Study J-1000 December 30, 1993

Memorandum 94-1

Trial Court Unification: Comments on Tentative Recommendation

This memorandum collects comments on the tentative recommendation on trial court unification. It also notes a few corrections derived from the Minutes of the November 1993 Commission meeting. (Timing requirements dictated that the tentative recommendation was distributed before the meeting minutes were prepared.)

The comments received to date are attached as an Exhibit. The comments are from:

- Board of Governors, California Attorneys for Criminal Justice (Exhibit pp. 1-2)
- Municipal Court, Harbor Judicial District, Orange County (Exhibit p. 3)
- Litigation Section, Los Angeles County Bar Association (Exhibit pp. 4-9)
- Judge Vernon F. Smith, Marin County Municipal Court (Exhibit pp. 10-11)
- Judge Howard J. Schwab, Los Angeles County Superior Court (Exhibit pp. 12-16)
- Judge Arjuna T. Saraydarian, Municipal Court, Three Lakes Judicial District, Riverside County (Exhibit pp. 17-18)

The announced comment deadline is December 31, 1993. Due to holiday scheduling problems, we are issuing this memorandum before the deadline date. We will supplement this memorandum with any later-arriving comments.

The comments of the Los Angeles County Bar Association Litigation Section are addressed to the 1993 Judicial Council Report on trial court unification, rather than to the Commission's tentative recommendation. To the extent we are able to transpose their comments in terms of the tentative recommendation, they are analyzed below. To the extent they relate to proposed statutory revisions or rules of court, they will be treated later in connection with statutory revisions implementing unification.

GENERAL COMMENTS

At the outset it should be noted that comments approving or disapproving the Commission's tentative recommendation do not necessarily reflect the position of the commenter on SCA 3, since the tentative recommendation deals with details of implementation and not the policy of trial court unification. A commenter may, for example, approve the revisions the tentative recommendation would make to SCA 3, but still be opposed to the basic concept of trial court unification.

Michael Rothschild expresses personal appreciation for the openness of Commission members to hear from diverse interests concerning the proposed constitutional amendment. Exhibit p. 2. Judge Vernon F. Smith compliments the Commission on an excellent job. Exhibit. p. 10.

The tentative recommendation is supported by the Harbor Judicial District Municipal Court. Exhibit p. 3. It is approved by the Board of Directors of the California Attorneys for Criminal Justice, to the extent it addresses their specific concerns. Exhibit pp. 1-2.

Judge Vernon F. Smith agrees with some of the Commission's proposals and disagrees with others. He does not indicate what the areas of disagreement are or his reasons, but does indicate that he believes the vast majority of readers familiar with the issues would accept the proposals and recommendations in their entirety. Exhibit p. 10.

PRELIMINARY PART

General Principles in Formulating Recommendations Concerning SCA 3

The Commission has followed the principle that the existing balance of power between legislative and judicial branches should not be disturbed in the implementation of trial court unification. We plan to add a note to this effect in the preliminary part of the tentative recommendation in the middle of page 9:

> **Nor should the trial court unification recommendations seek to shift the existing balance of power between the legislative and judicial branches of government. Regardless of the merits of the existing constitutional allocation of authority to control matters of court organization and operations, a change in the existing situation should not be injected as an element in the debate over trial court unification.**

Election Following Appointment

The discussion of election following appointment at page 26 of the tentative recommendation does not include several factors noted in the November 1994 Minutes:

> The Commission reconsidered its decision regarding when a newly appointed trial judge must run for election. Because the existing scheme for superior court judges requires them to stand election shortly after being appointed, it hampers selection of the most qualified persons, who may be reluctant to abandon their practices without assurance of serving as a judge for a meaningful length of time. Additionally, a delayed election scheme would decrease the likelihood that judges will be voted out of office based on their political views, as well as the likelihood that judges will decide cases based on how popular the decision will be with the electorate. It would also mean that voters will have a track record to evaluate when voting on judges, rather than having to vote when less information is available. In light of these considerations, the Commission adopted the Judicial Council's proposal that judges need not run for election until three years after being appointed.

The staff will incorporate this discussion in the draft of the final recommendation, if the Commission decides to preserve this aspect of the tentative recommendation. See discussion in Memorandum 94-7.

CONSTITUTIONAL RECOMMENDATIONS

Cal. Const. Art. I, § 16 (amended). Trial by jury

The tentative recommendation provides:

> SEC. 16. Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes ~~in municipal or justice court~~ within the appellate jurisdiction of the superior court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.
>
> In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is

charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.

Policy of Section. The Los Angeles County Bar Association Litigation Section is "vehemently" opposed to eight person juries without agreement of the parties. Exhibit p. 5. The staff recommends no action in response to this opposition. Nothing in the Commission proposal authorizes eight person juries—the Legislature must act to authorize them. The Commission proposal merely preserves the status quo on this issue to the extent practical, consistent with the Commission's approach to make no changes other than those necessitated by trial court unification. Elimination of the Legislature's authority to provide for eight person juries would go beyond what is required to implement trial court unification.

Causes Within Appellate Jurisdiction of Superior Court. This section refers to "causes within the appellate jurisdiction of the superior court". By this we mean causes of a type that would be appealable to the appellate division, not causes that actually have been appealed. The phrase we have used is possibly misleading in this respect.

The phrase also is incomplete. It is intended to pick up matters of a type that are currently within the municipal and justice court jurisdiction. However, there are some matters within the municipal and justice court jurisdiction that by statute are nonappealable, and a simple reference to matters within the appellate jurisdiction of the superior court fails to pick them up.

The staff proposes to replace the reference in this section to causes within the appellate jurisdiction of the superior court with a reference to civil causes "**other than causes of a type within the appellate jurisdiction of the court of appeal**".

Cal. Const. Art. VI, §1 (amended). Judicial power

The tentative recommendation provides:

> SEC. 1. The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, ~~municipal courts, and justice courts. All courts~~ all of which are courts of record.

