

## Item SP12-05 Response Form

### **Title: Strategic Evaluation Committee Report**

The Strategic Evaluation Committee (SEC) was appointed by Chief Justice Tani G. Cantil-Sakauye in March 2011 to conduct an in-depth review of the AOC with a view toward promoting transparency, accountability, and efficiency. The Chief Justice received the report and recommendations on May 25. At its meeting on June 21, 2012, the Judicial Council accepted the report and directed that it be posted for public comment for 30 days. Comments received will be considered public and posted by name and organization.

**PLEASE NOTE that all comments will be posted to the branch web site at [www.courts.ca.gov](http://www.courts.ca.gov) as submitted by the commentator as soon as reasonably possible after receipt.**

### **To Submit Comments**

Comments may be entered on this form or prepared in a letter format. If you are *not* submitting your comments directly on this form, please include the information requested below and the proposal number for identification purposes. Because all comments will be posted as submitted to the branch web site, please submit your comments by email, preferably as an attachment, to: [invitations@jud.ca.gov](mailto:invitations@jud.ca.gov)

Please include the following information:

**Name:** Roger K. Warren    **Title:** Retired Judge

**Organization:** \_\_\_\_\_

**Commenting on behalf of an organization**

*General Comment:* By way of introduction, I served on the Sacramento Superior and Municipal Courts for twenty years, retiring in 1996 to serve as president of the National Center for State Courts (NCSC) headquartered in Williamsburg, Virginia. During my tenure as a California trial judge I served as Presiding Judge of the Sacramento Municipal Court, Juvenile Court, Superior Court, and consolidated Municipal and Superior Courts. I was a member of the Judicial Council under the leadership of Chief Justice Malcolm Lucas during the early 1990's, served as chair of the Council's Planning Committee, and was the founding chair of the Trial Court Presiding Judges Advisory Committee. After my retirement from the presidency of the NCSC in 2004, I served on a part-time basis as Scholar-in-Residence (and later Judge-in-Residence) at the California AOC until the termination of that position on June 30, 2012. Among my responsibilities in that position were to serve as principal advisor to the California Commission for Impartial Courts and to lead and coordinate AOC activities in the fields of evidence-based practice to reduce offender recidivism and implementation of performance incentive funding (SB 678).

At the outset, I wish to join other commentators in expressing gratitude and appreciation to Chief Justice Cantil-Sakauye, the Judicial Council, and members of the SEC for their

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leadership, dedication, and hard work in re-examining the work of the AOC in these challenging times. The judicial branch of California is in crisis. It faces unprecedented fiscal challenges and judicial branch budget cuts. As the SEC Report notes, these unprecedented budget cuts have also exacerbated underlying tensions between the AOC and local courts resulting from the expanding roles of the AOC over the past fifteen years. (pp. 2-4).

In this context, all appear to recognize that heightened vigilance to the transparency, accountability, and efficiency of the AOC is imperative and that significant reductions to the AOC budget are immediately required. In reviewing the AOC's budget and staffing for potential near-term reductions, AOC management, the Judicial Council, and the SEC appear to agree that "mandated," "core," or "essential" functions should be prioritized for retention and that "discretionary," "less essential," or "non-essential" functions should be prioritized for reduction. While the task of identifying statutorily mandated functions may be more clear-cut, distinguishing "core" from "discretionary" functions is more complex and requires establishment of clear criteria and exercise of sound judgment.

I will not comment further here, however, on the process or substance of Judicial Council near-term AOC budget decisions. Much more is at stake here than that. Some of the SEC conclusions and recommendations, if immediately adopted wholesale as permanent changes without further careful analysis and consideration, as some have apparently urged, would dramatically undermine the constitutional role of the Judicial Council itself.

