



Judicial Council of California · Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: August 26, 2011

Title	Agenda Item Type
Judicial Branch Administration: Bar Association of San Francisco's Request to Amend Rule 10.815	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Rule 10.815	n/a
Recommended by	Date of Report
Administrative Office of the Courts	August 23, 2011
Mary M. Roberts, General Counsel, Office of the General Counsel	Contact
Curtis L. Child, Director, Office of Governmental Affairs	Mary M. Roberts, 415-865-7603 mary.roberts@jud.ca.gov

Executive Summary

The Bar Association of San Francisco (BASF) has requested that the Judicial Council amend rule 10.815 to authorize trial courts to establish a new fee for the appearance of each attorney at a case management conference in a complex civil case. The AOC recommends that the Judicial Council not amend rule 10.815 as requested. Rule 10.815 implements Government Code section 70631, which authorizes courts to charge a reasonable cost-recovery fee for providing a service or product in the absence of a statute or rule authorizing or prohibiting a fee for the particular service or product, if the Judicial Council approves the fee. The Legislature has addressed fees for complex cases and case management conferences, and amending rule 10.815 as requested would be inconsistent with statute.

Recommendation

The AOC recommends that:

1. The Judicial Council not amend rule 10.815;
2. The Judicial Council direct the AOC to consider new statewide fees or fee increases that the council may recommend to the Legislature to help offset the reduction in state funding for trial court operations; and
3. The Judicial Council direct the AOC to continue working with the trial courts to find other ways of addressing the reduction in state funding for trial court operations.

If the Judicial Council directs the AOC to initiate an amendment to rule 10.815, the AOC recommends that the Judicial Council authorize the AOC to expedite the rule-making process for adopting the rule, including a shortened time for public comment, to allow the rule, to be considered by the Judicial Council at its next meeting on October 28, 2011.

Previous Council Action

The council originally adopted rule 10.815 as rule 6.712 by circulating order dated December 19, 2005; the rule was renumbered effective January 1, 2007. By adopting and amending rule 10.815, the Judicial Council has approved courts charging a reasonable fee, not to exceed costs, for the following services and products:

- (1) Forms;
- (2) Packages of forms;
- (3) Information materials;
- (4) Publications, including books, pamphlets, and local rules;
- (5) Compact discs;
- (6) DVDs;
- (7) Audiotapes;
- (8) Videotapes;
- (9) Microfiches;
- (10) Envelopes;
- (11) Postage;

- (12) Shipping;
- (13) Off-site retrieval of documents;
- (14) Direct fax filing under rule 2.304 (fee per page);
- (15) Returning filed-stamped copies of documents by fax to persons who request that a faxed copy be sent to them;
- (16) Training programs for attorneys who serve as court-appointed temporary judges, including the materials and food provided to the participants; and
- (17) Other training programs or events, including materials and food provided to the participants.

(Cal. Rules of Court, rule 10.815(b).) The Judicial Council has approved court-established cost-recovery fees for incidental services and products as identified above, but not for activities that are directly associated with litigation of cases before the court. The council has not previously received requests for amendments to the rule related to costs for appearing at hearings or for other core services associated with litigation of a specific case. The council has taken no previous action on the BASF's request. A copy of rule 10.815 is attached for reference.

Rationale for Recommendation

Recommendation against amending rule 10.815

The BASF requested on August 18, 2011 that the Judicial Council amend rule 10.815 to allow trial courts to establish a new fee for the appearance of each attorney at a case management conference in a complex civil case. The fee is intended to provide additional funding to assist trial courts as they face reduction in state funding for trial court operations. The basis of the BASF's request is explained at greater length in the attached memorandum.

The OGC, also on August 18, 2011, issued a memorandum concluding that the Judicial Council may not approve a fee like that proposed by the BASF. Government Code section 70631 authorizes the Judicial Council to approve a court-established fee for a service or product if (1) there is no statute authorizing or prohibiting a fee for the service in question and (2) the fee is reasonable and does not exceed the costs of providing the service or product for which the fee is charged. Here, the Legislature has already specified an exclusive fee to be charged for participating as a party in a complex case (Gov. Code, §§ 70603(a)(1) and 70616), and has also determined that no fee may be charged for filing a case management statement, which is filed in connection with a case management conference (Gov. Code, § 70617(b)(3)). Because the Legislature has addressed fees for complex cases and case management conferences, the Judicial Council may not approve the proposed fee without significant risk that the fee would be found to be inconsistent with statute. The proposed fee would also be inconsistent with the legislative

intent reflected in Government Code section 70600, which states in pertinent part: “It is the intent of the Legislature to establish a uniform schedule of filing fees and other civil fees for the superior courts throughout the state.” The Legislature, however, could enact the proposed fee by statute. The basis of the OGC’s conclusion is explained at greater length in the attached memorandum. Although the memorandum is addressed to Curtis L. Child, and is marked “privileged,” the privilege has been waived and the memorandum distributed to members of the Judicial Council, to presiding judges and court executive officers of the superior courts, and to the BASF.

On August 22, 2011, the BASF submitted a memorandum responding to the OGC’s August 18, 2011 memorandum. This second BASF memorandum, which is labeled a “draft,” is also attached. The BASF argues:

1. The prohibition against additional fees in Government Code section 70603(a)(1) precludes adding fees only to first filing fees and does not apply to the proposed appearance fee;
2. A fee for filing a case management statement is distinguishable from a fee for an appearance at a case management conference because the former assists the court, while the latter benefits the party; and
3. Case law supports reasonable and appropriate court fees.

