

Memorandum 95-80

Trial Court Unification: Miscellaneous Issues

In addition to the issues addressed in Memorandum 95-77 (delegation of legislative authority), Memorandum 95-78 (redistricting issues), and Memorandum 95-79 (Voting Rights Act), the staff has identified a number of other issues relating to the new trial court unification statute (Government Code Section 68083). These are as follows:

STATE BAR REVIEW OF JUDICIAL NOMINEES

Before the Governor appoints or nominates a person for judicial office, the Governor must submit the names of the potential appointees or nominees to a designated agency of the State Bar and afford that agency an opportunity to evaluate those persons. Gov't Code § 12011.5 (reproduced in full at Exhibit pages 1-3). Where conversion of a municipal court judgeship to a superior court judgeship is possible, the Governor should not only have to provide the State Bar agency with the names of potential appointees, but should also have to specify whether they are being considered for the municipal court, the superior court, or both. Thus, it may be helpful to amend subdivisions (a) and (c) of Government Code Section 12011.5 along the following lines:

12011.5. (a) In the event of a vacancy in a judicial office to be filled by appointment of the Governor or in the event that a declaration of candidacy is not filed by a judge and the Governor is required under subdivision (d) of Section 16 of Article VI of the Constitution to nominate a candidate, the Governor shall first submit to a designated agency of the State Bar of California the names of all potential appointees or nominees for the judicial office for evaluation of their judicial qualifications. If the judicial office may be converted from a municipal court judgeship to a superior court judgeship, the submission shall state whether the potential appointee is being considered for the superior court, the municipal court, or both.

....

(c) Upon receipt from the Governor of the names of candidates for judicial office and their completed personal data questionnaires,

the State Bar shall employ appropriate confidential procedures to evaluate and determine the qualifications of each candidate with regard to his or her ability to discharge the judicial duties of the office to which the appointment or nomination shall be made. Within 90 days of submission by the Governor of the name of a potential appointee for judicial office, the State Bar shall report in confidence to the Governor its recommendation whether the candidate is exceptionally well-qualified, well-qualified, qualified, or not qualified and the reasons therefor, and may report, in confidence, such other information as the State Bar deems pertinent to the qualifications of the candidate. If the potential appointee is being considered for both the municipal court and the superior court, the State Bar shall make a separate recommendation for each judicial office.

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Comment. Subdivisions (a) and (c) of Section 12011.5 are amended to reflect the Governor's authority to convert certain municipal court judgeships to superior court judgeships. See Section 68083.

VENUE PENDING REDISTRICTING

The unification measure precludes the Governor from converting the last municipal court judgeship in a county, but does not bar the Governor from converting the last municipal court judgeship in a particular district within a county. In the latter situation, redistricting will be necessary. As discussed in Memorandum 95-78, mechanisms already exist for accomplishing the redistricting and for handling pending and new cases in the interim. Nonetheless, it may be helpful to provide statutory guidance regarding the proper venue for pending and new cases while redistricting is in progress. The staff suggests a statute such as the following:

Gov't Code § 68083.1 (added). Transitional venue provision

68083.1. (a) If the Governor converts the last remaining municipal court judgeship in a district to a superior court judgeship, venue shall be as follows until redistricting occurs:

(1) Under a coordination plan approved pursuant to Section 68112, proceedings pending in the converted district at the time of conversion shall either be (A) transferred to another court in the county pursuant to the coordination plan, (B) transferred to another

court in the county or the state pursuant to statute, or (C) adjudicated in the converted court.

(2) No new proceedings shall be filed in the converted court. Where jurisdiction and venue would have been proper in the converted court absent the conversion, the proceeding shall be filed in another district in the county.

(b) Promptly after redistricting, each proceeding pending in the converted district shall be transferred to another district in the county. The presiding judges of the new municipal court districts in the county shall determine by majority vote, or by seniority if there is no majority, how to reallocate the proceedings to further the administration of justice.

Comment. Section 68083.1 clarifies how proceedings are to be handled where conversion of the last remaining municipal court judgeship in a district necessitates redistricting by the board of supervisors pursuant to Section 71040.

Subdivision (a) draws on general rules regarding transfer of proceedings (e.g., Code Civ. Proc. §§ 396, 396a, 398, 402) and trial court coordination (Gov't Code §§ 68112-68114.9). Its requirements for new proceedings are consistent with the principles of county-wide venue and vicinage in criminal cases. *See* Pen. Code § 1462.2; *Hernandez v. Municipal Court*, 49 Cal. 3d 713, 781 P.2d 547, 263 Cal. Rptr. 513 (1989). They also conform to the civil rule that venue is county-wide if no judicial district within the county has a nexus to the matter. *See* Code Civ. Proc. § 395 (b).

