

Memorandum 2001-96

Trial Court Restructuring: Official Reporter

BACKGROUND

It has been apparent from the beginning that disposition of the statutes relating to official reporters would be the most complex task involved in this project. That is because there is an extensive body of statutes dealing with the details of official reporter and official reporter pro tempore employment, duties, and compensation in every superior court and municipal court district, and every one of them is different. Moreover, even within a single district the situation is far from straightforward, since some official reporters and official reporters pro tempore may be court employees and others may be independent contractors; in either case their compensation, apart from any salary, benefits, or per diem the law provides, invariably includes a separate element of transcription fee income.

Drafts the staff previously circulated to courts, Administrative Office of the Courts, official reporter professional associations, and labor unions attempted to cut through all this and simplify the law by guaranteeing official reporters a base compensation equivalent to what they are entitled to by law on the date the supporting statutes would be repealed, leaving future compensation packages to be determined by the normal negotiation processes. The concept was that, as a practical matter, compensation will continue to rise anyway, so the base is a theoretical safety net. In case of a recession in which compensation falls, the Legislature can revisit the matter and determine whether a continued compensation guarantee is appropriate.

Predictably, the professional associations and labor unions had few problems with this concept. The courts generally did not object to the approach. The Administrative Office of the Courts, however, was concerned. Why should official reporters be privileged above all other court employees?

The Commission requested further staff work on the following questions:

- (1) Whether the proposed protection of base "compensation" is overly broad.

(2) Whether the proposed protection of base compensation is appropriately applied to pro tempore reporters.

(3) Whether the proposed protection of base compensation is appropriate at all.

(4) Whether the Trial Court Employment Protection and Governance Act legally supersedes existing special compensation statutes.

(5) Whether the employment status of official reporters and official reporters pro tempore in the various counties is in fact diverse or whether simplification is possible.

EMPLOYMENT STATUS OF OFFICIAL REPORTERS AND OFFICIAL REPORTERS PRO TEMPORE

A major complication in dealing with the official reporters and official reporters pro tempore statutes is uncertainty about the employment status of personnel in various counties. The Commission requested further information about this matter.

The Service Employees International Union reports that official reporters are employees in all counties. Official reporters pro tempore are also employees “in almost all counties, especially since the law allows the union to represent them and we have chosen to do so wherever we can.”

The California Official Court Reporters Association notes that in San Francisco, official reporters pro tempore are not employees, but do accumulate vacation and sick leave. COCRA notes that there are probably many other situations they haven’t ferreted out yet.

The California Court Reporters Association likewise points out to us that things are not as clean as we would like. There are anomalies in the status of official reporters and official reporters pro tempore in a number of counties.

It was suggested at the September Commission meeting that one possible approach to simplification of this system would be to convert official reporters pro tempore into official reporters. This would not be a significant change in most counties, since official reporters pro tempore are court employees in most counties already.

As to the few official reporters and official reporters pro tempore who are “independent contractors” in theory, the suggestion was made that if the matter were tested, they would probably be found to be de facto employees and entitled

to rights of employees. Again, the law could be simplified by recognition of this situation.

The staff is reluctant to go down this road in the context of a project to clean deadwood out of the statutes. While it is true that these types of changes would be consistent with the practice in most courts, we know that is not the case in all. There will be resistance to the costs involved in converting true pro tempore appointees into trial court employees. The staff believes our effort here should be to clean out the obsolete statutes in a way that will minimally change the basic employment status of official reporters and official reporters pro tempore, leaving to others the design and management of the trial court personnel structure.

LEGAL STATUS OF OFFICIAL REPORTER COMPENSATION STATUTES

Have the innumerable statutes governing compensation of official reporters and official reporters pro tempore in fact been superseded by the Trial Court Employment Protection and Governance Act as a matter of law? At the outset, we must remember that at most TCEPGA may supersede those statutes only to the extent they apply to trial court employees. To the extent those statutes may apply to official reporters and official reporters pro tempore who are not trial court employees, they would not be superseded by TCEPGA in any event.

With respect to trial court employees, the Administrative Office of the Courts has stated that TCEPGA is the result of an extensive task force process involving all interested parties, and at the conclusion of the process it was clearly understood by all parties that the new law would supersede existing employee compensation statutes.