The BASF arguments are unpersuasive for the following reasons:

1. Government Code section 70603(a)(1) identifies the “only charges that may be added to the fees in this chapter.” The cited chapter includes all civil fees, not just first filing fees; Government Code section 70603(a)(1), therefore, precludes charging any fees in complex cases, except those already provided.
2. It is irrelevant whether the service or product is for the benefit of the court or the party as the threshold question is whether the fee is authorized by law.
3. The two cases cited by BASF support the Legislature enacting a fee by statute but do not support the argument that the Judicial Council may approve fees in the absence of statutory authority.

Recommendation that the AOC continuing working with the trial courts to address the reduction in state funding for fund trial court operations

The purpose of the BASF proposal is to address the reduction in state funding for trial court operations. Although the BASF proposes a new fee in complex cases, there are a number of alternatives to address this issue.

The basis for recommending that the council not amend rule 10.815 to authorize trial courts to adopt a new fee is that Government Code section 70631 precludes the council from approving a fee that has already been addressed by statute. The Legislature, however, may enact the proposed fee by statute. In addition, Government Code section 68502.5(a)(10) authorizes the

Judicial Council to review the level of the fees for services charged by the courts and prepare recommended adjustments for forwarding to the Legislature.

The AOC recommends that the Judicial Council direct it to continue working with the Superior Court of San Francisco County and other trial courts to consider ways to address the reduction in state funding for trial court operations.

Comments, Alternatives Considered, and Policy Implications

No proposal has been circulated for public comment. Because the AOC is recommending that the council act on the alternatives to the BASF request, the alternatives and policy implications are discussed in the *Rationale for Recommendation* section of this report, above.

Implementation Requirements, Costs, and Operational Impacts

The recommendation that the council not amend rule 10.815 will have no implementation requirements, costs, or operational impacts. The possible impact on the Superior Court of San Francisco County of the reduction in state funding for trial court operations has already been articulated in the request from the BASF and by the court in other communications.

The recommendation that the AOC continue to work with the trial courts to address the reduction of state funding for trial court operations will require the time and effort of trial court and AOC staff, but no additional funds are necessary to implement this recommendation.

Attachments

1. California Rules of Court, rule 10.815.
2. August 18, 2011, Memorandum from the BASF to Hon. Tani Cantil-Sakauye, Beth Jay, and Mary M. Roberts.
3. August 18, 2011, Memorandum from Mary M. Roberts and Michael I. Giden to Curtis L. Child (privilege waived).
4. August 22, 2011, Memorandum from the BASF to Curtis L. Child, Ronald G. Overholt, and Mary M. Roberts (labeled “draft”).



California Rules of Court (Revised January 1, 2011)

Rule 10.815. Fees to be set by the court

(a) Authority

Under Government Code section 70631, a superior court may charge a reasonable fee for a service or product not to exceed the costs of providing the service or product, if the Judicial Council approves the fee.

(b) Approved fees

The Judicial Council authorizes courts to charge a reasonable fee not to exceed costs for the following products and services unless courts are prohibited by law from charging a fee for, or providing, the product or service:

- (1) Forms;
- (2) Packages of forms;
- (3) Information materials;
- (4) Publications, including books, pamphlets, and local rules;
- (5) Compact discs;
- (6) DVDs;
- (7) Audiotapes;
- (8) Videotapes;
- (9) Microfiches;
- (10) Envelopes;
- (11) Postage;
- (12) Shipping;
- (13) Off-site retrieval of documents;
- (14) Direct fax filing under rule 2.304 (fee per page);
- (15) Returning filed-stamped copies of documents by fax to persons who request that a faxed copy be sent to them;
- (16) Training programs for attorneys who serve as court-appointed temporary judges, including the materials and food provided to the participants; and
- (17) Other training programs or events, including materials and food provided to the participants.

(Subd (b) amended effective January 1, 2007; previously amended effective July 1, 2006.)

(c) Guidelines for determining costs

The fee charged for any product or service listed in (b) may not exceed the court's cost in providing the product or service. In determining the costs of a product or service, the court must:

- (1) Identify the specific product or service; and
- (2) Prepare an analysis of the direct and indirect costs on which the fee is based.

(d) Reasonableness

In deciding what specific fee or fees, if any, to charge for a product or service under (b), the court must determine that the fee charged is reasonable considering relevant factors such as the benefits to the court and the public from providing the product or service and the effects of charging the fee on public access to the court.

(e) Reporting requirement

Each court that charges a fee under this rule must provide the Administrative Office of the Courts with a description of the fee, how the amount of the fee was determined, and how the fee is applied.

(f) Public notice

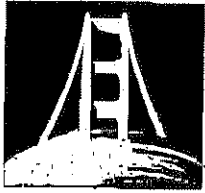
The court must notify the public of any fee that it charges under this rule by providing information concerning the fee in a conspicuous place such as the court's fee schedule.

(g) Procedure for adoption of fee

If a court proposes to change any fee authorized under (b) that it is already charging or to charge any new fee authorized under (b), the court must follow the procedures for adopting or amending a local rule under rule 10.613 of the California Rules of Court.

(Subd (g) amended effective January 1, 2007; previously amended effective July 1, 2006.)

Rule 10.815 amended and renumbered effective January 1, 2007; adopted as rule 6.712 effective January 1, 2006; previously amended effective July 1, 2006.



