Study J-1300 July 10, 1998

Memorandum 98-47

Trial Court Unification: Issues on Implementing Legislation

As discussed in Memorandum 98-48, Senate Bill 2139 (Lockyer) has been amended to include the Commission's implementing legislation for Proposition 220 (SCA 4). The bill is close to enactment, so the Commission should finalize its recommendation on the implementing legislation. A few issues require attention:

PRECLEARANCE UNDER VOTING RIGHTS ACT

In light of a request from the Attorney General's office, Senator Lockyer has amended SB 2139 to delete the Commission's proposed provision on preclearance under the Voting Rights Act. The Commission needs to decide whether to delete this provision from the Commission's recommendation as well.

Four California counties (Monterey, Yuba, Kings, and Merced) are subject to the preclearance requirement of the Voting Rights Act, 42 U.S.C. § 1973c, under which changes in voting practices and procedures must receive advance approval from the United States Attorney General or a three-judge district court. It is well-established that this preclearance requirement applies to judicial elections. Clark v. Roemer, 500 U.S. 646 (1991); *see also* Lopez v. Monterey County, 519 U.S. 9 (1996). "[M]inor changes, as well as major, require preclearance." Young v. Fordice, 520 U.S. 273, 117 S.Ct. 1228, 1235 (1997).

By abolishing municipal court judgeships and creating superior court judgeships, trial court unification under SCA 4 may affect judicial elections. Whereas municipal court judges are elected in municipal court districts, superior court judges are elected countywide. To help ensure compliance with the Voting Rights Act, the Law Revision Commission included a provision in the SCA 4 implementing legislation that would direct the state Attorney General to seek preclearance of trial court unification to the extent required under the Voting Rights Act:

Gov't Code § 70216 (added). Preclearance under Voting Rights Act

70216. The Attorney General shall, to the extent required by the preclearance provisions of the federal Voting Rights Act, 42 U.S.C. Section 1973 *et seq*., seek to obtain preclearance of Section 16(b)(1) of Article VI of the California Constitution as it applies in a county in which the courts are unified pursuant to Section 5(e) of Article VI of the California Constitution.

Comment. Section 70216 vests preclearance duties in the Attorney General. 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).

The Attorney General's office recently requested deletion of this provision. "Upon reflection, and in light of current litigation in which the scope of the Section 5 preclearance penalty is directly at issue, it is our strongly held opinion that this proposed provision, numbered in Section 5 of SB 2139 as Government Code Section 70216, is unnecessary to the objectives of the legislation and is detrimental to legal positions which our Office is currently defending in the federal courts." (Exhibit p. 1.) The Attorney General's office views this matter as "extremely important to the State's interests …." (*Id.* at 2.)

According to Linda Cabatic (Senior Assistant Attorney General), one of the Attorney General's concerns is that Government Code Section 70216 would make the Attorney General responsible for seeking preclearance. Although the Attorney General is "the chief law officer of the State," Cal. Const. art. V, § 13, the Voting Rights Act provides that preclearance requests shall be submitted by "the chief legal officer *or other appropriate official*" of the "State *or subdivision*" subject to preclearance. 42 U.S.C. § 1973c (emphasis added). The Attorney General's office maintains that if the trial courts in a county subject to preclearance want to unify, officials from that county are required to seek preclearance, not the Attorney General.

The Code of Federal Regulations appears to support that view:

> Changes affecting voting shall be submitted by the chief legal officer or other appropriate official *of the submitting authority*. When one or more counties or other political subunits within a State will be affected, the State *may* make a submission on their behalf. Where a State is covered as a whole, State legislation (except legislation of local applicability) or other changes undertaken or required by the State shall be submitted by the State.

28 C.F.R. § 51.23(a) (emphasis added); see also 28 C.F.R. § 51.2 ("*Submitting authority* means the jurisdiction on whose behalf a submission is made"). Because the preclearance requirement applies to specified California counties, not to the state as a whole, responsibility for seeking preclearance appears to rest with the "chief legal officer or other appropriate official" of each such county.

In discussing this point with Ms. Cabatic, the staff raised the possibility of revising the allocation of responsibility in proposed Government Code Section 70216, rather than deleting the provision altogether. Ms. Cabatic did not favor that approach. In particular, she expressed concern about possible inconsistency between proposed Government Code Section 70216 and the federal preclearance requirements. The Attorney General's position is that the federal requirements are sufficient and proposed Government Code Section 70216 is unnecessary and potentially detrimental.

