

Memorandum 2002-43

Statutes Made Obsolete by Trial Court Restructuring: Discussion of Issues

In March, the Commission decided to remove a number of sections from its Recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 1* (March 2002) for further study and possible inclusion in legislation next year. This memorandum addresses two of the removed sections.

Welf. & Inst. Code § 247. Juvenile court referees

The Trial Court Employment Protection and Governance Act provides for appointment of subordinate judicial officers by the “trial court” who serve at the pleasure of the trial court. Gov’t Code § 71622 (subordinate judicial officers). That statute also requires the Judicial Council to prescribe minimum qualifications and training requirements for subordinate judicial officers.

Based on this statutory scheme, the Commission last year tentatively proposed the repeal of Welfare and Institutions Code Section 247 as obsolete. That section provides for appointment of a juvenile court referee by the presiding judge of the juvenile court; the referee serves at the pleasure of the judge. Section 247 also imposes a qualification of five years of California practice experience for appointment. And it provides that compensation for the referee is to be set by the county board of supervisors (despite the fact that the trial court employment law now provides for compensation to be set by the court and that the trial court funding law now provides for the state, rather than the county, to fund trial court operations).

The Los Angeles County Superior Court objected to the proposed repeal of Welfare and Institutions Code Section 247. They argued that (1) appointment authority of the presiding juvenile court judge is consistent with the new trial court employment law — the trial court is in effect making the hiring and firing decisions, via the statutory delegation to the presiding juvenile judge, and (2) the minimum qualifications established by statute were not obsolete because the Judicial Council had not yet adopted rules pursuant to its statutory mandate. They argued that the statutory delegation to the presiding judge of the juvenile

court is appropriate since that judge is in the best position to evaluate the needs of the court and the performance of its referees. “This approach continues to work quite successfully in the large and complex superior court in Los Angeles County.” First Supp., Memorandum 2002-17, Exhibit p. 2.

Based on the court’s concern, the Commission decided not to proceed with the proposed repeal of Section 247, but to give the matter further study.

The Los Angeles County Superior Court has suggested amendment, rather than repeal, of the statute along the following lines:

247. The judge of the juvenile court, or in counties having more than one judge of the juvenile court, the presiding judge of the juvenile court or the senior judge if there is no presiding judge, may appoint one or more referees to serve on a full-time or part-time basis, subject to determination by the Judicial Council pursuant to Section 71622 of the Government Code of the number of referee positions authorized. A referee shall serve at the pleasure of the appointing judge, and unless the appointing judge makes his order terminating the appointment of a referee, such referee shall continue to serve as such until the appointment of his successor. ~~Except as otherwise provided by law, the amount and rate of compensation to be paid referees shall be fixed by the board of supervisors.~~ Every referee first appointed on or after January 1, 1977, shall have been admitted to practice law in this state and, in addition, shall have been admitted to practice law in this state for a period of not less than five years or in any other state and this state for a combined period of not less than 10 years. Nothing in this section shall be construed to apply to the qualifications of any referee first appointed prior to January 1, 1977.

If we go this route, the staff would also repeal the provisions relating to qualifications. The Judicial Council has now circulated draft rules on subordinate judicial officer qualifications for review, and the proposed rules appear to be generally acceptable. The only real issue is whether the experience required should be five years or 10. The proposed rules are scheduled for promulgation by the Judicial Council on November 1, with a January 1, 2003, effective date.

The more significant issue, in the staff’s opinion, is whether the statute prescribing the procedure for appointment and termination of a juvenile court referee should remain on the books in light of the general provisions of the Trial Court Employment Protection and Governance Act. The staff agrees with the Los Angeles County Superior Court that the two statutes are not necessarily inconsistent — if Welfare and Institutions Code Section 247 were repealed the

court presumably would have authority to delegate the hiring and firing function to an individual court officer, including the presiding juvenile court judge; the court would not have to act by a majority vote of all the judges on each appointment and termination decision for every court employee. The only limitation specified in Government Code Section 71622 is that the appointment of a subordinate judicial officer be made by order entered in the minutes of the court.