The SEC Report identifies six "overarching issues and themes" that emerged from its work: one "primary" theme and five "subordinate" themes. (pp. 3-6) Briefly, the five "subordinate" themes are that the AOC is oversized, it is top-heavy and unwieldy, its internal management processes are deficient, it has developed a culture of control rather than service, and it must take steps to restore its credibility. To the extent that the Judicial Council finds any of these contentions to be true, the Judicial Council can and should take appropriate corrective action. But, as other commentators have discussed in greater detail (see, e.g., Comment of Judge Curtis Karnow), many of the Report's observations and recommendations are supported only by perceptions or opinion surveys or not at all, and require much more extensive factual and expert analysis before their possible adoption. In Judge Karnow's words, "the Report is a starting point for further analyses of these issues; it is an insufficient basis, on its own, for action."

I will focus my general comments, however, solely on the SEC's discussion of the roles of the AOC and Judicial Council and the SEC's "primary theme" that "the role of the AOC is limited" and that the "AOC's primary role is as a service provider to courts needing or requesting assistance." (p. 35) Below, I add brief additional comments regarding two of the SEC's specific recommendations regarding these roles.

As the SEC Report notes, under law the Administrative Director "performs functions delegated by the Council or the Chief Justice" (CA Const., Art.6, Sec. 6 (c)) and the AOC serves as the staff agency to the Judicial Council "to assist the Council and its chair in

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carrying out their duties under the Constitution and laws of the State." (p. 24) In order to determine, therefore, what the proper roles of the Administrative Director and AOC are, one must first look to California's constitutional provisions regarding the duties of the Judicial Council and Chief Justice.

In referring to the constitutional duties of the Judicial Council, however, the SEC Report appears to have ignored the primary purpose for which the Council was created: "to improve the administration of justice." Article 6, section 6 (d), the paragraph setting forth the substantive duties of the Judicial Council, provides:

"To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute."

Indeed, the earlier language of section 6 (d) was revised in 1966 upon the recommendation of the California Constitution Revision Commission for the specific purpose of clarifying that all of the Judicial Council's mandated functions were to be undertaken for the overriding purpose of improving the administration of justice.

It is neither an aberration nor inadvertent that California's Judicial Council was created specifically for the purpose of improving the administration of justice. The California Judicial Council was created in 1926 as part of the national judicial council movement that flourished across the country between 1920 and 1940. By the late 1940's, 37 states had created judicial councils as planning and policy making bodies to improve their court systems. The councils served as the primary vehicles for the modern court reform movement. Arthur Vanderbilt, the ABA President and New Jersey Chief Justice who famously lamented that "judicial reform is no sport for the short-winded," served as chair of the New Jersey Judicial Council in the early 1930's and Judge Roscoe Pound, whose 1906 speech to the ABA on "The Causes of Popular Dissatisfaction with the Administration of Justice" is often cited as the origin of the modern court reform movement, served as Director of the National Conference of Judicial Councils in the late 1930's.

The SEC Report notes that among the ballot arguments in support of creating the Judicial Council in 1926 was the need for an organization to "correlate" the work of the various courts, be "responsible for seeing that the machinery of the of the courts is working smoothly," and organize the courts on a "business basis." (p. 23) However, there were other ballot arguments in support of the proposed amendment that are not cited by the SEC, including that the Judicial Council would meet "as a sort of board of directors, and will be charged with the duty of seeing that justice is being properly administered" and "whenever anything goes wrong any judge or lawyer or litigant or other citizen will know to whom to make complaint, and it will be the duty of the council to propose a remedy...."

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Thus, the overriding constitutional duty of the Judicial Council is to improve the administration of justice in California. Needless to say, that is a broad mandate. The SEC Report acknowledges that the broad range of functions prescribed by statute is "surprisingly more extensive than anticipated by the committee." (p. 34) Even putting aside those Council functions specifically prescribed by statute, however, I believe it is fair to say, based on perusal of the Council's strategic and operational plans alone, that since at least the late 1980's the Judicial Council, its leaders, and its advisory committees have generally construed the Council's mandate broadly, and have worked faithfully, tirelessly, and, for the most part, successfully towards that end. In order to carry out its various strategic objectives the Council also relied heavily, as most board of directors must, on its staff and delegated broad administrative authority to the Administrative Director and AOC.

