

JUDICIAL COUNCIL MEETING
February 20, 1997

The Judicial Council of California meeting began at 8:38 a.m. on Thursday, February 20, 1997, at the Radisson Hotel in Sacramento, California, on the call of Chief Justice Ronald M. George, chair.

Judicial Council members present: Chief Justice Ronald M. George; Justices Marvin R. Baxter, Roger W. Boren, Richard D. Huffman, and Arthur G. Scotland; Judges J. Richard Couzens, Albert Dover, Brenda Harbin-Forte, Lois Haight, Melinda A. Johnson, Jon M. Mayeda, Risë Jones Pichon, Eleanor Provost, and Kathryn D. Todd; Mr. Maurice Evans, Ms. Glenda Veasey, and Mr. Brian C. Walsh; and advisory members Ms. Sheila Gonzalez, Mr. Joseph A. Lane, Mr. Stephen V. Love, Hon. William F. McDonald, Mr. Ronald Overholt, and Hon. Nori Anne Walla.

Absent: Judge Paul Boland, Senator John L. Burton, Assembly Member Martha Escutia, and Mr. Harvey I. Saferstein.

Others present included: Mr. William C. Vickrey; Justice Christopher Cottle; Judges Marjorie Carter, Steve Jahr, Thomas Millard, Richard Neal, and Kathleen O'Leary; Mr. Thomas Agin, Mr. Ron Coley, Ms. Karyn Dresson, Ms. Beth Jay, Mr. Jay Johnson, Mr. Robert B. Kuhel, Mr. Alex MacBain, Ms. Linda Millspaugh, Ms. Marlene Nelson, Mr. Matt Newman, Mr. Louis Scarpino, Mr. Alan Slater, and Mr. Ray Wheeler; staff: Ms. Martha Amlin, Mr. Paul Baker, Mr. Michael Bergeisen, Ms. June Clark, Mr. Neil Cossman, Ms. Lesley Duncan, Ms. Jessica Fiske, Ms. Karin Flores, Ms. Barbara Fox, Mr. Mel Gibson, Ms. Lynn Holton, Ms. Kate Howard, Ms. Melissa Johnson, Mr. Dennis Jones, Mr. Ray LeBov, Mr. Martin Moshier, Ms. Judith Myers, Mr. Victor Rowley, Ms. Dale Sipes, Ms. Shelley Stump, Ms. Ann Templeton, Mr. Ron Titus, Mr. John Toker, Ms. Kiri Torre, Mr. Anthony Williams, Mr. Jerry Yalon, and Ms. Pat Yerian; media representatives: Mr. Eric Bailey, *Los Angeles Times*; Mr. Tom Dresslar, *Daily Journal*; Mr. Mark Katches, *Orange County Register*; Mr. David Kline, *Capitol News Service*; and Mr. Tom Nadeau, *Daily Recorder*.

Except as noted, each action item on the agenda was unanimously approved on motion made and seconded. (Tab letters and item numbers refer to the binder of Agenda Reports and Recommendations dated February 20, 1997, sent to members in advance of the meeting.)

Tab A Minutes of the January 29, 1997, Meeting

Council Action:

A motion was made to approve the minutes of the January 29, 1997, meeting. The motion passed.

Tab B Judicial Council Committee Presentations

Executive and Planning Committee Report

Justice Scotland reported that the Executive and Planning Committee had met twice since the last Judicial Council meeting. Topics discussed included a report and recommendations from Administrative Office of the Courts staff regarding Government Code section 68073 actions, nominations, and the March Planning Workshop. Justice Scotland also discussed Chief Justice George's outreach plan, which involves asking each member of the council to write a column in *Court News* and to visit local courts.

Policy Coordination and Liaison Committee Report

Justice Baxter stated that the committee had met once by conference call since the last Judicial Council meeting. At that meeting, the committee voted to recommend that the council sponsor legislation creating a five-year pilot project for early mediation in civil cases in which the amount in controversy exceeds \$50,000; the recommendation will be presented for action later in the agenda.

The committee also responded to a request that it consider a legislative proposal regarding judges' retirement and concluded that it is one aspect of the larger issue of judicial retention. The committee took no position on the specific proposal and recommended that the Chief Justice appoint a task force to review the issue of judicial retention generally.