Subdivision (b) ensures that no proceeding will remain pending in the converted district once redistricting occurs.

PERSONNEL

The California Constitution states that the Legislature "shall prescribe for each municipal court the number, qualifications, and compensation of judges, officers, and employees." Cal. Const. Art. VI, § 5(c); *see also* Gov't Code § 72000. The Constitution also directs the Legislature to "provide for the officers and employees of each superior court." Cal. Const. Art. VI, § 4. Pursuant to these constitutional mandates, the Legislature has passed numerous statutes detailing the personnel of particular superior and municipal courts. *See, e.g.,* Gov't Code §§ 69899.5 (Orange County Superior Court), 73954 (North County Judicial District); 74134 (Western Riverside County Judicial District); 74905-74922.5 (Ventura County Municipal Court).

When Senate Bill 162 was being considered in the Legislature, the possibility of explicitly addressing reallocation of staffing was raised:

As written, SB 162 relates only to the transfer of judgeships from municipal to superior court when vacancies arise. The bill does not relate to employees of the court which service those judgeships. The committee may wish to consider allowing the Judicial Council to make adjustments in staffing to facilitate this change on a county by county basis.

[Analysis, SB 162, Sen. Judiciary committee, as of 1/30/95.]

Nonetheless, the new unification statute does not expressly address reallocation of court personnel where a judgeship is converted from a municipal court position to a superior court position. It does state: "When a finding by the Governor that a position should be reallocated takes effect, the Judicial Council shall reallocate to the superior court the funding in support of the municipal court salary and the chamber staff positions as well as any other required funding." Gov't Code § 68083(d).

Arguably, by authorizing the Judicial Council to reallocate the funding for the judgeship, the chamber staff positions, and "any other required funding," the Legislature implicitly authorized the Judicial Council to reallocate chamber staff positions and perhaps also other personnel to account for conversion of the judgeship. If Section 68083(d) is construed that way, it raises the constitutional issue of delegation of legislative power to prescribe the officers and employees of municipal courts. *See generally* Memorandum 95-77. Even ignoring the constitutional issue, there are many other questions. If a judgeship is converted, are chamber staff positions the only positions to be reallocated from the municipal court to the superior court? May the Judicial Council eliminate other municipal court positions, such as clerks, referees, and commissioners, and establish new superior court positions? If so, are existing municipal court employees entitled to any preference in hiring? Must the new superior court positions correspond to the eliminated municipal court positions? May there be any changes in marshal and sheriff personnel?

The staff believes that clarification of these points would be helpful but must be done cautiously. The area is complicated, involving many considerations, such as collective bargaining agreements, retirement plans, seniority systems, and power struggles. The staff is not familiar with all of these matters, and has not

been able to fully research them. Input from the Judicial Council and others would be very useful.

Based on the information it currently has, however, the staff thinks that the cleanest approach may be to clarify that upon conversion of a judgeship, the Judicial Council may reallocate the chamber staff positions to the superior court, but any other personnel changes must be left to the Legislature. That could be accomplished through a statute along the following lines:

Gov't Code § 68083.2 (added). Personnel

68083.2. When a finding by the Governor that a position should be reallocated pursuant to Section 68083 takes effect, the chamber staff positions of the converted judgeship shall be reallocated to the new superior court judgeship. Other affected personnel shall be assigned pursuant to the coordination plan approved pursuant to Section 68112 until personnel changes are made by or pursuant to statute.

Comment. Section 68083.2 authorizes limited reallocation of court staffing upon conversion of a municipal court judgeship to a superior court judgeship.

The proposed approach is likely to be constitutional, because the Legislature would not be giving the Judicial Council uncontrolled authority to determine court personnel, just tightly constrained authority to reallocate the chamber staff positions. See Memorandum 95-77. Additionally, the Legislature frequently updates the many statutes pertaining to court personnel, so other necessary reallocations should occur fairly promptly. Existing coordination plans should suffice in the interim. Finally, the approach may eliminate any issue regarding preferential hiring of existing employees. The staff understands (but still needs to confirm) that chamber staff serve at the pleasure of the judge and thus there is no chamber staff when a municipal court judgeship is vacant.

APPLICATION OF SECTION 68083 TO VACANCIES ARISING BEFORE JANUARY 1, 1996

The new unification statute does not clearly specify whether it applies to vacancies arising before January 1, 1996. Rather, it states in part:

Upon the occurrence of a vacancy in a municipal court judgeship, other than the sole remaining municipal court judgeship for the county, if the Governor finds there are sufficient funds for the

conversion of a municipal court judgeship into a superior court judgeship and finds that the administration of justice would be advanced by such a conversion, the number of municipal court judges for the county shall then be reduced by one and the number of superior court judges for the county shall be increased by one.
[Gov't Code § 68083(a).]

