



LEGISLATIVE INTENT SERVICE

712 Main Street, Woodland, CA 95695
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

Considering *Kaufman & Broad v. Performance Plastering:* Housekeeping at the Third District Court of Appeal

**by Dorothy Thomson*, Esq., of
LEGISLATIVE INTENT SERVICE**

Introduction

On October 3, 2005 the 3rd DCA modified its opinion after rehearing in *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26. The modified opinion essentially a) clarifies that a determination of the existence of an ambiguity occurs not at the time of a motion for judicial notice, but by the panel of judges hearing the appeal; b) cleans-up the listing of cognizable and non-cognizable legislative history presented in the original opinion; and c) acknowledges the propriety of taking judicial notice of enrolled bill reports from a governor's file. In all other respects the original opinion is unchanged.

The Kaufman opinion solely responds to a motion for judicial notice of selected documents in the legislative history of Assembly Bill 1950 (Torlakson-1998), Chapter 856, Statutes of 1998. Addressing the use of legislative history generally the opinion states “. . .we have some general comments about requests for judicial notice of legislative history received by this court.” (Id. page 29)

This opinion appears to confine itself to cases coming before the Third Appellate District. *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* 133 App.4th 26, 31

Third Appellate District – Complete, Compiled Legislative Histories

The Court appears to state it will no longer accept a motion for judicial notice of a complete, compiled legislative history where the documents are not segregated and no attempt is made in the memorandum of points and authorities to justify each request for judicial notice. “Many attorneys apparently believe that every scrap of paper that is generated in the legislative process constitutes the proper subject of judicial notice. They are aided in this view by some professional legislative intent services. Consequently, it is not uncommon for this court to receive motions for judicial notice of documents that are tendered to the court in a form resembling a telephone book. The various documents are not segregated and no attempt is made in a memorandum of points and authorities to justify each

request for judicial notice. This must stop.” *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* 133 App.4th 26, 29

For cases questioning the wisdom of proffering selected documents of legislative history see *Drouet v. Superior Court (Broustis)* (2003) 31 Cal.4th 583, 598 (“Tenants urge us instead to rely on isolated fragments of the Act's legislative history.”); *Alch v. Superior Court (Time Warner Entertainment)* (2004, 2nd District, Div. 8) 122 Cal.App.4th 339, 364, fn.11 and fn.12 (“fn. 11. The employers offer a single page from the legislative history. . . .fn.12 Our review of the legislative history reveals the following information. . . .”); *People v. Valenzuela* (2001, 4th Dist, Div 2) 92 Cal.App.4th 768, 776, fn. 3 and fn. 4 (“In addition, we are reluctant to sanction defense counsel’s selective presentation of one excerpt from the legislative history obtained from the Legislative Intent Service. The entire legislative history should have been submitted to us.”)

For cases using the complete, compiled legislative history of an enactment see *People v. Brown* (1993) 6 Cal.4th 322, 334; *People v. Sanchez* (2001) 24 Cal.4th 983, 992, fn. 4; *Board of Retirement v. Superior Court* (2002, 2nd District) 101 Cal.App.4th 1062, 1070; *Arya Group Inc. v. Cher* (2000, 2nd District) 77 Cal.App.4th 610, 614, fn.3; *People v. Connor* (2004, 6th District) 115 Cal.App.4th 669, 681; *Whaley v. Sony Computer America, Inc.* (2004, 4th District, Div. 1) 121 Cal.App.4th 479, 487.

Third Appellate District - Motions for Judicial Notice of Legislative History

The Court sets forth the form by which it will consider “properly cognizable legislative history”:

- A motion for judicial notice must be made “with the understanding that the panel ultimately adjudicating the case may determine that the subject statute is ambiguous” *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* 133 App.4th 26, 30;
- The motion is to identify each separate document for which judicial notice is sought as a separate exhibit;
- Points and authorities are to be submitted citing authority for each exhibit being “cognizable legislative history.”

Query, what of “published” legislative history materials? Consider *In Quelimane Company, Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn.9 (“A request for judicial notice of published material is unnecessary. Citation to the material is sufficient (Citation.) We therefore consider the request for judicial notice as a citation to those materials that are published.”); *Sharon S. v Superior Court (Annette F.)* (2003) 31 Cal.4th 417, 440, fn. 18 (“Annette and Sharon each have submitted a request for judicial notice of legislative history materials generally available from published sources. We deny both requests as

unnecessary." [committee and floor analyses cited, as well as California administrative registers])

Third Appellate District – Cognizable Legislative History Documents

A request for judicial notice only of those documents constituting cognizable legislative history – legislative history that sheds light on the collegial view of the Legislature as a whole, are encouraged, “as a general rule,” in this opinion. *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* 133 App.4th 26, 30 In this regard, *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701 is cited as well as *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062.