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ATTACHMENT 2

2011 OFFICERS AND
BOARD OF DIRECTORS

August 18, 2011

Priya S. Sanger
President

MEMORANDUM

Kelly M. Dermody
President-Elect

To: The Honorable Tani Cantil-Sakauye, Chief Justice, California Supreme Court, Beth Jay, Principal Attorney to Chief Justice Tani Cantil-Sakauye, and Mary Roberts, General Counsel, Administrative Office of the Courts

Christopher Kearney
Treasurer

From: The Bar Association of San Francisco (BASF); Priya S. Sanger, BASF President, Wells Fargo Bank, Legal Department; Kelly M. Dermody, BASF President-Elect, Loeff, Cabraser, Heimann & Bernstein, LLP; Christopher Kearney, BASF Treasurer, Kecker & Van Nest LLP; Stephanie Skaff, BASF Secretary, Farella Braun + Martel LLP; Merri Baldwin, BASF Director, Chapman, Popik & White LLP; Daniel Burkhardt, BASF Executive Director; Stuart Gordon, Gordon & Rees LLP; Therese Stewart, San Francisco City Attorney's Office; Blanca Young, Munger, Tolles & Olson LLP

Stephanie Skaff
Secretary

Re: Trial Court Funding

Manly Agarwal
Merri A. Baldwin
Krystal Bowen
Doris Cheng
Haywood S. Gilliam, Jr.
Stuart Hanlon
Jonathan Hayden
Catherine S. Kirkman
Susan Kumagai
David Lowa
Timothy W. Meppin
Stuart Plunkett
Isabelle M. Salgado
Tracy Salisbury
Guyen Ta
David Tsai
Michael Tubach
Guy B. Wallace

Subject: Request for Approval of Certificate of Appearance for Complex Case Management Appearance, Pursuant to Government Code Section 70631

San Francisco Superior Court ("SFSC") is facing a budget crisis that, absent immediate additional funding, will require significant reductions in court services available to civil litigants. SFSC has announced that on October 3, 2011, it will be forced to:

Lay off 200 employees, leaving only 280 of 591 authorized positions;
Lay off all 11 of the commissioners and hearing officers who currently handle probate, child support, juvenile dependency, traffic and criminal proceedings;
Indefinitely close 25 civil courtrooms, and 14 of the 17 current civil trial departments, including its 2 highly regarded complex litigation departments.

BARRISTERS CLUB
OFFICERS

Matt Gluck
President

San Francisco may be the first California court to have to make such drastic cuts, but others are not far behind. We are requesting the Judicial Council's assistance to address the fiscal emergency facing our courts. In particular, we ask the Judicial Council to act pursuant to its mandate to ensure access to justice, and within its existing statutory authority under Government Code Section 70631, to amend CRC 10.815 to

Jon Eldan
Vice-President

David Reidy
Treasurer

Ann Nguyen
Secretary

EXECUTIVE DIRECTOR
AND GENERAL COUNSEL

Daniel Burkhardt



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authorize a new fee for appearances in connection with complex civil case management hearings. Authorizing this new fee is squarely within the Judicial Council's power, and appears to be the only mechanism available to meet SFSC's and other similarly situated courts' critical short-term need to raise revenue so that their courts can remain open to civil litigants. This proposal has been thoroughly vetted and has broad support in the Bay Area legal and business community.

The Judicial Council has the Power and Obligation to Address the Fiscal Crisis Facing California's Courts

Immediate and decisive action by the Judicial Council is necessary to avoid cutting off critical services to civil litigants and to ensure equal access to justice in San Francisco's courts, as well as in other courts similarly situated. The likely effect of the measures SFSC has announced will be to impose disproportionate hardship on those in California (anyone but the most wealthy) unable to bypass a backlogged civil court system by paying for private judges, and deny due process and justice to individuals and small businesses whose cases will not be heard in time to avoid or mitigate serious hardship.¹ Absent immediate action, the civil litigation system will grind to a halt, stalling the development of new legal precedent, leaving commercial disputes unresolved, and further crippling California's already fragile economy.

The Judicial Council has the power—and indeed the obligation—to address this emergency. The Judicial Council is charged with “improving the quality of justice and advancing the consistent, independent, and *accessible* administration of justice by the judicial branch for the benefit of the public.”² It counts among its “fundamental goals” and “responsibilities” “promoting public access to the justice system”³ and “taking all appropriate steps to develop and establish the judicial branch's fiscal priorities,”⁴ including by “secur[ing] appropriate funding for the judicial branch.”⁵

Consistent with these goals and responsibilities, the Government Code grants the Judicial Council broad powers to “regulate the budget and fiscal management of the trial courts” “notwithstanding any other law.”⁶ Although the Judicial Council does not appear to have the authority under this

¹ Long delays in resolution of disputes about such matters as child custody, elder abuse, discrimination, wrongful termination of employment, negligently caused personal injuries, police misconduct, unfair competition and others can effectively deny justice altogether as children grow up, elders and people injured in accidents die, individuals are unable to support themselves and their families, and small businesses fail because of wrongs that go unremedied.

² CRC 10.1 (emphasis added).

³ CRC Appx. D, Judicial Council Governance Policies § I.A.2.a.

⁴ CRC Appx. D., Judicial Council Governance Policies § I.A.2.d

⁵ *Id.*

⁶ Government Code Section 77206(a) provides:



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provision to raise *existing* fees set by the Uniform Civil Fees Act or by other statutory or regulatory mandate,⁷ it does have the power to authorize new fees not already covered by a statute or rule. Under Section 70631 of the Uniform Civil Fees Act:

In the absence of a statute or rule authorizing or prohibiting a fee by the superior court for a particular service or product, the court may charge a reasonable fee not to exceed the costs of providing the service or product, if the Judicial Council approves the fee. The fee shall be distributed to the court in which it was collected.

The Judicial Council has already exercised its power under Section 70631 to identify certain "approved fees" that it "authorizes courts to charge" for products and services not already addressed by an existing statute or rule.⁸ Under CRC 10.815, courts are pre-authorized by the Judicial Council to charge fees for a number of different products and services including forms, packages of forms, information materials, publications, CD, DVDs, audio- and videotapes, microfiches, envelopes, postage, shipping, off-site retrieval of documents, direct fax filing, returning file-stamped copies of documents by fax, training programs for attorneys serving as temporary judges, and other training programs and events.

