

Memorandum 93-66

Trial Court Unification: Commissioners

The California Constitution contemplates use of subordinate judicial officers such as referees and commissioners.

Sec. 22. The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties.

The Constitution also provides for use of attorneys as temporary judges on stipulation of the parties.

Sec. 21. On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

USE OF SUBORDINATE JUDICIAL OFFICERS IN UNIFIED COURT

Use of non-judges for judicial purposes has become increasingly important to handle California's heavy trial court load. In 1991-92, for example, the trial courts received assistance from commissioners, referees, and temporary judges amounting to an equivalent of 423 full-time judicial positions, or nearly a fourth of the total judicial manpower required during the year.

While use of subordinate judicial officers and temporary judges is far less costly than establishing additional judgeships, a number of observers have expressed concern about the growing use of commissioners and referees. The concern is that the quality of justice is being degraded, "lesser" matters are not receiving the judicial attention they should, and the public is losing its trust in the judicial system.

This concern is accentuated by trial court unification. The State Bar's Committee on Administration of Justice, for example, asks these questions about SCA 3:

What effect will consolidation have on the use of commissioners and referees? Will the courts turn to more appointed staff to handle the "small potatoes" cases?

As court dockets grow, and the budget tightens, will there be a move toward taking some cases now handled by municipal court judges out of the court system, i.e., traffic and small claims?

What impact will this have on public access and the administration of justice?

The anticipation is that once municipal and justice court judges are no longer limited in jurisdiction, there will be pressure for them to pick off the better cases, leaving the rejects of the system to the subordinate judicial officers. The staff believes this expectation is correct, if the views expressed by judges in the correspondence we have seen is any evidence.

The 1975 Cobey Commission felt this concern was so significant that they recommended abolition of commissioners completely. Their report summarizes the considerations:

(1) There is a general consensus that litigants often feel they are getting "second-class justice" from a subordinate judicial officer, and do not understand why their matter is "not important enough" to be heard by a judge. This particular sense of disappointment in the judicial process is sufficiently widespread as to raise substantial concern over the continued use of commissioners and referees.

(2) As a general rule, subordinate judicial officers cannot exercise the amount of judicial independence that can be exercised by a judge. Psychologically and subconsciously the subordinate judicial officer is always aware that parties can refuse to stipulate or file an affidavit. Therefore the inclination to "call them like you see them" is compromised.

(3) Use of commissioners and referees as "extra" judges by obtaining stipulations to their use as temporary judges and thereby removing all restrictions on the types of judicial decisions that may be made by them is so common as to constitute an abuse of the constitutional and legislative authorizations for court commissioners.

(4) The limitations on the powers of commissioners are sometimes so "gray" as to cause uncertainty of the validity of an action taken by a commissioner, thus giving rise to appeals that would be unnecessary if a judge had taken the action.

While the staff understands these concerns, we think the reality of court loads and fiscal limitations forces the heavy use of subordinate judicial officers that we

see today, regardless of trial court unification. We agree completely with the assessment of the situation made in the 1993 Judicial Council Report on this matter.

The Judicial Council notes the serious concerns that have been expressed that unification will necessarily lead to an increased and improper reliance upon commissioners to handle case that formerly were within the jurisdiction of the municipal court, thereby creating an "underground" or second-tier judiciary notwithstanding unification.

If this happens, it will not be because unification has created that opportunity. Indeed, over the last decade, courts around the state have increasingly relied upon commissioners and other non-judges to preside over trials. Small claims disputes are routinely handled by non-judges and parking violations are now processed administratively. Some have proposed that traffic infractions should also be processed administratively. There are legitimate questions about whether this shifting of judicial business away from judges robs the public of its constitutionally guaranteed right of access to courts for resolution of disputes.

The Judicial Council concludes that unification presents an opportunity to bring this topic to the surface. In a unified trial court, all trial court judges will be responsible for insuring that their court serves the needs of the public. Each unified district court should study its use of commissioners and other non-judges to perform judicial work. Ultimately, whether the public's interests will continue to be served by a unified trial court will depend very largely on the exercise of sound judgment by the judges of each court.

The staff notes that if our ultimate conclusion on this matter is to limit use of commissioners in the unified court system, we can so recommend to the Legislature. We would not revise the Constitution on this matter, however, but would only propose revision of the statutes defining the qualifications, authority, reviewability, or other aspects of the commissioner's function. This will allow the flexibility for change as circumstances change in the future.

For now, the staff recommends only the following constitutional amendment, at most.

Sec. 22. The Legislature may provide for the appointment by ~~trial courts of record~~ district courts of officers such as commissioners to perform subordinate judicial duties.

Comment. Section 22 is amended to reflect unification of the superior courts, municipal courts, and justice courts in a single trial level court. See Section 4 (district court) and former Section 5 (municipal court and justice court).

Note. The 1993 Judicial Council Report proposes to amend this section, although the staff thinks the need for the amendment is marginal. The section works without the amendment, and we'd be inclined in the interest of minimizing change to leave it alone.

OTHER ISSUES CONCERNING COMMISSIONERS

Combining superior court and municipal court operations will necessitate combining superior court and municipal court subordinate judicial officers. This involves primarily statutory changes to create one set of qualifications, one manner of selection, one set of responsibilities, and one salary schedule in each unified court.

Whether some of these statutes may have statewide rather than local application should also be considered. The California Court Commissioners Association, for example, suggests that there be standardization of terminology (superior and municipal court commissioners and referees would become "district court commissioners"), standardization of appointment process (appointment by the presiding judge of the district court), and standardization of salary structure (\$15,000 less than the salary of a district court judge). These are all matters we can review when we do the statutory portion of the unification study, although we note that statewide standardization would go beyond our immediate concern to propose changes necessitated by trial court unification.

TRANSITIONAL ISSUES

SCA 3 provides as a transitional matter that in each former superior, municipal, and justice court district, the previously selected judges, officers, and employees shall become the judges, officers, and employees of the district court. Subordinate judicial officers are presumably included in this listing. The staff does not believe this needs to be itemized in the constitutional provision, although perhaps a mention in the Comment would remove any possibility of doubt or question.

Sec. 23. Comment. Among the previously selected officers who become officers of the district court are officers such as commissioners and referees appointed to perform subordinate

judicial duties as provided for pursuant to Section 22 (subordinate judicial officers).

There have also been suggestions that language be enacted to ensure that there will be no reduction in the number of subordinate judicial positions as a result of trial court unification. This would strike against one of the fundamental reasons for unification—improved efficiency and resulting cost savings—and the staff cannot recommend it. In fact, we need to make certain that the transitional language keeping existing subordinate judicial officers in the unified court does not limit the ability to make necessary personnel changes following unification or even in anticipation of it. This matter is dealt with in some detail, and specific language proposed, in connection with the discussion of court officers and employees in Memorandum 93-57 (district court).

Respectfully submitted,

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Executive Secretary