Kile - TCF Background

Superior Court of the State of California
County of Shasta

STEVEN E. JAHR
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July 18, 1995

Hon. Malcolm M. Lucas
Chief Justice of California
303 2nd Street, South Tower
San Francisco, CA 94107

Re: Remarks at July 13, 1995 Judicial Council Issues Session

Dear Chief Justice Lucas:

Thank you for the opportunity to participate at the referenced meeting this past week. As you requested, I am enclosing what amounts to my best reconstruction of the remarks that I made during my presentation on the subject of the connection between the state trial court funding mechanism we now use and the governance of the judicial branch. I am also taking the liberty of enclosing a photocopy of a June 19, 1995, letter which I sent to Kiri Torre on the subject.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Steven E. Jahr

Enclosure

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REMARKS DELIVERED AT JUNE 13, 1995 JUDICIAL COUNCIL "ISSUES" SESSION ON THE SUBJECT OF TRIAL COURT FUNDING

How does the mechanism by which trial court operations are funded affect the governance of the judicial branch? In order to address that question, we must examine the unique structure of our branch of government.

Historically, the organization, and therefore, the governance of our courts have been characterized by fragmentation and by dependence on others. Why?

First, the trial courts in California are structurally fragmented. By that, I mean that at the local level, county departments which are part of the executive branch of government provide essential services to the courts. For example, in most Superior Courts today, all in-court clerk services and processing clerk services in the clerk's office are provided by employees of the County Clerk, an elected official of the executive branch of government. Those employees answer to the County Clerk. Similarly, in many Superior Courts, court security services are provided by the executive branch of government at the county level, namely, the Sheriff, with the same consequences. Structural fragmentation has also been present throughout the history of California trial courts in the area of budgeting and accounting because, until we began the process of state trial court funding by functional categories in 1993, each court reported its budget using a format dictated by the county government in which it was located. The County Auditor or the County CAO would "call the tune" in terms of the format used and in terms of which items were to be accounted for within the court's budget and which items where to be located within the budgets of county departments. This meant that attempts to compare the courts in one county with courts in another for any purpose were inhibited by disparate accounting and budgeting structures.

A second characteristic of the judicial branch which has resulted in fragmented governance and a dependence on others has to do with the fact that the very procedures by which the trial courts conduct their business are not established by the judicial branch but rather through the political process in the Legislature. Specifically, the rules of procedure and practice which are found in a variety of statutes, especially the Penal Code and the Code of Civil Procedure, are in large measure the product of the initiatives of a variety of special interest groups in the Legislature. Let me give you an example, perhaps an empirically crude one, of the effects of these outsiders who seek to mold our rules of practice and procedure to their liking.

In preparation for this meeting, I looked at some old volumes of unannotated Deerings Codes which I keep on hand in chambers for the occasion when it is necessary to get exact statutory language which existed at an earlier time. I pulled down the 1978 edition of the Deerings volume which contains the Code of Civil Procedure. The Code has been in effect, of course, for more than 120 years. Within the first 100 years, through 1978, the Code came to occupy 540 pages in the Deerings volume. I next opened the current 1995 edition of the Code of Civil Procedure which, as you know, is printed in the same format

using the same type size as was used in 1978. I discovered that the Code of Civil Procedure now occupies something on the order of 860 pages. That's right. An increase from 540 to 860 pages in just 17 years. All of us were, in 1978, either on the bench or involved in the practice of law; so we know that disputes which arose during that year were no more complex in their basic nature than disputes that find their way into court in 1995. Nevertheless, the Code of Civil Procedure has grown at an extraordinary pace in those 17 years. How can the judicial branch govern itself when, in this way, it is entirely dependent on others who set the very rules of practice and procedure by which we function?

If anyone wishes to argue that the ongoing phenomenon of the larding of our rules and practice and procedure by the efforts of special interests does not have a serious impact on our ability to deliver services, I have a three letter response: A D R. Alternative Dispute Resolution, including the industry known as private judging, was barely existent in 1978. Today, private dispute resolution activity is big business. And it is really no mystery why. It is certainly no accident. ADR is, in a real sense, simply a marketplace solution to the problem of obtaining high quality, efficient, and cost competitive resolution of civil disputes. ADR is thus a market-driven symptom of a serious problem: The judicial branch does not control, as it should, the rules of practice and procedure by which it functions. The rules become bloated and convoluted to suit the desires of competing groups of advocates.