Professional associations and labor unions, however, have stated that there was no such agreement. When an effort was made as part of the task force process to remove existing statutes, there were immediate objections. The result was that matter was put off to the Law Revision Commission to work on. See Gov't Code § 71674 (Commission "shall determine whether any provisions of law are obsolete as a result of the enactment of this chapter").

Presumptively, TCEPGA supersedes existing employment compensation statutes. However, a plausible argument to the contrary can be made, and there is evidence of legislative intent supporting both sides. A good lawyer could argue each piece of evidence either way.

Special Statutes Superseded

There is ample support for the position that TCEPGA was intended to, and in fact does, supersede existing special statutes on official reporter compensation:

Gov't Code § 71623. Salaries

71623. (a) Each trial court may establish a salary range for each of its employee classifications. Considerations shall include, but are not limited to, local market conditions and other local compensation-related issues such as difficulty of recruitment or retention.

(b) All persons who are trial court employees as defined in Section 71601, as of the implementation date of this chapter shall become trial court employees at their existing salary rate. For employees who are represented by a recognized employee organization, salary ranges may be subject to modification pursuant to the terms of a memorandum of understanding or agreement, or upon expiration of an existing memorandum of understanding or agreement subject to meet and confer in good faith. For employees who are not represented by a recognized employee organization, salary ranges may be revised by the trial court. However, as provided in Section 71612, the implementation of this chapter shall not be a cause for the modification of salary ranges by a trial court.

Gov't Code § 71673. Authority of court

71673. Notwithstanding any other provision of law, the trial court may exercise the authority and power granted to it pursuant to Article 2 (commencing with Section 71620) of this chapter, including, but not limited to, the authority and power to establish job classifications, to appoint such employees as are necessary, to establish salaries for trial court employees, and to arrange for the provision of benefits for trial court employees, without securing the approval or consent of the county or the board of supervisors, and without requiring any further legislative action, except as otherwise provided by this chapter.

Special Statutes Not Superseded

Some evidence can be marshaled for the argument that TCEPGA was not intended to, and in fact does not, supersede existing special statutes on official reporter compensation. The direct evidence is somewhat weak.

Gov't Code § 71612. Existing terms of employment not affected

71612. Except as otherwise expressly provided in this chapter, the enactment of this act shall not be a cause for the modification or elimination of any existing wages, hours, or terms and conditions of

employment of trial court employees. However, except as to those procedures, rights, or practices described in this chapter as minimum standards, the enactment of this act shall not prevent the modification or elimination of existing wages, hours or terms and conditions of employment through the meet and confer in good faith process or, in those situations in which the employees are either exempted from representation, or are not represented by a recognized employee organization, through appropriate procedures.

Note that Section 71612 does not actually guarantee existing compensation — it provides merely that enactment of TCEPGA shall not be considered a change in circumstances that would justify renegotiation. The section goes on to provide procedures for renegotiating compensation, without any guarantees.

Gov't Code § 71617. Limitation on municipal court employment

71617. To the extent this chapter applies to a municipal court, any action by the municipal court specifying the number, qualification, or compensation of officers or employees of the municipal court which differs from that prescribed by the Legislature pursuant to Section 5 of Article VI of the California Constitution shall remain in effect for a period of no more than two years unless prescribed by the Legislature within that period.

Section 71617 would seem to keep in effect the multitudinous statutes governing compensation of municipal court personnel. It may be argued that since municipal courts no longer exist, Section 71617 no longer has any relevance. But the statutes governing trial court unification state expressly that existing terms and conditions of employment continue through the unification process until adoption of a statewide structure for trial court employees, officers and other personnel. Gov't Code § 70217. And Section 71617 is part of the statewide structure. See also Gov't Code § 71614 (unification statutes not affected by TCEPGA).

However, if Section 71617 is necessary to preserve employment-related municipal court statutes, the fact that no comparable provision preserves employment-related superior court statutes suggests that the superior court statutes are in fact superseded by TCEPGA.

Inferences to be Drawn from Treatment of Other Employment Issues

Numerous provisions of TCEPGA establish processes for modification of existing salaries and benefits. The implication to be drawn from these provisions

is that TCEPGA contemplates the possibility of negotiation downwards as well as upwards. But this is nowhere spelled out.