By amending CRC 10.815 to authorize a new fee for appearances at complex civil case management hearings, the Judicial Council can help to "secure appropriate funding"⁹ for the courts by providing SFSC—and other superior courts—a means of raising revenue to address their critical financial needs. As discussed below, this amendment can be adopted on an expedited basis to address the time-sensitive needs of the courts and those who use them.

Notwithstanding any other law, the Judicial Council may regulate the budget and fiscal management of the trial courts. The Judicial Council, in consultation with the Controller, shall maintain appropriate regulations for recordkeeping and accounting by the courts. The Judicial Council shall seek to ensure, by these provisions, both of the following:

- (1) That the fiscal affairs of the trial courts are managed efficiently, effectively, and responsibly.
- (2) That all moneys collected by the courts, including filing fees, fines, forfeitures, and penalties, and all revenues and expenditures relating to court operations are known.

The Judicial Council may delegate its authority under this section, when appropriate, to the Administrative Director of the Courts.

⁷ See Gov. Code § 68502.5(a)(10) (Judicial Council "as part of its budget process" may review "the level of fees charged for various services and prepare recommended adjustments for forwarding to the legislature"); Gov. Code § 70602 (imposing a moratorium on increases in filing fees until July 1, 2013); Gov. Code § 70603(a) (Fee covered by the Uniform Fee Act "are intended to be uniform statewide and to be the only allowable fees for those services and filings").

⁸ CRC 10.815

⁹ CRC Appx. D., Judicial Council Governance Policies § I.A.2.d



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Authorizing a New Fee May Be the Only Immediate Way to Address The Current Financial Emergency

Although the Judicial Council bears responsibility for ensuring that courts are adequately funded and that citizens have equal access to the justice system in California, it has few options available to address financial emergencies like that facing SFSC.

The Uniform Civil Fees Act imposes a moratorium on all fee increases, which can only be lifted by the legislature.¹⁰ Further, subject to a few narrow exceptions that do not include fee increases to address fiscal emergencies, the Act provides that fees charged for filings and services “under this chapter are intended to be uniform statewide and to be the only allowable fees for those services and filings.”¹¹ Accordingly, courts (and the Judicial Council) are powerless to impose or authorize additional fees for the many filings and services already covered by the Act.¹² Authorizing a new fee for a service not addressed by an existing statute or rule appears to be the only way the Judicial Council can act to raise revenue through court fees under the existing statutory scheme.

The Judicial Council of course has the power to allocate funds among the individual trial courts,¹³ and the allocation scheme must “assure that all trial courts receive funding for the minimum operating and staffing standards before funding operating and staffing requests above the minimum standards.”¹⁴ Additionally, the Judicial Council may “relocat[e] ... funds during the course of the fiscal year to ensure equal access to the trial courts by the public, to improve trial court operations, and to meet trial court emergencies.”¹⁵ But reallocating an already greatly reduced court budget may be difficult given the budgetary challenges facing all of California’s trial courts.

Nor is a legislative solution capable of addressing the problem in the short term. The legislative process takes time and will not provide the immediate relief the courts need. The Judicial Council is in the best position to help generate immediate, additional revenue for the courts by authorizing a new fee under Government Code Section 70631.

A New Fee for Appearances at Civil Case Management Conferences is Reasonable and Necessary

¹⁰ Gov Code § 70602

¹¹ Gov. Code § 70603(a)

¹² For a complete list of authorized and prohibited civil fees in California, see the 2011 Statewide Civil Fee Schedule, available at:
http://www.imperial.courts.ca.gov/PDFDocs/Civil_Fee_Schedule_20110101.pdf

¹³ Gov. Code § 77200(c)

¹⁴ Gov. Code § 68502.5(a)(4); see also CRC 10.105

¹⁵ Gov. Code § 68502.5(a)(5)



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SFSC therefore requests that the Judicial Council exercise its existing statutory authority to approve, pursuant to Government Code Section 70631, an additional fee for the significant service provided to litigants and counsel by the complex case management conference hearing.

The case management services provided in complex cases are significantly more extensive than those regularly provided in connection with non-complex civil matters. They also provide great benefits to litigants and courts. Very often, complex case management services result in streamlined discovery, narrowing of issues, and coordination with other litigation, increasing efficiency and conserving scarce court resources. Charging litigants a fee for these valuable services is reasonable and justified.

We recognize that an additional court fee will make civil litigation more expensive for those involved in complex cases. But the modest additional cost the fee will add to complex litigation is far preferable to a complex litigation system that simply does not exist. And with the pending closure of both of SFSC's complex litigation departments, the disappearance of court resources devoted to complex litigation is not theoretical.

Our discussions with practitioners from both sides of the bar strongly suggest that the imposition of an additional fee in connection with complex civil case management conferences is viewed as justified and reasonable.

SFSC is in the process of determining the reasonable fee for appearance for counsel appearing in connection with complex case management hearings, and will provide it to the Judicial Council as soon as the analysis is completed.

SFSC's Proposal for Implementing the New Fee

Given the time pressures facing SFSC, we believe the fastest and most efficient way to implement the proposed fee increase would be for the Judicial Council to amend CRC 10.815 to add the following to the list of "approved fees" under Government Code Section 70631 currently set out under CRC 10.815: **Appearance Fee for counsel appearing in connection with complex case management hearings.**

Once amendment was approved by the Judicial Council, the addition of the new appearance fee could be adopted by SFSC and other courts pursuant to local rule under CRC 10.613. This new fee would be collected in connection with issuing a certificate of appearance at complex case management hearings.

Because of the incredible time pressure now facing SFSC, and because of the direct involvement by the local bar in the crafting of this proposal, we also request that the Judicial Council waive or shorten the existing time period for comment to allow for early adoption of the proposed new appearance fee under both 10.815 and as a local rule under CRC 10.613.