The proposal to name the unified court the superior court rather than the district court would be approved by the Los Angeles County Bar Association Litigation Section because of possible confusion with the federal trial courts. Exhibit p. 4.

Cal. Const. Art. VI, § 10 (amended). Original jurisdiction

The tentative recommendation provides:

> SEC. 10. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.
>
> Superior courts have original jurisdiction in all causes ~~except those given by statute to other trial courts~~ . Only the appellate division of the superior court may exercise the jurisdiction of the superior court in proceedings for extraordinary relief directed to the superior court.
>
> The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

The Commission had a difficult time phrasing the concept that writs for review of trial court activities may be issued by higher courts and by appellate divisions of the trial courts. "Only the appellate division of the superior court may exercise the jurisdiction of the superior court in proceedings for extraordinary relief directed to the superior court."

The staff has spent some time trying to come up with cleaner and clearer language to express this concept. It is difficult to express such a complex concept in a brief but understandable way. We offer the following alternative as shorter and possibly clearer:

> The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition ***, but a superior court may not exercise that jurisdiction in proceedings directed to the superior court except by its appellate division*** .

Cal. Const. Art. VI, § 11 (amended). Appellate jurisdiction

The tentative recommendation provides:

> SEC. 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception , and except in causes within the appellate jurisdiction of the superior courts, courts of appeal have appellate jurisdiction when superior

courts have original jurisdiction and in other causes prescribed by statute.

~~Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.~~

An appellate division is created within each superior court. The appellate division has appellate jurisdiction in criminal causes other than felonies, and in civil causes prescribed by statute or by rule adopted by the Judicial Council not inconsistent with statute. Judges shall be assigned to the appellate division by the Chief Justice for a specified term pursuant to rules not inconsistent with statute adopted by the Judicial Council to encourage the independence of the appellate division.

The Legislature may permit appellate courts and appellate divisions to take evidence and make findings of fact when jury trial is waived or not a matter of right.

Jurisdiction of Appellate Division. The tentative recommendation includes a provision that the appellate division of the superior court has appellate jurisdiction "in civil causes prescribed by statute." This provision should be revised to refer to "civil causes ***provided for*** by statute", consistent with the Commission's decision at its November 1993 meeting.

With this change, the staff believes the reference to Judicial Council rule not inconsistent with statute is unnecessary. The Legislature may delegate this authority to the Judicial Council if that appears appropriate. Moreover, the only reason to have such a provision is the possibility that new causes of action will be created without there being an appeal path prescribed. But since the Commission will be recommending legislation to implement trial court unification, we can ensure that there is a default statute specifying an appeal path as a general rule unless a special provision is adopted. The provision appears to the staff unnecessary, and serves to clutter what should be a fairly simple and straightforward constitutional provision. The staff would **delete** the words, "**or by rule adopted by the Judicial Council not inconsistent with statute**."

Composition of Appellate Division. The appellate division is proposed to be staffed by judges "assigned by the Chief Justice for a specified term" pursuant to rules not inconsistent with statute adopted by the Judicial Council to encourage the independence of the appellate division. The purpose of this provision is to emphasize the independent character of the appellate division.

The Los Angeles County Bar Association Litigation Section would agree with the requirement of appointment by the Chief Justice, and suggests a three-year term. "We believe that the requirement of such terms will further both the perception and practice of creating panels within the consolidated trial courts that are independent of those trial courts, from which appeals will be submitted to such appellate panels." Exhibit p. 5.

The staff questions the need to put detail into the Constitution itself concerning appointment by the Chief Justice and the term. Right now these matters are handled by statute, which provides for appointment by the Chief Justice for a specified period, and provides for appointment of a judge from another county to serve in the appellate department of a small superior court. Code Civ. Proc. § 77. The direction to the Judicial Council to adopt rules not inconsistent with statute to encourage the independence of the appellate division should be sufficient to do the job without burdening the Constitution with unnecessary detail. The staff would move the reference to assignment by the Chief Justice for a specified term from the Constitution to the Comment.

> An appellate division is created within each superior court. The appellate division has appellate jurisdiction in criminal causes other than felonies, and in civil causes ~~prescribed~~ ***provided for*** by statute ~~or by rule adopted by the Judicial Council not inconsistent with statute. Judges shall be assigned to the appellate division by the Chief Justice for a specified term pursuant to rules not inconsistent with statute adopted by the~~ **.** ***The*** Judicial Council ***shall adopt rules not inconsistent with statute*** to encourage the independence of the appellate division.
>
> **Comment.** The second paragraph preserves in the superior court the appellate jurisdiction of the former superior courts and vests appellate jurisdiction in an appellate division. The provision requires adoption of court rules intended to foster independence of judges serving in the appellate division. ***Rules must be consistent with statute. Cf. Code Civ. Proc. § 77 (appointments to appellate department by Chairperson of Judicial Council for period specified in order of designation).*** Rules may set forth relevant factors to be used in making appointments to the appellate division, such as length of service as a judge, reputation within the unified court, and degree of separateness of the appellate division workload from the judge's regular assignments (e.g., a superior court judge who routinely handles large numbers of misdemeanors might ordinarily not serve in the appellate division). Review by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from

different superior courts who sit in turn in each of the superior courts in the "circuit."

Cal. Const. Art. VI, § 16 (amended). Election of judges

The tentative recommendation provides:

> SEC. 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.
>
> (b) Judges of ~~other~~ superior courts shall be elected in their counties ~~or districts~~ at general elections except as otherwise required to comply with federal law, in which case the Legislature may provide for election by the system prescribed in subdivision (d) or by other arrangement . The Legislature may provide that an unopposed incumbent's name not appear on the ballot.
>
> (c) Terms of judges of superior courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the third January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.
>
> (d) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.
>
> The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.
>
> Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make this system of selection applicable to judges of superior courts.

