, 8-1 through 8-11, 9-4 and 9-5, and 10-1 and 10-2, which concern traditionally administrative areas such as finance and budgeting, information services, human resources, legal services, governmental affairs, construction management, and leasing of office space. I find the recommendations in the areas of human resources and finance and budgeting to be especially strong, since these are areas where the SEC Report indicates major problems in the past with transparency and accountability. Restoring lost credibility must begin with the elimination of practices that have led to allegations of breach of trust with trial court leaders, such as manipulation of the use of temporary employees and opaque budgeting and accounting reports.

I do find surprising the SEC's emphasis on the idea that the AOC employs "too many lawyers" – about 10% of its workforce – since, quite obviously, the nature of the AOC's work involves law and the justice system. Without a work study showing that lawyers are used by the AOC to perform ministerial work with no legal content and no need for the exercise of legal judgment – a study which SEC openly admits it has not done -- I see no basis in the Report for this sweeping observation.

Nevertheless, now that the Governor's 2012 budget has been finalized, very substantial layoffs at the AOC seem inevitable. This is in line with SEC recommendations 9-1 and 9-2. The question is not whether these personnel cuts should be made, but how. The SEC's recommendations will certainly provide excellent guidance for current AOC management to begin making those cuts immediately, regardless of how fast the Council acts on the entirety of the Report.

IV.

I share the concerns of those commenters who question some of the rhetoric employed in the SEC Report. The comments of Judge Curt Karnow of San Francisco, for example, are particularly incisive in drawing attention to the Report's heavy reliance on a distinction between "core" and "discretionary" functions of the AOC. Conceptually, that idea is appealing, but in application it quickly becomes elusive. Judge Karnow points out in great detail, as I have tried to do in a more general way, that careful scrutiny by the Council of each and every one of the SEC's recommendations is critical. As Judge Karnow notes, for many of the recommendations, the rhetoric employed by the Report obscures whether the specific path recommended rests on a solid foundation.

I also agree with the commenters who focus on the SEC's heavy emphasis on "cost benefit" analyses, "business case" analyses, and evaluation of "impacts to the courts." With respect to evaluating impacts "on the courts," I think that the scope of any such evaluation ought to include "the public and the courts." And as for cost-benefit and business case analyses, I share the concerns expressed by commenters who have pointed out that the values of access to justice and fair administration of justice are often not susceptible to strict quantitative measurement. At the June 21 meeting of the Council, Justice Laurie Zelon of the Second District Court of Appeal was particularly eloquent on this point.

V.

The Council itself should carefully consider each and every one of the SEC Report's recommendations. Many may make sense and may result in greater efficiencies and improvements in the AOC's operations. Others may not. I have touched only lightly on the merits of the recommendations, and in this memorandum have emphasized above all the need for a full, fair and transparent public process before most of the implementation decisions are made.

Despite all of its admirable qualities and evident professionalism, the SEC Report was developed behind closed doors. The judicial branch ultimately belongs to the citizens of this State. In addressing the Report, the Council should follow an open process that allows it and the public to be fully informed of the basis for all of the recommendations made by the SEC, so that whatever reforms are ultimately made at the AOC, are made out in the open, with the benefit of full transparency.