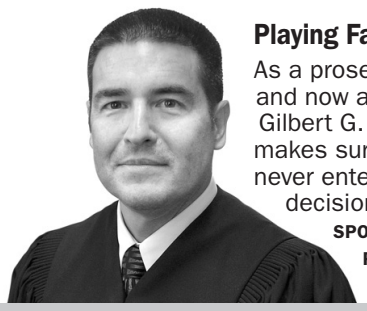

Playing Fair

As a prosecutor, and now as a judge, Gilbert G. Ochoa makes sure bias never enters his decisions. **JUDICIAL SPOTLIGHT PAGE 5**

Making Waves For the Jury Pool

Just as nature abhors (and will fill) a vacuum, jurors hate blank spots in a case and will spontaneously fill them — often in ways that do not favor your client, writes G. Christopher Ritter. **FORUM PAGE 6**

WEB EXCLUSIVE

Dose of Prevention

City Attorney Rocky Delgadillo and class action lawyers filed a unique motion against Blue Cross, seeking to halt state-sanctioned settlement notices from reaching dropped policyholders. For the full story, go to www.dailyjournal.com.

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Doctors, State Spar Over Medical Billing Ban

A Sacramento Suit Aims to Stop a New Regulation Against 'Balance Billing'

By Evan George
Daily Journal Staff Writer

Daily Journal file photo

A new regulation will impose fines on ER doctors who send patients the bill instead of sorting it out with health plans. But many emergency rooms could lose specialists if reimbursements lag, said Dr. Mark Bell. "The moment balance billing goes away, I am going to lose many specialists." Bell said.

LOS ANGELES — Starting Wednesday, any doctor who treats patients in medical emergencies and then sends them the bill rather than duke it out with their health plan faces fines by a state agency that does not typically police physicians.

That could spell relief for thousands of California patients who often get caught in the middle of fierce payment disputes.

But emergency room doctors said the new regulation could sicken the whole emergency care system by sticking them with more unpaid bills. Dr. Mark Bell, who heads the ER at Sherman Oaks Medical Center and Valley Presbyterian Hospital, said he fears the rule will push medical specialists away from emergency care.

"This may be the nail in the coffin for us," Bell said. Wednesday "is going to be a horrendous day for patients around California who are seeking hospital care."

State regulators said they created a process for doctors to seek payments without sending notices to patients. But doctor groups are suing the state before the rule even takes effect.

That lawsuit, filed in Sacramento Superior Court on Sept. 26 by the California Medical Association and others, is the latest shot in an escalating war between doctors and HMOs over the medical billing scheme known as "balance billing," often used by physicians to recoup hospital fees insurers refuse to pay. The move comes less than one month before the state Supreme Court will hear a related case.

The suit signals the first time the sparring has spilled over to state officials, specifically the Department of Managed Health Care, which launched the new regulation.

"The Department of Managed Health care stepped outside its authority," Francisco Silva, general counsel for the Sacramento-based California Medical Association, said. "Their job is to regulate HMOs and protect enrollees from HMOs, not to regulate doctors."

Silva said his group, representing more than 30,000 medical providers statewide, is seeking to suspend the ban on balance billing. A hearing is set for Nov. 21.

State officials said last week that they were glad to enter the legal skirmish if it meant relief for consumers.

"The process of holding the patient responsible is not fair," Cindy Ehnes, director of the Department of Managed Health Care, said. "It is important to remove the consumer from being used as leverage and substitute the department."

A department spokeswoman said the state has received nearly 500 complaints from patients who believed they were being unfairly billed, but that many more patients are likely affected.

Balance billing is a common practice because state and federal laws require ER doctors to treat patients regardless of whether they can pay or the doctor has a contract with that person's health plan. But once a patient is stable, the financial tug-of-war begins.

Doctors argue they must recoup fees when HMOs pay too little, or sometimes not at all, for emergency care. Health plans say balance billing extorts their customers and can lead to trumped-up charges for services they never would have agreed to cover.

Gov. Arnold Schwarzenegger has criticized balance billing for holding patients hostage in the payment disputes. In 2006, he ordered the department to shield patients from the practice. But negotiations floundered and of-

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Court Nixes Extra Pay for L.A. Judges

Appellate Panel Says County Policy Is Unconstitutional

Legislature's Purview

By Laura Ernde
Daily Journal Staff Writer

A state appellate court ruled Friday that Los Angeles County is not allowed to give its judges extra compensation on top of their state salaries.

