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Memorandum 2002-19

Legislative Intent and CLRC Recommendations

BACKGROUND

At the March meeting the Commission expressed concern over the Supreme Court's discussion of the status of Commission recommendations and Comments in *Conservatorship of Wendland*, 26 Cal. 4th 519, 542, 28 P.3d 151, 110 Cal. Rptr. 2d 412 (2001) (emphasis added):

> The conservator argues the Legislature understood and intended that the low preponderance of the evidence standard would apply. Certainly this was the Law Revision Commission's understanding. On this subject, the commission wrote: "[Section 2355] does not specify any special evidentiary standard for the determination of the conservatee's wishes or best interest. Consequently, the general rule applies: the standard is by preponderance of the evidence. Proof is not required by clear and convincing evidence." (30 Cal. Law Revision Com. Rep., supra, p. 264.) (5) We have said that "[e]xplanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." (Brian W. v. Superior Court (1978) 20 Cal.3d 618, 623 [143 Cal.Rptr. 717, 574 P.2d 788].) **Nevertheless, one may legitimately question whether the Legislature can fairly be assumed to have read and endorsed every statement in the commission's 280-page report on the Health Care Decisions Law.** (Cf. Van Arsdale v. Hollinger (1968) 68 Cal.2d 245, 250 [66 Cal.Rptr. 20, 437 P.2d 508] [describing the inference of legislative approval as strongest when the commission's comment is brief].)

The Commission asked the staff to consider options for bolstering and clarifying the status of recommendations and Comments as evidence of legislative intent. Ideas discussed at the meeting included expanding the discussion of this point in the Annual Report, enacting or amending general rules on legislative intent, encouraging legislators carrying Commission bills to include an appropriate statement in the record, and including language in uncodified bill sections referring to the relevant Commission recommendation.

COMMISSION RECOMMENDATIONS AND COMMENTS AS EVIDENCE OF LEGISLATIVE INTENT

Commission recommendations and Comments have been relied on by the courts frequently to help determine legislative intent. The *Wendland* opinion notwithstanding, courts and practitioners are generally appreciative of the insight and guidance provided by Commission commentary. We have observed, however, that a court is not reluctant to find other factors more persuasive than a Commission Comment when it believes a contrary interpretation is dictated by the other factors.

Some courts have gone well beyond the Commission recommendation and Comments that were formally placed before the Legislature during the legislative process. For example, we recently noticed the opinion in *Mejia v. Reed*, 97 Cal.App.4th 277, 118 Cal.Rptr.2d 415 (2002), dealing with the question whether a marital settlement agreement is subject to the Uniform Fraudulent Transfer Act. In reaching its answer in the affirmative, the court had occasion to refer to, quote, and rely on not only several different Commission recommendations and Comments, but also a staff memorandum prepared for a Commission meeting and a staff letter to the author of a bill explaining why a particular idea was rejected by the Commission.

The Commission has consistently taken the position that preliminary materials are not evidence of legislative intent because they have not been placed before the Legislature. However, the Commission's final recommendation and Comments are evidence of legislative intent because they are placed before, and considered by, the Legislature. Certainly, every legislator does not read all of this material — their time is limited, and it would not be humanly possible to read every bill, let alone all related documentation. But the committee system is designed to address this problem, and the committee members and staff do familiarize themselves with relevant material.

The Commission has considered and addressed similar issues in the past. Our Annual Report includes the following remarks:

> A Comment indicates the derivation of a section and often explains its purpose, its relation to other sections, and potential issues concerning its meaning or application. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions.[17] However, while the Commission endeavors in Comments to explain any changes in the

law made by a section, the Commission does not claim that every inconsistent case is noted in the Comments, nor can it anticipate judicial conclusions as to the significance of existing case authorities.[18] Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.[19]

17. E.g., People v. Martinez, 22 Cal. 4th 106, 129, 990 P.2d 563, 91 Cal. Rptr. 2d 687, 704 (2000); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968); Catch v. Phillips, 73 Cal. App. 4th 648, 654-55, 86 Cal. Rptr. 2d 584, 588 (1999). See also Milligan v. City of Laguna Beach, 34 Cal. 3d 829, 831, 670 P.2d 1121, 1122, 196 Cal. Rptr. 38, 39 (1983); Juran v. Epstein, 23 Cal. App. 4th 882, 893-94, 28 Cal. Rptr. 2d 588, 594 (1994); Barkley v. City of Blue Lake, 18 Cal. App. 4th 1745, 1751 n.3, 23 Cal. Rptr. 2d 315, 318-19 n.3 (1993). The Commission concurs with the opinion of the court in *Juran* that staff memorandums to the Commission should not be considered as legislative history. *Id.* at 894 n.5, 28 Cal. Rptr. 2d at 594 n.5.

