

Memorandum 99-88

Trial Court Unification: Review of Civil Procedures

This memorandum describes recent developments in the Law Revision Commission's joint study with the Judicial Council on revising civil procedure in light of trial court unification. In particular, the Administrative Office of the Courts ("AOC") recently proposed a decision-making process for the study, and the Commission needs to consider and respond to this proposal.

BACKGROUND

At the August meeting, the Law Revision Commission discussed the decision-making process for the joint study. Three models were considered:

(A) Two house concept with conference committee

(B) Two house concept, but divide work

(C) Joint working group of Judicial Council and Commission members develops proposal, then seeks approval from each entity

(Exhibit p. 1.) Commissioners expressed greatest interest in the third approach.

Since August, Commission staff and AOC staff have met twice to discuss the decision-making process and other aspects of the joint study. We have made progress in refining the scope of the study and are now in the process of identifying available resources and needed research. We will report further on these matters at the Commission's next meeting.

With regard to the decision-making process, Commission staff presented the above three models to AOC staff in September, explaining that the Commission would strongly prefer (and may even be required to use) a process involving public meetings and broad input. Commission staff pointed out that if a joint working group is formed, it should be small, because the Commission is small and does not have many people who can serve as decision-makers. Commission staff also emphasized the importance of using a process that is likely to result in a joint recommendation.

AOC staff agreed to discuss these matters with others in their organization. In early November, they orally described AOC's position on the decision-making process to Commission staff. At our request, they have since put AOC's proposed decision-making process in writing for the Commission to consider.

AOC'S PROPOSAL

Instead of selecting one of the three decision-making models discussed above, AOC has proposed another approach, under which each agency would follow its usual procedures, supplemented by extensive communication and cooperation between AOC staff and Commission staff. Specifically, AOC proposes

that the two staff partners in each agency (Mr. Sterling and Ms. Gaal for the CLRC and Ms. Vilardi and Ms. Grove for the AOC) be responsible for shepherding the issues addressed in the study through their respective agencies. This would permit the two agencies to follow their normal internal procedures and protocols for staff and advisory committee review, comment and recommendation. Where one agency (or important constituent part of one agency) takes a position on an issue, raises concerns about it, or suggests areas for further inquiry, these facts would be relayed to staff in the other agency so that appropriate action can be taken as quickly as possible. For instance, if a potential remedy under review in the joint study is identified by one agency and that issue raises substantial policy concerns with the other, the policy difference could be explored early. It would also help assure that overlap in studies is minimized if not eliminated and would permit coordination and the potential efficiencies coordination might involve.

(Draft Minutes of 11/1/99 Meeting of AOC staff and Commission staff, p. 2.) Under this approach, the Judicial Council and the Commission would engage in separate decision-making processes, but would not necessarily split up the study process and work in parallel. (*Id.* at 3.)

Here is an example of how the proposed decision-making process might be followed at the AOC:

- (1) The joint staff team would first decide on an issue-by-issue basis whether one or the other agency would take the lead at gathering data or researching each issue, or whether the work should proceed jointly.

- (2) Whether it had the lead in gathering data, received a preliminary report, or assisted in preparing a joint report, once the initial work had been completed and shared with CLRC staff, AOC staff would see that the issue was put on the agenda of the appropriate committee(s), for its review and comment.
- (3) AOC staff would report to CLRC staff the results of the committee review and the joint staff team would determine if any further or additional research or analysis was appropriate.
- (4) When necessary staff work had been completed, AOC staff would present the issue to the Judicial Council, including in its report both the positions of the CLRC staff (and Commission input, if available) and its own advisory committee(s).
- (5) If a difference between the two decision-making bodies became apparent, the difference would be reported and reconsideration calendared, as appropriate.

(Id.)

AOC staff acknowledge that joint recommendations of the Commission and the Judicial Council “are preferable and should be facilitated by staff working on the joint study whenever doing so is possible.” *(Id.)* If differences in policy concerns arise that cannot “be mediated after careful review of the other agency’s positions and interests,” then “the agencies would have to determine whether the issue at hand deserved to proceed with others in the joint study with the policy differences clearly articulated or deferred and presented at a later time.” *(Id.)*

RESPONDING TO AOC’S PROPOSAL

We will discuss the pros and cons of AOC’s proposal, as well as possible alternatives, at the Commission’s meeting.

Respectfully submitted,

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JUDICIAL COUNCIL AND LAW REVISION COMMISSION JOINT STUDY
ON REVISING CIVIL PROCEDURE IN LIGHT OF UNIFICATION:
POSSIBLE MEANS OF CONDUCTING THE STUDY

A. Two house concept with conference committee. The Judicial Council and Law Revision Commission would operate like two houses of a Legislature. A proposal developed and approved by the Judicial Council would go to the Law Revision Commission for consideration; a proposal developed and approved by the Law Revision Commission would go to the Judicial Council for consideration. The objective would be to develop joint recommendations to the Legislature (i.e., recommendations supported by both the Judicial Council and the Law Revision Commission). A conference committee approach could be used to resolve differences between Judicial Council and Law Revision Commission versions of a proposal.

B. Two house concept, but divide work. This would be similar to the preceding approach, but at the outset we would divide assignments between the Judicial Council and the Law Revision Commission. For example, suppose we decide to study (1) jurisdictional limits and (2) criteria for use of ADR programs. Instead of having each entity originate a proposal on each of these topics, one of the topics would be assigned to the Judicial Council for initial consideration and the other would be assigned to the Law Revision Commission for initial consideration. After the Judicial Council or Law Revision Commission develops and approves a proposal on a topic assigned to it, the proposal would go to the other entity for consideration. As with the preceding approach, the objective would be to develop joint recommendations to the Legislature.

C. Joint working group develops proposal, then seeks approval from each entity. The Judicial Council and Law Revision Commission would create a joint working group to conduct this study, comprised of members of the Judicial Council and the Law Revision Commission who are especially interested in this study. The joint working group would develop one or more proposals. After the joint working group approves a proposal, members of the group would present the proposal to their respective entities for consideration and approval (e.g., a Commissioner who serves on the working group would present the proposal to the Law Revision Commission; a Judicial Council member who serves on the working group would present the proposal to the Judicial Council). As with the other proposed approaches, the objective would be to develop joint recommendations to the Legislature.