By comparison, TCEPGA directly repeals conflicting statutes relating to government employee collective bargaining. TCEPGA also indirectly overrides conflicting statutes relating to employment selection, advancement, and protection. Gov't Code §§ 71640, 71650 (TCEPGA "shall replace" existing county employment selection, advancement, and protection systems applicable to trial court employees). The same types of statutory override were not applied to existing salary and benefits statutes.

Section 71673 (set out above) is also noteworthy. It is located among provisions of TCEPGA governing the relation of TCEPGA to other statutes. It states specifically that "notwithstanding any other provision of law," the trial court may establish salaries and arrange for benefits "without requiring any further legislative action." This suggests that the existing statutes are superseded by TCEPGA. Section 71673 is followed immediately by the provision directing the Law Revision Commission to determine whether any provisions of existing law are obsolete as a result of enactment of TCEPGA and to recommend amendments to remove the obsolete provisions. Section 71674.

Legislative Intent

There is evidence of legislative intent in legislative analyses made during the process leading to enactment of TCEPGA. The Senate Floor analysis of the final version of the bill states that "the level of benefits provided to trial court employees will not be reduced" by the bill and that MOUs remain in effect until expiration or amendment, subject to meet and confer. "Finally, this bill provides that the current classification, salary rate, and seniority of court employees shall remain the same and that disciplinary actions initiated before implementation of the personnel system shall remain in effect."

The analyses are clear that the intent of the legislation was to adopt "the unanimous recommendations of the Task Force on Trial Court Employees for establishing a uniform employment status scheme for court personnel." Those unanimous recommendations of the task force are nebulous, however.

As to salary, the task force report states:

The recommended salary model is compatible with the assumption that state funding levels will not significantly change as a result of the new personnel structure. The model also meets the intent of the Legislature that no employee in the trial court system

shall sustain a salary reduction as a result of the new personnel structure. The recommended salary model creates a system of decentralized management and does not reduce salaries or require substantial cost increases. In keeping with the intent not to reduce the salary of a trial court employee, all court employees will enter the new personnel system with their existing salaries at the time of transition.

Task Force on Trial Court Employees, *Final Report* at p. 72 (Dec. 31, 1999)

As to benefits, the task force report states:

The task force intends that trial court employees not lose the benefits they currently enjoy when they transition to the new personnel system. The task force recognizes that protecting benefits for trial court employees was crucial to meeting its charge that trial court employees' benefits should not be reduced.

Task Force on Trial Court Employees, *Final Report* at p. 136 (Dec. 31, 1999)

Sauce for the Goose?

We have heard from official reporter representatives that, although existing statutes provide for employment of official reporters "at pleasure," the statutes are superseded by the employment protection provisions of TCEPGA. Can these organizations rationally take the position that existing disadvantageous statutes are superseded by TCEPGA, but existing advantageous statutes are not?

At least with respect to "at pleasure" statutes, the staff thinks the official reporter representatives can make a plausible argument. TCEPGA is reasonably clear that it provides minimum employment protection standards every court must conform to, superseding existing county provisions. Gov't Code § 71650. TCEPGA says nothing about superseding existing statutes setting compensation of official reporters.

Conclusion

While an argument can be made that TCEPGA does not override existing statutes on trial court employee compensation, the staff believes the stronger argument is that TCEPGA was intended to supersede these statutes.

That does not end the discussion, however, since TCEPGA only governs compensation of those official reporters who are trial court employees. And although most official reporters and official reporters pro tempore are trial court employees, some are not.

This would argue for preservation of existing statutes, at least to the extent they may be applicable to existing non-employee official reporters and official reporters pro tempore. For non-employees, any preservation of existing rights ought not to be indefinite, but only until termination of existing contracts. This could easily be done with a saving clause, without the need to maintain large bodies of generally obsolete statutory material.

ADVISABILITY OF BASE COMPENSATION GUARANTEE

TCEPGA preserves existing compensation (including benefits) arrangements until termination of existing MOUs. At that point compensation is subject to redetermination pursuant to meet and confer in good faith processes.