Justice Baxter reported that discussions continue with legislators, the Governor, counties, employee organizations, and others on securing passage of state trial

court funding legislation that includes a long-term restructuring plan. Senate Bill 21 (Lockyer), which passed the Senate on February 7, is a short-term funding bill that deals only with the current-year funding crisis by freeing up the criminal fine revenue that has not been available for appropriation to the courts. The Chief Justice, Bill Vickrey, and Ray LeBov will be visiting next week with each member of the Senate and Assembly Budget Subcommittees to talk about trial court and judicial branch budgets; subcommittee hearings on those budgets are expected to begin mid-March.

Justice Baxter said that the Office of Governmental Affairs (OGA) staff has nearly finished the process of securing legislators' commitments to author bills in the council-sponsored legislative program.

Rules and Projects Committee Report

Justice Huffman reported that the committee had met once by conference call since the last Judicial Council meeting. He stated that RUPRO had approved the rules for certification of the record for death penalty cases and the Report on Efficiency and Effectiveness of the Court Appointed Counsel Program for submission to the council. (Both items will be addressed later in the agenda.)

Additionally, Justice Huffman said that RUPRO is reviewing the annual workplans of advisory committees and task forces and the internal rules of the council; developing ways to assist council members newly assigned as liaisons to advisory committees and task forces; and initiating a program to assist advisory committees active in rule making to review existing rules in their subject areas. RUPRO agreed to meet bi-weekly, mostly by telephone, to accomplish these goals. The committee also directed staff to seek ways to provide members with computer links to the AOC and to each other to enable the committee to communicate and receive materials more efficiently.

COUNCIL ITEMS 1 & 2 WERE APPROVED BY A SINGLE MOTION AS CONSENT ITEMS, PER EACH OF THE SUBMITTERS' RECOMMENDATIONS.

Item 1 Judicial Council Pilot Project: Nonrelative Extended Family Member Foster Care Placements

Legislation enacted by Statutes 1995, chapter 509, amended the Welfare and Institutions Code¹ to require the Judicial Council to establish a pilot project to allow children subject to placement in foster homes to be placed in the homes of nonlicensed, nonrelative extended family members. The legislation mandates that the pilot project include up to five counties, as selected by the council, in which the county department of social services and the juvenile court jointly agree to participate. Santa Clara County is specifically named as one of the participating counties.

Requests for proposals (RFP 11-8-96) for this pilot project were circulated statewide to each superior or consolidated court and county child welfare agency.

The Juvenile Law Subcommittee of the Family and Juvenile Law Advisory Committee recommends approval of four counties, in addition to Santa Clara, to establish pilot projects allowing foster care placements in nonlicensed, nonrelative extended family member homes as required by Senate Bill 1262.

Council Action:

The Judicial Council approved participation by Fresno, Riverside, San Diego, Santa Clara, and Siskiyou Counties in the Judicial Council Pilot Project: Nonrelative Extended Family Member Foster Care Placements.

Item 2 Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program

The 1996 Budget Act contains Budget Control Language and Supplemental Report Language directing the Judicial Council to report to the Legislature on several operational aspects of the court appointed counsel program. The Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program responds to both sets of directives.

The Administrative Presiding Justices Advisory Committee recommends approval of the report and authorization to transmit it to the Legislature.

¹ The legislation amended section 11402, and repealed and added sections 362.7 and 362.8, of the Welfare and Institutions Code.

Council Action:

The Judicial Council:

1. approved the Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program; and
2. authorized the Administrative Director of the Courts to transmit the report to the Legislature.

Item 3 Status Report on Funding the Trial Courts

Mr. Martin Moshier, Director of the Finance Division, gave an update on trial court funding and pending relevant legislation, including Senate Bill 21, which includes \$290.5 million for trial courts.

He reported that the council acted in February via circulating order to reallocate \$869,200 as an emergency advance from the Assigned Judges Program to Trial Court Operations, which will allow 16 courts to stay open through March 1, 1997. Mr. Moshier noted that this action is the third time in four months that the Trial Court Budget Commission (TCBC) and the Judicial Council have undertaken emergency measures to keep courts from closing as a result of the severe reduction in state trial court funding for fiscal year 1996–97. Previously, \$3.8 million was borrowed in two increments from the \$4.6 million reserve for court automation studies, to avoid closures or widespread layoffs in courts that are most reliant on state funding.

Mr. Moshier reported that the Governor’s budget for fiscal year 1997–98 proposes full state funding of the trial courts at 93.5 percent of the Judicial Council/TCBC request adjusted for the Collections Enhancement program.

He stated that, depending on the fate of pending legislation, additional action regarding allocation and reallocation of funds may need to be taken by the council via circulating order in order to forestall court closures and layoffs.

