

Judicial Independence – Law Firms

Court Reforms Needed – Yet California Facing Budget Reductions

The Editor interviews **Steven Kaufhold**, Partner, San Francisco office, Akin Gump Strauss Hauer & Feld LLP.

Editor's Note: Many general counsel and their CEOs are not aware of the total costs of litigation because typically defense costs are expended annually by the legal department while liability costs are expended by the business unit at the time a payment is made to the plaintiff. Based on information available to it, eLawForum estimates that in 2006 for all Fortune 500 companies the total cost of litigation (\$210B) was equivalent to approximately one-third of their after-tax profit (\$610B). See page 27.

eLawForum on the basis of an analysis of 20,000 cases found that only 1.8% of the cases brought against Fortune 500 companies actually proceeded to final judgment with 97% being resolved before trial and 1.2% being settled during trial.

DRI is marshalling its membership of 22,500 defense counsel as well as that of other national and local defense counsel organizations and LCJ in support of judicial independence, and its current President, John Martin, will be putting great emphasis on this issue during his term in office. The DRI Task Force Report on Judicial Independence "Without Fear of Favor" (see link to the Report in the version of this article at www.metrocorp.counsel.com) suggests needed reforms which would be supportive of judicial independence, including addressing such issues as poorly funded courts.

Editor: Steve, in which courts do you practice?

Kaufhold: My primary practice is in the area of securities litigation, most frequently in the federal courts all over the country. I also handle cases in the California state courts, particularly in Santa Clara County, which is in the heart of Silicon Valley, as well as in the Delaware Court of Chancery.

Editor: Do you find that delays are encountered because courtroom facilities are limited or judges are forced to carry too large a caseload? How does this affect the client's costs and the outcome?

Kaufhold: There are definitely delays due to caseload. The extent of such delay depends on the court you are in as some courts have managed to find techniques that address this issue. From a client standpoint, delay almost always increases the overall cost of litigation. This includes both the amount of fees paid to lawyers and the toll on businesspeople involved in managing or participating in the litigation. There is definitely an increased cost imposed when businesspeople have to start and stop involvement in different phases of litigation and then gear up for additional litigation rather than simply resolving the dispute at issue and returning to the operation of their business. The key from an administration of justice standpoint and from an efficiency standpoint is to ensure that the courts are adequately funded in terms of the facilities available, the number of judicial officers staffing a particular court and the resources available to handle cases.

Editor: You mentioned you most frequently practice in three court systems. Where are you most likely to encounter delays attributable to underfunding? What are your views on the just-announced budget cuts proposed by Governor Schwarzenegger?



Steven Kaufhold

Kaufhold: I would say that, among the three, you are most likely to encounter delay in the California state court system. This is particularly true in the counties that have experienced a great deal of population growth over the past decade and in those courts with especially large criminal case dockets. In the court's defense, almost everyone agrees that they are underfunded at the current levels. The challenge of managing the currently congested docket will become even more severe if the Governor's proposal for a 10% cut in the funding for the courts ever becomes effective.

The proposed cut in the overall budget is \$246 million and it is proposed that the courts would decide how those cuts would be implemented. This could have a number of immediate adverse effects on the California state court system. Obviously, necessary new facility construction would have to be delayed or eliminated entirely and additional judges could not be appointed to cope with our currently congested dockets. Even in the event that only a fraction of the proposed funding cut is actually implemented, there will be increased delays resulting from reduced hours for the personnel behind the scenes that make the court system run. They are the folks who staff the courtrooms, the clerks that do the filing and manage court documents and the security personnel needed to protect the courthouses and judges. Simply put, the proposed funding cut would be a giant step backward for the California state court system and for Californians.

Editor: Given the high costs of litigation as reflected in the eLawForum estimates (See page 27), let's look at some specific areas where current underfunding impacts the cost and increases uncertainties of litigation in the California state courts. What is the situation with respect to the failure to provide judges with clerks?

Kaufhold: Both in the Delaware Chancery Court and in the federal courts you have individual law clerks assigned to judges to assist them with their research and with the drafting of certain orders or other materials that they produce. In the California state court system, the individual judges generally do not have individual law clerks. Sometimes the judges who handle discovery matters or summary judgment and similarly complex motions may have clerks assigned to them, only on a part-time or volunteer basis and certainly not at the level of the Delaware Chancery Court or the federal courts. I think that the result is that, by and large, judges in the California state courts, who are already carrying a heavier caseload in general,

must do all facets of the work themselves, including some of the more basic research that the federal and Chancery judges rely on their law clerks to do. This gap in judicial resources will be further aggravated by Governor Schwarzenegger's budget proposal.