The 4th District Court of Appeal ruling breathed new life into a taxpayer rights lawsuit challenging the extra retirement and health benefits, which amount to about $46,000 a year for each of the county's judges.

Under the California constitution, the Legislature has to set salaries and cannot delegate that authority, said the unanimous three-judge panel based in San Diego. *Sturgeon v. County of Los Angeles*, D050832

"Thus, the practice of the County of Los Angeles of providing Los Angeles County Superior Court judges with employment benefits, in addition to the compensation prescribed by the Legislature, is not permissible," Justice Patricia D. Benke wrote. Justices Gilbert Nares and Judith L. Haller joined her in signing the opinion.

The court stopped short of saying the judges' extra benefits amounted to an unconstitutional gift of public funds or a waste of taxpayer money.

In fact, the panel pointed out that state lawmakers were well aware some counties with higher costs of living boosted judge benefits to attract qualified candidates to the bench and expressly approved of the dual payments in the Lockyer-Isenberg Trial Court Funding Act of 1997.

Los Angeles County has given extra benefits to its judges since the late 1980s. The county is the largest in the state, employing 430 of the state's 1,500 judges.

Los Angeles is not the only county that employs the practice, dubbed "double dipping" by some critics. Friday's opinion did not address payments by other counties.

The Judicial Council has been working to reduce the disparity of judicial pay.

William C. Vickrey, administrative director of the Administrative Office of the Courts, said he could not comment on the court decision, but planned to look at it for guidance.

"The council's goal is to improve the benefits for the purposes of being able to attract and retain a

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Banks' Action Forces Heller to Lay Off a Large Group of Employees

By Jill Redhage
Daily Journal Staff Writer

SAN FRANCISCO — San Francisco's firm-in-dissolution, Heller Ehrman, laid off a large number of its employees Friday, a source at the firm with knowledge of the layoffs confirmed.

The decision came despite the firm's plans to keep everyone on board for 60 days after the firm voted to dissolve on Sept. 26.

"It is with a great deal of regret that we write to inform you that we will not be able to pay you for work performed after today, Friday, October 10 and, as a result, that your employment with the firm will be terminated today," reads the first line of the email, as posted on a Web site catering to Heller staff members.

The layoff means that the firm will not be able to comply with the federal or California's Worker Adjustment and Retraining Notification Act, which requires large employers to provide 60 days notice in the event of mass layoffs, and which applies to the firm's associates, special counsel and staff.

Some 259 non-partner attorneys and staff in the firm's San Francisco office received Cal-WARN Act notifications on Sept. 26, a Heller employee said that day. The notice promised that employees would be paid full salary and benefits until the firm's shutdown.

The firm was unable to do so, because its banks refused to continue honoring its requests for withdrawals in order to meet payroll, the Heller source said.

The firm's banks — Bank of America and Citigroup — assumed control over all the firm's spending three weeks ago, after the firm breached a covenant in its bank financings, he said. That seizure led to the tanking of Heller's most recent merger discussions and the firm's decision to dissolve, he added.

The firm was unable to convince the banks that all of its remaining employees were vital to the dissolution process, the source said. "I think the banks are interested in one thing — recovering their debt."

Members of the dissolution committee are said to be devoting their days to arguing with the banks about what spending should be approved.

Before Friday's layoffs, around 600 attorneys and staff were still employed at the firm, the source said. Hundreds still remain, but the source said it was unclear how many employees the firm would be able to keep on and for how long.

The layoff email states, "We also expect that we will need to inform other employees over the following two weeks that we are unable to pay them any further and will need to terminate their employment."

The firm expects to be able to distribute a final paycheck to the employees it laid off Friday.

Only 60 to 70 shareholders are said to be left at the firm.

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Judge Rules L.A Planners Hid Environment Reports, Violated Brown Act

By Peter B. Matuszak
Daily Journal Staff Writer

LOS ANGELES — Open government advocates won a victory last week when a judge ruled that the city's practice of using internal city codes to disguise key environmental matters before the Planning Commission was illegal.