In fact, Government Code Section 77001 requires the Judicial Council to promulgate rules to establish a decentralized system of trial court management, which must include the authority and responsibility of trial courts to establish the means of selecting various court officers. Rules of Court provide for management of the court under the direction of the presiding judge, and allow the presiding judge to delegate duties to another judge. Cal. R. Ct. 6.603.

The staff thinks that Welfare and Institutions Code Section 247 should be repealed, but this should not preclude the Los Angeles County Superior Court, or any other court for that matter, from delegating to the presiding juvenile court judge authority to hire and fire juvenile court referees. No further statutory action is necessary.

If we wanted to assure uneasy court administrators that the court may delegate hiring and firing decisions, we could do that by statute. We would not want to do it in the context of the juvenile court referee statute, however, since that could by implication cast doubt on other employment decision delegations. We would do it by revising the Trial Court Employment Protection and Governance Act.

The staff envisions something along the following lines:

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

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 or termination of a subordinate judicial officer shall be made by order of the presiding judge or another judge or a committee to whom appointment or termination authority is delegated by the court, 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.

(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. Section 71622 is amended to make clear that the court's authority to appoint and terminate a subordinate judicial includes authority to delegate the appointment or termination decision. For example, the court may delegate authority to appoint or terminate a juvenile court referee to the presiding judge of the juvenile court. *Cf.* [former] Welf. & Inst. Code § 247 (juvenile court referee).

The authority to delegate a subordinate judicial officer appointment or termination decision is a specific instance of the general authority of a trial court to manage its affairs in a manner appropriate for its circumstances. *Cf.* Gov't Code § 77001; Cal. R. Ct. 6.601 *et seq.* (trial court management).

We would send this to court presiding judges and executive officers, subordinate judicial officers, and the Administrative Office of the Courts, before proceeding with such a proposal.

Penal Code § 1269b. Bail

Penal Code Section 1269b sets forth a procedure for the preparation, adoption, and revision of uniform countywide bail schedules. With regard to bailable felony offenses, the schedule is to be prepared, adopted, and annually revised by a majority vote of the superior and municipal court judges in a county at a meeting called by the presiding judge of the superior court. A uniform countywide bail schedule must also be prepared, adopted, and annually revised by a majority vote of the municipal court judges (or superior court judges in a

county without a municipal court) with respect to all misdemeanors and infractions, except Vehicle Code infractions.

2001 Tentative Recommendation

The Tentative Recommendation on *Statutes Made Obsolete by Trial Court Restructuring* (November 2001) would have made technical revisions to Section 1269b to reflect unification of the superior and municipal courts:

Penal Code § 1269b (amended). Bail

1269b. (a) The officer in charge of a jail where an arrested person is held in custody, an officer of a sheriff's department or police department of a city who is in charge of a jail or is employed at a fixed police or sheriff's facility and is acting under an agreement with the agency that keeps the jail wherein an arrested person is held in custody, an employee of a sheriff's department or police department of a city who is assigned by the department to collect bail, the clerk of the ~~municipal~~ superior court of the ~~judicial-district county~~ in which the offense was alleged to have been committed, and the clerk of the superior court in which the case against the defendant is pending may approve and accept bail in the amount fixed by the warrant of arrest, schedule of bail, or order admitting to bail in cash or surety bond executed by a certified, admitted surety insurer as provided in the Insurance Code, to issue and sign an order for the release of the arrested person, and to set a time and place for the appearance of the arrested person before the appropriate court and give notice thereof.

(b) If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance; if that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved as provided in subdivisions (c) and (d).

(c) It is the duty of the superior ~~and municipal~~ court judges in each county to prepare, adopt, and annually revise, by a majority vote, at a meeting called by the presiding judge ~~of the superior court of the county~~, a uniform countywide schedule of bail for allailable felony offenses.