The staff concurs in the assessment that proposed Government Code Section 70216 is not really needed. Because the provision would merely direct an official to seek preclearance "to the extent required by the preclearance provisions of the federal Voting Rights Act, 42 U.S.C. Section 1973 *et seq.*," it only mirrors the federal requirements. Although a parallel state provision may reinforce a federal requirement in some contexts, here only four counties are subject to the preclearance requirement. Two of those counties (Merced and Yuba) already have countywide municipal court elections, so preclearance of trial court unification may not be necessary. See Memorandum 97-37, p. 12. Monterey County is already involved in litigation over use of countywide judicial districts. See Lopez v. Monterey County, 519 U.S. 9 (1996). That leaves only Kings County. **In light of this limited potential impact, as well as the limited substantive effect of proposed Government Code Section 70216, the staff would delete the provision from the Commission's recommendation**, especially since Ms. Cabatic reports that officials in the counties subject to preclearance are already familiar with their duty to seek preclearance and do not need a state statute to alert them to this duty.

UNIFICATION DURING A MUNICIPAL COURT ELECTION

SCA 4 provides in part:

> When the superior and municipal courts within a county are unified, the judgeships in each municipal court in that county are

> abolished and the *previously selected municipal court judges* shall become judges of the superior court in that county. The term of office of a *previously selected municipal court judge* is not affected by taking office as a judge of the superior court.

Cal. Const. art. VI, § 23(b) (emphasis added). Application of this provision will present issues where unification occurs during the process of a municipal court election. For instance, it is unclear what it means to be a "previously selected municipal court judge" where unification occurs after a contested municipal court primary election but before a necessary runoff. Likewise, it is not clear what happens if a municipal court incumbent is unopposed at the primary but unification occurs before the deadline for a write-in campaign.

The Commission considered these issues at length at the June meeting. The Commission directed the staff to "explore means of ensuring that unification during the process of a municipal court election does not disrupt the election." Minutes (June 4, 1998), p. 7.

Having experimented with different approaches, **the staff and the Commission's consultant, Professor J. Clark Kelso, recommend adding the following provision to the implementing legislation for SCA 4**:

> **Gov't Code § 70216. Unification during municipal court election**
>
> 70216. (a) If unification of the municipal and superior courts within a county occurs during an election of a municipal court judge, the conduct of the direct primary election and general election is governed by the law otherwise applicable to election of a municipal court judge.
>
> (b) A judge elected pursuant to this section shall be deemed to be a previously selected municipal court judge within the meaning of subdivision (b) of Section 23 of Article VI of the California Constitution.
>
> (c) As used in this section, "during an election" means during the period beginning on the 127th day before a direct primary election and ending on the day of the general election.
>
> **Comment.** Section 70216 is added to clarify how Article VI, Section 23 of the California Constitution applies where unification occurs during a municipal court election.
>
> Under subdivision (a), the election proceeds as originally planned, helping to promote an orderly transition to unification. Cal. Const. art. VI, § 23(a).
>
> Under subdivision (b), the winner of the election is a previously selected municipal court judge, and thus becomes a superior court judge through unification. Cal. Const. art. VI, § 23(b).

> Subdivision (c) makes clear that Section 70216 applies where unification occurs between (1) the first day for filing a declaration of intention to become a candidate for a municipal court judgeship, and (2) the day of the general election. See Elec. Code §§ 8020 (nomination documents "shall first be available on the 113th day prior to the direct primary election"), 8022 (declaration of intention to become a candidate shall be filed "not more than 14 nor less than five days prior to the first day on which nomination papers may be presented for filing").

Under this provision, the election would proceed as originally planned and the winner would be deemed "previously selected" for purposes of Constitution Article VI, Section 23(b). By minimizing disruption of the election process, the statute would implement the Legislature's broad constitutional mandate to promote an orderly transition to unification. Cal. Const. art. VI, § 23(a). Providing this legislative interpretation of Article VI, Section 23(b) may also deter litigation over its meaning, or facilitate prompt resolution of such litigation, because there is a strong presumption in favor of the Legislature's interpretation of an unclear or ambiguous constitutional provision. *See, e.g.*, Heckendorn v. City of San Marino, 42 Cal. 3d 481, 488, 723 P.2d 64, 229 Cal. Rptr. 324 (1986); Penner v. County of Santa Barbara, 37 Cal. App. 4th 1672, 1678, 44 Cal. Rptr. 2d 324 (1986).