Despite statements in the Report such as "A consistent theme expressed by courts, judges, and others is that the AOC's role has expanded and changed beyond its intended purposes" (p.33); "the AOC has undertaken tasks and projects that tend beyond the core and mandatory functions that reasonably flow from constitutional or statutory authority" (p.4); "the AOC's role must be limited primarily to those functions and duties reasonably flowing from the Constitution and statute" (p.35); and "there is a valid concern that the AOC has steadily amplified its role, performed functions that are not essential, and accumulated and exercised control beyond that either envisioned by law or necessary to the courts" (p.35), there is as far as I can tell no evidence or claim in the Report that AOC staff have engaged in any tasks or projects that were beyond the scope of activities authorized by the Judicial Council or Chief Justice, or that the Judicial Council undertook or authorized any projects outside its broad mandate to improve the administration of justice.

Furthermore, in light of the Judicial Council's broad constitutional mandate to improve the administration of justice and the absence of any evidence that the AOC acted outside its delegated authority, the SEC Report's oft-repeated criticism of the AOC for not confining its performance to "core" and "essential" functions, rather than "discretionary" and "non-essential" functions, is nonsensical and misdirected. The AOC performs functions that it is authorized by the Council or Chief Justice, and funded by the Legislature and Governor, to perform. The Judicial Council and Chief Justice, not the AOC, set strategic and operational priorities for the entire judicial branch including the AOC. That is the fundamental purpose of the Judicial Council's comprehensive and inclusive judicial branch strategic and operational planning processes. The AOC does not have authority to disregard established Judicial Council priorities and independently determine to carry out only those functions that it or some of its judicial stakeholders consider to be "core" or "essential."

The Report's contention that "the AOC's primary role is as a service provider to courts needing or requesting assistance" (p. 35) is presumably not intended as a legal conclusion but merely to describe the policy preference of those court representatives whose views are predominantly reflected in the SEC Report. As an implicit criticism of the AOC,

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however, it appears, like other Report statements mentioned above, to be misdirected. The primary role of the AOC is to serve as the staff agency for the Judicial Council, not as staff to California's courts. The role of the AOC must align with the mandates, mission, and strategic objectives of the Council. To the extent that the role of the AOC is not prescribed by statute, it is up to the Judicial Council to determine whether and to what extent it may wish to modify the Council's mission and strategic and operational objectives so as to limit the AOC's role to being merely a direct service provider to the courts.

If the Judicial Council were to significantly limit its own mission and the role of the AOC to serving primarily as a service provider to courts requesting assistance, however, it is hard to see how the Council could possibly carry out effectively its mandated constitutional duties as the single judicial branch entity specifically charged with improving the administration of justice in California.

Judicial Council recommendations, rules, and statutorily-prescribed functions designed to "improve" the administration of justice necessarily require "change" of existing judicial administration practices. Implementing change of existing administrative practices is often controversial and invariably challenging. Yet, studying, advocating, recommending, planning, promoting, and implementing changes of existing judicial administration practices in order to improve the administration of justice is precisely what the Judicial Council was created to do. That is the Council's core mission and constitutional responsibility.

Furthermore, the nature of that constitutional responsibility is such that in its execution the Judicial Council is necessarily required to exercise effective judicial leadership, not merely to respond to court requests for services. And, in carrying out Judicial Council-approved plans and projects in which the Council has played a leadership role, the AOC, acting on behalf of the Council, is also often called upon to exercise leadership in promoting, supporting, and implementing Council objectives.