In adopting a uniform countywide schedule of bail for allailable offenses the judges shall consider the seriousness of the offense charged. In considering the seriousness of the offense charged the judges shall assign an additional amount of required

bail for each aggravating or enhancing factor chargeable in the complaint, including, but not limited to, additional bail for charges alleging facts that would bring a person within any of the following sections:

Section 667.5, 667.51, 667.6, 667.8, 667.85, 667.9, 667.10, 12022, 12022.1, 12022.2, 12022.3, 12022.4, 12022.5, 12022.53, 12022.6, 12022.7, 12022.8, or 12022.9, or Section 11356.5, 11370.2, or 11370.4 of the Health and Safety Code.

In considering offenses wherein a violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances.

~~(d) The municipal court judges in each county, at a meeting called by the presiding judge of the municipal court at each county seat, or the superior court judges in each county in which there is no municipal court, at a meeting called by the presiding judge of the superior court, shall prepare, adopt, and annually revise, by a majority vote, a uniform, countywide schedule of bail for all misdemeanor and infraction offenses except Vehicle Code infractions. The penalty schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council in accordance with Section 40310 of the Vehicle Code.~~

(e) Each countywide bail schedule shall contain a list of the offenses and the amounts of bail applicable thereto as the judges determine to be appropriate. If the schedules do not list all offenses specifically, they shall contain a general clause for designated amounts of bail as the judges of the county determine to be appropriate for all the offenses not specifically listed in the schedules. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior and municipal court judge and commissioner in the county, and to the Judicial Council.

(f) Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted.

All money and surety bonds so deposited with an officer authorized to receive bail shall be transmitted immediately to the judge or clerk of the court by which the order was made or warrant issued or bail schedule fixed. If, in the case of felonies, an indictment is filed, the judge or clerk of the court shall transmit all of the money and surety bonds to the clerk of the court.

(g) If a defendant or arrested person so released fails to appear at the time and in the court so ordered upon his or her release from custody, Sections 1305 and 1306 apply.

Comment. Subdivisions (a), (c), (d), and (e) of Section 1269b are amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. *Cf.* Code Civ. Proc. § 38 (judicial districts).

The tentative recommendation inquired whether the statute reflects actual practice and whether it should be further amended to do so.

Comments on the 2001 Tentative Recommendation

In response to the tentative recommendation, the San Diego County Superior Court commented that it uses a special judges' committee, which follows an expedited procedure. Memorandum 2002-14, Exhibit p. 16. This procedure does not conform to the statutory procedure; however, the court did not suggest revision of the statute.

The Los Angeles County Superior Court suggested some general language that could be used in place of the prescribed procedure:

The suggested language that follows might be suitable concerning adoption of bail schedules by the courts. It does not specify a procedure. The intent of the legislation is satisfied so long as the bail schedules are annually revised and approved either by the judges themselves or by a representative committee of the judges.

(c) "It is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses.... (d) The superior court judges in each county shall also prepare, adopt, and annually revise a uniform countywide schedule of bail for all misdemeanor and infractions offenses except Vehicle Code infractions...."

Memorandum 2002-14, Exhibit p. 60.

In light of these comments, the Commission decided not to proceed with the proposed revisions of Section 1269b. The Commission instructed the staff to investigate alternative methods for the adoption and revision of bail schedules, including the possibility of a simplified procedure or maintaining the existing scheme in place as a default procedure while permitting courts to adopt a procedure more suited to their circumstances. Minutes (March 2002), p. 15.

Background on Bail Schedules

Article 1, Section 12 of the California Constitution proscribes excessive bail and identifies three factors the court must consider in fixing the bail amount:

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

Absent from Section 12 is any requirement regarding the *method* of setting bail amounts.

Section 1269b was added to the Penal Code in 1945 and has been amended numerous times. Before 1973, bail schedules applied only to misdemeanors and infractions and were adopted by judges of the municipal and justice courts. In 1973, a separate bailable felony schedule was added, along with the requirement that it be adopted by the superior and municipal court judges.

