First Supplement to Memorandum 97-58

Trial Court Unification: Government Code Draft
(Comments of State Bar Litigation Section)

We have received comments of the State Bar Litigation Section on various issues in the trial court unification study. Attached as an Exhibit is an extract of the Section's comments relating to the unification voting procedure. See also proposed Government Code Sections 70200-70203, set out at pages 13-14 of Memorandum 97-58.

The Litigation Section supports the proposed unification voting procedure in principle, but has a number of suggestions.

Changes Within Voting Period

Proposed Government Code Section 70200(c) would authorize Judicial Council rules for the conduct of the vote, including "changes within the voting period". The Litigation Section points out that this phrase is ambiguous — it could refer to changes in votes, changes in eligible voters, changes in rules, etc.

The phrase is intended to allow Judicial Council rules on whether a judge may change a vote once it has been cast, if the voting period remains open. We would clarify the intent of this provision:

> The Judicial Council may adopt rules not inconsistent with this article for the conduct of the vote, including but not limited to rules governing the frequency of vote calls, manner of voting, duration of the voting period, changes <u>of vote</u> within the voting period, and selection of the operative date of unification.

The Litigation Section comments, "If this phrase refers to changes in the votes by judges within the county, we recommend that this concept be deleted. Once a judge casts a ballot for or against unification, the judge should not be permitted to change his or her vote during that balloting process. Otherwise, the lobbying and pressure exerted during the voting period may tend to be corrupting."

The staff does not disagree with the policy expressed by the Litigation Section, but statutory silence on the matter will not resolve the issue, should a judge try to change a vote that has been cast. Our options are either to address

the matter directly by statute or to leave it to Judicial Council rule. Rather than write an elaborate code for the unification voting process, we have chosen to provide a basic framework and leave it to Judicial Council rule to flesh out. The staff believes the approach of the current draft is correct. If vote changes become a problem, the Judicial Council can address the problem by rule.

Handling of Ballots

The Litigation Section suggests that ballots should be submitted to a designated representative of the Judicial Council from outside the county or to the registrar of voters.

Again, while the staff does not necessarily disagree with these concepts, we believe this sort of detail is inherent in the requirement of conduct and certification of the vote by the Judicial Council or registrar of voters. We do not believe it is necessary to statutorily elaborate the specific persons to receive ballots. This may be the subject of a Judicial Council rule.

Rescission of Vote to Unify

Proposed Government Code Section 70202(c) provides that a vote to unify may not be rescinded once it has been certified. The meaning of this is unclear to the Litigation Section — does this refer to an individual vote? shouldn't a vote be rescindable for irregularities? shouldn't a vote against unification be later rescindable by a vote for unification?

We could clarify the meaning of this provision with the following revision:

> ~~After~~ On certification, a vote ~~to unify~~ in favor of unifying the municipal and superior courts in a county is final and may not be rescinded or revoked by a subsequent vote.

Subsequent Vote after Vote Not to Unify

The Litigation Section is concerned about repeated efforts to unify and constant electioneering in perpetuity. They suggest either that the courts in a county be limited to one vote only, or that the frequency of successive elections be limited by statute. The staff does not believe we need to go that far. The authority provided in the proposed law for the Judicial Council by rule to limit the frequency of elections should be sufficient. We would add a Comment along the following lines:

> **Comment.** In case of a vote *not* to unify the municipal and superior courts in a county, this subdivision does not preclude a

later vote to unify, subject to Judicial Council rules governing the frequency of vote calls.

Voting Irregularities

With respect to voting irregularities, the staff would hate to draft a mini-Elections Code here, particularly to deal with problems that are not likely to arise. Certification of a vote to unify the courts should put an end to it. Suppose the Judicial Council certifies a unification vote, the courts unify their operations, and then irregularities in the vote are discovered? We do not see a compelling need to de-unify the court at that point.