Los Angeles County Superior Court Judge David Yaffe ruled in favor of public interest attorney Robert Silverstein on Oct. 6, finding that the city had repeatedly violated the Brown Act, the state's open government law, by not clearly disclosing when commissioners would be deciding whether to approve environmental reports for new developments mandated by the California Environmental Quality Act.

"The evidence before the court, which is uncontradicted, shows that the City Planning Commission of the City of Los Angeles repeatedly posted agendas of its meetings during the year 2007 that clearly disclosed each action that it intended to take or discuss at a meeting except actions to be taken or considered under the California Environmental Quality Act," Yaffe wrote. *La Mirada Avenue Neighborhood Assoc. v. Los Angeles,* BS108652 (L.A. Super. Ct., filed March 30, 2007).

The judge pointed out that all other items on at least six Planning Commission agendas were spelled out in simple understandable terms but that environmental matters to be taken up under CEQA were only mentioned in, "a cryptic reference like the following 'CEQA: ENV-2005-7720-EIR.'

"Such cryptic references are meaningless to most members of the public ... Such descriptions not only violate the Ralph M. Brown Act, but they also violate the fundamental purposes of CEQA," he wrote.

The ruling will force the city to change how it informs the public about pending environmental and land use decisions. The order enjoined the Planning Commission from taking any actions under CEQA that are not "described with clarity, particularity and detail," understandable to the general public.

The ruling will not stop any current projects, including the Paseo Plaza, which the suit was originally filed against. The preservationists who opposed the mixed-use project have settled their grievances with the developer, who agreed to pay into a fund that will be used to fix potential traffic problems. The plan calls for 437 residential units and 377,900 square feet of commercial space to be built near the corner of Santa Monica Boulevard and Western Avenue.

Despite the agreements, Silverstein continued to pursue

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ROBERT LEVINS / Daily Journal

"It has now become a lawsuit to vindicate the public's right to a transparent government," said attorney Robert Silverstein.

Judicial Council Grapples With Lean Budget

By Amy Yarbrough
Daily Journal Staff Writer

SAN FRANCISCO — The prevailing theme Friday as officials laid out a plan for trial court funding was, it could have been much worse.

The Judicial Council, the policy-making body for the state's court system, held a special meeting to divvy up a budget that includes one-time cuts of $92 million plus some permanent funding reductions put in place by Sacramento lawmakers.

Without identifying specific programs to be cut, the council unanimously allocated funds for court security, staffing and operational costs for new court facilities and those about to transfer to the

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Teachers Sue Over Ban on Vote Buttons

From The Associated Press

NEW YORK — The teachers' union for the nation's largest public school system accused the city on Friday of banning political campaign buttons and sued to reverse the policy, declaring that free speech rights were violated.

United Federation of Teachers President Randi Weingarten announced at a news conference that a lawsuit had been filed in U.S. District Court in Manhattan to challenge the enforcement of the policy.

"We couldn't believe it," said Weingarten, who wore a Barack Obama lapel button. The American Federation of Teachers, including its UFT delegates, voted over the summer to endorse Obama's presidential candidacy.

Weingarten said schools Chancellor Joel Klein urged principals more than two weeks ago to enforce a Department of Education policy requiring complete political neutrality.

S.D. City Attorney Sues WaMu, Alleging Unfair Lending Practices

By Pat Broderick
Daily Journal Staff Writer

SAN DIEGO — San Diego City Attorney Michael Aguirre Friday filed suit against Washington Mutual, Inc., over its lending practices.

According to the complaint, filed on behalf of the people of California, WaMu engaged in "a pattern of unlawful, unfair or fraudulent predatory real estate lending practices," causing homeowners throughout the state to lose — or be in jeopardy of losing — their homes through foreclosure. *Michael J. Aguirre v. Washington Mutual, Inc.*, 300093736, (San Diego Sup. Ct., filed Oct. 10, 2008).

The suit alleges that WaMu used deceptive lending practices on those who didn't understand the "terms and dangers of the costly loans they could not afford;" encouraged borrowers to refinance or obtain financing with "complicated mortgage instruments" and failed to disclose the dangers of negative amortization or the implications of pre-payment penalties.

The suit also charges WaMu with violations of the state's business code for allegedly making "untrue or misleading statements."