Although a long-term legislative solution to chronic underfunding of the judiciary is absolutely critical, it will take time to achieve. The crisis facing our courts is immediate, and requires a short-term solution that will generate revenue necessary to keep civil courtrooms open to all citizens. Under its broad authority to regulate the budget and fiscal management of the trial



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courts, the Judicial Council has the power to implement such a short term solution, and it can do so without reallocating any of the scarce resources budgeted to the courts. By amending CRC 10.815 to approve a new fee for appearances at civil case management hearings, and allowing courts like SFSC to adopt such a fee on an expedited basis, the Judicial Council can meet its responsibility to ensure that trial courts are adequately funded and that the civil justice system remains accessible to all litigants.



Judicial Council of California

ADMINISTRATIVE OFFICE OF THE COURTS

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MEMORANDUM

Date

August 18, 2011

Action Requested

Please review


To

Curtis L. Child, Director
Office of Governmental Affairs

Deadline

Not applicable

From

Mary M. Roberts, General Counsel 
Michael I. Giden, Attorney
Office of the General Counsel

Contact

Michael I. Giden
818-558-4802 phone
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Subject

Authority to Establish Fees in Complex Cases

Question Presented

May the Judicial Council approve a fee to be charged by a court for the appearance of each attorney at a case management conference in a complex case?¹

Short Answer

No. Under Government Code section 70631, the Judicial Council may only approve a court-established fee—that is reasonable and does not exceed the costs of providing the service for which the fee is charged—in the absence of a statute authorizing or prohibiting a fee for the

¹ We understand there has been discussion of an appearance fee in the amount of \$50 or \$300 per attorney appearing at a case management conference in complex cases.

CONFIDENTIAL: COVERED BY ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE

Opinion of the AOC Office of the General Counsel, not of the Judicial Council

PRIVILEGE WAIVED; DISTRIBUTION IS PERMISSIBLE

service in question. Here, the Legislature has already specified an exclusive fee to be charged for participating as a party in a complex case and has already determined that no fee should be charged for filing a case management statement, which is filed in connection with a case management conference. Because the Legislature has addressed fees for complex cases and case management conferences, the Judicial Council may not approve the proposed fee without significant risk that the fee would be found unlawful. The Legislature, however, could enact the proposed fee by statute.

Discussion

A. A court may not charge a fee in a complex case unless it is specifically authorized in the Uniform Civil Filing Fees and Standard Fee Schedule Act of 2005.

The Uniform Civil Filing Fees and Standard Fee Schedule Act of 2005 (UCF) (Gov. Code, § 70600 et seq.) establishes a uniform schedule of filing and other civil fees for superior courts statewide. With a few exceptions identified in Government Code² section 70603, the fees specified by the UCF are “the only allowable fees for those services and filings.”³ (§ 70603(a).)

Section 70603(a) specifically addresses the only exception that may be added in a complex case:⁴

The *only charges* that may be added to the fees in this chapter are the following:

² All code references are to the Government Code.

³ The Legislature explained the purpose of the UCF in uncodified language as follows:

(c) Local fees and surcharges on court filing fees have created confusion, difficulty in administration, and lack of uniformity in fees in different counties across the state.

(d) The creation of a uniform civil fee structure will streamline and simplify civil fees, provide for uniformity in different counties, address the funding shortfall occurring under the current fee structure, and significantly improve financial stability, accountability, and predictability in the courts.

(e) The uniform civil fee structure seeks to eliminate confusion about the proper fee amounts to be paid, significantly ease the administrative workload in collecting and distributing fees, and provide a small amount of additional funding for important judicial branch functions, including technology infrastructure and court facilities.

(Assem. Bill 145; Stats. 2005, ch. 75, § 1.)

⁴ The other exceptions identified in section 70603 include special surcharges authorized for filings in the City and County of San Francisco and in Riverside and San Bernardino Counties. (§ 70603(a)(3), (4), (5).)

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Opinion of the AOC Office of the General Counsel, not of the Judicial Council

PRIVILEGE WAIVED; DISTRIBUTION IS PERMISSIBLE

(1) In a complex case, the fee provided for in Section 70616 may be added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, and 70614.

(Italics added.) The complex case fee provided for in section 70616 is paid to the clerk at the time of the filing of the first paper if the case is already designated as complex, or within 10 calendar days of the filing of a court order determining the case to be complex. The plaintiff or plaintiffs collectively pay one \$550 fee, and each defendant pays a \$550 fee up to a cap of \$10,000.

Under section 70603(a)(1), the only additional fee that can be charged in a complex case is the above-described fee authorized by section 70616, unless another fee is authorized in the UCF.

B. Section 70631 authorizes the Judicial Council to approve a civil fee only in the absence of a statute authorizing or prohibiting a fee for a particular service or product.

The only statute in the UCF under which a fee for an appearance at a case management conference in a complex case *might* be authorized is section 70631. That section provides:

In the absence of a statute or rule authorizing or prohibiting a fee by the superior court for a particular service or product, the court may charge a reasonable fee not to exceed the costs of providing the service or product, if the Judicial Council approves the fee. The fee shall be distributed to the court in which it was collected.

Section 70631 authorizes the Judicial Council to approve a civil fee only in the absence of a statute that either (1) *authorizes* a fee for the relevant service or product or (2) *prohibits* a fee for the relevant service or product.⁵ As discussed in the following section, there are several statutes that address the subject matter of the proposed fee.

⁵ Rule 10.815 of the California Rules of Court was adopted by the Judicial Council to implement section 70631. Rule 10.815 was originally adopted as rule 6.712 through a circulating order dated December 19, 2005, and was renumbered effective January 1, 2007. Subdivision (b) of the rule lists 17 products and services for which the council has authorized courts to charge reasonable fees, not to exceed costs. They include forms, informational materials, publications, envelopes, postage, shipping, training programs, and other similar products and services.

