Legis. Prog. October 5, 2010

Memorandum 2010-40

2010 Legislative Program: Status of Bills

The staff is pleased to report a successful conclusion to the Commission's 2010 legislative program. All of the Commission-recommended bills considered by the Legislature in 2010 have been enacted. The attached table summarizes the status of the Commission's 2010 legislative program.

This memorandum also provides a brief discussion of two bills of interest to the Commission.

AB 1723 (LIEU & EMMERSON) — HEARSAY

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). The Commission submitted the report in compliance with a legislative deadline of March 1, 2008. 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. At the time, a major case on forfeiture by wrongdoing under the Confrontation Clause (U.S. Const. amend. VI) was pending before the United States Supreme Court. 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 Commission did not take steps to obtain enactment of this amendment.

In June 2008, the United States Supreme Court decided the pending case on forfeiture by wrongdoing under the Confrontation Clause. The Court concluded that the constitutional right of confrontation is forfeited only when a defendant intentionally silences a witness; it is not enough to show that the defendant

engaged in wrongdoing that caused the witness to be unavailable. *Giles v. California*, 554 U.S. 353 (2008).

This year, Assembly Members Lieu and Emmerson introduced a bill (AB 1723) that addressed both of the topics discussed in the Commission's report. The bill was amended repeatedly in the legislative process, and the policy committee analyses referred extensively to the Commission's report. See Assembly Committee on Judiciary Analysis of AB 1723 (April 13, 2010), pp. 13-14; see also Senate Committee on Public Safety Analysis of AB 1723 (June 29, 2010). The bill eventually passed the Legislature and was approved by the Governor. See 2010 Cal. Stat. ch. 537.

As enacted, the measure amends Evidence Code Section 240 to expressly recognize that a witness is unavailable if the witness refuses to testify on a subject, despite "having been found in contempt for refusal to testify." This is similar in spirit to the amendment recommended in the Commission's report, which focused on whether a witness refused to testify "despite a court order to do so."

As enacted, the measure also adds a forfeiture-by-wrongdoing exception to California's hearsay rule:

> **Evid. Code § 1390. Forfeiture by wrongdoing**
>
> 1390. (a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged or aided and abetted in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
>
> (b)(1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing.
>
> (2) The hearsay evidence that is the subject of the foundational hearing is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.
>
> (3) The foundational hearing shall be conducted outside the presence of the jury. However, if the hearing is conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met.
>
> (4) In deciding whether or not to admit the statement, the judge may take into account whether it is trustworthy and reliable.
>
> (c) This section shall apply to any civil, criminal, or juvenile case or proceeding initiated or pending as of January 1, 2011.

> (d) This section shall remain in effect only until January 1, 2016, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2016, deletes or extends that date. If this section is repealed, the fact that it is repealed should it occur, shall not be deemed to give rise to any ground for an appeal or a postverdict challenge based on its use in a criminal or juvenile case or proceeding before January 1, 2016.

This new exception is broader than a previously-enacted, somewhat similar exception (Evid. Code § 1350). But it is narrower than what the authors originally sought and actually desired. See AB 1723 (Lieu & Emmerson), as introduced; Letter from Asm. Lieu to E. Dotson Wilson (Aug. 17, 2010), *published in* Asm. J. (Sept. 1, 2010), pp. 6987-88. The new exception is also much narrower than what was proposed in an earlier bill that led the Legislature to require the Commission to conduct its study. See AB 268 (Calderon), as amended May 3, 2007.

By its terms, the new exception will sunset on January 1, 2016, unless the sunset date is deleted or extended before then. It is thus likely that the Legislature will revisit this topic in the next few years.

For now, no Commission action is required. In the Commission's next annual report, however, it would be appropriate to refer to the enactment of AB 1723 in reporting the fate of the Commission's recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*. That could be done by revising the current entry as follows: "No legislation introduced. But see 2010 Cal. Stat. ch. 537, enacting a similar amendment of Evid. C. § 240."