Countywide elections. The Los Angeles County Bar Association Litigation Section agrees that judicial elections should be countywide in the unified court, although they "express a concern about the possible effect of such electoral boundaries on diversity on the trial court bench." Exhibit p. 4.

The statistics show that 60% of minority judges in the state are now elected countywide, and there is some indication that minority judges do better in countywide than in district elections. In any event, the staff has proposed that the Constitution not lock in countywide elections, but leave flexibility for the countywide election scheme to be varied by legislation where appropriate. See Memorandum 94-6 (trial court unification—geographical districts).

Retention elections. Judge Howard J. Schwab of Los Angeles County Superior Court, while agreeing that judicial elections should be county based, argues for a change to retention elections. Exhibit pp. 12-16. His proposal is that judges would be appointed and a judge's name would not appear on the ballot except upon petition of a specified number of electors, in which case the ballot issue would be retention of that judge. He argues that not only would this satisfy the Voting Rights Act, it also would increase the independence of the judiciary and help protect minority and women appointees from challenge.

The Commission has considered this possibility, and concluded that a change in the current election system, while perhaps meritorious, is not required by trial court unification. In order to avoid injecting extraneous issues into the trial court unification debate, the existing judicial election scheme should not be tampered with. The staff sees nothing in Judge Schwab's argument that should cause a change in the Commission's position.

The staff also notes that the argument for retention elections is undercut by the fact that the only Voting Rights Act case to consider judicial retention elections held they are covered by the Act. Bradley v. Election Board, 797 F. Supp. 694 (1992) (judicial retention election is "election of representative" within meaning of Act; moreover, question whether judge should be retained is "proposition" covered by Act).

The Commission has suggested the possibility of retention elections as a cure for a Voting Rights Act violation, but leaves that decision to the Legislature. The existing judicial election scheme, while not perfect, does serve a populist function. It is worth noting that the existing Constitution already authorizes the Legislature and individual counties to provide for retention elections, but none has; a constitutional change is not needed to authorize it. Moreover, a system that

is totally dependent on appointments does not augur well for judicial diversity, as evidenced by the current low percentage of women and minority judges. At least the current system offers the safety-valve of accessibility to the ballot for persons excluded by the appointment process.

Cal. Const. Art. VI, § 23 (added). Transitional provision

The tentative recommendation provides:

> SEC. 23. (a) The purpose of the repeal of Section 5, and the amendments to Sections 1, 4, 6, 8, 10, 11, 15, and 16, of this article and to Section 16 of Article I, adopted at the June 1994 primary election is to abolish the municipal and justice courts and unify their operations in the superior courts. Notwithstanding Section 8 of Article IV, the implementation of, and orderly transition under, this measure may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests.
>
> (b) On July 1, 1995, the judgeships in each municipal and justice court in a county are abolished and the previously selected municipal and justice court judges become judges of the superior court in that county. The term of office of a previously selected municipal and justice court judge is not affected by succession to office as a judge of the superior court. The 10-year membership or service requirement of Section 15 does not apply to a previously selected municipal or justice court judge. The Judicial Council may prescribe appropriate education and training for judges.
>
> (c) Subject to contrary action pursuant to statute, on July 1, 1995, in each preexisting superior, municipal, and justice court:
>
> (1) Previously selected officers, employees, and other personnel who serve the court become the officers and employees of the superior court.
>
> (2) Preexisting court locations are retained as superior court locations.
>
> (3) Preexisting court records become records of the superior court.
>
> (4) Pending actions, trials, proceedings, and other business of the court become pending in the superior court under the procedures previously applicable to the matters in the court in which the matters were pending.
>
> (5) Matters of a type previously within the appellate jurisdiction of the superior court remain within the jurisdiction of the appellate division of the superior court.
>
> (6) Matters of a type previously subject to rehearing by a superior court judge remain subject to rehearing by a superior court judge, other than the judge who originally heard the matter.

(7) Penal Code procedures that necessitate superior court review of, or action based on, a ruling or order by a municipal or justice court judge or a magistrate shall be performed by a superior court judge other than the judge or magistrate who originally made the ruling or order.

(d) This section shall be operative until January 1, 2002, and as of that date is repealed.

Subdivision (a). The first sentence of subdivision (a) should be revised to refer to amendments and repeals "**approved**" rather than "adopted" at the June 1994 primary election, consistent with existing constitutional terminology. Cal. Const. Art. XVIII, §4 (approval of constitutional amendments and revisions); Cal. Const. Art. II, § 10 (approval of initiative and referendum measures). Corresponding changes should be made to proposed statutory references to adoption of SCA 3.

The last sentence of subdivision (a) should be revised, consistent with the Commission' s decision at the November meeting, to read: "Notwithstanding Section 8 of Article IV, the implementation of, and orderly transition under, this measure may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests ***where otherwise permitted under this constitution*** ."

Subdivision (b). Under subdivision (b), previously selected municipal and justice court judges become superior court judges and the terms of office of the judges are not affected. Judge Arjuna Saraydarian is concerned about the first round of former municipal and justice court judges whose terms of office expire after unification. Exhibit pp. 17-18. Since unification would occur on July 1, 1995, these judges will be required to run for reelection countywide at the next general election thereafter (probably the March 1996 primary).

This would give those judges 9 months to familiarize the electorate with their qualifications in those jurisdictions where the judges do not already run countywide. Judge Saraydarian doesn't think this is enough time, pointing out that the Commission's tentative recommendation allows newly-appointed judges up to three years before they have to face election. See Section 16(c).

However, the staff does not believe the three-year delayed election is advisable, and recommends that the Commission abandon this proposal. See discussion in Memorandum 94-7. Nine months is as much time as many superior

court appointees have before an election is held. And the existing municipal and justice judges will have the added advantage of some preexisting name recognition in the county, as well as superior court incumbency status.