Editor: Is it difficult to get summary judgment in the California state courts because the judges just do not have enough time?

Kaufhold: Yes. It is difficult for at least two reasons. First, California law is not as favorable to summary judgment as in the federal courts and a number of other states. Second, as you suggest, there is an issue with the amount of time and attention that judges have to devote to such motions. There are also structure issues. When you are in federal court you generally have the same judge assigned for all purposes and the result is that judges not only have more familiarity with the case, they are in a position where they will also handle the trial if summary judgment is denied, so they have a greater incentive to spend as much time as is necessary to give full consideration to the motion. In many California state courts, you have separate law and motion judges or you will not have a single assignment for the entire case. Under these circumstances, the judges do not have the same level of familiarity with the case and you may also not have the same incentive for the judge to dive into a motion for summary judgment and really consider seriously whether the case should go to trial.

Editor: Are judges in the California state courts more likely to admit the testimony of witnesses that would not be admissible under Daubert or similar tests?

Kaufhold: I think it is difficult to generalize. I do think that when you compare California state courts with the federal courts, there is definitely much more of a tendency on the part of California state courts to admit the evidence and let a jury determine the weight that it should receive. The law at a state level has not developed as strongly in terms of carefully scrutinizing expert testimony and experts' qualifications as it has in the federal courts, and federal judges generally have adapted more readily to the role of serving as "gatekeepers" with respect to the evidence that goes before a jury.

Editor: Do the California state courts offer e-filing and cost- and time-saving technologies?

Kaufhold: The Santa Clara Superior Court now has e-filing for all complex cases – cases assigned to the complex department. This is a very helpful development and one that will likely expand both within California and nationally if adequate funding can be allocated. Unfortunately, this is another area where most California state courts still have a lot of catching up to do and the Governor's budget reduction proposal will slow the process of adopting these new technologies even more.

Editor: e-Discovery is very big and the

risks of failing to comply are tremendous. Given their caseloads, do you see judges at the state court level being able to control overly broad e-discovery requests?

Kaufhold: I think it is really evolving from court to court. The difficulty with e-discovery is that it has made the burdens, particularly on corporate defendants, exponentially more expensive and time consuming. That fact is not lost on the plaintiffs' bar. They are spending a huge amount of time focusing on e-discovery. In time, this will be an area where, as with expert testimony discussed earlier, some reasonable limits must be applied by the courts. The ongoing risk is that if courts are consumed with overcrowded dockets, it is much easier to simply order production of all requested e-discovery than it is to take the time and effort to carefully parse an overbroad discovery demand and to determine what is fair and appropriate in a specific case. It is really crucial that courts have adequate time and resources to focus on important issues like e-discovery that can have a huge cost impact on litigants.

Editor: Given the statistics developed by eLawForum showing that almost all cases are settled, do you think that this is attributable in part to uncertainties introduced by the fact that overburdened state courts lack the time and staff to properly deal with summary judgment motions, admission of expert evidence, e-discovery and other complex issues?

Kaufhold: That may be true in part. My experience is that uncertainty almost always drives settlement of complex cases. In addition, the delay issues that you referenced earlier also drive settlement. There comes a time in many cases when a client believes it is time to resolve a case for business reasons. This could be due to a pending acquisition, the departure of a key executive or witness from the company or some other reason. If California courts were funded in a manner that permitted them the staffing and resources to focus on complex issues and to reduce delay, there can be little doubt that corporate defendants, and, frankly, all litigants would benefit.

Editor: How do you feel about the effort of the DRI to address the concerns that you have mentioned in this interview. Do you see that effort as being timely and deserving of support by inside and outside counsel?

Kaufhold: It definitely is. There has been a certain reluctance on the part of a number of lawyers to speak up regarding the need for adequate funding of our courts. Having an organization like DRI collect these experiences and bring them to light is a positive development. Such studies and recommendations also provide an important context for legislators and voters to consider proposals such as our Governor's recent proposed funding cuts for the California courts. It's difficult to imagine that anyone who considers carefully the DRI findings would conclude that spending cuts are consistent with providing the quality of justice that litigants here expect and deserve.

Please email the interviewee at skaufhold@akingump.com with questions about this interview.