Aguirre is seeking permanent injunctions prohibiting the bank from further violations of the business code; a civil penalty of $2,500 against each defendant for each violation of the business code; and the costs of the suit.

"We are asking a court to prevent WaMu from initiating or advancing any foreclosure on any residential subprime mortgages involving properties which are owner-occupied in the state of California," he said in a statement.

WaMu declined to comment.

"It is our long-standing policy not to comment on pending litigation," said Gary Kishner, a WaMu spokesman.

According to David Karlin, head deputy city attorney, Aguirre is able to file suits on behalf of California residents under the state's Business and Professions Code, which grants the right to city attorneys operating in cities with populations exceeding 750,000.

The WaMu litigation follows a similar suit filed by Aguirre in July against Countrywide Financial Corp., also on behalf of the people of the state, alleging predatory lending practices.

On Oct. 6, Attorney General Jerry Brown announced a multi-state settlement with Countrywide that he said could provide up to $8.68 billion of home loan and foreclosure relief nationally, including $3.5 billion to California borrowers.

While Aguirre is a party to the settlement, he still is asking for what he terms some "modifications." In a letter dated Oct. 10 to the general counsel of Countrywide's new owner, Bank of America, Aguirre asked the lender to hire adequate staff to assist the many distressed homeowners who could benefit from the terms of the settlement; and to confirm in writing its commitment to stop foreclosures throughout the city of San Diego until the terms of the settlement is in place.

"It is absolutely intolerable for the bank to continue foreclosures during the interim on properties that might be retained by homeowners under the program," Aguirre wrote in the letter.

On his lawsuit against WaMu, now owned by JPMorgan Chase, Aguirre said that he had not conferred with the attorney general. When contacted, Brown's office declined to comment, pending a review of the suit.

Aguirre said that he intends to file a suit against another major lender by Tuesday, and others might follow.

Aguirre currently is vying for re-election against Superior Court Judge Jan Goldsmith in the Nov. 4 election.

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S.F. Politician Pleads Guilty to Corruption Charges

By Rebecca Beyer
Daily Journal Staff Writer

SAN FRANCISCO — Former San Francisco County Supervisor Edmund Jew pleaded guilty Friday to federal charges of mail fraud, bribery and extortion, admitting that he took $40,000 from a fast-food restaurant in his district in exchange for his help with city planning requirements.

But Jew placed some of the blame on other politicians, whom he did not name, saying he learned the practice from them.

"The lessons taught from other politicians led to bad judgment," the flower shop owner told U.S. District Judge Susan Illston.

After the hearing, Jew's defense attorney Stuart D. Hanlon said Jew would name the politicians he referred to at his sentencing, which Illston set for February.

Jew was first elected in November 2006 to represent the Sunset District of San Francisco. He began his term in January 2007 and, according to his plea, began demanding cash payments from a Quickly restaurant within a month. He resigned from his post in January 2008 after his indictment.

Assistant U.S. Attorney Michael Li-Ming Wang told Illston that prosecutors could prove Jew promised to help the Quickly store with city licensing requirements in exchange for cash. Wang said prosecutors had videotaped evidence where Jew "touted his power" to persuade Quickly to pay him. He said Jew accepted $40,000 in $100 bills and that FBI investigators found $10,000 wrapped in tin foil in Jew's refrigerator.

"I am truly sorry for all the disgrace my actions have brought upon myself, the city and county of San Francisco, and my family," Jew told Illston. "I promise I will never make these mistakes again."

The maximum prison time for mail fraud is 20 years; for bribery, 10 years; and for extortion, 20 years, according to the federal sentencing guidelines.

Hanlon said after the hearing that he thought Jew could face as much as five years in prison but that he hoped for a sentence of probation or two to three years in prison.

The attorney said his client had intended to use the money for the benefit of his district. Hanlon said he told his client "the end doesn't justify the act."

"I pointed out that if you took money and gave it to Mother Teresa, it's still extortion," he said.

Jew has pleaded not guilty to state charges that he lied about his residence to qualify for the ballot in his campaign to become a supervisor.

Hanlon said his client would try to resolve those charges without a trial as well.

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Associated Press

"The lessons taught from other politicians led to bad judgment," former San Francisco Supervisor Edmund Jew told federal Judge Susan Illston Friday.

Court Nixes Extra Pay for L.A. Judges

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quality judiciary," he said.