The procedure for adoption and revision of a bail schedule has been revised as well. In 1945, the statute required only that the bail schedule be “previously fixed and approved by the judges of said court.” In 1957, the section was amended to provide for (1) adoption of the bail schedule by “the judge or a majority of the judges of each judicial district” and (2) revision of the bail schedule “from time to time by the judge or judges of the judicial district.” In 1977, a majority vote requirement was expressly applied to the preparation, adoption, and *revision* of bail schedules. While the revision of bail schedules was still required from “time to time,” the number of meetings that could be called for this purpose varied from not more than two nor less than one meeting each year (1959) to “one or more meetings” for this purpose (1973). The “time to time” provision was discarded in 1987 when the annual meeting requirement for revising bail schedules was added.

Toward a More Flexible Approach

While the requirement of an annual meeting of all superior court judges might work well in small courts with a handful of judges, it is significant that two of the largest superior courts have expressed dissatisfaction with this approach and at least one court (San Diego) has adopted a procedure contrary to that required by Section 1269b. As we have discovered, a “one size fits all” approach does not work for all courts. Therefore, the staff agrees with the Los Angeles County Superior Court that each court should be allowed to establish its own procedures for the preparation, adoption, and revision of bail schedules.

As proposed by the court, Section 1269b would simply require that the superior court judges in each county prepare, adopt, and annually revise a

uniform countywide schedule of bail for bailable felony offenses and a separate uniform countywide schedule of bail for misdemeanor and infraction offenses, except Vehicle Code infractions. The court's suggested language has the advantage of flexibility. The proposed language leaves it up to each court to determine the procedure that will be used, but still requires that the judges revise the schedules annually. The annual review requirement was added to ensure that all bail schedules are updated regularly to reflect new offenses and increases in penalties for existing offenses. Senate Judiciary Committee analysis of SB 630 (July 7, 1987). This is a legislative policy decision that no one is proposing to change.

The staff suggests, however, that the section be tweaked further than the Los Angeles County Superior Court suggests. In addition to the changes proposed by the court, we would include the technical revisions proposed in the 2001 tentative recommendation.

Further, Section 1269b as currently written requires that one bail schedule be adopted by the superior and municipal court judges for bailable felony offenses, and another schedule be adopted by the municipal court judges (or the superior court judges in a county with a unified superior court) for misdemeanors and certain infractions. As a result of unification, there is no longer any apparent reason to compile two separate bail schedules, because the superior court judges are the only judges who will prepare, adopt, and revise the schedules. The staff's approach would therefore combine the two schedules and procedures. We could include a "Note" requesting input on this change and asking whether a single bail schedule would be workable.

Under the staff draft, each superior court would also be authorized to adopt local rules establishing the procedure to be used. A default procedure would apply in the event that a particular court does not adopt such rules:

Penal Code § 1269b (amended). Bail

1269b. (a) The officer in charge of a jail where an arrested person is held in custody, an officer of a sheriff's department or police department of a city who is in charge of a jail or is employed at a fixed police or sheriff's facility and is acting under an agreement with the agency that keeps the jail wherein an arrested person is held in custody, an employee of a sheriff's department or police department of a city who is assigned by the department to collect bail, the clerk of the municipal superior court of the judicial-district county in which the offense was alleged to have been committed,

and the clerk of the superior court in which the case against the defendant is pending may approve and accept bail in the amount fixed by the warrant of arrest, schedule of bail, or order admitting to bail in cash or surety bond executed by a certified, admitted surety insurer as provided in the Insurance Code, to issue and sign an order for the release of the arrested person, and to set a time and place for the appearance of the arrested person before the appropriate court and give notice thereof.

(b) If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance; if that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved as provided in subdivisions (c) and (d).

(c) It is the duty of the superior ~~and municipal~~ court judges in each county to prepare, adopt, and annually revise, ~~by a majority vote, at a meeting called by the presiding judge of the superior court of the county,~~ a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions. The penalty schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council in accordance with Section 40310 of the Vehicle Code.

(d) A court may by local rule prescribe the procedure by which the uniform countywide schedule of bail is prepared, adopted, and annually revised. If a court does not adopt a local rule, the uniform countywide schedule of bail shall be prepared, adopted, and annually revised in the same manner as provided for adoption of local rules.