Ms. Gonzalez asked if the members of the Legislature fully understand that courts are shutting down because of the shortage of funds. Chief Justice George replied that legislators recognize the problem, but many do not want a short-term solution to diminish the pressure to find a long-term solution.

Justice Huffman asked when courts will close. Mr. Moshier said that 24 courts will probably close the first week of March and 51 courts could close by mid-March.

Council Action:

For information only; no action required.

**Item 4 Approval of Trial Court Budget Commission Recommendations
Regarding Government Code Section 68073 Actions by the Trial
Courts in Orange and Lassen County**

Council Action:

A motion was made that the Judicial Council meet in Executive Session in order to consult with legal counsel. The motion passed.

Special Comments:

When the public meeting reconvened, Chief Justice George explained that no action had been taken by the Judicial Council during Executive Session.

Administrative Office of the Courts staff; Judge Jahr, chair of the Trial Court Budget Commission (TCBC); Mr. Wheeler, counsel for the Orange County courts; Mr. Agin, Assistant County Counsel for Orange County; and Judge Millard, the presiding judge of Orange County Superior Court, made presentations regarding formal prelitigation actions pursuant to Government Code section 68073 that have been submitted to the TCBC for consideration by the trial courts and counties of Orange and Lassen.

It was noted that the Budget Evaluation and Appeals Committee (BEAC) and the Government Code Section 68073 Review Committee met jointly by telephone conference pursuant to council-approved procedures to review the submissions and forwarded their findings and recommendations to the TCBC. The TCBC met on January 28, 1997, to review the submitted actions and the committees' proposals.

Mr. Moshier provided an overview of Government Code section 68073 and discussed its legal, procedural, and budgetary provisions and implications. He stated that section 68073 was enacted in 1953 when trial courts were fully funded by counties; today, counties fund only a portion of the budget. He also said that

interpretations of the language and intent of the code section are varied and controversial.

He stated that three counties filed 68073 requests with the TCBC last year: Los Angeles, Yolo, and Orange. The Judicial Council acted on those requests; however, before the actions commenced, Senate Bill 99 provided trial court funding to be matched by counties.

Mr. Moshier said that three counties have filed 68073 requests with the TCBC this year: Lassen, Yolo, and Orange. He stated that the TCBC has not yet met to discuss the Yolo County claim. He also said that he has received notification that Mendocino county will be filing a claim shortly.

He noted that the Executive and Planning Committee asked AOC staff for an independent recommendation and analysis of legal and procedural issues regarding 68073 actions. He stated that the recommendation of the Finance Division is to approve the TCBC recommendation without passing on the dollar amounts therein.

Ms. Gonzalez asked whether courts in other counties are facing similar funding problems. Mr. Moshier noted that courts that are more reliant on state funding are having more problems, but that there is a 20 percent average shortfall statewide.

Judge Jahr and Mr. Yalon reviewed the definition of need for additional funding. Judge Jahr stated that the role of the Judicial Council and the TCBC in reviewing 68073 requests is not one of determining the financial circumstances of the county within which the court sits. Their role is to consider the need of the requesting court and then to consider reallocation of funds. Judge Jahr noted that there is no money in other courts currently to reallocate.

Judge Jahr stated that the TCBC recommends a definition of need in which a court must establish that it is unable to sufficiently provide services of trial court operations mandated by law based upon all available funding sources. He noted that the TCBC decided not to adopt a crisis definition of need.

Council Action:

Judge Couzens moved that the Judicial Council adopt the following definition of “need”: “Need,” pursuant to Government Code section 68073, requires courts to establish that they are unable to sufficiently provide services of trial court operations mandated by law based upon all available funding sources, and is neither the equivalent of the TCBC-determined needs-based approved budget, nor “critical need” as applied by the TCBC in distributing funding under Senate Bill 99 in fiscal year 1995–96. The motion passed.

Mr. Walsh asked whether the standard used by the TCBC for Lassen County is whether the courts would close without additional funding, noting that the standard that the Judicial Council just adopted is different from this standard. Mr. Yalon responded that the TCBC applied the standard it recommended to the council (rather than the slightly modified standard actually adopted). However, both the TCBC-recommended and Judicial Council-approved standards apply the same basic definition of “need.”

Council Action:

Justice Huffman moved that the Judicial Council approve and adopt the TCBC-proposed finding that the Lassen County Courts have established the need for additional funding under Government Code section 68073. The motion passed.

