Using Legislative History in California Appeals

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Appellate courts often look to legislative history documents to construe the meaning of statutes in various situations. California courts have taken different approaches on what information may be submitted and how it should be submitted. This article discusses those approaches.

The Third District Approach: *Kaufman & Broad v. Performance Plastering*

The Third District Court of Appeal has a specific local rule governing requests for judicial notice of legislative history documents, based on its decision in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal.App.4th 26 (2005). Local Rule 4 provides that a party seeking judicial notice of legislative history "must identify each such document as a separate exhibit and must provide legal authority supporting the consideration of each document as cognizable legislative history." This is both a procedural and substantive rule, as it sets forth the procedure for submitting legislative history and requires that each submitted document be "cognizable" legislative history.

In *Kaufman & Broad*—an opinion devoted entirely to a motion for judicial notice of legislative history documents—the court provides guidance to attorneys regarding the correct way to make such a request and what constitutes proper legislative history.

The opinion by Justice Sims begins with a scathing critique of practitioners who submit large motions for judicial notice of legislative history without segregating the documents or justifying each request:

> 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., 133 Cal.App.4th at 29.

The rest of the decision focuses on the proper use of legislative history on appeal. First and foremost, "resort to legislative history is appropriate only where statutory language is ambiguous." *Id.* However, a party seeking judicial notice of legislative history does not have to establish the ambiguity at the time of requesting judicial notice. *Id.* at 30. But even if a request

for judicial notice is granted, the panel of justices assigned to hear the appeal may ultimately "determine that the subject statute is unambiguous, so that resort to legislative history is inappropriate." *Id.*

The court also noted that only certain categories of documents are "properly cognizable legislative history." The decision lists documents that are cognizable legislative history and documents that are not, with extensive citations to prior case law for each category. The general rule is that "legislative history must shed light on the collegial view of the Legislature, *as a whole*." *Id.* (emphasis in the original).

Documents that are properly cognizable legislative history include information from ballot pamphlets (summaries and arguments); conference committee reports; different versions of a bill; floor statements; house journals and final histories; reports by the legislative analyst; legislative committee reports and analyses; legislative counsel's digest; legislative counsel's opinions and supplementary reports; legislative party floor commentaries; official commission reports and comments; statements by sponsors, proponents, and opponents communicated to the legislature as a whole; transcripts of committee hearings; analyses by legislative party caucuses; and enrolled bill reports.

Documents that are *not* properly cognizable legislative history include: authoring legislator's files, letters, press releases, and statements not communicated to the legislature as a whole; documents with an unknown author or purpose; copies of handwritten documents without the author identified contained in legislator's file; letters to the governor or particular legislators (including the bill's author); magazine articles; memoranda from third parties to proponents of a bill; proposed bills that are withdrawn by the author; the state bar's view of the meaning of legislation; subjective intent reflected by statements of interested parties and individual legislators (including the bill's author) that are not communicated to the legislature a as whole; and views of individual legislators, staffers, or other interested persons.

Other approaches

While some courts have followed the *Kaufman & Broad* approach, other courts have been willing to grant requests to review the entire legislative history for a particular statute. Some decisions go farther, criticizing litigants who submit only a partial history.
There are many decisions where appellate courts have taken judicial notice of the entire legislative history of a statute. *See, e.g., Marie v. Riverside County Reg. Park, etc.*, 46 Cal.4th 282, 290-292 (2009); *Stewart v. Rolling Stone LLC*, 181 Cal.App.4th 664, 676 n. 8 (1st Dist., Div. 1 2010); *Board of Retirement v. Superior Court*, 101 Cal.App.4th 1062, 1070 n. 6 (2d Dist., Div. 6 2002); *Alch v. Superior Court*, 122 Cal.App.4th 339, 364 n. 12 (2d Dist., Div. 8 2004); *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal.App.4th 729, 735 n. 2 (5th Dist. 2009); *People v. Connor*, 115 Cal.App.4th 669, 681 n. 3 (6th Dist. 2004). Even the Third District has done this in a post-*Kaufman* decision, indicating that a party may submit the entire legislative history of a statute so long as Local Rule 4 is followed. *See Wirth v. State of California*, 142 Cal.App.4th 131, 141 n. 6 (3d Dist. 2006).

Some decisions have criticized parties who submit only selected parts of legislative history. In *Drouet v. Superior Court*, 31 Cal.4th 583, 589 (2003), the Supreme Court rejected an interpretation based on "isolated fragments of the Act's legislative history," pointing to a "single paragraph in a Senate committee analysis...." Likewise, in *Fremont Indemnity Co. v. Fremont General Corp.*, 148 Cal.App.4th 97, 128-129 (2007), the Second District criticized the respondents' reliance on two items of legislative history, noting that these were only "brief summaries" that would not be viewed as "comprehensive statements of the intent of the statute." In *People v. Valenzuela*, 92 Cal.App.4th 768, 776 n. 3, 4 (2001), the Fourth District denied a request for judicial notice of a letter from the bill's author to the governor. Aside from the fact that the letter was not proper legislative history since it reflected the views of one legislator, the court was also "reluctant to sanction defense counsel's selective presentation of one excerpt from the legislative history obtained from the Legislative Intent Service." *Id.* at n. 4. "The entire legislative history should have been submitted to us." *Id.*

Finally, some California Supreme Court decisions indicate that the Court will review legislative history that is published without requiring a formal request. A citation in a brief to legislative history that is officially published in print or online (and readily available) may be sufficient. *See Sharon S. v. Superior Court*, 31 Cal.4th 417, 440 n. 18 (2003) (denying request for judicial notice of published documents as "unnecessary"); *Quelimane Company, Inc. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 46 n. 9 (1998) (request for judicial notice unnecessary; citing the material "is sufficient"). Information readily available through the Official California Legislative History Information website, http://www.leginfo.ca.gov/index.html, would likely fall into this category.

Conclusion

When using legislative history in an appeal, make sure to review the most recent decisions from the appellate district and division (if applicable) where your appeal is pending. In the Third District, it is crucial to follow Local Rule 4 and *Kaufman & Broad* by separately indexing each legislative history document as an exhibit and submitting a formal motion with legal authority showing why each document constitutes cognizable legislative history. In other districts, it may be preferable to submit the entire legislative history for a statute. It is still a good idea to index each document submitted and provide authority for the request. In some cases, citation to published legislative history information may suffice, without a formal request, if the material is officially published and readily available.

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