Senator Lockyer has already incorporated the proposed approach into Senate Bill 2139. The provision requires amendment, however, because it refers to the 113th day before the election, rather than the 127th day. If the Commission adopts this approach, the staff will make sure this amendment is made.

To explain the approach, **the staff also suggests inserting a new paragraph in the preliminary part of the Commission's recommendation**. See Exhibit p. 3.

CODE OF CIVIL PROCEDURE SECTION 170.6: NUMBER OF CHALLENGES IN A CRIMINAL CASE IN A UNIFIED COURT

Code of Civil Procedure Section 170.6 gives litigants in both civil and criminal cases "an extraordinary right to disqualify a judge." Le Louis v. Superior Court, 209 Cal. App. 3d 669, 676, 257 Cal. Rptr. 458 (1989). The right is automatic, in the sense that the litigant need only believe in good faith that the judge is biased; proof of prejudice is not required. *Id.* Under no circumstances, however, "shall a party or attorney be permitted to make more than one such motion [for

disqualification] in any one action or special proceeding." Code Civ. Proc. § 170.6(3).

Section 170.6 does not specify how this "one motion" limitation applies to a preliminary hearing in a criminal case. In discussions relating to the SCA 4 implementing legislation, a representative of the Judicial Council questioned whether unification will affect the number of Section 170.6 challenges a criminal defendant can make, and whether the implementing legislation needs to address this point. Specifically, the concern was whether a criminal defendant in a non-unified county is entitled to two such challenges (one for the preliminary hearing in municipal court and one for the trial in superior court), whereas a criminal defendant in a unified county would only get one challenge, because the preliminary hearing and trial would be in the same court.

The law appears to be, however, that "in the criminal context a peremptory challenge may be exercised at either the preliminary *hearing* or at the *trial* of a criminal action," but not at both. Le Louis v. Superior Court, 209 Cal. App. 3d 669, 679, 257 Cal. Rptr. 458 (1989) (emphasis in original); *see also* Avelar v. Superior Court, 7 Cal. App. 4th 1270, 1276-77, 9 Cal. Rptr. 2d 536 (1992) (dictum approving *Le Louis* result); 63 Ops. Cal. Att'y Gen. 801 (1980); *but see* Flores v. Superior Court, 226 Cal. App. 3d 797, 277 Cal. Rptr. 90 (1991) (reaching contrary result without explanation, citing inapposite case). A preliminary hearing "can only be properly conceived as a component proceeding of the criminal action which commences with the filing of a complaint and can continue through superior court proceedings, including trial, resulting in judgment." Le Louis, 209 Cal. App. 3d at 679.

Thus, regardless of whether a criminal case is pending in a unified court or in a non-unified court, each side can only make one motion for disqualification pursuant to Section 170.6. There is no potential disparity in treatment to eliminate. Moreover, although there is a pending case on whether a preliminary hearing and a criminal trial are separate proceedings for purposes of Section 170.6 (Bowers v. Superior Court, 3d Dist. (No. CO26887)), the issue is a matter of case law, not statute. Regardless of how that case may be resolved, addressing the issue by statute in the implementing legislation for SCA 4 would be premature and inconsistent with the Commission's approach of preserving the status quo through the unification process. **No action on this point appears necessary.**

Introduction

Code of Civil Procedure Section 198.5 allows a superior court to select potential jurors from a municipal court district, instead of from the entire county, in specified circumstances:

> 198.5. In counties where sessions of the superior court are held in cities other than the county seat, the names for master jury lists and qualified jury lists to serve in those cities may be selected from the judicial district in which the city is located and, if the judges of the court determine that it is necessary or advisable, from a judicial district adjacent to a judicial district in which the city is located.

Unification would abolish the municipal courts in a county, making the reference to judicial districts problematic, particularly since a statutory reference to a judicial district would mean the county in a unified court (see proposed Code Civ. Proc. § 38 & Comment).

