Comment on Draft Open Meeting Rule by Alliance of California Judges

November 19, 2013

To Whom It May Concern:

On behalf of the 500 members of the Alliance of California Judges, we thank the Council for this opportunity to comment on the proposed draft of the rule regarding open advisory committee meetings. We note, however, that the five days allotted for input is hardly enough time to study the draft rule and its ramifications. This is not a promising start to the rule-making process, and is not in keeping with the branch leadership's promises of greater openness and meaningful dialogue.

In the face of tomorrow's looming deadline, we offer the following thoughts:

The actions of the Council and AOC must be transparent—and have not been. The identities of the people responsible for the Branch's greatest missteps—missteps which have cost the taxpayers hundreds of millions of dollars and which have sapped our credibility with the Legislature and the public—remain shrouded in mystery. We do not know who came up with the idea for CCMS, and no recorded vote to begin the project exists in the historical minutes of the Judicial Council. It took three years to discover the identity of the AOC staffer who drafted legislation that would have stripped local bench officers of the right to pick their own presiding judges—and we still don't know whose brainchild it was. Without transparency, there is no accountability, and without accountability, there is no reform.

The lack of transparency is particularly troubling because the Judicial Council's five internal committees and associated advisory committees wield much of the real decision-making power within the Branch. The Judicial Council itself has devolved into a largely ceremonial institution. Over one ten-year stretch, its members failed to vote unanimously only

six times. All too often, the Judicial Council merely rubber-stamps decisions made behind the scenes by the five powerful internal committees.

The smaller advisory committees, for their part, are often dominated by AOC bureaucrats. As the authors of the SEC report wrote in 2012, "[T]he growth and reach of committees, grants, rules and programs have created a concomitant growth in the size and influence of the AOC staff. A related criticism is that the AOC staff has taken undue control of these processes." Judges and the public can never know who is really making the decisions at these meetings unless we have access.

The Branch doesn't need a rule to open its meetings. Early in her tenure, our Chief Justice announced that she was "committed to absolute transparency." She can make it so. The Chief Justice created one of the internal committees—Technology—by fiat. If she can bring an internal committee into being unilaterally, she can dictate how it does its business. She can simply order that the committees do their business in the open, without waiting for the promulgation of a cumbersome Rule of Court.

If a Rule of Court is preferred, however, the Council can simply extend its current rule to its subsidiary committees. Rule of Court 10.6 requires that the Judicial Council conduct open meetings. It has seven exceptions, not the 17 of the draft rule. The Council can simply expand Rule 10.6 to apply to its subsidiary committees.

The proposed rule has too many loopholes. The draft rule's 17 exceptions threaten to swallow the rule. We highlight just a few issues:

· The draft allows closed sessions when committees discuss "legislative strategy or negotiations." The desire to formulate legislative strategy in secret is alarming. In the past, branch leaders have taken positions on legislation that were diametrically opposed to the interests and the wishes of many of the judges. The frenzied lobbying effort

against AB 1208, which, according to a CJA poll, had more backing than opposition among the judges, is a case in point.

· The draft allows closed-door meetings to discuss "collection and review of raw data and statistics." Why? How can we evaluate the soundness of any decision reached by a committee unless we know the data on which it's based?

· The draft exempts discussions regarding real estate transactions, as does Rule 10.6. Given the Branch's poor track record when it comes to courthouse construction and real estate acquisition, we should be subjecting real estate transactions to heightened scrutiny. Opening these discussions might prevent fiascos such as the public-private partnership deal behind the Long Beach Courthouse, which will cost the taxpayers $100 million over the 35-year life of the lease, or the Markleeville courthouse, which would have been built at a cost of $26 million in a town with 200 residents until media attention prompted a change in plans.

· The draft exempts "discussions on matters or subjects that will not be included in a report to the Judicial Council." This provision is particularly troubling. A committee can keep its work secret simply by declining to write a report to the Council.

· **The draft rule doesn't seem to apply to any long-term planning meetings**. These meetings used to occur regularly until two years ago, when they were called off, apparently due to bad publicity. Even the agendas for these meetings were kept secret. A meeting at which the judiciary discusses its long-term future and its basic priorities is a meeting that must be open.

The rule has no enforcement mechanism, but instead relies upon the individual and personal interpretation and motivations of a myriad of committee chairs. Without an enforcement mechanism--at a minimum an immediate appeal to the Chair of the Council, at maximum an

expedited writ procedure--it is all but guaranteed that the rule will have no effect. If no enforcement mechanism is written into the rule, then a much stronger presumption of openness should be included in the rule. In this case we would favor language to the effect that all meetings should be open absent a clear, present, and demonstrable danger to person, property, or the administration of justice. We also suggest that at each Council meeting the chairs of all committees be required to attend and explain to the Council whether meetings since the last Council meeting were open to the public, and if not, give a clear and detailed explanation as to why not.

The best rule in the world won't make a difference without a true commitment to change. While we applaud any effort to make the Branch's policy-making processes more transparent, we remain skeptical. We've been down this road before with Rule 10.500, a rule requiring public access to judicial administrative records that has been construed very narrowly. Unless the Branch's leaders subject themselves to democratic selection by their peers, the promulgation of rules is just window-dressing. True reform requires a Judicial Council elected by the judges it purports to represent. True reform requires a top-to-bottom audit of the AOC.

We hope that you will include us among the "stakeholders" from whom you'll be gathering input over the next several weeks, though thus far our requests to be included have been rebuffed. We represent a third of the branch, and our members and their concerns should not be ignored by leadership. That has not proven a wise or productive course in the past.

Thank you,

Directors,
Alliance of California Judges