Arguably, because the statute does not expressly authorize the Governor to convert judgeships that became vacant prior to January 1, 1996, the Governor lacks such authority. In general, a statute only applies retrospectively if the Legislature clearly indicates that it intends the measure to be applied that way. *See, e.g., Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207, 753 P.2d 585, 246 Cal. Rptr. 629 (1988). The Legislature could easily have stated that Section 68083 applies to vacancies existing before its operative date, yet it did not do so. An obvious conclusion is that the Legislature did not intend to grant the Governor such authority.

On the other hand, however, legislative analyses of Senate Bill 162 not only state the number of existing municipal court vacancies and annual vacancy rate, but also list the existing vacancies by county. *See* Analysis, SB 162, Sen. Judiciary committee, as of 1/30/95; Analysis, SB 162, Asm. Judiciary committee, as of 7/5/95; Analysis, SB 162, Sen. Floor Session, as of 4/20/95. That suggests intent to apply the measure to those vacancies. Other legislative history reportedly also supports such an interpretation. Further, "[a] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." *Kizer v. Hanna*, 48 Cal. 3d 1, 7, 767 P.2d 679, 255 Cal. Rptr. 412 (1989); *see also* *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 826-27, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). While it is not indisputable, it seems likely that Section 68083 will be construed to cover vacancies arising before January 1, 1996.

The language of Section 68083 bolsters this conclusion to some extent. In a statute providing for an event "upon" the occurrence of a contingency, the word "upon" may mean before, after, or simultaneously with the event, depending on the context. *People v. Williams*, 24 Cal. 2d 848, 852 (1944); *Walsh v. Board of Administration of the Public Employees Retirement System*, 4 Cal. App. 4th 682, 705, 6 Cal. Rptr. 2d 118 (1992). In the context of Section 68083, the only reasonable interpretation is that the Governor need not and in fact should not convert a judgeship immediately after a vacancy arises, but rather should evaluate the

situation as directed by the Legislature and only then decide whether to convert the judgeship. Thus, "upon the occurrence of a vacancy" does not seem to mean "immediately after a vacancy arises," but rather "while a vacancy exists." If that reading is correct, however, it would follow that the statute covers vacancies existing as of January 1, 1996, as well as vacancies arising later.

Although the staff considers that the most probable construction of Section 68083, there is enough ambiguity that a clarifying statute along the following lines might be helpful, although not essential:

Gov't Code § 68083.3 (added). Preexisting vacancies

68083.3. (a) Section 68083 applies to vacancies arising before January 1, 1996, as well as vacancies arising on or after January 1, 1996.

(b) This section is declarative of existing law.

Comment. Section 68083.3 is a transitional provision clarifying the Legislature's intent to apply Section 68083 to preexisting municipal court vacancies, as well as vacancies occurring after its operative date.

Regardless of the Commission's view on such a clarifying statute, the current ambiguity regarding extension of Section 68083 to existing vacancies is a further reason for adding a statutory savings clause such as the one proposed at page 9 of Memorandum 95-77. Specifically, because the savings clause would validate judicial acts pursuant to an improper conversion, it may help preserve order if the Governor converts a judgeship that became vacant before January 1, 1995, and a court later determines that Section 68083 does not apply to preexisting vacancies.

FUTURE CONFORMING REVISIONS

In addition to the possible conforming revisions discussed above, conversion of particular judgeships may necessitate additional conforming revisions, such as revision of statutes referring to particular municipal court districts or prescribing the personnel of a particular municipal court. Who should be responsible for such conforming revisions: the Commission, the Judicial Council, or someone else? The staff's inclination is that the Judicial Council may be best situated to undertake this role. But input from the Judicial Council and others would be

helpful in determining whether this perception is correct, as well as whether to in any way formalize responsibility for preparing such future conforming revisions.

Respectfully submitted,

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Gov't Code § 12011.5 (amended). Judicial appointees or nominees

12011.5. (a) In the event of a vacancy in a judicial office to be filled by appointment of the Governor or in the event that a declaration of candidacy is not filed by a judge and the Governor is required under subdivision (d) of Section 16 of Article VI of the Constitution to nominate a candidate, the Governor shall first submit to a designated agency of the State Bar of California the names of all potential appointees or nominees for the judicial office for evaluation of their judicial qualifications.