Deadline for Unification Vote

Finally, the Litigation Section suggests a sunset period after which future unification elections could not be held. The staff does not believe this is consistent with the Legislature's intent to enable unification whenever the courts in a county are ready for it. We would not adopt this suggestion.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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August 22, 1997

California Law Revision Commission
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Re: J-1300 -- Trial Court Unification

Ladies and Gentlemen:

By this letter, the Litigation Section of the State Bar of California comments on the staff draft of the Tentative Recommendation on Trial Court Unification: Revision of Code of Civil Procedure, No. J-1300. In preparing these comments, we have considered your memoranda 97-37, 97-38, 97-40, and 97-52; and the Tentative Recommendation dated July 14, 1997.

As a preliminary matter, we emphasize that any comments and recommendations about the proposals in this letter should not be construed as criticism of the Commission or its staff. To the contrary, the Commission and staff have made an excellent start in preparing recommendations to the Legislature. These matters must have taken very substantial effort and time because of the details, complexity, and sophistication of the issues presented by the changes which will be required if SCA 4 is passed by the electorate. The Commission and its staff are to be complimented for their excellent work.

* * * * *

4. Unification Voting Procedure.

We support in principle the approaches taken in proposed
Government Code sections 70200-70203, as reflected in the
July 14, 1997, draft. We also make the following observations:

a.   We are pleased to see the current wording of proposed
Section 70200(a). As originally drafted, unification would have
occurred on certification of results requiring a majority of all
votes "actually cast." As currently worded, the proposed section
properly requires unification on the majority of the superior
court judges and the majority vote of municipal court judges in
the county. This is consistent with SCA 4, and the prior wording
would have been inconsistent with SCA 4.

b.   In proposed Section 70200(c), the phrase "changes within the
voting period" appears. The meaning of this phrase is unclear.
Changes in what? Does this refer to changes in the votes? To
changes in the identity of the voters? Or to changes in the
rules to be adopted by the Judicial Council? If this phrase
refers to changes in the votes by judges within the county, we
recommend that this concept be deleted. Once a judge casts a
ballot for or against unification, the judge should not be
permitted to change his or her vote during that balloting
process. Otherwise, the lobbying and pressure exerted during the
voting period may tend to be corrupting.

c.   We suggest that statements be added to proposed
Section 70201 which would require that all ballots be submitted
to a designated representative of the Judicial Council or to the
registrar of voters and that the ballots are not amendable once
cast. We suggest that the section provide that the ballots will
be collected either by persons appointed by the Judicial Council
from outside the county in which the election is being held or by
the registrar of voters.

d.   Proposed Section 70202(c), dealing with certification of
results, provides that, after certification, a vote to unify the
municipal and superior courts in a county may not be "rescinded."
To us, this is unclear. Does this mean, for example, that an
individual vote may not be rescinded? Or that the results of the
election may not be rescinded. Proposed Section 70202 does not
state the consequences if there are irregularities in the conduct
of the election. If irregularities have occurred in the election
process, should the vote not be rescindable? Conversely, if a
majority of judges vote against unification, the current wording
suggests that they could not rescind that vote by a subsequent
election in which the majority of judges vote for unification.

We perceive a risk to the reputation of the judiciary if constant electioneering on the issue of unification could continue in perpetuity. One possible revision of Section 70202(c) would read:

> After the results of the vote have been certified by the Judicial Council, the judges in a county may not vote again on the issue of whether to unify or not to unify the municipal and superior courts.

Another alternative would be to permit successive elections but to limit the frequency with which they may occur and to include a sunset provision by which, after a certain date, future elections would not be held.

* * * * *

Thank you for this opportunity to comment.

Very truly yours,

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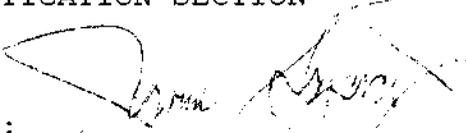
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