Accordingly, the Commission has proposed to amend Section 198.5 as follows:

> **Code Civ. Proc. § 198.5 (amended). Superior court venires in judicial districts**
>
> SEC. ____. Section 198.5 of the Code of Civil Procedure is amended to read:
>
> 198.5. ~~In~~ (a) Except as provided in subdivision (b), in counties where sessions of the superior court are held in cities other than the county seat, the names for master jury lists and qualified jury lists to serve in those cities may be selected from the judicial district in which the city is located and, if the judges of the court determine that it is necessary or advisable, from a judicial district adjacent to a judicial district in which the city is located.
>
> (b) In a county in which there is no municipal court, if a session of the superior court is held in a location other than the county seat, the names for master jury lists and qualified jury lists to serve in that session may be selected from the area in which the session is held, pursuant to a local superior court rule that provides all qualified persons in the county an equal opportunity to be considered for jury service.
>
> **Comment.** Section 198.5 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). Subdivision (b) is drawn from Section 191 (policy of state to select jury from population of area served by

court; all qualified persons to have an equal opportunity to be considered for jury service).

Senator Lockyer has incorporated this provision into SB 2139.

The preliminary part of the draft recommendation explains:

> The general policy of the state is that juries are selected from the population of the "area served by the court." Historically, this has meant that superior court juries are selected from the county and municipal court juries from the municipal court district. This concept has changed in recent years — superior courts may draw from the judicial district in which a particular session is located, and municipal courts may draw from the superior court pool.
>
> Statistics on the frequency with which the superior courts use municipal court jury pools are not available. However, a survey conducted by the Judicial Council reveals that a substantial number of municipal courts use the superior court pool.
>
> The proposed law maintains the existing flexibility enabling a court to draw a jury from the area served by it. After unification, the court will have sufficient authority to continue the practice most appropriate for that county.

(Memorandum 98-48, p. 9 of the attachment (footnotes omitted).) The preliminary part also points out that as "a technical matter, the proposed law revises Code of Civil Procedure Section 198.5 to refer to the area in which a session is held, rather than the municipal court district, in a county in which the courts have unified." (Memorandum 98-48, p. 9 of the attachment, at n. 65.)

At the June meeting, the Commission revisited the proposed amendment of Section 198.5 and considered alternative ways of drafting it. The Commission directed the staff to provide further analysis of which approach to use.

Analysis

The Commission's guiding principle in drafting the SCA 4 implementing legislation has been to preserve the status quo through unification, as much as possible. Under existing Section 198.5, a superior court appears to be able to select potential jurors from an area less than countywide only for sessions held in cities other than the county seat:

> 198.5. In counties where sessions of the superior court are held *in cities other than the county seat,* the names for master jury lists and qualified jury lists *to serve in those cities* may be selected from the

> judicial district in which *the city* is located and, if the judges of the court determine that it is necessary or advisable, from a judicial district adjacent to a judicial district in which *the city* is located.

(Emphasis added.)

The Commission's proposed amendment of Section 198.5 seems to faithfully follow the same approach:

> (b) In a county in which there is no municipal court, if a session of the superior court is held *in a location other than the county seat,* the names for master jury lists and qualified jury lists *to serve in that session* may be selected from the area in which *the session* is held, pursuant to a local superior court rule that provides all qualified persons in the county an equal opportunity to be considered for jury service.

(Emphasis added.) The option of drawing a jury from an area less than countywide is limited to sessions held in locations other than the county seat.

That would seem to end the analysis; we have provided what seems to be a unified court equivalent to the current rule for non-unified courts. The answer is not so simple, however, because we need to consider the kinds of cases handled in a unified superior court, as opposed to a non-unified superior court.

Unlike a non-unified superior court, a unified court will try limited civil cases, misdemeanors, and infractions. Under the proposed amendment of Section 198.5, a unified superior court would not be able to select jurors for such cases from an area less than countywide unless the cases were tried in a location other than the county seat. In counties that do not unify, however, the municipal court would be able to draw jurors from an area less than countywide regardless of whether the court is located at the county seat or elsewhere. The proposed amendment would thus change the status quo in this respect.

One way of addressing this situation would be to eliminate the county seat limitation for limited civil cases, misdemeanors, and infractions, but preserve it for felonies and civil cases other than limited civil cases. This would most accurately reflect the status quo, but the staff does not believe the extra complexity is warranted. The logic of the county seat limitation is unclear, and Section 198.5 only *permits* superior courts to draw jurors from an area less than countywide, it *does not mandate* use of such an approach. The staff would not preclude use of less-than-countywide jury selection for limited civil cases, misdemeanors, and infractions tried at the county seat, or establish a special rule

for limited civil cases, misdemeanors, and infractions in this context. **Rather, the staff recommends allowing less-than-countywide jury selection at any session of a unified superior court (whether at the county seat or otherwise), but only in counties where sessions of the superior court are held in a location other than the county seat:**