A third and related area of fragmentation and dependence has to do with the fact that the courts do not control the enactment of substantive statutory law. That is, of course, as it should be. By definition. Nonetheless, that circumstance impedes our ability to manage our own affairs. An obvious example is the dramatic effect that the "three strikes" legislation has had on the courts. The "three strikes" law went into effect without the slightest consideration of its effect on court operations costs. We are all now feeling the effects of "three strikes" cases. They are effectively preventing civil cases from going to trial while at the same time increasing, considerably, costs of essential court functions; for example, spending on juries, court reporting and the like. No state funding has accompanied this important new state law.

A fourth characteristic of the judicial branch which leads to dependence on others is the absence of independent authority to create new bench officer positions as the need arises, which further hobbles our ability as an institution to engage effectively in self-governance.

In summary, by law, the governance of the judicial branch is diffused and resides in all three branches of government at both the state and local levels. It is dependent on forces, interests, and institutions over which we in the courts presently have limited influence.

Yet, in the face of that reality, the Legislature, ironically the very institution which long before any of us was born enacted the laws which created this environment of fragmentation, has by recent action created for the courts a golden opportunity for successful self-governance, an opportunity for us to take control of our destiny in large

measure. That action falls into three general categories. First, by enacting the Delay Reduction Law, the Legislature re-empowered the trial courts to control the flow of cases from the moment they are filed. Second, through the coordination law, our trial courts have been empowered to deploy all available resources throughout each county evenly and in a businesslike fashion. Third, the funding laws have empowered the judicial branch at the state level to formulate the budgets for the trial courts, individually and in the aggregate.

That brings us to the question of what steps can be taken at the state level in support of self-governance by the judicial branch. There are several steps, but, in my view, the key to self-governance is found in reliable state funding of the lion's share of trial court operations costs, utilizing the functional budgeting method that is presently in place and relying upon the Judicial Council and its Trial Court Budget Commission to develop the budgets and to make the allocations of funds to the courts.

To explain that conclusion, I will digress for a moment to relate some of the experience which I have gained as a member of the Trial Court Budget Commission and its Budget Evaluation and Appeals Committee over the past three budget years. At first, when the Commission was formed, we discovered that the data which was provided by the trial courts was not capable of being interpreted or compared as between the courts. As we regularized the procedures which the courts were to follow in submitting their budget packages, we developed the tools which, incrementally, over time opened the door to a vast storehouse of knowledge about our trial courts which was previously unknowable. That process continues. The regularization of accounting practices and the refinement of the process in the last two fiscal years has allowed us for the first time to make real comparisons between courts and then to follow up with the courts to determine whether a court that seems to be reporting greater expenditures for a particular function is doing so because it is discharging all of its obligations while a court that is spending less is not or, perhaps, that the court spending less has developed a better way of accomplishing the objective which could be communicated to all of the trial courts in California. The budget process has led not just to the formulation of budgets but to the identification of what we might call "best practices." It has created a potential for unprecedented "cross-pollination" between all the courts. Previous to the advent of functional funding, the exchange of ideas largely occurred on a hit or miss basis when judges from various jurisdictions met at CJER institutes. Through the budget process, which has eliminated, in a real sense, the barriers between jurisdictions, the free flow of information throughout the trial courts is greatly enhanced. These developments have created a natural springboard to improved self-governance.

For example, and returning to the characteristics of our institution which were surveyed earlier, you will recall that the first area of fragmentation was structural, having to do with the different budget reporting techniques employed in each of the counties and with the dependence of the courts on county departments which provide essential services.

With functional budgeting as a part of the state funding process, we no longer have to compare "apples with oranges." While we are by no means at the point of having completely refined the process, we have made considerable progress which allows us to make reliable decisions in approving or disapproving budget requests and in formulating overall budgets. Moreover, since the Judicial Council itself is involved in the subject of court funding and budgeting, it is placed in a much better position than before to forward initiatives which further the interests of the judicial branch as a whole. The regularization of budgets that comes with the state funding law inevitably compels the development of self-knowledge which is a powerful tool in the hands of the judicial branch.

