California's justice deficit

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Cy Pres, two words and italicized, short for the Norman French phrase Cy Pres comme possible - so near as possible - has been used in trust and estate law to change a thwarted bequest to its next best use. Today it is used more frequently to distribute unclaimed funds from class action settlements to their next best use, sometimes related to the purpose of the lawsuit, sometimes in the public interest.

CYPRES, one word and capitalized, is an acronym for a Cybernetic Parachute Release System, an automatic activation device (AAD) for a parachute unit as a safety device for a skydiver to prevent death from a free fall if the rate of descent at a certain altitude is over a threshold.

Justice in California has reached a danger threshold. It may be time to resolve issues around Cy Pres and use it as an activation device to help stop the incipient free fall through that threshold.

Justice is in danger on many fronts: closed and limited courtrooms, underfunded self-help programs in courts, absence of representation in family law and other child-related courts, underfunding of legal service programs and extreme inequality in legal services between different parts of California - especially between urban and rural areas and the coastal and non-coastal counties. All this defines an historic justice deficit in California.

It has been magnified by the catastrophic decline in IOLTA (Interest on Lawyer Trust Account) revenues that are allocated to legal services. A large effort went into requiring banks to pay comparable interest rates on those accounts. But with the dramatic decline in all interest rates, IOLTA revenue has dropped 75 percent from $20.1 million in 2007-08 to a record low, estimated to be $5 million in the current year 2010-11. By using reserve funds, the State Bar has so far helped legal aid programs avoid the full brunt of the revenue plunge. Total distributions using reserve funds have nevertheless fallen markedly, from $15.5 million in the 2008-09 funding cycle to an estimated $6 million in the next (2011-12) funding cycle - a drop of more than 60 percent, and that because of the increasing reliance on those limited IOLTA program reserve funds. Without those soon-to-be exhausted reserves to cushion the impact, it is not clear how legal aid programs will absorb the potentially catastrophic decline in funding.

California by statute (Code of Civil Procedure §384) does give trial judges authority, on a case-by-case basis, to distribute class action Cy Pres funds to legal service programs. Unfortunately, the law and politics of Cy Pres are not so simple. With the Class Action Fairness Act and recent U.S. Supreme Court changes in diversity jurisdiction, more and more class actions are in federal courts, to which state rules on Cy Pres may not run. In both state and federal court, lawyers and other interest groups often argue over which of their favorite charities or legal service programs should be favored with Cy Pres dollars, and despite appellate review on an abuse of discretion standard, trial judges have been reversed for allocating Cy Pres dollars to local charities close to the judge and courtroom and only tangentially connected to the litigation.

Many judges themselves are uncomfortable with the class action Cy Pres process. Adam Liptak in the New York Times has written:

"In the class action context, though, allowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses,' said David F. Levi, a former federal judge who is now the dean of the Duke University School of Law. 'It made me more than a little uncomfortable that groups would solicit me for consideration as recipients of Cy Pres awards.' I know, he added, 'that other judges felt that there was something unseemly about this system.' "

So there we have it: huge needs to fund the administration of justice and legal service programs; the availability of substantial funds, within existing but sometimes ambiguous contexts, to help fund those needs; politics and competition for those dollars; and, with it all a sometimes expressed, often inchoate but existing judicial discomfort on the discretion permitted.

This is a classic case where successfully managing the competing interests, ambiguous discretion and discomfort can lead to the whole becoming greater than the sum of its parts, and help solve real problems.

Other states have dealt with the issues by legislation or court rules.

Illinois law requires by statute that up to half of all leftover class action settlement money be turned over to legal service groups. Last year, the Washington Supreme Court adopted a rule requiring that at least a quarter of leftover money be used in a similar way. But with more class actions being national and in federal court, an additional purpose of those state legislative and judicial acts may be to help advance a culture and agreement within the legal profession that an automatic set of rules - an automatic activation device - directing Cy Pres resources to specified needs of the administration of justice and legal services can implement core values of the profession and brake a free fall to injustice.

It is time for our profession in the class action context to start the process of changing Cy Pres comme possible to Cy Pres Publico - so near to the public interest