Subdivision (c). Subdivision (c)(1) is a place holder pending Commission recommendations for resolution of personnel issues in the unified court. Judge Vernon F. Smith offers specific suggestions concerning resolution of personnel issues (Exhibit pp. 10-11), which we will take up later in connection with our review of the matter generally.

Subdivision (c)(7) implements the concept that criminal review procedures would be unchanged by trial court unification. The Board of Governors of California Attorneys for Criminal Justice approves this position. Exhibit pp. 1-2.

STATUTORY RECOMMENDATIONS

Gov't Code § 68070.3 (added). Transitional rules of court

Subdivision (b) refers to selection of a presiding judge for the unified court. Judge Vernon F. Smith makes suggestions concerning the role of the presiding judge in a unified court. Exhibit p. 11. We will take up his suggestions later in connection with statutory revisions implementing unification.

Gov't Code § 68122 (added). Preclearance of trial court unification

The tentative recommendation provides:

> 68122. The Attorney General shall, pursuant to the preclearance provisions of the federal Voting Rights Act, 42 U.S.C. § 1973 *et seq*., seek to obtain preclearance of Senate Constitutional Amendment No. 3, adopted at the June 1994 primary election, before it becomes operative, with respect to any county subject to preclearance requirements.

At the November meeting the question arose whether the Secretary of State might not be a more appropriate state officer than the Attorney General to seek preclearance. The Voting Rights Act requires preclearance submissions "by the chief legal officer or other appropriate official". The Attorney General is the chief law officer of the state. Cal. Const. Art. V, § 13. The Secretary of State is the chief elections officer of the state. Gov't Code § 12172.5. The phrase "chief legal officer or other appropriate official" used in the Voting Rights Act is broad enough to encompass either California's Attorney General or its Secretary of State. *See generally, Dodson v. Graham*, 462 F.2d 144, 148 (5th Cir. 1972), *cert. denied*, 409 U.S.

879 (1972) (preclearance requirement was met even though county attorney submitted preclearance request rather than state attorney general); 28 C.F.R. § 51.23(a) ("Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority").

Thus, naming either the Attorney General or the Secretary of State in proposed Government Code Section 68122 would be consistent with federal law. The Attorney General's office has expressed a willingness to take on this responsibility. The Secretary of State's office has likewise expressed a willingness to undertake this. Neither office has indicated a turf concern about the other doing it, and the two offices would probably work together in developing the necessary statistics for the submission. The Secretary of State's office has historically done this sort of work, although the Attorney General's office became involved in preclearance activities for the last round of legislative redistricting. Preclearance of *judicial* election changes would be novel for either office.

The staff's feeling is that this particular preclearance process will be as much a legal as a factual issue. For this reason, we would stay with the proposal for submission by the Attorney General, and will add the following explanation to the Preliminary Part:

> **The Attorney General is required to seek preclearance of trial court unification under the federal Voting Rights Act before it goes into effect in those counties in which preclearance is required. See 42 U.S.C. § 1973c (preclearance submission by state's chief legal officer); Cal. Const. Art. V, § 13 (Attorney General state's chief law officer).**

Gov't Code § 71000 (added). Laws applicable in superior court

The tentative recommendation provides:

> 71000. The following provisions relating to municipal and justice courts remain applicable on and after July 1, 1995, to causes in the superior court of a type that would be within the jurisdiction of the municipal and justice courts as that jurisdiction existed on June 30, 1995:
>
> (a) The economic litigation procedures provided by Article 2 (commencing with Section 90) of Chapter 5 of Title 1 of Part 1 of the Code of Civil Procedure.
>
> (b) The small claims procedures provided by Chapter 5.5 (commencing with Section 116.110) of Title 1 of Part 1 of the Code of Civil Procedure.

(c) Any other provision relating to the municipal and justice courts that the superior court or judge determines is necessary because application of the provision relating to superior courts would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons.

Proposed Section 71000 is not really essential to transitional activities for trial court unification. It picks up a few key points of the law applicable in the unified court in advance of a detailed disposition of the statutes. There are two reasons for this—(1) to cover the eventuality that conforming legislation is not enacted in a timely fashion, and (2) to allay concerns that these important provisions may have been overlooked in the rush to unification.

The staff no longer finds these concerns persuasive. There will be a massive statutory revision required by trial court unification, and these are but a few of many important provisions that will have to be dealt with expressly. If conforming legislation is not enacted in a timely fashion, there will be many problems, not just these. The staff now believes that urgency legislation in 1994 should be kept as clean and simple as possible, relating only to immediate transitional activities for unification. We would **delete** this provision from the recommendation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

EXHIBIT

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December 9, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: *SCA 3*

Dear Mr. Sterling:

By letter dated October 27, 1993, and by appearance before the Law Revision Commission, I have expressed concerns about SCA 3 on behalf of the Board of Governors of California Attorneys for Criminal Justice. We have followed the matter closely and have received the Commission's tentative recommendations dated November 25, 1993. Therefore this letter.

The concerns of CACJ have been limited to aspects of criminal law and procedure impacted by the proposed constitutional amendment. The following quote from the Commission's general principles in formulating recommendations found at page 9 of the tentative recommendation succinctly summarizes our concerns -- we therefore are wholly in support of it:

> "The trial court unification recommendations should not serve as an occasion to review jury trial, appeal or other fundamental procedural rights of litigants. The recommendations seek to implement the structure and organization of trial court unification as a matter of court administration, without altering existing rights."

More specifically, please inform the Commission that, with the adoption of the following language found at page 35 of the November 24th tentative recommendations and the proposed implementing constitutional amendment, all concerns previously expressed on behalf of the CACJ Board of Governors are met:

> "The dual system of municipal or justice court preliminary decision and superior court review for some criminal procedures should be preserved in the unification of the courts. Although it has been suggested that criminal procedures could be streamlined in a unified court, the Commission does not believe trial court unification should serve as a vehicle for changing substantive or procedural rights of parties."