Courts may also rely on the explanatory text of a Commission recommendation. See, e.g., Vournas v. Fidelity Nat'l Title Ins. Co., 73 Cal. App. 4th 668, 673 n.4, 86 Cal. Rptr. 2d 490, 493-94 n.4 (1999). In a recent case, the Supreme Court gave weight to a Commission recommendation, as the "opinion of a learned panel," even though the recommendation has not been enacted. Sierra Club v. San Joaquin Local Agency Formation Comm'n, 21 Cal. 4th 489, 502-03, 981 P.2d 543, 87 Cal. Rptr. 2d 701, 711-12 (1999).

Commission Comments are published by Lexis Law Publishers and West Publishing Company in their print and CD-ROM editions of the annotated codes, and printed in selected codes prepared by other publishers. Comments are also available on Westlaw and Lexis.

18. See, e.g., Arellano v. Moreno, 33 Cal. App. 3d 877, 109 Cal. Rptr. 421 (1973).

19. The Commission does not concur in the *Kaplan* approach to statutory construction. See Kaplan v. Superior Court, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973); 1974 Cal. Stat. ch. 227.

WOULD A MORE FORMAL NEXUS HELP?

There was a time when the Commission would take steps to establish a more formal nexus between the Commission's recommendation and Comments and the Legislature's adoption of implementing legislation. At the time a legislative committee approved a bill implementing a Commission recommendation, we would seek to have the committee adopt a report to the effect that the bill implemented the Commission's recommendation and the Commission's Comments reflected the committee's intent in approving the bill. If Comments required revision, the revised Comments would be adopted as committee Comments. We would seek to have the revised Comments printed in the Daily Journal of the relevant house.

That was a different era, and the practice was abandoned some time ago. The workload of the committees has increased, and they are unwilling to take the

time to go through these extra motions. The Legislature is no longer willing to bulk up the journals with this sort of material.

Moreover, Commission bills frequently pass through the Legislature on the consent calendar. Pulling a bill off the consent calendar in order to adopt a statement of legislative intent is not an enticing proposition from a bill management perspective.

The Commission's recommendations and Comments are sent to the members of the committee considering the bill and to the committee staff members analyzing the bill for them. The Comments are also sent to the Governor when the bill has passed the Legislature. This becomes part of the legislative history of the bill and a matter of public record.

As a practical matter, courts generally look for any evidence of legislative intent they can find, and do not appear to be particular as to the formal adoption of background materials by the Legislature. We haven't done an actual survey, but it is highly likely that courts rely just as heavily on Commission materials that have not been formally adopted by the Legislature as on materials that have been formally adopted. The courts appear to make no distinction in this respect.

If a court wishes to reach a result different from the result that would be suggested by the Commission materials, the court generally has no problem doing so. There are plenty of other indicia of legislative intent, and plenty of other arguments that can be made, to allow the court to reach the decision it thinks proper. The fact that the Legislature may formally have adopted a Commission recommendation or Comment does not appear to be a particular impediment.

These considerations make the staff somewhat skeptical about the value of investing resources in trying to re-establish more formal links between the Commission's recommendations and the Legislature's implementation of them. Commission materials are what they are, and the courts will give them whatever weight they deem appropriate in the circumstances of a particular case.

OPTIONS

That having been said, what are the options?

Annual Report

The first line of defense is the Annual Report. This has historically been the means chosen by the Commission to respond to judicial practices that appear to

be problematic. The staff does not have a problem with bolstering the Annual Report material on this point. Something along the following lines may be appropriate:

> [FN] The Commission does not concur with the suggestion of the court in *Conservatorship of Wendland*, 26 Cal. 4th 519, 28 P.3d 151, 110 Cal. Rptr. 2d 412 (2001), that a Commission Comment might be entitled to less weight because the Legislature may have not have been aware of every word in the Commission's report. 26 Cal. 4th at 542. The Commission's Comments are made available to legislative committee members and staff who are charged with in depth study of the legislation and who make recommendations to the Legislature concerning the legislation. See, e.g., "The Committee System" in *California's Legislature* at 126-27 (Office of the Chief Clerk, California State Assembly 2000).