As to the business of county departments which provide essential services to the courts, the Trial Court Budget Commission requires that unsupported and apparently overstated costs of providing those services may no longer simply be "passed through" from the county agency to the courts. Detailed support for the costs that these agencies charge to the courts are to be provided so that they, too, can be scrutinized. The state funding process has also, I believe, contributed an incentive to bringing some of these outside agencies under the court's management umbrella by way of reorganization. For example, in Shasta County, the employees of the County Clerk's office who provided support services to the Superior Court, have now been brought under the authority of the Executive Officer of the courts. Similarly, with the approval of our Board of Supervisors, legislation was enacted which allowed the judges to consolidate the security services in our county and select which agency would provide them. The Marshal's Office was selected which means that security services are now provided by an arm of the court.

In summary, whether by management reorganization or simply through the budget accountability requirements now imposed by the Trial Court Budget Commission, the state court funding program promotes accountability . It puts the Judicial Council in a position of interpreting a vast fund of knowledge so that it can determine what is needed to do the job and, also, how best to do the job.

State court funding also can assist the courts in addressing the formulation of court practices and procedures. As the judicial branch arms itself with valuable budgeting information, it will be empowered to influence the legislative enactment of rules of criminal or civil practice and procedure because it will be able to attach a cost, system-wide, to the legislation, whether it is legislation proposed by the judicial branch of government or legislation proposed by others. Our more powerful voice in this process will put us in a position to insist that the Legislature uniformly requires the preparation of a "judicial impact report" associated with each proposed change in the rules of procedure and practice and the allocation of incremental, state-wide increases in trial court funding commensurate with any added operational costs flowing from those new laws. The effect will amount to a natural "brake" on special interest legislation designed to mold the rules of procedure. It will encourage the Legislature to become more cost-conscious in analyzing that kind of legislation and, ultimately, it will cause outside marketplace alternatives in the field of dispute resolution to become less attractive because the courts will become more competitive.

In addition, the state funding program addresses the governance problem associated with the enactment of new substantive statutory law, for essentially the same reason. The judicial branch will better be able to identify costs resulting from the enactment of new laws and to effectively persuade the Legislature to provide across-the-board incremental funding as a condition of passage.

Finally, state trial court funding addresses the judgeship needs problem, too, because the wealth of budget data being generated by the courts and the interpretation of that information by the Trial Court Budget Commission will spur the completion of the new judgeship needs methodology which will, in turn, permit the judicial branch credibly to advance judgeship needs in the Legislature.

In a sense, despite all of the dislocations and disruptions that we have experienced in the last few years in response to the demands of the delay reduction law, the coordination law and the new funding law, these laws will enable the judicial branch to experience a renaissance in advancing its independence, but only if we seize the moment and only if significant progress is now made in the shift of responsibility for funding the trial courts primarily to the state.

In advocating for state funding, the judicial branch must insist that the funding of the operations of the third branch of government is of the highest priority and not simply to be relegated to the world of realignments and the like. The courts, after all, are not simply an ornamental tapestry on the wall of government. Without an effective judicial branch of government, the rule of law is in jeopardy. Without the rule of law, there is no government. There is only anarchy and chaos. One need not look far in the western world, to Bosnia, to see how a civilization which turns its back on the rule of law will surely disintegrate. Few people appreciate how close California's courts are to widespread structural failure because of the Legislature's unwillingness for the past several years to correctly prioritize the funding of court operations and to live up to its statutory commitment to pay for trial court operations.

I would submit to you, in closing, that a dependable primary source of funding the operations of our trial courts is essential to providing adequate services to the citizenry and to assuring access for all Californians to justice.

State trial court funding assures those results and also provides the benefit of improved self-governance by the judicial branch of its affairs because state funding allows for a clear examination, on a comparative basis, of the practices and procedures in all courts which, in turn, enables the development on a local basis of "best practices" which can be readily identified as such and communicated system-wide. State funding permits the development, through pooled experiences of all courts, with the Judicial Council as the clearing house, of minimum service levels and, ultimately, specific performance standards.