In its own unique fashion, the Court provides laundry lists of legislative history documents. One lists documents “Constituting Cognizable Legislative History in the Court of Appeal for the Third Appellate District” and the other documents “Not Constituting Legislative History in the Court of Appeal for the Third Appellate District.” *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* 133 Cal.App.4th 26, 31, 37 **It is indicated that the lists are based only on cases from the California Supreme Court and the Third District Court of Appeal.**

To simplify, the first list cites to cases using a) ballot pamphlets: summaries and arguments, statements of vote; b) floor analyses; c) bill versions; d) floor statements; e) legislative Journals and Final Histories; f) Legislative Analyst reports; g) policy and conference committee reports, interim reports, analyses and bill analysis worksheets; h) Legislative Counsel digests and opinions; i) official commission reports; j) statements by sponsors, proponents and opponents “communicated to the Legislature as a whole”; k) predecessor bills; l) hearing transcripts; and (m) enrolled bill reports.

The second list cites to cases *not* using a) authoring legislator files, letters press releases and statements “not communicated to the Legislature as a whole”; b) documents of unknown author or purpose; c) letters of sponsors, proponents, opponents; d) letters to the Governor, bill author or legislators, “without an indication the author’s views were made known to the Legislature as a whole”; e) media articles; f) unsuccessful bills; g) statements and materials of “subjective intent” not “communicated to Legislature as a whole;” h) files of committees, floor analysis offices, political caucuses, authors and governors [with citation to no cases]; and i) post enrollment documents.

Some legislative history document types cross lists, being on both. So what is or is not cognizable legislative history – legislative history that sheds light on the collegial view of the Legislature as a whole is not always discernable from the type of legislative history document. This would seem to suggest that any legislative history document deserves individual evaluation for its merit. In addition, from a review of the list of documents not “constituting legislative history” in the Third

District, it appears that some categories of documents are more susceptible than others to a “not representing a collegial view” finding, yet are potentially capable of being found otherwise. Guidelines to analysis would presume to be existing cases of the California Supreme Court and the Third District Court of Appeal as set forth in *Kaufman*; however in its lists the Court failed to note a number of cases finding that documents it categorizes not cognizable or as may be reasonably inferred, susceptible in nature, can be, under appropriate cases, cognizable.

Legislative Intent Service has accumulated more than 700 cases in its Unabridged Points and Authorities on a) Using Extrinsic Aids in Statutory Construction; and b) Authority and Procedure for Judicial Consideration. (Available online: <http://www.legintent.com/pointsauthorities.php>) In the majority of these cases, courts, including the California Supreme Court and the Third District Court of Appeal, have utilized legislative history materials, found in both lists to construe statutory language. Some cases directly discuss the propriety of use of a particular document type as an aide to statutory construction; most simply refer to and use the document type, demonstrating an inference that the document was found properly judicially noticeable.

From the Legislative Intent Service Unabridged Points and Authorities, one can discern the cases where susceptible documents are found to be properly judicially noticeable. Consider these California Supreme Court and Third District cases:

Committee files¹:

White v. Ultramar, Inc. (1999) 21 Cal.4th 563, 572, fn.3 (individual legislator comments from Assembly and Senate Committee bill files); *People v. Drennan* (2000, 3rd District) 84 Cal.App.4th 1349, 1357-1358 (digest of Assembly Bill by Speaker Jesse Unruh, and floor statement).

Departmental Sponsorship, Support and Analysis²:

Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1027-8 (agency bill analysis); *Mejia v. Reed* (2003) 31 Cal.4th 657, 667 (commission letter, State Bar memorandum); *People v. Snyder* (2000) 22 Cal.4th 304, 309

¹ This list is limited by the manner in which courts cite to legislative history documents. Often the court will reference a committee or floor statement, letter, memorandum, or press release with no comment as to how the document was received: as an individual document only or as an individual document taken from a file. In California legislative process, these document types are only located in file materials. Many other cases using documents that are only found in a committee file are not noted under the heading “Committee files” as it is not known if the entire file was reviewed and this document selected for discussion; or whether only that individual document was noticed and reviewed.

² See footnote 1.

(commission memorandum); *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 508 (council report); for further California Supreme Court cases, see LIS Unabridged Points and Authorities Legislative History and Intent as Aides to Statutory Construction.

Boehm & Associates v. Worker's Compensation Appeals Board (2003, 3rd District) 108 Cal.App.4th 137, 145 (agency memorandum and letter to Governor); *San Rafael Elementary v. State Board of Education* (1999, 3rd District) 73 Cal.App.4th 1018, 1029-30 (agency bill analyses and letter) *Clemente v. Amundson* (1998, 3rd District) 60 Cal.App.4th 1094, 1105 (agency request for approval and bill analysis); *Al-Sal Oil Co. v. State Board of Equalization* (1991, Third District) 232 Cal.App.3d 969, 978 (letters and memoranda of agencies to the Governor).