Statement of Legislative Intent in Bill or by Author

Other ideas are to have the bill author put a statement in the legislative journal to the effect that the bill effectuates the Commission's recommendation and is intended to be interpreted in that light, or even to add an uncodified provision in the bill to that effect. The first option is probably achievable; the second probably not.

A letter from the author of a bill addressed to the Clerk of the Assembly or Secretary of the Senate explaining the author's intent, for publication in that body's journal, is not unheard of. We could prepare a letter for the author's signature, indicating that the author's intention in introducing a particular piece of legislation was to implement the Law Revision Commission's recommendation on the matter. This sort of declaration is of limited utility for a court trying to ascertain legislative intent — it indicates the author's intent, but not the intent of the remainder of the Legislature. Moreover, the letter is often printed sometime after the Legislature has already acted on the matter, thereby diminishing its utility.

A section at the end of a bill stating that it is the intent of the Legislature in adopting the bill to implement the Commission's recommendation would be more direct and effective. However, it would be difficult to implement such an approach. It would probably meet resistance from Legislative Counsel and committee staff. And it would make it more difficult to obtain approval of the measure — the Legislature may be willing to vote on language placed before it,

but unwilling to vote on collateral material that many of the members haven't reviewed.

If the Commission were to adopt either of these approaches as a matter of practice, what would be the consequence of failure? Suppose legislators routinely indicate that bills implement Commission recommendations, but for some reason such a statement is not published in the journal with respect to a particular bill. Is there an implication with respect to that bill that the Commission's recommendation is **not** to be taken as evidence of legislative intent? And if it is taken as evidence of legislative intent anyway, what then is the utility of printing the journal statements?

The concept of including uncodified intent language in a bill poses an even worse threat. If the bill is introduced with intent language in it, but that language is removed from the bill due to objections of committee staff or Legislators, what does that say about the Legislature's intent in adopting the bill?

The staff thinks it's better to let well enough alone. The courts have not had problems relying on Commission recommendations and Comments where appropriate, despite the aberrant language in *Wendland*.

Principles of Statutory Construction

Another concept is the possibility of reinforcing standard principles of statutory construction, which elicit the relevance of secondary supporting material. The Uniform Statute and Rule Construction Act (1995), for example, lists among the "aids to construction" that "may be considered in ascertaining the meaning of the text":

> (3) an official commentary published and available before the enactment or adoption of the statute or rule.

USRCA § 20(b)(3).

Would it make any sense to enact such a rule of construction in California? The existing California codes include a few selected rules of construction, including material relating to definitions, singular and plural, tense, etc. However, there is very little concerning broader rules of construction, such as the concept that the specific controls over the general or that a newly enacted provision prevails over an older one.

The Legislative Counsel — a member of the Law Revision Commission — has historically taken a position antagonistic to a general codification of rules of construction, such the Uniform Act.

If the Commission wishes to develop a statute requiring courts to recognize Commission recommendations and Comments in construing statutes enacted on recommendation of the Commission, we would need to obtain legislative authority to do so. Such a study does not fall within any category currently assigned to the Commission by the Legislature.

CONCLUSION

These considerations are not new to the Commission. The Commission has grappled with them from time to time in the past as aberrant court decisions surface. The Commission has always concluded that the best, though inadequate, way to deal with the problem is through cautionary language in the Annual Report. The staff recommends no departure from this approach in the current instance.

It would be possible to go beyond the relatively spare statement suggested by the staff in this memorandum and put together a compendium of authorities demonstrating proper application of Commission materials or comparable secondary sources in ascertaining legislative intent. This could be included in the Annual Report or simply posted on our website. It would provide a readily available foundation for an attorney seeking to use a Commission recommendation or Comment to demonstrate legislative intent in construing a statute.

If the Commission is interested in pursuing this matter further, we would not divert staff attorney resources to it. Rather, we would seek to have background research done under the auspices of a law school program, such as the McGeorge Institute for Legislative Practice or the Hastings Public Law Research Institute, or by a law student intern for the Commission.

Respectfully submitted,

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