State trial court funding empowers the courts to speak with the legislative and executive branches of government with one voice not only in the matter of responsible budgeting but in the formulation of the rules of practice and procedure and in judicial needs assessments.

We have seen that the tensions associated with hybrid funding responsibility are reaching critical mass, that all of the progress achieved and future progress promised, indeed the future progress of the trial courts, is now at risk. This year, we must convince the Legislature about the paramount nature of the service we provide to the citizens of California and of the need for our state government to meet its statutory commitment adequately to fund the trial courts.

Superior Court of the State of California
County of Shasta

STEVEN E. JAHR
PRESIDING JUDGE

June 19, 1995

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Kiri S. Torre
Assistant Director
Administrative Office of the Courts
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Re: Preparation for Judicial Council "Issues Session"

Dear Kiri:

This note is to follow on the remarks that I made during our recent telephone conference call. The purpose is to explain the point that, in considering the big picture relating to court practice procedure and funding, the Judicial Council, (prominent members of which serve in the Legislature), should consider solutions to what has become of the rules of practice and procedure in the courts in recent years as special interests have more successfully than ever cluttered the Code of Civil Procedure and the Penal Code with rules that bog down the processes which the courts are statutorily obliged to speed up and to conclude justly and in a cost-efficient manner. As I view it, the courts really have little control over their operations as long as they are powerless to formulate the fundamental rules of practice and procedure by which they operate. If those rules are dictated by others, particularly by partisan interests which prevail in the legislative process, we will not achieve true reform and will not be able to effectively address the phenomena of unnecessarily protracted litigation and private judging and private arbitration which have sprung up as a simple marketplace solution to unnecessarily burdensome and costly processes in the courts.

Allow me to illustrate. In 1872, more than 120 years ago, the Code of Civil Procedure was enacted. The Legislature took its authority for setting forth the rules of procedure and practice in California's courts from Article VI, section 6 of the California Constitution which provided that the Judicial Council may not adopt rules for court administration, practice, or procedure which are inconsistent with statute. From this tenuous foothold, the authority of the Legislature to specify the most minute of details in court practice and procedure was solidified. I just reviewed editions of the unannotated Deerings Codes and discovered that, in 1978, the California Code of Civil Procedure occupied 541 pages in

that year's volumes. The same publisher, using the same printing format, produced its annual codes for 1995. In the brief 17 year span since 1978 the Code of Civil Procedure has grown to occupy 861 pages. Can it be that civil disputes in our state have become that much more complex between 1978 and 1995, or, more likely, is this extraordinary growth in the Code of Civil Procedure a reflection of the success which numerous special interests of every conceivable philosophical prospective have had in molding the practices and procedures of the third branch of government to their liking? If the courts are truly to control their own operations they can only do so if they have primary responsibility and authority to promulgate the rules of civil and criminal practice and procedure. Otherwise, the courts remain essentially a captive branch of government.

For those who may be concerned that vesting in the courts the rule making authority for the judicial branch of government poses a danger, I see it as no greater hazard than for the Legislature to have the power to develop and promulgate its own committee system rules and its rules of practice and procedure. Surely it cannot be seriously questioned that the Legislature is better equipped to establish rules of legislative practice and procedure than another branch of government should that other branch of government suddenly be vested with the authority to do so.

I guess my point is this: When the Judicial Council takes the long view in developing processes by which the third branch of government (which has been reinvigorated in its tendency toward self-determination by the funding laws, the coordination laws and the delay reduction laws - all initiated by the Legislature) runs itself, it should compare the mechanism of authority for the making of rules of practice and procedure in the state courts in California with the mechanisms that are in place in the federal system and other state systems in an effort to ascertain if we cannot do a much better job for the citizens than is being done right now. One need only listen for a short time to experienced litigation attorneys, both from the plaintiff's bar and the defense bar (whose institutional representatives ironically have been responsible for much of the legislation about which I speak) to hear that they are having to resort to a variety of other and different out-of-court dispute resolution modes in order to get a high quality, timely, and cost-efficient resolution of their disputes. We in the judicial branch are now competing, as we should, in a marketplace, and the market is choosing other alternatives. We can do better and I believe it is in the area noted above that we can make progress.

Very truly yours,

STEVEN E. JAHR
Presiding Judge of the Superior Court

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