AB 2284 (EVANS) — EXPEDITED JURY TRIALS ACT

After unification of the municipal and superior courts, the Legislature directed the Commission and the Judicial Council to jointly reexamine California's three-track system of civil litigation, in which different procedural rules apply to small claims cases, limited civil cases, and unlimited civil cases. See Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51 (1988). In compliance with this directive, the Law Revision Commission and the Judicial Council conducted a joint study of the jurisdictional limits for small claims and limited civil cases. The study explored the possibility of increasing the jurisdictional limits and thereby improving access to justice in cases involving relatively small amounts of money. The study was tabled in February 2004, because there did not seem to be much likelihood of reaching a consensus among stakeholders on increasing the jurisdictional limits.

Since then, the jurisdictional limit for a small claims case has been increased for certain types of cases. The Judicial Council also led an effort to improve the quality of decisionmaking by temporary judges, which had been identified as an area of concern in the joint study of jurisdictional limits.

Most recently, the Judicial Council took another step that is primarily intended to improve access to justice in cases involving relatively small amounts of money. The Judicial Council established a working group on small civil cases, which was chaired by Judge Mary Thornton House (Los Angeles Superior Court), who also led the Judicial Council's work on jurisdictional limits. The new working group included a broad spectrum of the legal community: leaders from the plaintiffs' bar, the defense bar, the insurance industry, the court system, legal services groups, and other organizations. In addition to the working group members, several people were invited to participate as liaisons to certain groups. The Commission's Chief Deputy Counsel was honored to participate as liaison for the Law Revision Commission.

The working group explored the concept of an expedited jury trial ("EJT"), which has been used successfully in New York and South Carolina. Upon determining that the concept might be worth pursuing in California, the working group developed a proposal to implement the concept, which was later incorporated into legislation and proposed court rules. The legislation has now been enacted as AB 2284, which was authored by Assembly Member Evans (the Commission's current Assembly Member). See 2010 Cal. Stat. ch. 673. A news article describing the reform is attached as Exhibit pages 1-4. This is an exciting new development, which may be a big leap forward in ensuring access to justice in small civil cases. The Judicial Council and others are now publicizing the reform, because EJTs are purely voluntary and the reform will not be meaningful unless it is widely used. It will be interesting to watch how this new concept works in California.

Respectfully submitted,

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Brian Hebert
Executive Secretary

Status of 2010 Commission Legislative Program

As of October 4, 2010

		AB 2767		SB 105	SB 189	SB 1080	SB 1115				
	Introduced	2/26/10		1/27/09	2/18/09	2/17/10	2/17/10				
	Last Amended	6/15/10		8/12/10	8/16/10	8/24/10	—				
First House	Policy Committee	4/13/10		5/5/09	1/12/10	4/6/10	4/6/10				
	Fiscal Committee	4/28/10		—	1/19/10	—	—				
	Passed House	5/17/09		5/14/09	1/25/10	4/15/10	4/15/10				
Second House	Policy Committee	6/10/10		7/1/10	6/15/10	6/22/10	6/22/10				
	Fiscal Committee	6/28/10		—	8/4/10	—	—				
	Passed House	8/2/10		8/16/10	8/17/10	8/26/10	8/2/10				
Concurrence		8/9/10		8/19/10	8/25/10	8/27/10	—				
Governor	Received	8/16/10		9/2/10	9/3/10	9/7/10	8/13/10				
	Approved	8/27/10		9/29/10	9/30/10	9/30/10	8/23/10				
Secretary of State	Date	8/27/10		9/30/10	9/30/10	9/30/10	8/23/10				
	Chapter #	212		620	697	711	178				

Bill List: AB 2767 (Judiciary Committee): Trial Court Restructuring: Part 5
SB 105 (Harman): Donative Transfer Restrictions
SB 189 (Lowenthal): Mechanics Liens
SB 1080 (Public Safety Committee): Deadly Weapons
SB 1115 (Public Safety Committee): Deadly Weapons — Conforming Revisions

Also of Interest:
AB 1723 (Lieu & Emmerson): Hearsay

KEY

Italics: Future or speculative

"—": Not applicable

*: Double referral, not fiscal

[date] : Deadline

PERSPECTIVE • Sep. 17, 2010

Expedited Jury Trial Legislation: An Unusual Agreement Between Those Who Usually Disagree

On April 30, 2009, a most diverse collection of organizations met, under the cloud of California's fiscal crisis and budget cuts, at the Administrative Office of the Courts in San Francisco to discuss the increasing backlog in state civil trials.