Mr. Moshier commented that the courts and government in Orange County disagree on almost every point. He noted that the TCBC Government Code Section 68073 Review Committee and the BEAC asked the county government and courts in Orange County to submit additional material regarding the total amounts requested by the courts and offered by the county. There are differences in how the courts and county define words used in the code section and different points of view about what the county has offered to fund. The difference between the amount the courts requested and the amount the county offered is \$18.9 million; Mr. Moshier noted that the TCBC found the courts’ request for the additional \$18.9 million credible.

Mr. Couzens asked whether approving a specific figure requires a determination of a county’s financial status. Judge Jahr responded that it was not always necessary, adding that some counties were so obviously broke that no determination was required.

Justice Huffman asked how the request by the Orange County courts related to the standard just adopted by the council. Judge Jahr stated that the TCBC did not do a line-item review of the Orange County courts' budget but rather relied on the TCBC's previous work and approval. Justice Huffman was concerned that other courts could make a case similar to that of the Orange County courts. Other courts could claim that since funding they have received from the state and the county is less than their TCBC-approved budget, they also have cause for a 68073 action.

Judge Couzens asked whether the Orange County courts without an additional \$18.9 million would be unable to provide services as in the standard just adopted by the council. Mr. Yalon replied affirmatively.

Mr. Walsh stated his concern that the Judicial Council is adopting a policy that does not consider a county's fiscal situation or an individual court's use of money or efficiency. Judge Jahr noted that section 68073 does not provide for this and is silent about how to review actions.

Ms. Gonzalez asked whether the TCBC reviewed Orange County's request for perimeter security, noting that even though other courts' TCBC-approved budgets included perimeter security, there is no money to fund this in a substantial number of courts. Mr. Yalon replied that the TCBC reviewed Orange County's entire request, including perimeter security funding.

Mr. Agin, Assistant County Counsel for Orange County, stated that the county's General Fund is taking on a risk of \$24 million to make a total of \$129.6 million available to the courts. He invited the courts and council to audit the county's figures to verify the amounts presented. He stated that the county will fight a 68073 action that results in a court order against the county. He said that if the county is held to a finding that it must provide an additional \$18.9 million, the courts must provide the supporting documentation.

Mr. Agin stated that he was uncomfortable opposing the request of the Orange County courts, but he is doing so because the County's General Fund is in jeopardy and the county has already eliminated hundreds of positions. He stated that he has asked the county and courts to meet together to determine actual needs and funding. Mr. Agin requested that the council consider a finding of fact to determine needs and commented that several county requests for finding of fact have been rebuffed by the courts.

Mr. Walsh asked Mr. Agin if the county believed that need had not been demonstrated by the courts or if the county held there was no need. Mr. Agin responded that Orange County is still paying off debts and will be in bankruptcy

for quite some time. He stated that the courts have not prioritized their funding needs in appearances before the Orange County Board of Supervisors. He added that the county has offered to hire consultants to provide an independent analysis of efficiencies within the courts. He also stated that if the courts in the next five months spent at a rate equivalent to the last seven months, the total amount spent would be under the \$129.6 million available.

Justice Huffman asked Mr. Agin why the courts and county had a difference of \$23 million in their figures. Mr. Agin stated that the courts are ignoring the \$24 million in Senate Bill 21 funding for which the county has taken on the risk.

Mr. Wheeler, counsel for the Orange County courts, stated that during the last several years the courts and county have been living under bankruptcy; that the county-approved budget provides four percent less than was provided in 1994–95; and that the courts are asking for less money than the TCBC-approved budget.

He stated that the county is viewing the courts as a department and not as an independent body of government with the ability to make its own determinations and decide its own needs.

Judge Millard stated that the \$129.6 million the county will make available to the courts includes \$13.8 million in funds that are for non-rule 810 expenses² related to the justice system. He said that if \$13.8 million is subtracted from the \$129.6 million, the remaining \$115.8 million is the amount being provided by the county to fund court operations pursuant to rule 810. Judge Millard noted that this was \$8 million less than was spent in 1995-96 on court operations pursuant to rule 810.

Judge Millard stated that the courts want to negotiate a resolution to the problem, but the trial courts are running out of money. He said that this is not an evidentiary hearing and not the right place to resolve the issues between the county and the courts. Judge Millard stated that Orange County is treating its courts as another agency rather than as a branch of government. He said that the courts are not eager to litigate this issue, and they want to resolve the problems and guard against the courts closing.

In response to a question from Judge Provost, Mr. Agin stated that the \$129.6 million figure included both rule 810 and non-rule 810 costs.

² California Rule of Court, rule 810 provides a list of expenses subject to state funding under Government Code section 77003.

