

SAN FRANCISCO SUPERIOR COURT IN CRISIS: WHAT CAN BE DONE?

Priya Sanger

“**T**he civil justice system in San Francisco is collapsing,” San Francisco Superior Court Presiding Judge Katherine Feinstein announced at a packed press conference on July 18, 2011. She then detailed a complete dismantling of the court beginning with sixty-day layoff notices being delivered to two hundred court employees, separation papers being delivered to eleven of the twelve court commissioners (one commissioner is funded by a federal grant), and twenty-five civil courtrooms closing effective October 3, 2011.

With a \$13.75 million deficit for the fiscal year that began July 1, 2011, Feinstein continued, “After we downsize this court in the next sixty days, we will be a shell of what we once were.”

So what is The Bar Association of San Francisco doing to help?

Within two days of Judge Feinstein’s press conference, BASF’s Board of Directors met and sprang into action. BASF wrote a letter to the Judicial Council of California and the Administrative Office of the Courts (AOC) urging support for funding for the San Francisco Superior Court. This letter was also signed within twenty-four hours by eight minority bar associations, including the Minority Bar Coalition, which represents more than twenty local bar associations.

Twenty-nine past BASF presidents drafted a similar letter urging the AOC “to do everything in its power to maintain a fair and accessible system of justice for the people of California.”

And within twenty hours, led by BASF board member and managing partner of O’Melveny & Myers’ San Francisco office Michael F. Tubach, sixty-two managing partners of Bay Area law firms signed a letter urging the AOC “to take swift and clear action to prevent the unfathomable consequences that are sure to result from the contemplated cuts.”

The Bar Association of San Francisco is working at light speed to meet the crisis in the courts head-on and to form

a coalition to remedy it. The BASF Court Funding Task Force, consisting of three working groups, has been created and is drawing on the expertise of leaders from the defense bar, the plaintiff bar, corporations, government, the San Francisco Chamber of Commerce, law schools, and unions representing court workers—all working side by side on the common goal to save our local court.

The three parallel working groups—Legislation, Constitutional Challenges, and Judicial Council—have identified the following options that were being considered and worked on as of mid-August as *San Francisco Attorney* magazine went to print.

SHORT TERM OPTION

In the short term, the Judicial Council could authorize trial courts to assess a new user fee, not otherwise mandated by statute and not previously assessed, in an area that will not affect access to justice for the poor—such as in complex litigation (establishment of a user fee is not to be confused with the assessment of filing fees, which are statutorily mandated). Here are a few Q&As:

- *Does the power exist within the scope of the Judicial Council without need for legislation?* Yes it appears to be within the scope of California Government Code Regulation 70631.
- *How might this happen?* The Judicial Council would set up an emergency meeting to review and approve the proposed service fee.
- *What are the pros?* These fees allow trial courts to get an ongoing cash infusion from complex litigation for all courtrooms during the budget shortfall until a legislative solution is reached. Courtrooms can be kept open, and thus access to justice remains intact.
- *What are the cons?* The legislature may continue to underfund the judicial branch; however, this could be overcome with greater education of legislators and more lobbying by a future judicial coalition.
- *Does this threaten unification?* No, this plan does not affect each county superior court’s allocation under the es-

established Judicial Council funding formula. The plan is a remedy that provides self-help power to each trial court.

MEDIUM-TO-LONG-TERM OPTIONS

A medium-term option is for the legislature and the Judicial Council to authorize each county court to assess an additional (supplemental) fee to an already-fee-assessed service in an area that will not affect access to justice for the poor, such as in complex litigation, and legislation allows a budget-strapped court to keep the additional fee in its county. Here are a few Q&As:

- *Does the power exist within the scope of the Judicial Council without need for legislation?* No, legislation will be needed. The Judicial Council and the AOC will have to approve this option before it is brought to the legislature.
- *How might this happen?* BASF's outreach to key members of the legislature indicates these members are receptive to sponsoring additional service fees.
- *What are the pros?* Legislation for additional service fees allows each county court to raise revenue in the medium term until long-term legislative solutions can be reached. Courtrooms can be kept open, access to justice remains, and this option does not threaten unification.
- *What are the cons?* Additional fees for judicial services may be difficult to pass, as some groups have a suspicion of greater fees. The legislature may continue to underfund the judicial branch; however, this could be overcome with greater education of legislators and more lobbying by a future judicial coalition.
- *Does this threaten unification?* No, this option leaves unification intact. It provides self-help to each trial court.

Last, the likely best long-term solution would be the establishment of a broad-based coalition seeking a legislative solution where the judicial branch is sufficiently funded, which would begin with refunding courts to a level sufficient to reenact access to justice.

- *What are the pros?* This option would avert a potential lawsuit brought against the state of California for underfunding the judicial branch of government. It would preserve separation of powers, promote the independence and strength of the judicial branch, and restore access to justice. This option enables unification to continue.
- *What are the cons?* The State of California's revenues for the midterm January 2012 budget are projected to be short by \$500 million. This option could take time to implement, but could be accomplished with greater education of legislators and more lobbying by a future judicial coalition.

In conclusion, I hope that the Q&A article below and the options being generated by BASF's three working groups give you an idea of how your bar association is working on behalf of not only the 14,000 licensed attorneys in San Francisco, but also the men, women, and children who seek access to justice through San Francisco Superior Court, our court, every day of the week.

I invite you to join us as we work through these challenging times. If you are interested in serving on one of the BASF working groups please let me know by emailing courtffunding@sfbbar.org.

Priya S. Sanger is senior counsel in the Strategy and Operational Risk Group of the Wells Fargo & Company Law Department. She serves as BASF president for 2011.