You and your staff are to be commended for the creative solution to problems we have perceived within SCA 3 as initially proposed. In particular, the alleviation of potential procedural and due process concerns by adding one simple and straightforward sentence to paragraph 11 of the proposed legislation.

I personally have appreciated the openness of Commission members to hear from diverse interests in relation to this most important proposed constitutional amendment. On behalf of California Attorneys for Criminal Justice I sincerely hope that the tentative recommendations outlined above and the proposed implementing amendments to SCA 3 are adopted by the Commission and the legislature without further change.

Very truly yours,

MICHAEL ROTHSCHILD

MR:bjc

cc: Elisabeth Semel, Esq.
Semel & Feldman

CHRISTOPHER W. STROPLE
JUDGE

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December 9, 1993

STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations/SCA3

Gentlemen:

This court supports the Tentative Recommendations of the Commission. Individual Judges of this court, however, have reserved the right to comment individually on specific points.

Very truly yours,

C. Stropple

CHRISTOPHER W. STROPLE
Presiding Judge

CWS:am:sca3

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December 13, 1993

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Re: SCA 3 (Trial Court Unification)

Gentlemen:

The Los Angeles County Bar Association Litigation Section has reviewed the recommendations adopted by the California Judicial Council on September 23, 1993 as proposed revisions for inclusion within SCA 3 regarding consolidation of the California trial courts. A copy of the referenced recommendations is enclosed for your convenience.

The Litigation Section has adopted the following positions regarding each of the 17 referenced recommendations:

1. We concur that the Superior, Municipal and Justice Courts should be merged into one trial level court, whose jurisdictional boundaries shall be the same as the county within which the district court is located. We also concur in the recommendation that the electoral district boundaries should be the same as the county boundaries. In doing so, we express no opinion regarding compliance with the Voting Rights Act because we lack the expertise to formulate such an opinion, and express a concern about the possible effect of such electoral boundaries on diversity on the trial court bench.

2. We recommend that the new consolidated court be identified as the Superior Court because we believe that the name "district court" will result in confusion with the federal trial courts.

3. We approve this recommendation.

4. We approve this recommendation.

5. We approve this recommendation.

6. We approve this recommendation.

7. We approve this recommendation with the proviso that assignments to the district court appellate panels should be made by the Chief Justice for three year terms. We believe that the requirement of such terms will further both the perception and practice of creating panels within the consolidated trial courts that are independent of those trial courts, from which appeals will be submitted to such appellate panels.

8. We vehemently oppose the proposal that juries in Category Two civil cases consist of eight (8) -- rather than twelve (12) -- persons. We do not believe that the size of juries should decrease in any proceedings without agreement by the parties. Misdemeanor litigation is just as important to the parties involved in those proceedings as is Superior Court litigation under the current system. Jury size should be consistent in all cases regardless of the potential penalties or the amount at issue.

9. We have two concerns regarding this proposal. First, we are concerned that the Judicial Council may promulgate rules of court administration that are inconsistent with statute. We do not believe that should be permitted.

   Second, we are concerned that the wording in the Summary of this recommendation may suggest that the four State Bar members of the Judicial Council are non-voting members. We have no concern as long as the State Bar members continue to serve as voting members of the Judicial Council.

10. We approve this recommendation.

11. We approve this recommendation with the understanding that it is not intended to reduce the compensation or benefits of any judge. In order to retain capable, knowledgeable and efficient judges, it is essential to at least maintain their compensation and benefits at current levels.

12. We approve this recommendation.

13. We approve this recommendation.

14. We believe that this recommendation is incomplete, and that as worded it may engender some unnecessary opposition to the consolidation effort. As worded, some

members of our subcommittee believe that this proposal interferes with the ability of government to determine the location of courts. Consequently, we suggest a modification to this recommendation so as to provide that the consolidated trial court should have the authority to determine the location of court facilities consistent with caseload needs.

15. We recommend that the Section take no position regarding this proposal.

16. We support this recommendation.

17. We support this recommendation.

We, of course, have a continuing interest in SCA 3 and trial court unification. If we can be of any further assistance, please do not hesitate to contact us.

Very truly yours,

DAVID J. PASTERNAK
Vice Chair
Los Angeles County Bar Association
Litigation Section

cc: William Vickrey
Director, Administrative Office of Courts
Honorable Roger K. Warren
Presiding Judge - Sacramento Superior and Municipal Courts
Honorable Robert Mallano
Presiding Judge - Los Angeles Superior Court
Honorable Aviva Bobb
Presiding Judge - Los Angeles Municipal Court
Gerald Chaleff
President, Los Angeles County Bar Association
Richard Walch
Executive Director - Los Angeles County Bar Association
Teresa Beaudet, Esq.
Jane Johnson, Esq.
Lee Edmon, Esq.

GENERAL RECOMMENDATIONS

These recommendations were adopted jointly by the Presiding Judges and Court Administrators Standing Advisory Committees on August 20, 1993, and approved, as amended, by the Judicial Council on September 23. The Appellate Standing Advisory Committee and the Appellate Court Committee of the California Judges Association were responsible for drafting the recommendations dealing with original and appellate jurisdiction. Some of the recommendations below do not require constitutional amendment and would be implemented through legislation or rules of court.