> 198.5. ~~In~~ (a) Except as provided in subdivision (b), in counties where sessions of the superior court are held in cities other than the county seat, the names for master jury lists and qualified jury lists to serve in those cities may be selected from the judicial district in which the city is located and, if the judges of the court determine that it is necessary or advisable, from a judicial district adjacent to a judicial district in which the city is located.
>
> (b) In a county in which there is no municipal court, if sessions of the superior court are held in a location other than the county seat, the names for master jury lists and qualified jury lists to serve in a session may be selected from the area in which the session is held, pursuant to a local superior court rule that provides all qualified persons in the county an equal opportunity to be considered for jury service.
>
> **Comment.** Section 198.5 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). Subdivision (b) is drawn from Section 191 (policy of state to select jury from population of area served by court; all qualified persons to have an equal opportunity to be considered for jury service). A local rule promulgated pursuant to subdivision (b) may differentiate between misdemeanors, infractions, and limited civil cases, on the one hand, and felonies and civil cases other than limited civil cases, on the other. See Code Civ. Proc. § 85 (limited civil cases) & Comment; Penal Code § 691 (definitions) & Comment.

This would give courts flexibility in deciding whether to draw jurors from all or only part of a county, yet continue to the limit that option to counties where sessions of the superior court are held in a location other than the county seat.

Respectfully submitted,

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June 15, 1998

MR. NATHANIEL STERLING
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Re: SB 2139 (Lockyer): Request for Amendment by Deletion
Proposed Gov. Code Sec. 70216 (Preclearance of State Constitutional Provisions)

Dear Mr. Sterling:

It has come to our attention that a piece of legislation with which the Commission is involved -- SB 2139 (Sen. Lockyer), intended to facilitate implementation of unified courts under Proposition 220 -- contains a provision which would involve this Office in the federal "preclearance" process under Section 5 of the Voting Rights Act. (42 U.S.C. § 1973c.) Upon reflection, and in light of current litigation in which the scope of the Section 5 preclearance penalty is directly at issue, it is our strongly held opinion that this proposed provision, numbered in SECTION 5 of SB 2139 as Government Code Section 70216, is unnecessary to the objectives of the legislation and is detrimental to legal positions which our Office is currently defending in the federal courts.

Accordingly, on behalf of the Attorney General's Office, we hereby formally request that SB 2139 be amended to delete section 70216 in its entirety, and that this amendment be effectuated as soon as possible. We are informed by Professor J. Clark Kelso that this provision, or one similar in effect, was initially included in SCA 3 some years ago at the suggestion of a representative of this Office, and we apologize for any confusion or inconvenience which may

result from our current request for deletion. However, we view the matter as extremely important to the State's interests, and urge you to take all steps necessary to eliminate section 70216 from the bill.

Thank you for your prompt attention to this matter. Please give me a call if you wish to discuss this matter further, or if you foresee any difficulties or delays in making the revision requested herein.

Sincerely,

DANIEL E. LUNGREN
Attorney General

LINDA A. CABATIC
Senior Assistant Attorney General

cc: Hon. Bill Lockyer, President Pro Tempore of the Senate
J. Clark Kelso, Director, Institute for Legislative Practice
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Study J-1300 July 10, 1998
Memo 98-47

Exhibit

UNIFICATION DURING A MUNICIPAL COURT ELECTION: INSERT FOR PRELIMINARY PART

☞ ***Note.*** To explain proposed Government Code Section 70216, the staff proposes to insert the following paragraph at the end of the discussion of "Judicial Elections" on pages 14-15 of the preliminary part of the Commission's report.

> The proposed legislation would also provide guidance on how unification affects an ongoing municipal court election.[1] If unification occurs during a such an election[2], the election would proceed as originally planned, promoting an orderly transition to unification.[3] The winner of the election would be deemed "previously selected" for purposes of SCA 4, and would become a superior court judge through unification.[4]

1. Proposed Gov't Code § 70216.

2. "During a municipal court election" means between the 127th day before a direct primary election and the day of the general election. Proposed Gov't Code § 70216(c); see Elec. Code §§ 8020 (nomination documents "shall first be available on the 113th day prior to the direct primary election"), 8022 (declaration of intention to become a candidate shall be filed "not more than 14 nor less than five days prior to the first day on which nomination papers may be presented for filing").

3. Cal. Const. art. VI, § 23(a).

4. Cal. Const. art. VI, § 23(b); proposed Gov't Code § 70216(b).