The group heard from a representative of the National Center on State Courts and a New York state judge. But most interesting was the message from a plaintiffs' attorney and a defense attorney, both from South Carolina. The two were poles apart in their practice of law, but on that day they were on the same page.

The organizations they spoke to were also poles apart, having openly displayed their opposition and, at times enmity, towards one another in seasons of battles in the Legislature and the courts, at the ballot box, and in the media. Foremost in this regard were the Consumer Attorneys of California (CAOC) and the Civil Justice Association of California (CJAC).

Other prominent and important participants that day were the California Defense Counsel, the CalChamber, Consumers Union, and members of the Bench. Taking their seats that morning, the participants had exchanged guarded pleasantries and sat, much as in a court room, with CAOC representatives on one side, and CJAC and allies on the other, with judicial officers in the middle.

Anyone familiar with the three decades of confrontation between CJAC and CAOC knows we each truly believe that we are fighting for the very soul of the civil justice system. CAOC, an association of thousands of contingent fee plaintiffs' lawyers, is committed to "preserve and protect access to justice for all by preserving the constitutional right to trial by jury and by seeking to resist any effort to curtail the rights of Californians to seek redress for injury." CJAC, a coalition of insurance, oil, high-tech and pharmaceutical companies, hospitals and physicians, realtors, builders, banks, and local governments, is committed to "working to reduce the excessive and unwarranted litigation that increases business and government expenses, discourages innovation, and drives up the cost of goods and services for all Californians."

One might have safely predicted that these two groups, given their combative history, could never work together on anything as significant as a step toward reshaping the face of litigation in California. But on that day, that prediction would begin to be wrong.

Today, 16 months later, their cooperation has placed on the Governor's desk a new, unanimously-supported expedited jury trial program, embodied in Assembly Bill 2284 - a new tool that holds great promise in time and cost savings for everyone involved in the civil justice system.

The South Carolina plaintiffs' and defense lawyers (whose travel costs were shared by the plaintiffs' and defense attorneys' organizations) had described their system of stipulated one-day jury trials in which both small and large cases were being expeditiously and economically resolved. Each expounded the benefits the system provided for their clients: reduced time and expense for both sides, relief on stressed judicial resources and on the jury pool, certainty of trial dates, and finality of decisions.

By the end of the presentation, everyone seemed to recognize that the project offered potential benefits to clients, the courts, and attorneys. Most significantly, before the meeting ended the California participants agreed to set up a working group to explore whether a model suitable for California could be designed.

This was not the first look at the expedited jury trial concept. The CAOC had earlier brought the South Carolina model to the Judicial Council's attention. Staff at the Administrative Office of the Courts had, some years before, tracked a federal attempt to implement an expedited trial system based on a mandatory court order and a non-binding opinion - a combination that proved to be a fatal handicap.

Soon after the April 30 lunch, working groups facilitated by Judicial Council Senior Attorney Daniel Pone and Los Angeles County Superior Court Judge Mary Thornton House, a former member of the Judicial Council's Civil and Small Claims Advisory Committee, began meeting regularly. The California Expedited Jury Trial Program was shaped and defined through numerous meetings and conferences. At one point, business groups funded a return trip to Sacramento by the South Carolina attorneys to give a large group of business representatives an opportunity to learn and ask questions about that state's experience. From the beginning of the process, the California Defense Counsel was a strong, contributing participant, sharing co-sponsorship of the bill with the CAOC and the Administrative Office of the Courts.

As our work ended, we found ourselves somewhat awkwardly expressing agreement - awkward also in the anticipation of appearing together before the Legislature's judiciary committees to encourage a yes vote on a significant piece of legislation.

Over the years we had, unexpectedly, found ourselves advocating for the same piece of legislation, but helping build something together from the ground up is another story entirely. That seemed an event as rare as spotting a shooting star in daylight.

Nearly as remarkable as the consensus between CJAC and CAOC, was the joining of Democrats and Republicans in late August to vote unanimously to send AB 2284 to the Governor.

The goal of the expedited jury trial process is to complete a trial in one day. The bill provides, through stipulation, the following: a jury trial utilizing eight instead of 12 jurors, with no alternates; one hour for voir dire, with each side having three peremptory challenges; and three hours for each side's presentation of evidence. A verdict requires at least six jurors, unless the parties stipulate to a lesser number. The process, while preserving the rules of evidence and civil procedure, encourages the parties to stipulate in advance to the admission of certain evidence and encourages the use of pretrial high-low agreements with the high typically being insurance policy limits. The process achieves finality by making the verdict binding and not subject to post-trial motion or appeal, except in very limited circumstances.

From CAOC's perspective, the expedited jury trial option will provide broader access to justice and expand the right to a jury trial to more citizens. It will make the handling of many small to mid-size cases economically feasible. Many plaintiffs who would otherwise be unable to obtain counsel because of the economics associated with a contingency fee practice will now be able to obtain representation. The art of advocacy will be advanced as expedited jury trials will provide more opportunities for new lawyers - both plaintiff and defense - to get jury trial experience. The efficiencies of the trials themselves will help relieve the backlog of civil trials,

allowing cases with more complex issues, and requiring more judicial resources, to advance more expeditiously to trial. Additionally, in cases where liability is not contested, or where a limited issue is impeding settlement, the expedited jury trial option will provide a forum for swifter and more economic resolution of discrete issues, thereby promoting settlement.

From CJAC's perspective, the expedited jury trial offers an up-to-now missing option, a middle ground between mediation and arbitration and a full blown jury trial. It provides for vigorous advocacy and the efficient presentation of information while reducing the costs of a lengthy jury trial. For CJAC and its allies, expedited jury trials can advance the goal of reducing the economic burden on California businesses and public agencies associated with the defense of minor or meritless claims. It sends a modest but genuine signal that California *does* want to reduce unnecessary business costs, improve the state's business climate, and reduce the costs of goods and services to Californians.

We urge that lawyers, legal seminar groups, consumer organizations, the business community, and government all strive to make consumers of legal services aware of the expedited jury trial option. This tool will not produce results if it is not recognized and used.

We hope that for lawyers, the judiciary, and lawmakers, AB 2284 and the process that created it demonstrate a commitment to openly consider, and work together wherever possible, to explore options that promote efficiency and economy without sacrificing parties' rights to fully and fairly litigate their claims.

We do not suggest that this consensus means an end to the significant differences between our organizations or reduce the vigor with which each advances its ideals and objectives. But it does signal a willingness and ability to explore opportunities on common ground in the grand chasm between us.

How can we proceed from here? Four thoughts:

First, recognize that we *do* have a mutual goal of neutral efficiency in the civil justice system. At a time of exceptional stress in funding the judicial system, gains in this area will be appreciated by all Californians and, we hope, make the work of all attorneys more productive and satisfying. Observers at the initial expedited jury trial meeting noted that participants' interest picked up when the South Carolina lawyers said in their state's experience with the process, outcomes did not swing pro-defendant or pro-plaintiff.

Second, emphasize mutual benefits to all clients - plaintiffs and defendants. People who come to attorneys for representation want a fair solution that involves the most efficient use of their time and money - and then lets them get on with their lives. Everyone benefits from our helping to make that happen. Recall the Judicial Council's 2005 survey, which found that the cost of an attorney was the most commonly stated barrier to access to the courts, no matter what the respondent's income level.

Third, try to include everyone in the legal community at the beginning stage of exploring an idea. Dan Pone, with the Administrative Office of the Courts, said this about the process that led to AB 2284: "The best thing we did was involve everyone from the get go."

Fourth, focus on areas that require forward-looking creativity and untested or overlooked options. In an Aug. 11 *Daily Journal* opinion article, Sanford Jossen, an arbitrator and mediator for the Los Angeles County Superior Court wrote: "While the evolution of the law will continue to be based on precedent by nature and design, the administration of justice must be focused on the future if it is to continue serving the public."

In these difficult days for California, we should not set aside our principles and goals, but we should join in focusing our strengths toward creatively solving challenges facing those responsible for the fair and efficient administration of justice.

Christopher B. Dolan is president of the Consumer Attorneys of California. **John H. Sullivan** is president of the Civil Justice Association of California.

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