CONFIDENTIAL: COVERED BY ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE

Opinion of the AOC Office of the General Counsel, not of the Judicial Council

PRIVILEGE WAIVED; DISTRIBUTION IS PERMISSIBLE

C. Section 70631 does not authorize the Judicial Council to approve a fee for an appearance at a case management conference in a complex case because the Legislature has already enacted statutes that address fees in this area.

Because the Legislature has addressed the subject of complex case fees in sections 70603(a)(1) and 70616, we conclude that section 70631 does not authorize the Judicial Council to approve a fee for an appearance at a case management conference in a complex case. The Legislature has also addressed case management conferences in section 70617(b)(3), which further supports this conclusion.

1. Because the Legislature has already authorized a fee for complex cases and prohibits any other fees for complex cases, section 70631 does not authorize the Judicial Council to approve a fee for appearing at case management conferences in complex cases.

The UCF both (1) *authorizes* a fee for complex cases in section 70616 and (2) *prohibits* any other fee in complex cases in section 70603(a)(1), which, as previously noted, provides:

The *only charges* that may be added to the fees in this chapter are the following:

(1) In a complex case, the fee provided for in Section 70616 may be added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, and 70614.

(Italics added.) Because section 70631 authorizes the Judicial Council to approve a fee only in the absence of a statute governing the subject matter of the fee, and because the Legislature has specifically addressed fees for complex cases in sections 70603(a)(1) and 70616, the council is

Although section 70631 does not specify the method by which the Judicial Council is to approve fees, review of the rule's history makes clear that in adopting rule 10.815, the council intended to set forth an exhaustive list of products and services for which courts may charge fees. The memorandum recommending adoption of the rule explained that an alternative course of action that had been considered was that courts might submit fee-authorization requests on a case-by-case basis. (Memorandum from W. Vickrey and T. Hansen to Judicial Council of Cal., *Circulating Order: CO-05-03—re Rule Authorizing Courts to Charge Fees for Certain Products and Services* (Dec. 13, 2005).) This option was rejected, however, because it would be time-consuming and inefficient for the council to consider fee-authorization requests on an ad hoc basis, and, further, it could “result in a wide range of different new fees being charged by the courts, which would be inconsistent with the goal of standardizing fees” articulated by the Legislature in section 70603. (*Id.* at p. 3.)

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not authorized under section 70631 to approve any additional court-established fee for complex cases.⁶

2. **Because the Legislature does not permit a fee to be charged for *filing* a case management conference statement, the Judicial Council likely cannot approve a fee for *appearing* at case management conferences in complex cases.**

In section 70617, the Legislature states that *no fee* shall be charged for *filing* a case management conference statement. (§ 70617(b)(3).) This is further evidence that the Legislature did not intend that parties be charged for *appearing* at a case management conference, whether in a complex case or otherwise.

We recognize that the opposite argument could be made—i.e., that because the proposed fee would be for *appearing* at a hearing and not for *filing* a document, the UCF does not address a fee for appearing at a hearing. If that argument were to prevail, the Judicial Council could, under section 70613, approve a court-established fee for appearing at case management conferences, *if* holding a case management conference is a “service” within the meaning of section 70631 *and* the proposed fee is reasonable and not in excess of the costs of providing the “service.” We think that argument is unpersuasive.

The purpose of civil filing fees is to offset a portion of the costs of operating a court; they are not intended to support the entire cost of running a court or any particular activity associated with a case. As our Supreme Court has observed:

Because of the central role of the judicial system in society, public funding of the courts is an established tradition, and the ability to shift the cost of court operations to the parties is limited, particularly in criminal cases. . . . [I]n civil cases litigants properly may be required to pay fixed, incidental court fees that indirectly subsidize *a portion* of the cost of the judicial system, such as filing fees.

(*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 737, italics added, citations omitted.) In *Townzen v. County of El Dorado* (1998) 64 Cal.App.4th 1350, 1359, the Court of Appeal considered the reasonableness of a \$182 first filing fee for each defendant. It determined that the

⁶ This is not to say that other fees explicitly authorized in the UCF cannot be charged in a complex case. For example, the court may charge all the motion fees specifically authorized in section 70617. The Legislature has prohibited any other fees in complex cases *unless* they are already authorized in the UCF. (§ 70603(a)(1).)

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amount of the fee did not exceed the reasonable cost of “services related to the administration of the superior courts.” Although the court did not make its analysis explicit, the court took this broader approach rather than considering whether the fee covered only the costs of filing a responsive pleading.

Charging a fee for appearing at a case management conference is closely related to charging for filing a case management conference statement. A party must attend a case management conference and must file a case management conference statement for any conference it attends. The Legislature has stated that no fee is to be charged for filing a case management statement (§ 70617(b)(3)); it would elevate form over substance to distinguish the proposed fee as an “appearance fee” to avoid the impact of that legislative proscription. To do so would be inconsistent with the authority granted in section 70631 under which the Judicial Council may approve a court-established fee only in limited circumstances and for limited purposes (i.e., reasonable cost-recovery for providing products and services).

Because there is a statute prohibiting a fee for filing case management conference statements, and because section 70631 authorizes the Judicial Council to approve a fee only in the absence of such a circumstance, we conclude that the Judicial Council likely cannot approve a fee for appearing at a case management conference.

D. The Legislature could authorize the proposed fee by statute.

Although the Judicial Council probably cannot approve the proposed fee, the Legislature could enact the fee by statute. The Supreme Court has noted that, although public funding of the courts is an established tradition, “in civil cases litigants properly may be required to pay fixed, incidental court fees that indirectly subsidize a portion of the cost of the judicial system, such as filing fees.” (*Laff, supra*, 25 Cal.4th at p. 737.) In enacting the UCF, the Legislature stated that civil fees are an important part of funding the court system. (AB 145, § 1.) We have previously concluded that civil fees are user fees under section 3 of article XIII A of the California Constitution (as amended by Proposition 26 at the November 10, 2010 election); such fees may, therefore, be enacted by the Legislature by a simple majority vote.