(b) The membership of the designated agency of the State Bar responsible for evaluation of judicial candidates shall consist of attorney members and public members with the ratio of public members to attorney members determined, to the extent practical, by the ratio established in Sections 6013, 6013.4, and 6013.5, inclusive, of the Business and Professions Code. It is the intent of this subdivision that the designated agency of the State Bar responsible for evaluation of judicial candidates shall be broadly representative of the ethnic, sexual, and racial diversity of the population of California and composed in accordance with Sections 11140 and 11141 of the Government Code. The further intent of this subdivision is to establish a selection process for membership on the designated agency of the State Bar responsible for evaluation of judicial candidates under which no member of that agency shall provide inappropriate, multiple representation for purposes of this subdivision.

(c) Upon receipt from the Governor of the names of candidates for judicial office and their completed personal data questionnaires, the State Bar shall employ appropriate confidential procedures to evaluate and determine the qualifications of each candidate with regard to his or her ability to discharge the judicial duties of the office to which the appointment or nomination shall be made. Within 90 days of submission by the Governor of the name of a potential appointee for judicial office, the State Bar shall report in confidence to the Governor its recommendation whether the candidate is exceptionally well-qualified, well-qualified, qualified, or not qualified and the reasons therefor, and may report, in confidence, such other information as the State Bar deems pertinent to the qualifications of the candidate.

(d) In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience.

(e) The State Bar shall establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office by the designated agency. These rules and procedures shall establish appropriate, confidential methods for disclosing to the candidate the subject matter of substantial and credible adverse allegations received regarding the candidate's health, physical or mental condition, or moral turpitude which, unless rebutted,

would be determinative of the candidate's unsuitability for judicial office. No provision of this section shall be construed as requiring that any rule or procedure be adopted which permits the disclosure to the candidate of information from which the candidate may infer the source, and no information shall either be disclosed to the candidate nor be obtainable by any process which would jeopardize the confidentiality of communications from persons whose opinion has been sought on the candidate's qualifications.

(f) All communications, written, verbal or otherwise, of and to the Governor, the Governor's authorized agents or employees, including, but not limited to, the Governor's Legal Affairs Secretary and Appointments Secretary, or of and to the State Bar in furtherance of the purposes of this section are absolutely privileged from disclosure and confidential, and any communication made in the discretion of the Governor or the State Bar with a candidate or person providing information in furtherance of the purposes of this section shall not constitute a waiver of the privilege or a breach of confidentiality.

(g) When the Governor has appointed a person to a trial court who has been found not qualified by the designated agency, the State Bar may make public this fact after due notice to the appointee of its intention to do so, but no such notice or disclosure shall constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the appointee.

(h) When the Governor has nominated or appointed a person to the Supreme Court or court of appeal in accordance with subdivision (d) of Section 16 of Article VI of the State Constitution, the Commission on Judicial Appointments may invite, or the State Bar's governing board or its designated agency may submit to the commission its recommendation, and the reasons therefor, but no such disclosure shall constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the nominee or appointee.

(i) No person or entity shall be liable for any injury caused by any act or failure to act, be it negligent, intentional, discretionary, or otherwise, in the furtherance of the purposes of this section, including, but not limited to, providing or receiving any information, making any recommendations, and giving any reasons therefor. As used in this section, the term "State Bar" means its governing board and members thereof, the designated agency of the State Bar and members thereof, and employees and agents of the State Bar.

(j) At any time prior to the receipt of the report from the State Bar specified in subdivision (c) the Governor may withdraw the name of any person submitted to the State Bar for evaluation pursuant to this section.

(k) No candidate for judicial office may be appointed until the State Bar has reported to the Governor pursuant to this section, or until 90 days have elapsed after submission of the candidate's name to the State Bar, whichever occurs earlier. The requirement of this subdivision shall not apply to any vacancy in

judicial office occurring within the 90 days preceding the expiration of the Governor's term of office, provided, however, that with respect to those vacancies and with respect to nominations pursuant to subdivision (d) of Section 16 of Article VI of the Constitution, the Governor shall be required to submit any candidate's name to the State Bar in order to provide it an opportunity, if time permits, to make an evaluation.

(l) Nothing in this section shall be construed as imposing an additional requirement for an appointment or nomination to judicial office, nor shall anything in this section be construed as adding any additional qualifications for the office of a judge.

(m) The Board of Governors of the State Bar shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in, any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature, except an evaluation, review, or report on potential judicial appointees or nominees as authorized by this section.

The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such an evaluation, review, or report in his or her individual capacity.

(n) If any provision of this section other than a provision relating to or providing for confidentiality or privilege from disclosure of any communication or matter, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this section to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this extent the provisions of this section are severable. If any other act of the Legislature conflicts with the provisions of this section, this section shall prevail.