

Second Supplement to Memorandum 2001-88

Statutes Made Obsolete by Trial Court Restructuring (Draft of Tentative Recommendation)

Memorandum 2001-88 reviews several outstanding issues requiring Commission attention before the tentative recommendation is approved for distribution. This supplement discusses two other issues: (1) prohibitions on the practice of law by subordinate judicial officers, and (2) deputy court clerks and other deputy court officers.

Proposed staff revisions relating to these issues are presented for the Commission's review and approval for inclusion in the tentative recommendation, subject to any additional Commission revisions.

PROHIBITIONS ON PRACTICE OF LAW BY SUBORDINATE JUDICIAL OFFICERS

Existing Statutory Restrictions

It has been a long-standing practice of the Legislature to impose restrictions on the private practice of law by various public officers, including judges, court commissioners, and clerks. The primary purpose for these restrictions is to avoid conflicts of interest (or the appearance of impropriety), thereby ensuring public confidence in the integrity of the judicial system.

With one exception (below), all of the Title 8 restrictions on the practice of law apply solely to court commissioners or referees. There are both general and county-specific restrictions, the vast majority of which prohibit commissioners and referees from engaging in "the private practice of law." See, e.g., Sections 70142 (superior court commissioners), 72190 (municipal court commissioners), 74925 (municipal court commissioner in Tulare County). A few exceptions to this general prohibition appear in county-specific municipal court statutes. Generally, they permit part-time or temporary municipal court commissioners or referees to engage in the private practice of law except before the municipal court to which they were appointed. See, e.g., Sections 74703 (temporary municipal court traffic referees in Sonoma County), 74982 (part-time municipal court commissioners in Shasta County).

Section 68082 prohibits a judge of a court of record, court commissioner, or county clerk from practicing law in any California or federal court or acting as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before governmental bodies. A judge is also prohibited from the practice of law by Article VI, § 17, of the California Constitution.

As originally enacted, Section 68082 did not include a reference to a court commissioner — it referred to “a justice.” In 1971, “court commissioner” was substituted for “a justice.” The staff has been unable to determine why the Legislature added commissioners to Section 68082 at a time when Sections 70142 and 72190 already barred commissioners from the private practice of law. Perhaps, the Legislature felt that the prohibition against acting as agent or solicitor in the prosecution of claims before government agencies was not embraced within “the private practice of law.” Or, perhaps it was to make the definition of practice of law (barring law partnerships) in Section 68082 applicable to commissioners.

Proposed Revisions

The draft tentative recommendation proposes the repeal of the county-specific provisions regarding the practice of law by commissioners and referees, as well as most of the general prohibitions applicable to superior and municipal court commissioners (Sections 70142, 72190, 72450). The staff proposes to continue the existing general statutory prohibition against the practice of law, but extend it to subordinate judicial officers generally. The staff draft authorizes the Judicial Council to adopt rules permitting exceptions to the general prohibition in order to accommodate the needs of those courts whose county-specific provisions are proposed for repeal. The staff believes that the most appropriate place for the revised general rule is Section 71622, which already governs the appointment, tenure, and qualifications of subordinate judicial officers.

Gov’t Code § 71622 (amended). Subordinate judicial officers

SEC. ____ . Section 71622 of the Government Code is amended to read:

71622. (a) Each trial court may establish and may appoint such subordinate judicial officers as are deemed necessary for the performance of subordinate judicial duties as are authorized by law to be performed by subordinate judicial officers. However, the number and type of subordinate judicial officers in a trial court

shall be subject to approval by the Judicial Council. Subordinate judicial officers shall serve at the pleasure of the trial court.

(b) The appointment of a subordinate judicial officer shall be made by order entered in the minutes of the court.

(c) The Judicial Council shall promulgate rules establishing the minimum qualifications and training requirements for subordinate judicial officers. A subordinate judicial officer may not engage in the private practice of law except to the extent permitted by Judicial Council rules.