Constitutional Recommendations

1. The superior, municipal and justice courts shall be merged into one trial level court, called the district court, whose electoral district and jurisdictional boundaries shall be the same as the county within which the district court is located. (Cal. Const., Art VI, § 1)

2. There shall be one type of trial level judge, called a district court judge. As of the effective date of the amendments, all existing superior, municipal and justice court judges shall become district court judges and shall serve out the balance of their current terms as district court judges. (Effective Date provision)

3. To qualify for service as a district court judge, a person shall have been a member of the State Bar for 10 years prior to selection, except that sitting municipal and justice court judges shall be exempt from the requirement. (Cal. Const., Art. VI, §s 15 & 15.5)

4. Terms of district court judges shall be 6 years. The Governor shall fill vacancies by appointment until the elected judge's term begins. A vacancy shall be filled by election to a full term at the next general election after the third January 1 following the vacancy. (Cal. Const., Art. VI, § 16(c))

5. The district court shall select an executive officer to serve as clerk of the court. (See removal of language regarding county clerk in Cal. Const., Art. VI, § 4)

6. The court of appeal shall have appellate jurisdiction over Category One causes, and the district court shall have appellate jurisdiction over Category Two causes. The categorization of causes shall be determined by special Rule of Court promulgated by the Judicial Council and approved by a

majority of the justices of the Supreme Court. Initially, this Rule of Court shall categorize all causes presently within the jurisdiction of the municipal and justice courts as Category Two causes, and all other causes shall be categorized as Category One causes. (Cal. Const., Art. VI § 11)

7. Extraordinary writs to review Category One causes shall be heard by the court of appeal, and extraordinary writs to review Category Two causes shall be heard by the district court. (Cal. Const., Art. VI § 10)

8. In Category One civil causes, the jury shall consist of 12 persons or a lesser number agreed on by the parties. In Category Two civil causes, the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties. (Cal. Const., Art I, § 16)

9. The Judicial Council shall be the policy-making body for the courts and shall have power to promulgate rules of court administration whether or not such rules are consistent with statute. The Chief Justice shall be the chief executive officer for the courts and shall implement the rules promulgated by the Judicial Council. The Council shall consist of the Chief Justice, who shall be the presiding officer, one other justice of the Supreme Court, 3 justices of courts of appeal, 10 judges of district courts, 2 non-voting court administrators, and such other non-voting members as determined by the Council, each appointed by the Chief Justice for a 3-year term pursuant to procedures established by the Council, 4 members of the State Bar appointed by its governing body for 3-year terms, and 1 member form each house of the Legislature appointed as provided by the Legislature. (Cal. Const., Art. VI § 6)

10. The proposed constitutional amendments shall become effective on July 1, 1995. (Effective Date provision)

Statutory Recommendations

11. District court judge salaries shall be set by statute, and all district court judges shall receive the same salary. As of the effective date of the amendments, the salary shall be equal to the salary for superior court judges.

12. The retirement rights and benefits of sitting and retired judges shall not be diminished by reason of unification. A municipal court judge who has retired prior to unification should receive retirement benefits based on 91% of the salary of a sitting district court judge (which represents the present salary differential between superior court judges and municipal and justice court judges). The details of the retirement plan need further study by the Judicial Council.

13. No judgeships shall be eliminated as a result of unification. Any reallocation of judicial resources between districts shall be accomplished in accord with recommendations by the Judicial Council in light of the results of the pending judicial needs study and the need for flexibility in the use of assigned judges.

14. The district court shall have the authority to establish the location of court facilities.

Rules of Court Recommendations

15. By rules of court, a judge shall be allowed to continue to hear matters for which he or she was elected or appointed until the end of the judge's term or five years after the effective date of the amendments, whichever is longer.

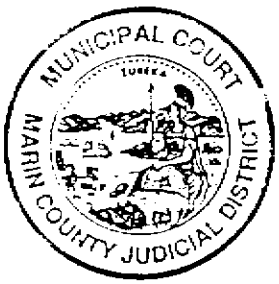
16. All district court judges who preside in districts which have an insufficient caseload to fully support the number o available judicial officers shall be subject to assignment to other courts.

17. Venue and vicinage within the district shall be determined by local court rule.

The full report of specific proposed constitutional amendments to implement the constitutional recommendations and commentary in support is contained in Trial Court Unification: Proposed Constitutional Amendments and Commentary as Amended and Adopted by the Judicial Council; Chair, Honorable Roger K. Warren; Reporter, Professor J. Clark Kelso; September 29, 1993.

MARIN COUNTY MUNICIPAL COURT

Vernon F. Smith
Judge



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December 14, 1993

California Law Revision Commission Members
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Re: Trial Court Unification

Dear Revision Members:

I wish to compliment the California Law Revision Commission Members on the excellent job in preparing the tentative recommendation concerning Trial Court Unification. I'm sure the Commission was under time constraints and I was very impressed with the sophistication of the Commission, and the high level of understanding demonstrated in the report. Over the years, I have unfortunately not read a great deal of material from the Commission, and I'm very impressed with the final product. I would also compliment what must be a very fine staff for spending many hours in helping prepare the document.

While I personally agree with some, and disagree with other recommendations, overall your analysis and approach show a high degree of knowledge. I believe that the vast majority of readers familiar with these issues, would accept your proposals and recommendations in their entirety. Once again, congratulations on the excellent work accomplished.

On page 43 of the report, you invite suggestions on the transition process concerning court employees, from interested persons. I believe that like our county, most employees of Superior or Municipal Courts, are covered by collective bargaining agreements which generally provide for procedures in the event of a reduction in force. Following your overall approach of recommending minimal change unless absolutely necessary, in at least these counties any loss of jobs would be taken care of by attrition, or, by the well-established process in these collective bargaining agreements. In counties without such procedures, the

process will have to begin as with any other county employee, transferring employees between various departments, to accommodate what appears to be substantial personnel savings if SCA is passed into law. I do not believe that any statewide system for dealing with job loss, would be an appropriate area for the legislature. Allow each county to make its decisions as they have in the past, concerning such personnel matters.

Thus, seniority rights, retirement plans, accrued benefits, etc., would be left in the hands of each county, through negotiation with the employees. Perhaps, the employee would be given the option of selecting which benefit package or retirement plan they wished to be under. It might cost a few extra dollars at the beginning, but would be a smooth transition for such employees.