A spokesman for the Los Angeles County Superior Court declined to comment on the ruling.

"While it does affect the courts, the defendant is L.A. County, not the Superior Court," said spokesman Allan Parachini. "We are not parties to that lawsuit and it is a pending case in the Court of Appeal and it's fairly likely that other appeals will happen."

The lawsuit was filed by Judicial Watch, a conservative nonprofit based in Washington, D.C. Attorney Sterling E. Norris said he was still reviewing the decision at press time.

Former Court of Appeal Justice Elwood Lui of Jones Day in Los Angeles represented the county on appeal. He did not immediately return a call for comment Friday.

Staff Writer Fiona Smith contributed to this story.

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L.A. Planners Hid Environmental Reports, Violated Brown Act, Judge Rules

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the Brown Act case against the city.

"Although this case will not affect any of these past projects, it has now become a lawsuit to vindicate the public's right to a transparent government going forward," Silverstein said. "So in the future the city will be forced to comply with the Brown Act in all of these major environmental and land use decisions."

When first asked last year about the alleged Brown Act violations last year, Nick Velasquez, spokesman for City Attorney Rocky Delgadillo, said that the "complaint has no validity."

In an e-mail response Friday, Velasquez said the city attorney would not comment on the judge's ruling because the final written judgment had not yet been entered.

Silverstein said the written judgement will merely restate the judge's ruling issued on Oct. 6, and include his request for attorney's fees. He has litigated the case for the past year and a half on a pro bono basis and said with the win he may also qualify for a fee multiplier to be paid by the city.

In its opposition brief, the city attorney's office argued that the practice of listing the internal file numbers for projects and acronyms for the types of report or action being considered at Planning Commission meetings was sufficient.

However the judge ruled against the city on all points in the case.

"Unfortunately, the Los Angeles City Council once again forced the public to litigate a case to the bitter end, rather than simply comply with a clear requirement of law that is designed to assure transparency," Silverstein said.

Silverstein took the case on behalf of Robert Nudelman, a longtime local preservationist. The La Mirada Neighborhood Association joined the lawsuit as well.

La Mirada settled its grievances over the project with the developer out of court last fall. Then in May, Nudelman died while visiting family out of state.

Aaron Epstein, a board member of the Hollywood Heritage preservation group and friend of Nudelman, stepped in as lead plaintiff in the case.

Terry Francke, general counsel of Californians Aware, a public interest group that advocates for transparency in government agreed.

"That the city of Los Angeles routinely concealed major environmental decisions cannot be defended as a simple mistake. It is this type of secrecy that the Brown Act exists to prevent," said Francke, who also drafted the 1994 legislative revisions to the Brown Act.

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Doctors Spar With State Over Medical Billing Ban

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ficials withdrew three prior proposals partly due to a crippling lack of consensus on how to solve payment disputes.

Instead, the new rule simply outlaws balance billing as an "unfair billing pattern," and prohibits "hospitals and hospital-based physicians" such as "radiologists, pathologists, anesthesiologists and on-call specialists" from seeking payment directly from any patient who is covered by a health plan.

"We determined that the effort to protect the consumer first and foremost was our primary responsibility and by doing so we would force solutions around the rest of the [issues]," Ehnes said.

But groups representing emergency physicians see the outright ban as a concession to health plans that ignores the issues, because it remains silent on how to solve payment disputes or set rates.

Elena Lopez-Gusman, vice president of governmental affairs for the California chapter of the American College of Emergency Physicians, said the state should focus instead on regulating HMO reimbursements "so that health plans can't unilaterally and systematically underpay."

Her group is one of the plaintiffs suing the state over the ban. According to the complaint, the ban would also give HMOs an unhealthy incentive to shrink their network of physicians — a tactic that prompted another long-awaited regulation dealing with "timely access." Plaintiffs also argue in the complaint that state officials did not consider the regulation's "significant adverse economic impact on providers."

Lopez-Gusman said ER doctors will have to wait longer to be reimbursed and at lower rates. "You can't take money out of a failing system and expect that there won't be health consequences," Lopez-Gusman said.

Many emergency rooms could lose on-call specialists if reimbursements lag, according to emergency physician Bell. "Trauma surgeons, orthopedic surgeons … the moment balance billing goes away, I am going to lose many specialists," Bell said.