(d) The presiding judge of a superior court may cross-assign one type of subordinate judicial officer to exercise all the powers and perform all the duties authorized by law to be performed by another type of subordinate judicial officer, but only if the person cross-assigned satisfies the minimum qualifications and training requirements for the new assignment established by the Judicial Council pursuant to subdivision (c).

(e) The superior courts of two or more counties may appoint the same person as court commissioner.

(f) As of the implementation date of this chapter, all persons who were authorized to serve as subordinate judicial officers pursuant to other provisions of law shall be authorized by this section to serve as subordinate judicial officers at their existing salary rate, which may be a percentage of the salary of a judicial officer.

Comment. The amendment to subdivision (c) of Section 71622 continues and generalizes provisions that formerly governed the private practice of law by commissioners and referees of the superior and municipal courts. See, e.g., former Sections 70141.1 (superior court commissioner in El Dorado County), 70142 (superior court commissioners), 72190 (municipal court commissioners), 72450 (municipal court traffic trial commissioners), 74925 (municipal court commissioner in Tulare County). See also Cal. Code Jud. Ethics, Canons 4G (practice of law), 6 (compliance with Code).

Under subdivision (c), the Judicial Council is authorized to establish exceptions to the general statutory prohibition to allow subordinate judicial officers, or classes of subordinate judicial officers, to engage in the private practice of law. For example, special provisions formerly permitted certain types or classes of municipal court commissioners and referees to engage in the private practice of law before any court except the court in which they served. See, e.g., former Sections 74703(e) (temporary municipal court traffic referees in Sonoma County), 74982(d) (part-time municipal court commissioners in Shasta County).

A revised version of Section 68082 replacing “county clerk” with “court executive or administrative officer” is already included in the draft tentative recommendation. We would further modify the section to add an introductory clause (“Except as otherwise provided by law ...”) to provide for newly-authorized Judicial Council rules. (An additional technical amendment deleting “court of record” is also proposed since all courts are now courts of record. Cal. Const. art. VI, § 1.)

Gov’t Code § 68082 (amended). Practice of law by court officers

SEC. _____. Section 68082 of the Government Code is amended to read:

68082. ~~During his~~ Except as otherwise provided by law, during the officer’s continuance in office, a court commissioner, judge ~~of a court of record, or county clerk~~ court executive or administrative officer shall not practice law in any court of this state or act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before any department of the state or general government or courts of the United States. As used in this section, the practice of law includes being in partnership or sharing fees, commissions, or expenses in the practice of law with any person acting as an attorney in this state.

Comment. Section 68082 is amended to reflect the Judicial Council’s authority to qualify the general statutory prohibition against the private practice of law by a subordinate judicial officer. See Section 71622 (subordinate judicial officers).

The section is also amended to reflect the fact that all courts are “courts of record” pursuant to Article VI, Section 1, of the California Constitution.

The section is also amended to reflect elimination of the county clerk’s role as ex officio clerk of the superior court. See former Section 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is relieved of those powers, duties, and responsibilities. See Sections 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

DEPUTY COURT OFFICERS

General Provisions Concerning Deputies

A public officer's duties can only be performed by the officer or by one or more appointed and sworn deputies. If properly appointed, the deputy has authority coextensive with that of the officer in the performance of the officer's duties. See *Rauer v. Lowe*, 107 Cal. 229, 40 P. 337 (1895); *Andrews v. Metzner*, 83 Cal. App. 764, 257 P. 203 (1927); *Tate v. Superior Court*, 45 Cal. App. 3d 925, 119 Cal. Rptr. 835 (1975). A number of statutes state this principle explicitly, including Section 24100 which applies to deputy county clerks. These statutes, however, simply codify common law principles. See *Muller v. Boggs*, 25 Cal. 175 (1864).

The "deputy" classification does not currently appear in the Trial Court Employment Protection and Governance Act. The staff proposes to add "deputies" to the Act to make clear that the court or the court's appointee has the authority to appoint deputy court officers, such as deputy court clerks and other types of deputies specified in sections proposed for repeal. See, e.g., Sections 69900 (deputy jury commissioner), 74905 (deputy executive officer), 74921.10 (deputy clerk administrator), 74985 (deputy marshal).