Finally, in your future proposals, I would ask that you consider making the presiding judge more like that position at the appellate court level. Allowing the presiding judge to be elected for two years, followed by perhaps a year as the assistant presiding judge, would allow for uniformity of procedures and policies, but also add some teeth to the position. Throughout the state, someone needs to be in charge of vacation and judicial education training schedules, assignments to outlying courthouses, assignment to particular calendars, review the work habits including time of arrival, etc., of judicial officers. In other words, someone should be in charge. Perhaps one presiding judge per county would be appropriate, with assistant presiding judges at the various locations, where such exist. With such additional authority, a safeguard may require replacement of the presiding judge by two-thirds vote or any other mechanism the commission might think appropriate.

Once again, congratulations on a job well done and I look forward to your final recommendations.

Sincerely,

VERNON F. SMITH
Presiding Judge of the Municipal Court

VFS/dg
cc: John P. Montgomery, Clerk /Administrator

The Superior Court
6230 SYLMAR AVENUE
VAN NUYS, CALIFORNIA 91401
CHAMBERS OF
HOWARD J. SCHWAB, JUDGE

TELEPHONE
(818) 374-3172

December 16, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations on Trial Court Unification

Dear California Law Revision Commission:

It was with great interest that I read your thoughtful tentative recommendations relative to Trial Court Unification. I agree most fervently that judicial elections should be based upon the County and that any tinkering with Countywide elective jurisdictions would only cause confusion, disorganization and constitutional infirmity. However, with all due respect, I disagree with your conclusion on Page 30 of this report that retention elections should not explicitly be made a part of any vehicle unifying the Superior and Municipal Courts, such as SCA 3.

Retention elections with petitions should replace contested judicial elections, not only to insure compliance with the Voting Rights Act, but also to create and maintain an independent and diverse judiciary. In my opinion, the State Supreme Court, the Court of Appeal and the Trial Courts would be elected for a twelve year or six year term by means of retention. However, under my proposal, a particular judge's name would not be placed on the ballot when he or she is up for election unless a petition is filed with a minimum number of signatures of registered voters in that county requesting that the named judge be placed on the ballot. (For example, 1,000 signatures or 1/2 of 1% of the number of voters voting in the last general election, whatever is less of the two, might be appropriate in Los Angeles County.) If such a petition is not filed within a certain space of time, then that particular judge (or justice) would have been deemed to have been elected for a full term. On the other hand, if such a petition is timely filed with the requisite number of signatures, then that judge's (or justice's) name would be placed on the ballot for purposes of retention based upon 50% of those voting plus 1, in order to be retained. The proposed system promotes three major positive goals:

1). It would greatly increase the independence of the judiciary. Contested elections encourage arbitrary challenges (such as running against a particular judge because he or she has a seat with a "lucky number") and "grudge challenges". In 1992, a San Diego Superior Court Judge was challenged by an attorney because he had ruled against that lawyer in a summary judgment motion. Such challenges should have no place in our system of election.

2). More stability would be created for minorities and women who are judicial appointees. It is a sad fact of life that those candidates most often challenged in judicial elections are minorities or women. Persons with "ethnic" names are the most vulnerable targets. In fact, of the ten incumbent Los Angeles Superior Court judges challenged for election in the last ten years, seven were either women and/or minorities. While the great majority of these jduges easily survived their challenge, it is doubtful that many of them would have been targeted except for their minority or gender status. Under the retention/petition system, a judge's name would not even appear upon the ballot, absent a petition. Opportunists would not be able to take advantage of bigotry in order to achieve a seat on the court. In this regard, retention elections to be effective must be provided with a petition mechanism. In Los Angeles County, by reason of the great number of judges (easily over 100) up for retention election, each general election would be "top heavy", costing the County a fortune in publishing the ballot if all of the names were placed thereon. Secondly, retention elections without petition might make those with ethnic minority names more vulnerable to those voters who are overt or covert bigots. In the retention/petition method of election, each judge stands on his or her own record in being accountable to the public. Not only would such a system help insure the propriety of the unification of the courts, it would also help take politics out of the judicial electoral system while still retaining accountability to the public for its bench officers.

3). Unification without a retention/petition method of elections might arguably be in violation of the Voting Rights Act. SCA 3, as prsently written may cause more problems and devastation to trial judges and greater expense to the taxpayers than can presently be envisioned. As it now exists, SCA 3 may arguably be invalid, may cause havoc to California's bench officers, may produce endless litigation, and may end up creating a judiciary that is totally politicized. In Chisom vs. Roehmer (1991) 501 U.S.___ 115 L.E.d 2d 348 and Houston Lawyers' Association vs. Attorney General of Texas (1991) 501 U.S.___ 115 L.Ed 2d 379, the United States Supreme Court held that the provisions of the Federal Voting

Rights Act applied to contested State Judicial Elections. In Houston Lawyers' the nation's highest court held that the Voting Rights Act could apply to at large elections such as countywide under certain circumstances. If there is to be unification, then the election system for state trial judges should be changed in SCA 3 from the contested elections to that of retention elections such as exists for Appellate Courts with the additional use of a petition with a required number of signatures that must be filed before a bench officer's name would be placed on the ballot.

It may be argued that any initiative calling for unification of the Superior and Municipal Courts (which in turn would abolish the individual municipal court judicial districts to form one countywide district court) would be invalid as being in violation of the Federal Voting Rights Act. Presently there is litigation involving Monterey County where the Municipal Court recently consolidated their individual judicial districts into one countywide Municipal Court district. A lawsuit has been filed in United States District Court challenging the consolidation as being in violation of the Federal law, requesting that all seated municipal court judges therein be removed from office and that new elections be called with the original districts. The theory of the plaintiffs is that consolidation has weakened the minority voters in the old districts and was therefore illegal. If there is unification of the Superior and Municipal Courts in California on a countywide basis, a similar argument could be made that such is a violation of the Voting Rights Act. Whether the claim could prevail is in doubt, but the specter of trial court consolidation being held unconstituional with the possibility of every single sitting judge losing his or her seat is sobering. Further, judges elected after court unification would face the uncertainty of the possibility of immediate removal from office in the midst of their terms, if, by chance, the elections were to be declared illegal and new elections were ordered.