Statements by Sponsors, Proponents, Opponents³:

American Financial Services Assn. v. City of Oakland (2005) 34 Cal.4th 1239, 1263 (legislator letter to the Governor); *Martin v. Szeto* (2004) 32 Cal.4th 445, 450-451 (authoring legislator, proponents and opponents letters to Governor); *Stormedia Inc. v Superior Court* (1999) 20 Cal.4th 449, 459-460 (drafter's statements); *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055-1057 (drafter's statements); *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 917, 926 (proponent/opponent letter); for further California Supreme Court cases, see LIS Points and Authorities Using Extrinsic Aids in Statutory Construction. (Available online: <http://www.legintec.com/pointsauthorities.php>)

Reis v. Biggs Unified School District (2005, 3rd District) 126 Cal.App.4th 809, 826 (proponent statement); *In re Michael D.* (2002, 3rd District) 100 Cal.App.4th 115, 122 (proponent/opponent statement); *Guilleman v. Stein* (2002, 3rd District) 104 Cal.App.4th 156, 166, fn. 12 (proponent letter); *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* (1997, 3rd District) 58 Cal.App.4th 1261, 1273-4, 1280-81 (proponent letter); *California Trout, Inc. v. State Water Resources Control Board* (1989, 3rd District) 207 Cal.App.3d 585, 602-603, fn. 7 (proponent/opponents, including agencies, correspondence to the governor).

Author Statements and Letters⁴:

Catholic Charities of Sacramento, Inc. v. Superior Court (Dept. of

³See footnote 1.

⁴ Author Statements, Letters, Press Releases are discoverable in committee and floor files, as well as the file of the author. Hence again, the comment of footnote 1 should be considered.

Managed Health Care) (2004) 32 Cal.4th 527, 579 (legislative author floor statements); *Martin v. Szeto* (2004) 32 Cal.4th 445, 450-451 (author and proponent/opponent letters to governor); *Drouet v. Superior Court (Broustis)* (2003) 31 Cal.4th 583, 598 fn.4 (legislative author letter to governor); *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 377 (legislative author letter to governor); *Mercy Hospital and Medical Center v. Farmers Insurance Group of Companies* (1997) 15 Cal.4th 213, 222 (legislative author letter to governor); *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 377-378 (multiple letters of state agency, legislative author, proponents, printed in Journal); for further California Supreme Court cases, see LIS Unabridged Points and Authorities Legislative History and Intent as Aides to Statutory Construction. (Available online: <http://www.legintent.com/pointsauthorities.php>)

Hamilton v. Gourley (2002, 3rd District) 103 Cal.App.4th 351, 358, fn. 1 (legislative author letter to governor); *Lewis v. County of Sacramento* (2001, 3rd District) 93 Cal.App.4th 107, 121, fn. 4 (legislative author committee statement); *In re Marriage of Siller* (1986, 3rd District) 187 Cal.App.3d 36, 46, fn.6 (legislative author floor statement).

Author file or documents therefrom⁵:

Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal.4th 1246, 1257-1258 (letter from proponent to legislative author); *Commodore Home Systems, Inc. v Superior Court* (1982) 32 Cal.3d 211, 219 fn.9 (letters and memoranda from legislative author file); for further California Supreme Court cases, see LIS Unabridged Points and Authorities Legislative History and Intent as Aides to Statutory Construction.

Guillemin v. Stein (2002, 3rd District) 104 Cal.App.4th 156, 166, fn.12 (proponent letter to legislative author).

Governor's Correspondence, Press Releases and Messages:⁶

American Financial Services Assn. v. City of Oakland (2005) 34 Cal.4th 1239, 1263 (legislator's letters to governor); *Martin v. Szeto* (2004) 32 Cal.4th 445, 450-451 (legislative author letter to governor, proponent and opponent letters to governor); *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 72

⁵ See footnote 1 and 4

⁶ Governor's Correspondence, Press Releases, Messages are most often found in the file of the Governor also known as post-enrollment documents. In this regard then, consider the commentary in footnote 1.

(legislative author letter to governor); *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1150 (legislative author letter to governor); *People v. Ledesma* (1997) 16 Cal.4th 90, 98, 100 (governor's message on signing bill); *People v. Tanner* (1979) 24 Cal.3d 514, 520 (governor's press release).