Gov't Code § 71620 (amended). Trial court personnel

SEC. _____. Section 71620 of the Government Code is amended to read:

71620. (a) Each trial court may establish such job classifications and may appoint such trial court officers, deputies, assistants, and employees as are deemed necessary for the performance of the duties and the exercise of the powers conferred by law upon the trial court and its members.

(b) Each trial court may appoint an executive or administrative officer who shall hold office at the pleasure of the trial court and shall exercise such administrative powers and perform such other duties as may be required by the trial court. The executive or administrative officer has the authority of a clerk of the trial court. The trial court shall fix the qualifications of the executive or administrative officer and may delegate to him or her any administrative powers and duties required to be exercised by the trial court. ~~Notwithstanding any other provision of law, the trial court may, by local rule, specify which of the powers, duties, and responsibilities required or permitted to be exercised by the county clerk in connection with judicial actions, proceedings, and records shall be exercised or performed by the executive or administrative officer. The county clerk shall be relieved of any obligation imposed~~

~~on him or her by law with respect to these specified powers, duties, and responsibilities, to the extent the local rule imposes on the executive or administrative officer the same powers, duties, and responsibilities.~~

Comment. Subdivision (a) of Section 71620 is amended to make clear that the court (or the court's appointee) has the authority to appoint deputy court officers. It should be noted that Article 7 (commencing with Section 1190) of Chapter 1 of Division 4 of Title 1 applies to all deputy court officers.

The last two sentences of subdivision (b) are superseded by Section 69840 (powers, duties, and responsibilities of clerk of court).

Deputy Court Clerks

The draft tentative recommendation eliminates the county clerk's role as ex officio clerk of the superior court and delegates those duties and responsibilities to the court administrative or executive officer. See Sections 26800 (repealed), 69840 (added), and 71620 (amended). Consequently, the role of the county clerk's deputies as ex officio deputy clerks of the court is also eliminated.

Representatives of the Los Angeles County Superior Court are concerned that without an express statutory provision regarding a deputy court clerk's authority and duties, actions taken by deputy court clerks may be regarded as ultra vires by other state and foreign courts and governments (e.g., authenticating judgments entitled to full faith and credit).

Although common law indicates that specific statutory authority is not necessary, including such a provision may ease concerns and prevent misunderstandings. The staff proposes to add to the tentative recommendation a provision that Article 7 (commencing with Section 1190) of Chapter 1 of Division 4 of Title 1 of the Government Code applies to deputy court clerks. That article is part of the general provisions that govern public officers and employees and covers such things as the appointment, oath, and authority of deputies.

Gov't Code § 69840 (added). Powers, duties, and responsibilities of clerk of court and deputy clerk of court

SEC. _____. Section 69840 is added to the Government Code to read:

69840. (a) The clerk of the court shall exercise or perform, in addition to the powers, duties, and responsibilities provided by statute, any powers, duties, and responsibilities required or permitted to be exercised by the county clerk in connection with judicial actions, proceedings, and records. The county clerk is

relieved of any obligation imposed by law on the county clerk with respect to these powers, duties, and responsibilities.

(b) A deputy court clerk is subject to the provisions of Article 7 (commencing with Section 1190) of Chapter 1 of Division 4 of Title 1.

Comment. Section 69840 is added to reflect:

(1) Elimination of the county clerk's role as ex officio clerk of the superior court. See former Section 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is relieved of those powers, duties, and responsibilities. See also Section 71620 (trial court personnel).

(2) The corresponding elimination of the deputy county clerk's role as ex officio deputy clerk of the superior court. See Section 24100 (deputy included in principal's name). Subdivision (b) makes clear that Article 7 (commencing with Section 1190) of Chapter 1 of Division 4 of Title 1 applies to deputy court clerks. See also Section 71620 Comment (Article 7 applicable to all deputy court officers).

Respectfully submitted,

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