Recognition of the necessary and proper leadership roles of the Judicial Council and AOC does not mean, however, that the AOC should ever carry out Council plans or projects through a "culture of control," as the SEC feels has occurred. (p. 38) In carrying out Judicial Council plans and projects I strongly agree with the SEC that the AOC should "assume a customer service orientation toward the courts." (p.4)

In my experience, in implementing Council projects, the Council and AOC have almost invariably utilized an existing advisory committee, or established a new commission, advisory committee, task force, or working group, composed predominantly of judges, court executives, or other court representatives, to guide the implementation process. It is my understanding that the principal purpose of these entities has been to assure in good faith and to the maximum extent possible that Council initiatives are guided by customer input and advice and fairly implemented in light of any expressed or reasonably foreseeable customer concerns. Nonetheless, if the Council finds that the AOC has in fact

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implemented Judicial Council initiatives without a proper customer service orientation, as the SEC believes, the Judicial Council can and should take corrective action.

Finally, the SEC Report also refers to the tension between the authority of the AOC on the one hand and the autonomy of local courts presided over by judges who are constitutional officers on the other hand. (See, e.g., pp. 4, 34) In my view this issue is very real and lies at the heart of the challenges facing the California judicial branch. Mitigating this tension should be a high priority for the Judicial Council. Because the AOC only exercises authority on behalf of the Judicial Council, however, the legal tension is really between the constitutional authority of the Judicial Council on the one hand and the constitutional authority of trial court judges on the other.

In its discussion of this tension, however, the SEC Report omits any reference to section 6 (f) of Article 6 which provides: "Judges shall report to the council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned." In short, the SEC Report fails to consider that trial court judges have an express constitutional duty to "cooperate with" the Judicial Council. Section 6 (f) does not fully resolve the tension between the constitutional authority of the Judicial Council and the constitutional authority of trial court judges, but it does implicitly recognize and seek to mitigate that tension by specifically imposing upon trial court judges the affirmative duty to cooperate with the Judicial Council. In this manner Article 6 seeks to ensure that the constitutional authority of California trial judges will not impede the Judicial Council in the Council's efforts to carry out its constitutional mandate to improve the administration of justice.

To be clear, section 6 (f) certainly does not mean that either the AOC or Judicial Council is immune from constructive criticism, or that judges and other stakeholders should not have a full opportunity to meaningfully participate in Judicial Council deliberations and decision-making, or that the AOC can implement Council programs in a heavy-handed or insensitive manner. But I submit that it does mean that judges cannot properly exercise their constitutional authority in a manner that impedes, undermines, or subverts the ability of the Judicial Council to carry out its own constitutional responsibilities. Recognition of, and respect for, the legitimate constitutional authority of all parties involved may be a good place to start in seeking to address this issue.

*Specific Comment - Recommendation/Chapter Number 4-1:* ("The Judicial Council must take an active role in overseeing and monitoring the AOC and demanding transparency, accountability, and efficiency in the AOC's operations and practices.")

In discussing the Judicial Council's oversight and monitoring roles, the SEC Report also discusses the Council's broader governance role. (p. 42-43) As the Report recognizes, effective governance goes beyond oversight and monitoring of the Administrative Director. Setting clear goals, objectives, plans, policies, and expectations to guide the work and performance of the Administrative Director is essential to effective monitoring and oversight. Effective governance would also seek to establish a unity of purpose and

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relationship of trust between the Council and Administrative Director. This would lead to a much healthier organization than one in which the Council lacks trust in the Administrative Director and feels it has to constantly be looking over his or her shoulder-overseeing and monitoring his or her every move. For these reasons, I recommend that the concept of effective governance also be included in recommendation 4-1.

Recommendation 4-2 ("The primary role and orientation of the AOC must be as a service provider to the Judicial Council and the courts.")

For the reasons set forth in my general comments above, I propose the following modification of this recommendation: "The primary role of the AOC is to serve as the staff agency to the Judicial Council. In carrying out its responsibilities with respect to the courts the AOC should assume a customer-service orientation. "

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