Boehm & Associates v. Workers' Comp. Appeals Bd. (2003, Third District) 108 Cal.App.4th 137, 145 (agency letters to governor); *Hamilton v. Gourley* (2002, Third District) 103 Cal.App.4th 351, 358, fn.1 (legislative author letter to governor);

Alt v. Superior Court (1999, 3rd Dist) 74 Cal.App.4th 950, 959, fn. 4 (legislative author letter to governor).

Third Appellate District Application of Cognizable Legislative History Standard

If it be reasonable to infer that each document type is to be evaluated, and judged as being, or not being, cognizable legislative history, we see this approach demonstrated in the three types of documents which were the subject of the judicial notice request in *Kaufman* case.

Legislative bill fact sheet: the proffer of "AB 1960 (Torlakson) Construction Defect Litigation Reform Fact Sheet" is declined as "Nothing in appellant's motion suggests this document was made available to the Legislature as a whole. Rather, it appears to reflect the personal view of Assemblymember Tom Torlakson." *Kaufman & Broad Communities Inc. v. Performance Plastering, Inc.* 133 App.4th 26, 39

This statement seems to invite attorneys to include commentary in a motion to this court demonstrating the availability of the document, or the content of the document to the legislature. One could demonstrate this by noting how many files this document was found in; typically a fact sheet of this nature appears in the policy committee files as well as an author's file, some evidence of wide distribution. One could examine all analyses for any evidence of quotes, paraphrases or commentary on the information in the Fact Sheet, for where the substance of the text is consistently presented in legislative analyses, this is evidence of being made available to the Legislature as a whole. To similar effect, if the document, or its language and/or ideas is duplicated in a consistent fashion in materials found in the Governor's file, such as enrolled bill reports, or letters of the legislative author or proponents/opponents, this would seem to demonstrate an availability, lending integrity to the document as relevant indicia of legislative intent.

This evidence would tend to substantiate as was held in a 2004 Supreme Court case, that "These statements about pending legislation are entitled to consideration to the extent they constitute "a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. (*California Teachers Assn. v. San Diego*

Community College Dist. (1981) 28 Cal.3d 692, 700.)” *Martin v. Szeto* (2004) 32 Cal.4th 445, 450-451.

Policy Committee Analyses: these were judicially noticed.

Enrolled Bill Reports: The original Kaufman opinion declined these document types based on the cognizable legislative history standard, citing to *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn.7; *People v. Patterson* (1999) 72 Cal.App.4th , 438, 444.

In our original comment on the *Kaufman* opinion we indicated advocates of this document type may wish to consider the California Supreme Court cases and those Third District cases using this type of legislative history document and distinguish the *Hutnick* and *People v. Patterson* decisions, for the California Supreme Court stated in a 2004 decision “. . .we have routinely found enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing, instructive on matters of legislative intent. (Citations.) Though we do not give great weight to the report, it is instructive here.” *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934 fn.19. Also, a 2005 case of the Third District which simply quoted from an Enrolled Bill Report, stating “An enrolled bill report prepared for the Governor by the Office of Criminal Justice Planning contains the following explanation. . . .” *People v. Carmony* (2005, 3rd District) 127 Cal.App.4th 1066, 1079.

In the modified opinion, after some discussion, the court found:

We are obligated to follow *Elsner*. . . .We hereby grant appellant’s motion for judicial notice of the enrolled bill reports, and we leave it to the panel deciding this case to determine the extent to which these reports may be “instructive.”

Nonetheless, we respectfully add that we continue to find the logic of *McDowell* [opining that enrolled bill reports should not be considered for there is no inference that they were read by the Legislature] . . .unassailable. . . .

But we do not write on a clean slate.

Kaufman & Broad Communities Inc. v. Performance Plastering, Inc. 133 Cal.App.4th 26, 41-42

Conclusion

Legislative history documents are judicially noticeable extrinsic aides to statutory construction under Evidence Code section 452(c). Under Evidence Code section 452 there are no significant limits on the judicial discretion of a court to judicially notice documents as aides to statutory construction. (Evidence Code section 450, Law Revision Commission Comment: “Section 450 will neither

broaden nor limit the extent to which a court may resort to extrinsic aides . . . Nor will Section 450 broaden or limit the extent to which a court may take judicial notice of any other matter not specified in Section 451 or 452.”)

The Third District Court of Appeal in *Kaufman*, however, seems to be imposing limits by its announcement it will no longer accept a complete compiled legislative history where each individual document is not identified, justified and authorized. It seems to be signaling practitioners in its jurisdiction that they, rather than the Court, are to filter a legislative history for the most probative documents. On a case by case basis, it remains to be seen how advocates will use this discretion, and how the Court will come to terms with its own, and the California Supreme Court’s case precedent developed prior to, and contemporaneously with, this housekeeping effort.