In addition, it could be posited that SCA 3 (as you have pointed out on pages 28 and 31 of your recommendations) is invalid in not seeking advance approval from the Federal Government. As the court in Chisom v. Roehmer noted, changes in voting procedures for judges under certain circumstances must first be presented to the appropriate Federal authorities for pre-clearance before being implemented. Chisom v. Roehmer, supra 115 L.Ed2d at pg. 367 Clark vs. Roehmer (1991) 500 U.S.___ 114 L.Ed 2nd 691, 700. If it should be determined that unification created a voting change by reason of abolition of individual Municipal Court judicial districts, implementation could be halted if contested elections remain in effect. At the very least, protracted and expensive litigation could

occur with the fate of the state trial courts being uncertain for many years.

Many of the above noted problems could be obviated by changing the electoral system for trial judges from contested to retention/petition elections. It would seem that retention elections such as provided for the Appellate Courts are not within the Voting Rights Act. Both the Houston Lawyers' Association and the Chisom cases dealt with contested elections. However, Chisom noted that the State would not be within the Voting Rights Act for judges if judicial officers were appointed. Chisom vs. Roehmer, supra 115 L.Ed.2d at P. 367. The Chisom court mentioned nothing about lifetime appointments such as in the Federal Courts. It would therefore appear that the problems discussed in both U.S. Supreme Court cases were limited solely to contested judicial elections and therefore retention/petition elections would not be included in the act. Any change toward unification should also include retention/petition as opposed to contested elections.

If there is to be unification of the trial bench, it must be done in a constitional manner which will not drain taxpayer money in endless litigation. Such changes cannot be left to implementative or "clean-up" legislation since State constitutional issues are raised by the elective process for judicial officers.

It is true that in Indiana, the Federal District Court opinion of Bradley vs. United States Election Board, 797 F. Supp. 694, 696-698 (S.D. Ind. 1992) held in general terms that retention elections are within the Voting Rights Act. However, this opinion of one Federal Judge in the mid-west is not sufficient to dispel the language of the United States Supreme Court in Chisom vs. Roehmer, supra, 115 L Ed 2d 348, 367 in refusing to apply the Voting Rights Act to the appointment of judicial officers.

The reasoning of Bradley is, with all due respect, totally fallacious. Bradley seems to hold that since there were very few minority appointments in Indiana, that the retention process could arguably be suspect even though the opinion concedes that the appointment system itself cannot be attacked under the Voting Rights Act.

The power of the public to reject an appointment made by the governor would not have the same ramifications as contested elections. Retention/petition elections would be totally within the spirit of the Voting Rights Act in that it would help protect against bigoted attacks based on ethnic background or gender. To insure compliance with the Voting Rights Act, as well as encouraging an

independent and diverse judiciary, SCA 3 should be modified to change contested elections for trial judges to retention/petition elections on a countywide basis.

Thank you for your consideration.

Very truly yours,

Howard J. Schwab

Howard J. Schwab
Judge of The Superior Court

HJS:pl

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December 16, 1993.

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739.

Dear Members of the Commission,

The following comments relate to your Commission's tentative recommendations on Trial Court Unification; specifically with respect to the election of municipal court judges whose present terms of office expire in 1997 and must stand election in 1996.

As recommended, SCA 3 provides that all existing judges will become initial district judges and their terms of office will not be affected. This means that Municipal court judges whose terms require them to stand election in 1996 must run in Countywide races just a few months after the effective date of SCA 3 (July 1, 1995).

Contrast the above with your Commission's recommendation on "election following appointment" (page 26). It is recommended that all newly appointed District court judges stand their first election during the third year after appointment to fill a vacancy, in order to "avoid thrusting a person into an immediate countywide election campaign."

I agree with your recommendation which will allow a newly appointed judge time to become known countywide. I humbly suggest however that the same rationale be extended to municipal court judges who have heretofore campaigned in their judicial districts but now "are going to be thrust in 1996 into a countywide election just a few months after they become district judges. Superior court judges whose election is held in 1996 obviously do not have the same difficulty since their's already is a countywide election.

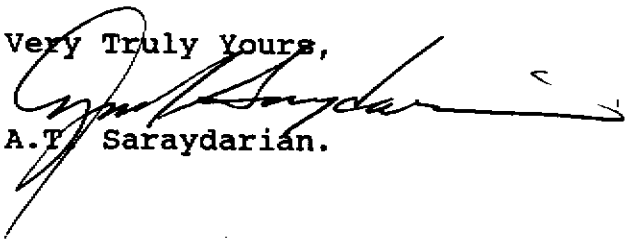
A recommendation by your Commission to resolve this situation will go a long way in eliminating some basic resistance to SCA 3 by not only municipal court judges, but by the public in local district who may be under the perception that they are losing local control and a voice in electing judges from their local communities.

May I suggest that the Commission seek recommendation on this issue. May I also suggest two possible solutions. First, the legislation would provide that all municipal judges who must stand for election in 1996 will be deemed appointed as district court judges effective upon the expiration of their current terms, thus allowing these judges to run three years after the expiration of

their terms (January 6, 1997). A second suggestion, the legislation would provide that the terms of all municipal court judges who must stand election in 1996, will be extended two years so that they will stand countywide election in 1998. These suggestions may also be applicable to justice court judges.

Thank you for the opportunity to comment.

Very Truly Yours,



A.T. Saraydarian.