(e) In adopting a uniform countywide schedule of bail for all bailable felony offenses the judges court shall consider the seriousness of the offense charged. In considering the seriousness of the offense charged the judges court shall assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint, including, but not limited to, additional bail for charges alleging facts that would bring a person within any of the following sections:

Section 667.5, 667.51, 667.6, 667.8, 667.85, 667.9, 667.10, 12022, 12022.1, 12022.2, 12022.3, 12022.4, 12022.5, 12022.53, 12022.6, 12022.7, 12022.8, or 12022.9, or Section 11356.5, 11370.2, or 11370.4 of the Health and Safety Code.

In considering offenses wherein a violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and

Safety Code is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances.

~~(d) The municipal court judges in each county, at a meeting called by the presiding judge of the municipal court at each county seat, or the superior court judges in each county in which there is no municipal court, at a meeting called by the presiding judge of the superior court, shall prepare, adopt, and annually revise, by a majority vote, a uniform, countywide schedule of bail for all misdemeanor and infraction offenses except Vehicle Code infractions. The penalty schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council in accordance with Section 40310 of the Vehicle Code.~~

(e) ~~(f)~~ Each The countywide bail schedule shall contain a list of the offenses and the amounts of bail applicable thereto as the judges determine ~~court determines~~ to be appropriate. If the ~~schedules do~~ schedule does not list all offenses specifically, ~~they it~~ shall contain a general clause for designated amounts of bail as the ~~judges of the county determine~~ court determines to be appropriate for all the offenses not specifically listed in the ~~schedules~~ schedule. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior and municipal court judge and commissioner in the county, and to the Judicial Council.

~~(f)~~ (g) Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted.

All money and surety bonds so deposited with an officer authorized to receive bail shall be transmitted immediately to the judge or clerk of the court by which the order was made or warrant issued or bail schedule fixed. If, in the case of felonies, an indictment is filed, the judge or clerk of the court shall transmit all of the money and surety bonds to the clerk of the court.

~~(g)~~ (h) If a defendant or arrested person so released fails to appear at the time and in the court so ordered upon his or her release from custody, Sections 1305 and 1306 apply.

Comment. Subdivisions (a), (c), (e), and (f) of Section 1269b are amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. Cf. Code Civ. Proc. § 38 (judicial districts).

Subdivision (d) is added to permit each superior court to adopt a local rule of court governing the procedures for the preparation, adoption, and annual revision of a countywide schedule of bail. A default procedure applies where a court has not adopted a local rule of court.

This draft would refer to “the court” instead of “the judges,” consistent with the terminology used in Article 1, Section 12, and the goal of promoting flexibility. Conforming revisions would be necessary in a few other sections that reference bail schedules adopted by “the judges.”

Constitutional Concerns

The staff sees several potential constitutional issues regarding the use of bail schedules:

- Do bail schedules violate Article 1, Section 12 of the California Constitution by ordinarily addressing only one of the three factors enumerated therein — seriousness of the offense?
- Does the Legislature have the power to prescribe the procedure by which the court sets the amount of bail?
- Do county-specific bail schedules constitute a denial of equal protection since the preset bail amounts for the same crime may vary from county to county?

Based on the dearth of case law, law review articles, and treatise writings on these issues, they do not appear to be a problem. This may be because bail schedules are beneficial for all participants in the criminal justice system. In addition, bail schedule amounts may be challenged by requesting a bail hearing before a judge. See Penal Code § 1269c. Therefore, the staff is not worried about these potential issues.

What Next?

If the Commission approves an amendment of Section 1269b, the proposed revisions can be included in the new tentative recommendation on trial court restructuring that we plan to circulate for comment later this year. Alternatively, if the Commission feels that the revisions should be highlighted separate from other proposed revisions, they can be circulated immediately to interested parties as a staff draft.

Respectfully submitted,

Lynne Urman
Staff Counsel

Nathaniel Sterling
Executive Secretary