Ehnes said her department takes seriously the threat of funding to ERs and is ready to handle an onslaught of complaints from doctors about not being paid. The Department of Managed Health Care will investigate and audit health plans to make sure they pay fair rates, she said. And the department has already created a new prosecution unit to handle those investigations and resolve disputes.

Ehnes also insisted that the department has authority over unfair billing practices and that the Office of Administrative Law has agreed.

"We believe we will prevail in any suit that attempts to block that," Ehnes said.

Even if an injunction is denied, the regulation could inadvertently be put on trial later this year. On Nov. 5, the California Supreme Court is set to hear arguments on a related case called *Prospect Medical Group v. Northridge Emergency Medical Group* that deals with the legality of balance billing.

In 2006, the 2nd District Court of Appeal sided with physicians, finding that state law does not prohibit hospitals from billing patients for the balance if a provider does not have a contract with the HMO. *Prospect Medical Group v. Northridge Emergency Medical Group,* 136 Cal.App.4th 1155 (Cal. App. 2nd Dist. 2006).

Andrew Selesnick, a partner with Alleguez & Selesnick in Encino, represents the ER doctors in that case. He said enacting the new regulation months before the Supreme Court weighs in has created a " quagmire" for medical providers.

"It is very difficult for them to know how to comply with the regulations," Selesnick said. He said he has advised clients to halt even balance billing for care given before the regulation takes effect on Wednesday because it remains unclear whether the rule is retroactive.

Selesnick said that medical providers who work in emergency rooms are looking to the courts to understand how payment disputes threaten the quality of ER care for patients. "In terms of regulatory uncertainty and physicians' ability to comply with the law, this is a perfect storm," he said.

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State Judicial Council Grapples With a Leaner Budget for Courts

Continued from page 1

state, as well as funds for probate and conservatorship reform.

The council also laid out criteria that aims to spare four of the state's struggling courts from the one-time cuts.

"Bad as the legislative session was and as difficult as the challenges will be … I think for the most part we're in a far better situation than anyone expected," William Vickrey, the administrative director of the courts, told the council.

Under the proposal Gov. Arnold Schwarzenegger put forth in January, the trial courts would have faced $215 million in permanent cuts. The Legislature was able to offset a huge chunk of that money by deferring $88.3 million in spending for a number of programs, including delaying funding for 50 new judgeships for more than a year. Just doing that, saved $70.1 million.

The one-time cuts — roughly four percent of the trial courts' $2.3 billion budget — will affect 54 courts throughout the state. Shasta, Mendocino, Yuba and San Joaquin counties will be exempt based on two criteria: greatest need for resources and very little reserves.

The Judicial Council voted to allocate $45.2 million in new and carryover funding for court security. That money will go to cover projected cost increases and roughly $105,000 in security costs for new court facilities or those that are scheduled to transfer to state control this year. Nearly half of that $45 million is being covered through one-time security funding, according to Stephen Nash, director of finance for the Administrative Office of the Courts. He stressed the need for a more permanent source of funding.

"We're looking at a very precarious funding situation for security moving forward," Nash said.

The Judicial Council also voted to redirect $12.48 million in funding from its Trial Court Trust Fund to cover a shortfall in its program that provides court appointed counsel in dependency matters. Savings will also be used to cover a shortfall in its assigned judges program.

Recent reforms to the probate and conservatorship system left the judicial branch with another unique funding problem. Legislation passed in 2006 increased statutory requirements for processing conservatorship cases, but funding has been eliminated twice since: first by the governor, and then by the Legislature.

On Friday, the Judicial Council voted to use $8.5 million of its money to help cover costs of the new requirements, though that money is only half of the $17 million the program is expected to cost annually.

In remarks prior to the budget discussion, Chief Justice Ronald M. George, spoke of how, even with the current economic situation, matters were far better than before court unification, when courts were funded by individual counties.

"There were some courts that first year," George said, recalling visits he made to courthouses throughout the state in 1996 and 1997, "that were starting to close down some of their court operations."

"Again, we're in very bad economic times but really we've come out much better under state funding than we would have before," George added.

Friday's vote did not address budget issues for the California Supreme Court, the Courts of Appeal or the Administrative Office of the Courts. The Judicial Council expects to take up their budgets later this fall.

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