Legis Prog May 10, 2002

First Supplement to Memorandum 2002-19

Legislative Intent and CLRC Recommendations

Memorandum 2002-19 discusses possible responses to the reasoning of the Supreme Court in *Wendland* that a Commission Comment might be entitled to less weight due to the Court's assumption that not every member of the Legislature had read the Comment. In the memorandum the staff suggests addition of language in our Annual Report critical of that reasoning.

We have received a letter from Professor Clark Kelso suggesting that our Annual Report might attempt to characterize the *Wendland* logic as being limited to situations where the court is construing a statute to avoid constitutional problems. He suggests that in such a circumstance the court might legitimately be concerned that issues of constitutional dimension need to be brought explicitly to the Legislature's attention. He notes:

> In essence, the court might be applying a rule of clear articulation when the issue is how to avoid constitutional boundaries (i.e., the Legislature's intent must be clearly articulated in the statutory language itself or, if not in the language, in some other piece of the legislative history that was likely to have been actually read or heard by most or all legislators.

Exhibit p. 1.

That is an interesting concept, although the staff is wary of trying to validate the concept that the relevance of supporting materials is based on the court's assumption as to how many legislators may have actually read them. A number of issues suggest themselves:

(1) If the "likely to have been read" standard is embraced, how is the likelihood of reading to be ascertained? Is it just a guess, or based on statistical sampling, or affidavits of members? How many members must be likely to have read materials in order for the materials to be considered relevant?

(2) Suppose the legislative materials in question support, rather than contradict, the court's ultimate conclusion. Is the court precluded from citing to those materials in a constitutional case?

(3) If "likely to have been read" is an appropriate standard for constitutional cases, should it not also be the standard for any case where the issue is of great importance, whether or not it hinges on the Constitution? And if so, how would it be determined whether a case rises to a level that triggers a change in the rules of construction?

While the interpretation suggested by Professor Kelso is plausible, the staff is reluctant to go there. We are not convinced that principles of statutory construction should vary depending on whether or not there is a constitutional issue involved.

Respectfully submitted,

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Executive Secretary

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Dear Mr. Sterling:

With respect to Memorandum 2002-19 and the California Supreme Court's decision in *Conservatorship of Wendland*, 26 Cal.4th 519 (2001), I wonder if it would be proper and useful to describe the decision in your annual report as limited to situations where the court is construing a statute to avoid constitutional problems. In such situations, the court might legitimately be concerned that issues of constitutional dimension need to be brought explicitly to the Legislature's attention. In essence, the court might be applying a rule of clear articulation when the issue is how to avoid constitutional boundaries (i.e., the Legislature's intent must be clearly articulated in the statutory language itself or, if not in the language, in some other piece of the legislative history that was likely to have been actually read or heard by most or all legislators).

Sincerely,

J. Clark Kelso