LEGISLATIVE
INTENT SERVICE

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I. HOW TO OFFER LEGISLATIVE HISTORY DOCUMENTS TO A COURT

A. Motion for Judicial Notice

Judicial notice may be taken under Evidence Code section 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 Evidence Code section 452(c) a court has discretion to take judicial notice. Evidence Code section 453 provides the means to make it mandatory for a court to judicially notice documents proffered under section 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

Evidence Code section 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, Sixth District) 115 Cal.App.4th 669, 681, fn.3) Rule 8.252, California Rules of Court provides that "To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order."

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, Second District, Division 2) 89 Cal.App.4th 719, 725)

II. 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." (Code Civil Procedure section 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 . . . ." (Evidence Code section 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 Edition, 1986) Circumstantial Evidence, section 309, page 279; see also 1 Jefferson, California Evidence Benchbook (3d ed. 1998) section 27.21, page 299)

D. Reliability of the Documents

Some Courts require legislative history documents submitted under a request for judicial motion be "cognizable legislative history" which is defined ". . .as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature as a whole." *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005, 3rd District) 133 Cal.App.4th 26, 30. Consider whether the type of documents being submitted are a) officially produced; b) widely circulated or available to the Legislature; or c) contain information the character of which can be found to be personal opinion of the writer. Analyze the document to determine who wrote it; what document type is it; where is it found in the legislative process;

when it was written and why it was written. Answering these questions can enable one to argue the document is reliable, relevant indicia of legislative intent.

E. Limitations on Evidentiary Objections

Evidence Code section 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) section 47.6, p. 1092)

F. Authentication

1. General

Judicial notice is a substitute for proof; judicially noticed materials are not evidence per se. 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.) . . ." (Witkin California Evidence (3d Edition) Judicial Notice, section 82, pages 75-76) However, "Some judges still insist on authentication of any material submitted in support of a judicial notice request. See *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 46, fn.9 . . . ("None of the materials submitted by plaintiffs is authenticated, however. (Evid. Code §§1401, 1530)"), . . . For that reason, to be on the safe side, it is a good practice to submit the material with a supporting affidavit from an expert." (Imwinkelreid, Wydick and Hogan California Evidentiary Foundations (3d Edition, 2000) pages 590-591) Code of Civil Procedure section 2015.5 authorizes declarations under penalty of perjury in lieu of affidavits. The declaration of the attorneys of Legislative Intent Service appears to meet these requirements. (See *People v. Connor* (2004, Sixth District) 115 Cal.App.4th 669, 681; *Whaley v. Sony Computer America, Inc.* (2004, Fourth District, Division 1) 121 Cal.App.4th 479, 487)

2. Declaration

The declaration under penalty of perjury provided by Legislative Intent Service is designed to be attached as an exhibit to a declaration by the attorney accompanying a memorandum of points and authorities in support of the motion. The attorney declaration should identify whether the entire compiled legislative history is being submitted, or which particular documents from the compilation are being submitted to the court. (Entire legislative history cited in *People v. Sanchez* (2001) 24 Cal.4th 983, 992, fn.4; *People v. Brown* (1993) 6 Cal.4th 322, 334; *Board of Retirement v. Superior Court* (2002, 2nd District) 101 Cal.App.4th 1062, 1070; *People v. Connor*, (2004, 6th Dist.) 115 Cal.App.4th 669, 681, fn.3) If particular documents are submitted, explanation, as appropriate, may be provided of why other available documents are not being submitted (*e.g.* not pertinent to issues or history is voluminous, but available upon request).

The declaration should further verify that the documents are being submitted as received from Legislative Intent Service. (www.legintent.com Cases Citing LIS) If the matter arises in the Third District Court of Appeal, see *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc.* (2005, Third District) 133 Cal.App.4th 26; also www.legintent.com "Considering *Kaufman & Broad v. Performance.*"

G. Submission of Partial or Complete Legislative History

Whether one submits a partial or complete legislative history is an exercise of discretion. 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. Several cases criticize counsel for not submitting a complete legislative history. (*Drouet v. Superior Court (Broustis)* (2003) 31 Cal.4th 583, 598; *Fremont Indemnity Company v. Fremont General Corporation* (2007, 2nd District, Division 3) 148 Cal.App.4th 97, 128-129) *Alch v. Superior Court (Time Warner Entertainment)* (2004, Second District, Division 8) 122 Cal.App.4th 339, 364, fn.11 and fn.12; *People v. Valenzuela* (2001, Fourth District Division 2) 92 Cal.App.4th 768, 776, fn.3 and fn.4) Recent cases reviewing a complete legislative history are People v. Cole (2006) 38 Cal.4th 964, 989; Frazier Nuts v. American Ag Credit (2006, 5th District) 141 Cal. App. 4th 1263, 1272. The Third District Court of Appeal, to the contrary, directs submission of individual documents. *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc (2005, Third District)* 133 Cal.App.4th 26; however a complete legislative history was reviewed in *Wirth v. State of California* (2006, 3d District) 142 Cal.App.4th 131, 141, fn. 6.

H. 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." Evidence Code section 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)

I. Legislative Research Fees as Costs

Complete legislative history research is not readily available to the public. Therefore the costs of legislative history research fees is a recoverable cost. (*Van De Kamp v. Gumbiner* (1990, Second District Division 5) 221 Cal.App.3d 1260, 1280; *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App. 4th 361, 363-364) Costs of legislative history fees recoverable under Code of Civil Procedure section 1033.5(a)(12), which permits recovery of the costs of exhibits "if they were reasonably helpful to aid the trier of fact" are recoverable, even if not submitted to the court where there is statutory ambiguity requiring resort to these aides to statutory construction. *City of Anaheim v. Department of Transportation* (2005) 135 Cal.App.4th 526, 534-535.