Drafts circulated by the staff would have put a floor of existing compensation under this scheme, in order to facilitate cleaning out existing statutes on official reporters. Thus, compensation could remain unchanged or be negotiated upward, but could not be reduced. The Commission requested further analysis of the advisability of such a guarantee of base compensation.

In support of this approach is that it may be the only practical way to clean out the statutory debris. There is an argument (weak) that TCEPGA does not supersede existing statutes. Even if TCEPGA does supersede existing statutes, it only does so with respect to court employees; it does not affect statutory compensation of nonemployee official reporters and official reporters pro tempore. If we wipe out existing statutes as to court employees but continue to protect non-employees, we are in effect favoring those whom the law arguably should least favor. By inserting a guaranteed minimum floor, we can cut through all this, treat all reporters and official reporters equally, and move on to a more rational scheme of setting compensation. The floor is only a theoretical minimum, since as a practical matter compensation continually increases.

Opposed to this approach is that official reporters and official reporters pro tempore ought not to receive special treatment over other trial court personnel. TCEPGA is a rational scheme for setting employee compensation, and to preserve existing statutes for those few official reporters and official reporters pro tempore who are not trial court employees is allowing the tail to wag the dog. Moreover, salaries are not guaranteed continually to rise — in a recessionary period such as one we are entering, salaries may fall. Official

reporters and official reporters pro tempore ought not to be immune from the economic forces that affect all other employees.

These concerns are particularly troublesome as applied to benefits, such as health care. Should one group of employees be locked into certain benefits based on the peculiarities of the particular contract in effect at the time the new system is enacted? Suppose HMO benefit levels change as a matter of standard practice, and health care insurance that replicates old benefit levels is either completely unavailable or could be made available only at a prohibitive cost that would consume funds otherwise available for standard health care insurance for all employees.

Perhaps salary and benefits should be distinguished. At least one official reporter representative has said that, while official reporters and official reporters pro tempore are not more special than other trial court personnel, their circumstances are. "I think everyone can agree we have a very complicated and unique relationship with the courts, both as pro tems and employees. For instance, I believe we are the only classification that receives a 1099 (for transcripts) and purchases equipment to interface with the courts to provide a service, such as real time."

STAFF RECOMMENDATION

The major concern the staff has is a political one. It is apparent that it is preferable to wean official reporter and official reporter pro tempore compensation from the old system where these matters were determined by legislation. However official reporters are understandably reluctant to give up existing protections they may have.

While the staff believes TCEPGA supersedes existing official reporter compensation statutes, at least to the extent the statutes apply to court employees, this conclusion is not completely clear and an argument can be made that they still have some effect.

The staff thinks the debate here is largely theoretical, since it is unlikely that compensation will decrease in the long run. However, there are certainly scenarios where the possibility of a decrease is more than academic, particularly in the benefits area.

One possible approach is to conclude that we cannot ascertain with certainty whether existing official reporter statutes are in fact obsolete as applied to court

employees. We would then leave the existing statutes in place until the matter is resolved by a court. (That assumes the matter would come before the courts in due course — an unlikely scenario if the staff's analysis is correct that this is largely a theoretical issue.)

Another approach is simply to recommend repeal of existing statutes on the basis that they are superseded by TCEPGA as to court employees and are de minimis as to non-employees. If official reporters disagree strongly enough with this position, they could make their case to the Legislature, and we would get a real determination of legislative intent. The staff is somewhat reluctant to follow this course because the Legislature is looking to the Commission for what should be a noncontroversial cleanout of obsolete statutes.

A third alternative would be to make clear that regular court compensation setting mechanisms control, but only after a transitional period that protects existing rights. A minimal transitional period would protect existing rights until termination of existing memoranda of understanding and existing agreements. Alternatively, there could be a specified term of years for protection of existing compensation packages, before the regular meet and confer procedures are fully implemented. (This would more likely work against rather than in favor of official reporters, since the pressure is likely to be for an increase, rather than a decrease, in compensation during the transitional period.)

In light of these considerations, the staff offers for discussion possible revision of the proposed provisions on official reporter compensation along the following lines:

Gov't Code § 69947. Compensation of official reporter

69947. (a) As used in this section:

(1) "Compensation" includes, but is not limited to, salary, benefits, privileges, fees, and allowances.

