Memorandum 2010-3

2010 Legislative Program

This memorandum summarizes the status of the Commission's 2010 legislative program.

This year's legislative program will include two bills that were held over from 2009 and will be considered for enactment this year. In addition, the Deadly Weapons bill will be introduced this year. Finally, two other recommendations are being considered for inclusion in an Assembly Committee on Judiciary omnibus bill.

The status of these items is discussed below.

The memorandum concludes by noting a bill that has been introduced to reform an exception to the hearsay rule, in an area that the Commission has studied.

TWO-YEAR BILLS FROM 2009

SB 105 (Harman). Donative Transfer Restrictions

SB 105 (Harman) was introduced in 2009 to implement the Commission's recommendation on *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). The bill was approved by the Senate on May 14, 2009.

The bill was taken off calendar in the Assembly and made into a two-year bill, in order to provide more time to identify and address the concerns of the California Judges Association ("CJA").

The staff has been actively involved in discussions with CJA and other interested persons. We are making good progress toward finding a compromise that would address CJA's concerns without causing problems for other interested persons or undermining the key policy determinations made by the Commission. Once Senator Harman decides how he would like to amend the bill, the staff will consult the Commission's Chair (or if time permits, the full

Commission) to describe the proposed changes and learn whether they are acceptable from the Commission's perspective.

The bill appears to be on track for enactment in 2010.

SB 189 (Lowenthal). Mechanics Lien Law

SB 189 (Lowenthal) was introduced in 2009 to implement the Commission's recommendation on *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007). The bill was held in the Senate in 2009, making it a two-year bill, in order to provide enough time for stakeholder groups to review the proposed law and raise any concerns.

During that interval, the staff held working group meetings with representatives of stakeholder groups. The results of those meetings have been described in prior memoranda. See Memorandum 2009-45 and its First Supplement; Memorandum 2009-48.

The bill was set for hearing by the Senate Committee on Judiciary on January 12, 2010. Shortly before that hearing date, Senator Lowenthal received letters of opposition from some stakeholder groups. The opposition was based on general concerns about the potential for inadvertent changes in the law, rather than any specifically identified problems.

Senator Lowenthal's staff requested a December 21, 2009, meeting with the main stakeholder groups, committee staff, and the Commission's staff (Steve Cohen and Brian Hebert attended for the Commission). At the meeting, Senator Lowenthal's staff and the Commission's staff committed to work with all of the stakeholder groups in 2010 to identify and address any specific concerns they might have about SB 189. Based on those commitments, the groups present at the meeting agreed to provisionally withdraw their opposition.

At the January hearing before the Senate Committee on Judiciary, Senator Lowenthal reaffirmed his commitment to work with all stakeholder groups to resolve any specifically identified problems. He agreed not to set the bill for hearing in the Assembly until June, to provide as much time as possible for stakeholder analysis and discussion. With that commitment, the bill was approved unanimously by the committee. It was then approved by the Senate Appropriations Committee without hearing, and approved by a unanimous vote on the Senate floor.

The bill is now in the Assembly.

DEADLY WEAPONS

Since the Commission approved its recommendation on *Nonsubstantive Reorganization of Deadly Weapon Statutes* (2009), the staff has been making various inquiries to assess the feasibility of introducing implementing legislation in 2010. In response, the Senate Public Safety Committee expressed interest in introducing the recommendation in 2010, as a committee bill. As a general rule, committee bills must be approved by every member of a committee. This means that a committee bill must have bipartisan support and be uncontroversial.

The recommendation recently received the necessary approvals to proceed as a committee bill. It will be introduced as Senate Bill 1080 (Public Safety Committee). The conforming revisions included in the recommendation have been introduced as a separate bill, Senate Bill 1115 (Public Safety Committee).

ASSEMBLY COMMITTEE ON JUDICIARY OMNIBUS BILL

Marketable Record Title: Notice of Option

Typically, either the Senate or Assembly Committee on the Judiciary will introduce an omnibus bill each year, to enact uncontroversial improvements to civil law. This conserves legislative resources by combining numerous technical proposals into a single large bill, rather than clogging the committee's agenda with a number of smaller bills. It also provides a vehicle for modest technical reforms that might otherwise be difficult to place.

The Commission's recommendation on *Marketable Record Title: Notice of Option* (2009) would seem to be a good candidate for inclusion in the omnibus committee bill. It would make a single minor (and largely technical) correction to civil law that should be entirely uncontroversial.

Because the proposal is so narrow in scope, it would be difficult to find an author willing to carry it as a stand-alone bill. (Legislative rules restrict the number of bills that each legislator can introduce. It is unlikely that a legislator would be willing to use one of those bills for so modest and technical a reform.)

For those reasons, the staff has requested that the proposed law be included in the omnibus bill being introduced by the Assembly Committee on Judiciary this year. It seems likely that the request will be granted, but it is not certain.

If the request is denied, the staff will keep its eyes open for a bill relating to property title and if one appears, inquire about adding our proposal to it.

Trial Court Restructuring: Part 5

Because of the technical (and usually uncontroversial) nature of the Commission's work on trial court restructuring, the recommendations made in connection with that study are generally good candidates for inclusion in an omnibus committee bill. For that reason, the staff requested that the proposed legislation recommended in *Trial Court Restructuring: Part 5* (2009) be included in the Assembly Committee on Judiciary's omnibus bill this year.