MMR/MIG/atg

cc: William C. Vickrey, Administrative Director of the Courts
Ronald G. Overholt, AOC Chief Deputy Director

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August 22, 2011

DRAFT

MEMORANDUM

To: Curtis L. Child, Director, Office of Governmental Affairs, Administrative Office of the Courts (AOC); Ronald G. Overholt, Chief Deputy Director, AOC; Mary Roberts, General Counsel, AOC

From: The Bar Association of San Francisco (BASF); Priya S. Sanger, BASF President, Wells Fargo Bank, Legal Department; Kelly M. Dermody, BASF President-Elect, Loeff, Cabraser, Heimann & Bernstein, LLP; Christopher Kearney, BASF Treasurer, Kecker & Van Nest LLP; Stephanie Skaff, BASF Secretary, Farella Braun + Martel LLP; Merri Baldwin, BASF Director, Chapman, Popik & White LLP; Daniel Burkhardt, BASF Executive Director; Stuart Gordon, Gordon & Rees LLP; Therese Stewart, San Francisco City Attorney's Office; Blanca Young, Munger, Tolles & Olson LLP

Re: Trial Court Funding

Subject: Response to August 18, 2011 Memorandum from the General Counsel's Office of the Administrative Office of the Courts

We write in response to the August 18, 2011 memorandum from the Administrative Office of the Courts' Office of General Counsel analyzing whether the Judicial Council has the power to authorize an appearance fee for case management conferences in complex civil cases (the "Memo"). Given the emergency facing our courts, we appreciate the prompt response from the General Counsel's Office. However, we respectfully disagree with the Memo's conclusion that the Judicial Council "probably cannot approve the proposed fee."¹ Although, as the Memo points out, the legislature can and should play a significant role in assisting San Francisco Superior Court and other courts in financial distress, the Judicial Council is both empowered and obligated to ensure funding for and access to the State's courts. As detailed below, we continue to believe that it is well within the Judicial Council's authority to approve the proposed fee, and we urge the Judicial Council to do so without delay. Access to justice will be denied to countless civil litigants unless the Judicial Council acts to implement a stop-gap measure to help the courts meet critical short-term needs while a legislative solution is being pursued.

¹ Memo, at p. 6



Government Code Section 70631 Empowers the Judicial Council to Approve Fees Not Prohibited or Authorized by an Existing Statute or Rule

The Memo acknowledges that under Government Code Section 70631, an appearance fee for case management conferences in a complex case could be charged “in the absence of a statute or rule authorizing or prohibiting” such a fee.¹ The Memo concludes, however, that the Judicial Council “probably cannot approve the proposed fee”² because the legislature “addressed the subject of complex case fees in Sections 70630(a)(1) and 70616,” and prohibited a filing fee for case management conference statements in Section 70617(b)(3).³

Respectfully, these provisions pose no barrier to the Judicial Council’s authority. Under Section 70631, the Judicial Council may not authorize a fee if an existing statute or rule (1) “authoriz[es]” (2) or “prohibit[s]” (3) a fee by the superior court for the “particular service or product” in question.⁴ The Judicial Council’s power to authorize a fee for a “particular service or product” related to complex cases, such as appearances at case management conferences, is not constrained simply because the legislature “has addressed the subject of complex case fees”⁵ generally in the Act. Nor is it limited just because the legislature has prohibited a fee for a “closely related”⁶—but distinct—service. The legislature must have authorized or prohibited a fee for the “*particular* service”⁷ at issue.

The legislature has not authorized or prohibited a fee for appearing at case management conferences in a complex case, including in either of the two provisions cited in the Memo: Government Code Section 70603(a)(1) and Government Code Section 706017(b)(3). We discuss each in turn below.

² Gov. Code § 70631; Memo, at p. 3

³ Memo, at p.6

⁴ Memo, at p. 4

⁵ Gov. Code § 70631 (emphasis added). Section 70631 provides in full:

In the absence of a statute or rule authorizing or prohibiting a fee by the superior court for a particular service or product, the court may charge a reasonable fee not to exceed the costs of providing the service or product, if the Judicial Council approves the fee. The fee shall be distributed to the court in which it was collected.

⁶ Memo, at p. 4

⁷ Memo, at p. 6

⁸ Gov. Code. 70631



Government Code Section 70603(a)(1) Does Not Prohibit Additional Fees In Complex Cases

Section 70603(a) provides, in full:

(a) Except as provided in this section, the fees charged for filings and services under this chapter are intended to be uniform statewide and to be the only allowable fees for those services and filings. The only charges that may be added *to the fees in this chapter* are the following:

(1) *In a complex case, the fee provided for in Section 70616 may be added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, and 70614.*

(2) In an unlawful detainer action subject to Section 1161.2 of the Code of Civil Procedure, a charge of fifteen dollars (\$15) as provided under that section may be added to the fee in Section 70613 for filing a first appearance by a plaintiff.

(3) In Riverside County, a surcharge as provided in Section 70622 may be added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, 70614, 70650, 70651, 70652, 70653, 70655, and 70670.

(4) In San Bernardino County, a surcharge as provided in Section 70624 may be added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, 70614, 70650, 70651, 70652, 70653, 70655, and 70670. This paragraph applies to fees collected under Sections 70611, 70612, 70613, 70614, 70650, 70651, 70652, 70653, 70655, and 70670, beginning January 1, 2006.

(5) In the City and County of San Francisco, a surcharge as provided in Section 70625 may be added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, 70614, 70650, 70651, 70652, 70653, 70655, and 70670.⁸

The Memo interprets Government Code Section 70603(a)(1) to mean that “unless another fee is authorized in the [Uniform Civil Fees Act],” “the *only* additional fee that may be charged in a complex case is the fee authorized by Section 70616,”⁹ which allows a complex case fee to be added to the filing fees for first papers applicable to all civil cases.