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COURT CRISIS Q&A WITH BASF PRESIDENT PRIYA SANGER

Petra Pasternak

The Bar Association of San Francisco has marshaled some familiar names to draw up possible lines of attack in San Francisco's court budget crisis. Among the approaches BASF is weighing are legislative changes, fee increases and a legal challenge to court closures. BASF President Priya

Sanger, a senior counsel at Wells Fargo Bank, said she expects each topic to come up in a meeting Thursday [August 11, 2011] with Chief Justice Tani Cantil-Sakauye, who is hosting a budget crisis-driven get-together with Bay Area bar leaders. Sanger said some of the other names

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on the invite list include plaintiff attorneys Joseph Cotchett Jr. and Elizabeth Cabraser, and Morrison & Foerster litigator James Brosnahan. Sanger discusses the options and the surprise \$4.6 million found last week in the court reserves:

Q: What's BASF doing to address the planned court closures?

A: We have created a BASF Court Funding Task Force consisting of three working groups. One is a working group chaired by Stephanie Skaff from Farella Braun & Martel, with vice chair help from Chris Kearney from Kecker & Van Nest and Cloey Hewlett from Nossaman, on ways in which legislation could be passed to help the courts get greater funding. This working group consists of defense and plaintiff law firms, in-house lawyers, consumer attorneys and also has support from the S.F. Chamber of Commerce's Jim Lazarus, who is serving as the chamber liaison to the legislative working group. The second working group is exploring litigation options and determining whether to seek redress of the funding shortfall on the basis of unconstitutionality, run by Kelly Dermody of Lieff Cabraser. The third working group run by Merri Baldwin of Chapman, Popik & White is focused on the judiciary and exploring ways in which the S.F. Superior Court, AOC and the Judicial Council can seek greater funding through their own efforts or in concert with the Legislature.

Obviously there is some overlap within the working groups because we are all working together toward a common goal. The three working groups have been reaching out to the courts, to the AOC, to other legal and trade associations, to bar association leaders throughout the state, and to state and local legislators to get the relevant facts, assess the political landscape so we can understand what is workable and what is not workable, and to address the situation as a broad coalition whose goal is to increase court funding.

Q: What type of legislative solutions are being considered?



Priya Sanger

A: One approach is new legislation that would allow each individual court to add either new fees or supplemental fees for services in the complex litigation area, an area which would be able to withstand a new or heightened fee without running afoul of access-to-justice issues. Such a law would allow each court to raise revenues in a way that would be consistent with court unification but would still allow each court to benefit from services it provides. The danger of this option is that the Legislature may continue underfunding

the judiciary on the theory that the judiciary can raise its own funds. Another option is to explore new legislation providing for additional funding by shifting funds from general revenue funds to the judicial branch. Another option is to allocate part of a possible [future] sales tax increase to the S.F. Superior Court. These are some but not all of the options we are considering. So we're brainstorming ways that we might shore up the shortfall with help from the brain trust in our BASF membership, in our trade groups, our legislators, the S.F. Superior Court, and from the Judicial Council and AOC.

Q: What angle is the litigation task force taking?

A: This group would be exploring the possibility that it's unconstitutional to underfund the courts because the court as a separate branch of government relies on funding from the executive and legislative branches in order to function properly and in order to keep the separation of powers strong. People rely on the courts as part of their access to justice.

Q: Could a suit like that risk a constitutional crisis?

A: No, the challenge itself would not create a constitutional crisis. Constitutional challenges such as these are not uncommon. The challenge would remedy a constitutional crisis rather than create one.

Q: Does BASF favor any single solution?

A: At this juncture we don't know which path is the best

path and it may well be that a combination of paths is the best way. We believe that undertaking several parallel paths in a concerted action is the best way to respond. To get more money it may require that we do more than one thing because the financial situation that the courts are currently in today is severe. And we can't necessarily rely on one option to make enough money to solve the problem.

Q: What's your hope for the meeting with the chief justice?

A: We would like to explore the practical options that are available for the courts and discuss ways in which the Bar Association of San Francisco and other associations can assist the courts in their quest for more money, and hopefully reaching a mid- to long-term solution.

Q: Some lawyers were surprised to learn about the \$4.6 million in reserve funds the superior court announced last week. Did you know about it beforehand?

A: No. I didn't know about the court reserves. I don't know if anyone could have known because the books were only recently closed.

Q: Is BASF pressuring the court to spend that money?

A: We don't have enough facts about the reserve at this juncture. What we do know is it's up to the presiding judge to do what she feels is fiscally responsible.

Q: Some in the legal community are concerned that Presiding Judge Katherine Feinstein is crying wolf to leverage more funding from the state or Judicial Council. Is that a concern you share?

A: I don't believe she's crying wolf. The San Francisco courts are going through a financial crisis, with or without that reserve, and they need our help. The Bar Association is committed to helping the courts through this crisis by finding ways to address the funding shortfall in the medium and long term.

Q: Is there anything all parties can agree on?

A: Everyone acknowledges there's a need for access to justice, and that not having a strong and well-funded judiciary puts our democracy at risk. The judiciary is not just another interest group clamoring for money from the Legislature — it is the third branch of government that represents access to justice and enables law and order. Removing funding from the courts to the point where it is weakened and can't function is tantamount to the dismantling of the third branch of government by the legislative and executive branches. An underfunded judiciary is not only a denial of access to justice to individuals and to businesses, it is a threat to our democracy. The Bar Association of San Francisco is committed to fight for the independence and the financial fortitude of our judicial branch.



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