However, after that request was made, it became apparent that two provisions in Commission's proposal — Government Code Sections 26806 and 69894.5 — are likely to be opposed by the California Association of Clerks and Election Officials ("CACEO") and the Judicial Council, respectively.

Background

Generally, existing Section 26806 authorizes the hiring of interpreters and translators to perform specified services in court proceedings or for county recordation, in counties with 900,000 or more persons.

Existing Section 69894.5 authorizes courts to hire persons to perform services as specified in Section 26806.

The proposed law would move the court-related material from Section 26806 into Section 69894.5, and would update that material to reflect trial court restructuring. After those proposed changes, Section 26806 would only contain the county recordation material.

Objection to Section 26806

CACEO believes that Section 26806 should be repealed entirely, rather than amended. It maintains that the section was superseded by Government Code Section 27293. See Memorandum 2009-49, pp. 27-28 & Exhibit pp. 11-13.

The Commission concluded that the section was not superseded and that repeal of the section would therefore constitute a substantive change in the law. See *id.*; Minutes (Dec. 2009), p. 5.

Objection to Section 69894.5

The Judicial Council objects to the continuation of a number of existing provisions in the proposed amendment of Section 69894.5. It says that those provisions are inconsistent with the Trial Court Interpreter Employment and Labor Relations Act. It believes the provisions should be deleted. See Memorandum 2009-49, pp. 29-30 & Exhibit pp. 4, 7-8.

The Commission concluded that deletion of those existing provisions would constitute a substantive change in the law. See *id.*; Minutes (Dec. 2009), p. 5.

Discussion

The objections described above are beyond the Commission's ability to address in connection with its study of trial court restructuring, because they would require substantive changes. The Commission is not authorized to recommend substantive changes in this study.

Because the sections at issue are very likely to draw opposition in the Legislature, they are not suitable for inclusion in an omnibus committee bill. That leaves the Commission with two options on how to proceed: (1) withdraw the entire *Trial Court Restructuring: Part 5* recommendation from consideration for inclusion in the omnibus committee bill, or (2) withdraw only the proposed revisions of Government Code Sections 26806 and 69894.5 from consideration, allowing the remainder of the proposal to be considered for inclusion in the omnibus bill.

The staff believes that the second option is preferable. Most of the content of the *Trial Court Restructuring: Part 5* recommendation is uncontroversial and is likely to be accepted for inclusion in the omnibus committee bill. If the whole recommendation were pulled from consideration, we would need to scramble to find another vehicle. That would be difficult because of the very qualities that make the recommendation a good candidate for inclusion in the omnibus committee bill — the modest and technical nature of the proposed reforms.

What's more, the objections relating to Sections 26806 and 69894.5 cannot easily be addressed by the Commission in the context of the current study. Resolution of the objections would seem to require substantive changes that are beyond our authority to recommend. Consequently, even if we were to find another vehicle for the recommendation, it still seems likely that the proposed revisions of Sections 26806 and 69894.5 would eventually be knocked out of the implementing bill (due to our inability to find a compromise that would be consistent with our limited authority in this study).

Given that likelihood, it made sense to pull the two sections at the outset and let the rest of the recommendation proceed on its best footing, as a candidate for inclusion in the omnibus bill.

In January, the staff recommended that approach to the Commission Chair. She agreed that it made sense given the current situation. The staff proceeded accordingly in submitting the proposal to the committee for consideration.

If the recommendation is approved for inclusion in the omnibus bill on that basis, **the staff recommends that the Commission urge CACEO and the Judicial Council to sponsor legislation addressing their concerns about the two sections.** Those groups are not constrained in the way that the Commission is. They could sponsor legislation to make the substantive changes that they seek. If such bills are introduced, the staff will monitor them and assess whether the bills address all of the material in Sections 26806 and 69894.5 made obsolete by trial court restructuring. If such material remains after the Legislature has acted on the bills, the staff will bring that matter to the Commission's attention and seek further guidance on how to proceed.

Is that approach acceptable?

ITEM OF INTEREST

At the request of the Legislature a few years ago, the Commission prepared a report on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443 (2007). In the report, the Commission recommended that the Legislature await guidance from the United States Supreme Court before taking any action on forfeiture by wrongdoing as an exception to the hearsay rule. The Commission also recommended that California's provision on unavailability (Evid. Code § 240) be amended to expressly recognize that a witness is unavailable if the witness refuses to testify on a subject, despite a court order to do so.

The United States Supreme Court has since provided guidance on forfeiture by wrongdoing. In *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 2684 (2008), the Court made clear that an out-of-court, testimonial statement by a witness would be admitted over a Confrontation Clause objection only if there was evidence that "the defendant *intended* to prevent [the] witness from testifying." (Emphasis added.)

Assembly Members Lieu and Emmerson have now introduced a bill (AB 1723) that proposes a new forfeiture-by-wrongdoing exception to the hearsay rule. The new provision would include the intent-to-silence requirement that the

United States Supreme Court found applicable to a testimonial statement under the Confrontation Clause.

AB 1723 also proposes an amendment to Evidence Code Section 240 that is quite similar (but not identical) to what the Commission recommended in its report.

The staff will monitor the progress of this bill, and inform the Commission as appears appropriate.

Respectfully submitted,

Brian Hebert
Executive Secretary