(2) "Court operations" has the meaning defined in Section 77003 and Rule 810 of the California Rules of Court as it read on July 1, 1996.

(3) "Official reporter" includes official reporter pro tempore.

(b) The official reporter shall receive the following compensation:

(1) For reporting services, the compensation determined pursuant to the Trial Court Employment Protection and Governance Act, Chapter 7 (commencing with Section 71600), or, if the reporter is not a trial court employee within the meaning of that act, the compensation determined by agreement between the court and the reporter. In no event shall the compensation of the official

reporter be less than the compensation provided by law on December 31, 2002, for duties of the reporter that constitute court operations the court.

(2) For transcription services, the fees prescribed in this article.

(c) If the duties for which the official reporter receives compensation from the court include services to the county that do not constitute court operations, including but not limited to services for the county board of supervisors, board of equalization, coroner, or grand jury, the county shall reimburse the court for a pro rata share of the compensation.

(d) The compensation of the official reporter determined pursuant to this section shall not be less than the compensation otherwise provided for by law on December 31, 2002, for duties of the reporter that constitute court operations, including, to the extent provided for by law on that date, any determination of salary based on salary in Los Angeles County and any computation of retirement benefits based on transcription fees. However, the compensation is subject to modification thereafter (1) pursuant to meet and confer in good faith under the Trial Court Employment Protection and Governance Act on or after [January 1, 2006,] or on or after expiration of an existing memorandum of understanding or agreement, whichever is later, or (2) if the reporter is not a trial court employee within the meaning of that act, by the court on or after expiration of the term of the appointment. The times provided in this subdivision may be waived by agreement of the court and the official reporter.

Comment. Section 69947 supersedes former Government Code Section 69947 (compensation of official reporter). It reflects enactment of the Trial Court Employment Protection and Governance Act. See Gov't Code §§ 71620 (trial court personnel), 71623 (salaries), 71673 (authority of court). The section supersedes special statutes that prescribe the compensation of official reporters. See, e.g., former Gov't Code § 69948 (compensation in contested cases).

Subdivision ~~(b)~~(1) (d) sets as a minimum for compensation of the official reporter for reporting services the compensation to which the official reporter was entitled on December 31, 2002, subject to subsequent modification pursuant to prescribed procedures. Under the Trial Court Employment Protection and Governance Act, modification of existing wages, hours, or terms and conditions of employment may occur only through the meet and confer in good faith process or other appropriate procedures. Section 71612.

Compensation is broadly defined in subdivision (a)(1) and would include, by way of illustration and not by way of limitation, all of the following:

- Wages, including compensation based on the salary schedule of another county. See, e.g., former Gov't Code §§ 69995 (Ventura County), 70012 (Orange County), 70050.5 (San Francisco County).
- Overtime fees. See, e.g., former Gov't Code § 70045.10 (Tehama County).
- Retirement benefits, including benefits based on transcription fees. See, e.g., former Gov't Code §§ 69991 (Monterey and Stanislaus Counties), 70045.10 (Tehama County), 70047.1 (Stanislaus County).
- ~~Bonuses, to the extent they were part of the compensation structure for the official reporter on December 31, 2002.~~
- Reimbursement for supplies. See, e.g., former Gov't Code § 70045.8 (Butte County).

~~The compensation to which the official reporter was entitled on December 31, 2002, may include compensation for duties that are not part of court operations. If compensation negotiated pursuant to subdivision (b)(1) excludes those duties, the floor is adjusted pro rata. If the compensation negotiated pursuant to subdivision (b)(1) includes those duties, the court is entitled to pro rata reimbursement from the county. See subdivision (c).~~

Uncodified. Saving clause — rights and benefits of employee

SEC. ____. If a right, privilege, duty, authority, or status (including but not limited to a qualification for office, salary range, or employment benefit) is based on a provision of law repealed by this act, and if a statute, order, rule of court, memorandum of understanding, or other legally effective instrument provides that the right, duty, authority, or status continues for a period beyond the effective date of the repeal, that provision of law continues in effect for that purpose, notwithstanding its repeal by this act.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary