LEGISLATIVE INTENT SERVICE *Spring 2005*

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TAKING JUDICIAL NOTICE

We have received numerous requests from our clients for advice on offering legislative history materials in court. This issue of **Engrossment** is dedicated to providing some of those answers.

POINTS AND AUTHORITIES

Whether as a hardcopy binder or in a pdf electronic delivery format, in each research project we deliver to our clients, they receive, without charge, our firm's compilation of points and authorities to assist their use of our materials as extrinsic aides to statutory construction for judicial consideration of legislative history and intent. We also drafted a *sample motion* that is posted on our website. Please call us and we will be happy to email to you a copy of our materials.

OFFERING LEGISLATIVE HISTORY DOCUMENTS TO A COURT

A. MOTION FOR JUDICIAL NOTICE: Judicial notice may be taken under Evid. Code § 452(c) of "Official acts of the legislative, executive and judicial departments of the United States, or any state of the United States." (*People v. Snyder* (2000) 22 Cal.4th 304, 315 fn.5; *Delaney v. Baker* (1999) 20 Cal.4th 23, 30; *Post v. Prati* (1979) 90 Cal.App. 3d 626, 634.)

1. DISCRETIONARY JUDICIAL NOTICE MADE MANDATORY: Under Evid. Code § 452(c) a court has discretion to take judicial notice. Evid. Code § 453 provides the means to make it mandatory for a court to judicially notice documents proffered under § 452(c). A party must give "each adverse party sufficient notice of the requests, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request;" and to furnish "the court with sufficient information to enable it to take judicial notice of the matter."

2. JUDICIAL NOTICE BEFORE APPELLATE OR SUPREME COURT: Evid. Code § 459 grants appellate courts the same right and power to take judicial notice as the trial court. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 359; *People v. Connor* (2004, 6th District) 115 Cal.App. 4th 669, 681 fn.3.) Rule 41.5, California Rules of Court provides for "a cause pending before the Supreme Court of a Court of Appeal, a request that the court take judicial notice under Evidence Code section 459 shall be made by a motion under rule 41 filed separately from a brief or other paper."

B. No Judicial Notice Required for Published Documents: Several recent decisions of the California Supreme Court find judicial notice unnecessary; a simple citation to "published" legislative documents is sufficient to bring the legislative history to a court's attention. (*Sharon S. v. Superior Court (Annette F.)* (2003) 31 Cal.4th 417, 440, fn. 18; *Quelimane Company Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 46, fn.9.) "Published" legislative history documents appear to be legislative bills, committee and floor analyses or any other documents published in book format, or on the web by the Legislature. (Id.)

C. STIPULATION: Parties to a case may stipulate to the admission of documentary evidence a court's use of legislative history materials. (*Community Redevelopment Agency v. County of Los Angeles* (2001, 2nd Dist., Div. 2) 89 Cal. App. 4th 719, 725.)

ISSUES TO CONSIDER IN REQUESTING JUDICIAL NOTICE

A. PRIMACY OF LEGISLATIVE INTENT: To construe or interpret a statute, the court's primary objective is to determine the legislative intent of the enactment; all other rules of construction yield to this rule. "In the construction of a statute the intention of the Legislature. . .is to be pursued, if possible." (CCP § 1859)

B. JUDICIAL FUNCTION: Paraphrasing from *California Teacher's Assn. V. Governing Board of Rialto United School District* (1997) 14 Cal. 4th 627, the "touchstone of statutory interpretation" is the "probable intent of the Legislature." The judicial role is "limited" in the process of interpreting legislative enactments of the political branch of government – "It cannot be too often repeated that due respect for the political branches of our government requires us

to interpret the laws in accordance with the expressed intention of the Legislature." (Id.)

C. RELEVANCE OF THE DOCUMENTS: Even where judicial notice is mandatory, there is a superseding requirement of relevancy to meet. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136 fn.1; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065.) Relevant evidence is that evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence. . ." (Evid. Code § 210) There is no precise or universal test of relevancy; "The question must be determined in each case according to the teachings of reason and judicial experience." (1 Witkin California Evidence (3d Ed., 1986) Circumstantial Evidence, § 309, pg 279; see also 1 Jefferson, California Evidence Benchbook (3d ed. 1998) § 27.21, pg 299.)

D. LIMITATIONS ON EVIDENTIARY OBJECTIONS: Evid. Code § 454 provides that "In determining the propriety of taking judicial notice of a matter . . . Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege [exclusion of evidence where prejudice outweighs probative value]." ". . .an adverse party may not object to a proper matter for judicial notice. Even before the abolition of the best evidence rule, a copy of a document, instead of the original, could be the source of information for judicial notice." (1 Jefferson, California Evidence Benchbook (3d Ed. 1998) § 47.6, p. 1092.)

E. AUTHENTICATION: Judicial notice is a substitute for proof; judicially noticed materials are not evidence per se. "In determining the propriety of taking judicial notice of a matter,. . .(Ev. C. 454), the judge is free from nearly all of the restrictions of the rules of evidence." (Witkin California Evidence (3d Ed.) Judicial Notice, § 118, page 101.) When documents are judicially noticed ". . .the judge does not proceed in accordance with the rule of . . .authentication of writings, nor is he restricted by the exclusionary rules (opinion rule, hearsay rule, best evidence rule, etc.) . . ." (Id., § 82, pgs 75-76.) Authentication may be seen as needed of "unpublished" documents of the Legislature. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn.9.) Offering, in the alternative, to authenticate legislative history materials by declaration or affidavit, is a good practice. (Imwinkelreid, Wydick and Hogan California Evidentiary Foundations (3d Ed., 2000) pg 590-591.)

F. SUBMISSION OF PARTIAL OR COMPLETE LEGISLATIVE HISTORY: Whether one submits a partial or complete legislative history is an exercise of discretion. For example, consider the significance of the issue of statutory construction in light of the overall case at hand, volume of legislative history available, quality of available discussion in all legislative documents, tenor of the court and opposing counsel, and so on. One case criticized counsel for not submitting a complete legislative history. (*People v. Valenzuela* (2001, 4th Dist., Div. 2) 92 Cal.App.4th 768, 776, fn. 3 & 4)

G. EXPERT TESTIMONY: Expert testimony can be used in the interpretation of a statute in light of its legislative history. "In determining the propriety of taking judicial notice of a matter, or the tenor thereof: (1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party." Evid. Code § 454(a). (*Fallbrook Sanitation District v. LAFCO* (1989) 208 Cal.App.3d 753, 764; *Roberts v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 782.)

H. LEGISLATIVE RESEARCH FEES AS COSTS: Complete legislative history research is not readily available to the public. Thus, the costs of legislative history research fees is a **recoverable cost.** (*Van De Kamp v. Gumbiner* (1990, 2nd Dist. Div.5) 221 Cal.App.3d 1260, 1280

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