Judge Haight asked Judge Millard when the courts will close if they do not receive the additional \$18.9 million. Judge Millard replied that the courts have funding for 10 months.

Council Action:

Mr. Walsh moved that the Judicial Council approve and adopt the TCBC finding that the Orange County Courts have established the need for additional funding under Government Code section 68073. The motion passed. [The Judicial Council did not take a position on the TCBC recommendation that the council approve and adopt the TCBC finding that the Orange County Courts' deficiency request for \$18.9 million is justified based upon the documentation submitted.]

Council Action:

Ms. Veasey moved that the Judicial Council determine that a claim of deficiency regarding trial court facilities, including the Orange County Courts' deficiency request regarding court facilities, is outside the scope of the TCBC's authority under Government Code section 68073. The motion passed.

Council Action:

Mr. Walsh moved that the Judicial Council approve and adopt the TCBC finding that no state funds are available for allocation or reallocation at this time in response to the requests of the courts of Lassen and Orange Counties. The motion passed.

Council Action:

Justice Scotland moved that the Judicial Council urge the courts and counties to work together to ensure that the necessary funding is available to maintain an acceptable level of operations for Orange and Lassen County courts. The motion passed.

Council Action:

Justice Scotland moved that with respect to future 68073 requests and based upon the desire of the Judicial Council to consider actual need for funds, rather than attempt to fully fund the approved budget in the absence of full state funding, the council direct staff to return to the council at the appropriate time with recommended criteria and procedures for future 68073 requests in the event that section 68073 remains in effect. The motion passed.

Item 5 Proposed Amendments to Rules on Certification of the Record in Death Penalty Appeals (Cal. Rules of Court, rule 39.5; new rules 39.50-39.57)

Justice Cottle presented the item to the council. He stated that Assembly Bill 195 (AB 195) became law on September 30, 1996. It created new procedures, effective January 1, 1997, that are designed to expedite the certification of the record and the briefing in capital appeals. In order to implement AB 195, the Criminal Law Advisory Committee recommends the adoption of new California Rules of Court, rules 39.50-39.57, which incorporate amendments to former rule 39.5. The proposed amendments and rules prescribe in more detail procedures mandated by AB 195 and provide for extensions of time, as contemplated by the legislation.

Judge Couzens asked if the record is checked for completeness during the new time frame of 120 days. Justice Cottle replied that it was. Justice Boren asked if the appellate counsel could move to correct after the 120-day period and Justice Cottle replied that it would take place within the 120-day period.

Council Action:

Justice Huffman moved that the Judicial Council adopt, effective March 1, 1997, new California Rules of Court, rules 39.50-39.57, regarding death penalty appeals, which incorporate amendments to former rule 39.5. The motion passed.

Item 6 Proposed Legislation for Early Mediation of Civil Actions and Proceedings

Judge Richard Neal presented the item to the council. He stated that due to the success of the pilot project for court-referred mediation of civil actions and proceedings in which the amount of controversy is \$50,000 or less, the Civil and

Small Claims Advisory Committee recommends that the Judicial Council sponsor legislation for early mediation for civil actions and proceedings having an amount in controversy in excess of \$50,000.

The proposed legislation would establish a pilot project for the Los Angeles County courts and for other counties that elect to participate, and would specifically focus on creating an early status conference followed by early mediation. He stated that the purpose of the legislation is to implement an effective process of court-referred mediation that will reduce the cost, time, and associated stress of dispute resolution. The Judicial Council would be required to submit a report to the Legislature on the effects of the pilot project, similar to the report concerning the initial pilot project adopted by the council at its November 15, 1996, meeting. He noted that Office of Governmental Affairs staff has made arrangements for introduction of the proposed legislation before the 1997 legislative deadline.

Judge Haight asked where the anticipated fee of \$250/hour for the mediator originated. Judge Neal said that the range of mediator fees is broad, ranging from \$500/hour to much lower and that the median is \$250/hour. Mr. Love asked how a mediator would be paid if fees are waived. Judge Neal said that his county has volunteer mediators who would be involved in this type of situation, and an alternative would be to have one side bear the costs as part of the settlement.

Council Action:

It was moved that the Judicial Council sponsor the proposed legislation for early mediation of civil actions and proceedings having an amount in controversy in excess of \$50,000. The motion passed.

Tab C Circulating Orders Approved Since Last Business Meeting

For information only; no action required.

Tab D Judicial Council Appointment Orders Since Last Business Meeting

For information only; no action required.

The meeting was adjourned at 1:50 p.m.

Respectfully submitted:

William C. Vickrey
Secretary