⁹ Gov. Code § 7063(a) (emphasis added)

¹⁰ Memo, at p. 3 (emphasis added)



Section 70603(a)(1), however, simply limits the charges that can be added to first paper and first responsive paper filing fees (set forth in Sections 70611, 70612, 70613, and 70614) in a complex case. As the plain language and the overall statutory scheme reflect, Section 70603(a)(1) does not prohibit fees for *other* filings and services in complex cases, such as appearances at case management conferences.

Section 70603(a) does two things. First, it sets forth a general rule that the fees in the Uniform Civil Fee Act are “uniform” and exclusive, i.e. “the only allowable fees for those services and filings.” Second, it carves out exceptions to those rules in the numbered subsections, which allow certain specified fees to be “added to” the fees authorized “in this chapter.”

Section 70603(a)(1) creates such an exception “in complex cases,” for which it authorizes an initial complex case fee, set forth in Section 70616, to be “added to” the usual first paper and first response paper filing fees charged in all civil cases under the Act. All Sections 70603(a)(1) and 70616 do, in other words, is authorize higher filing fees for the first paper a party files in a complex case. Neither provision says anything about charging fees in a complex case for services and filings *other than* those related to the first papers filed with the court. They certainly do not impose a blanket prohibition on all additional fees in complex cases. As the statutory scheme makes clear, Section 70603(a)(1) is an “except[ion]” that *expands*—rather than *limits*—the fees that may be charged in complex cases.

Government Code Section 70617(b)(3) Prohibits Only Filing, Not Appearance Fees for Case Management Conferences

Like Section 70603(a)(1), Section 70617(b)(3) also does not prohibit (or authorize) a fee for the “particular service”¹⁰ that is the subject of the proposed fee. It provides that “there shall be no fee ... ***for filing*** ... a civil case management statement,”¹¹ but says nothing about charging fees ***for appearing*** at a case management hearing. If the legislature intended to prohibit fees for appearances at case management hearings, it could easily have done so explicitly.

The Memo worries that to draw a distinction between filing fees and appearance fees “would elevate form over substance.”¹² But there are real and meaningful differences between filing a civil case management statement and appearing for a civil case management conference, especially in a complex case. The case management statement is filed jointly by the parties for the benefit of the court, to apprise the court of the status of the case and provide an outline of subjects to be covered at the conference.¹³ Because filing the case management statement is a service that benefits the court it makes sense that the Legislature would prohibit a fee for filing,

¹¹ Gov. Code. 70631

¹² Gov. Code § 70617(b)(3)

¹³ Memo, at p. 6

¹⁴ See CRC 3.725 (requirements for case management statements); form CM-110 (form required for case management statements); CRC 3.727 (subjects to be considered at the case management conference).



the statement without prohibiting a fee for appearances at the conference itself, which is held for the benefit of the parties.

Indeed, case management conferences are often scheduled at the request of one or more parties, and in a complex case are frequently used by litigants to address developments as complex litigation unfolds, to advocate for structuring the litigation in a manner most advantageous to their cause, and to enlist the judge's help in moving the case toward settlement, among other things.

In short, nothing in Section 70617(b)(3) explicitly or implicitly prohibits a fee for appearances at case management conferences in complex cases.

Authorizing the Proposed Fee is Reasonable and Appropriate in Light of the Emergency Facing Our Courts

Nothing in the case law, either, supports the conclusion that the Judicial Council would be acting outside its authority by approving the proposed fee.¹⁴ Indeed, the cases cited in the Memo affirm that it is reasonable and appropriate to charge civil fees in order to subsidize the general operation and administration of the trial courts. *See People v. Superior Court (Laff)* (2001) 25 Cal. 4th 703, 727 (“in civil cases litigants properly may be required to pay fixed, incidental court fees that indirectly subsidize a portion of the cost of the judicial system”); *Towzen v. County of El Dorado* (1998) 64 Cal. App. 4th 1350, 1359 (a proper purpose of court fees in civil cases is to “offset the costs of services related to the administration of the superior courts”).

This is especially true in the face of a fiscal emergency, when the Judicial Council is obligated to ensure that the trial courts remain adequately funded and accessible to all citizens. CRC Rule 10.815(d), which implements Government Code Section 70631, explains that the reasonableness of a proposed fee depends on “the benefits to the court and the public from providing the product or service and the effects of charging the fee on public access to the courts.” The proposed appearance fee is inherently reasonable since without it, public access to the courts will effectively be denied for most civil litigants in the city and county of San Francisco (and in other areas facing similar crises). Requiring a fee for a valuable service provided in the litigation of complex cases can and should be used to ensure that the courts remain accessible to all civil litigants.

The Courts Require the Judicial Council's Immediate Assistance To Address The Current Fiscal Emergency

As we emphasized in our memorandum of August 18, 2011, the San Francisco superior courts desperately need short-term relief that will allow them to raise revenue while a legislative solution is being pursued.

¹⁵ Memo, at p. 5



We appreciate the prompt attention that the Judicial Council and its staff have given this matter, and hope that the Council will approve the proposed fee after all of the details of the proposal—such as the amount and duration of the proposed fee—are fully formulated and presented. For example, we believe that any concerns about the proposed fee court be addressed by (1) limiting complex appearance fees only for courts that certify need, and (2) requiring the fee to sunset after three years, during which the parties would jointly seek a permanent rule change from the legislature in connection with broader court funding reforms.

Our hope is that the Council will engage with us in a dialogue about tailoring the proposal so that it can be adopted, consistent with the Council’s authority, to provide immediate assistance to courts in need while furthering our mutual objective of achieving a long term legislative solution to the court funding crisis.

DRAFT