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Legislative History Notes: Correspondence Found in Legislative Bill Files

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The California courts take judicial notice of legislative history records that are generated during the course of a bill's enactment to clarify ambiguous terms (most common usage) and to reinforce a statute's "plain meaning" (growing trend). In *Kaufman & Broad v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, the relevancy of correspondence preserved in unpublished legislative bill files for determining legislative intent was given a big thumbs down by the Third District Court of Appeal (3rd DCA) when such materials were not "communicated to the Legislature as a whole." Unfortunately, the California Supreme Court declined to depublish the decision on December 14, 2005, leading some to wonder if *Kaufman* might have a life beyond its own jurisdiction.

However, at least two recent cases have undermined the 3rd DCA's limits in this area. Moreover, no published decision addresses the elephant in the room: Government Code section 9080 clearly establishes the relevancy of records found in legislative committee, floor, and partisan caucus bill files – including correspondence – for determining legislative intent, and without regard as to whether they were communicated to the "Legislature as a whole."

Fiction Alert #1. The Legislature does not function "as a whole" so it is impossible to communicate with it in that manner. There is no single voting forum where all Assembly and Senate members convene. The cases relied upon in *Kaufman* here (at 36) appear to address testimony or records provided at individual legislative forums where a vote is taken (e.g. committees).¹

The Supreme Court declines to follow *Kaufman*. In *Sockup v. Law Offices* (2006) 39 Cal.4th 260, the California Supreme Court took judicial notice of an "entire legislative history" that included *Kaufman*-banned materials such as "the views of individual legislators or advocates of the legislation rather than the Legislature as a whole." *Id.* n.9. However, the Court made a point of only relying upon official bill analyses and bill versions to reach its opinion – records it described as "indisputably proper subjects of judicial notice." *Id.* Nevertheless, in so doing, the Court wisely preserved its prerogative to consider the relevancy of *Kaufman*-banned records on a case-by-case basis.

The *Kaufman* court does an about-face in *Cequell*. In *Cequell III Communications I, LLC. v. Local Agency Formation Commission* (2007) 149 Cal.App.4th 310, the 3rd DCA departed from its strict *Kaufman* limits when it relied upon a bill analysis by a private party and the accompanying letter sent to the bill's author which had been "located in the files of the Assembly Committee on Local Government." *Id.* at 326. After noting that the trial court had admitted them as part of a "packet of documents constituting the Assembly Final History" the 3rd DCA stated in a *footnote*:

Letters to individual legislators, including the bill's author, are not matters constituting cognizable legislative history if they were not communicated to the **Legislature as a whole** [citing *Kaufman*].

Here, however, the analysis and letter were apparently provided to the Assembly Committee on Local Government and included in the **final history of the bill**, making the material a proper subject of judicial notice. *Id.* n.3 (Emphasis added.)

Fiction Alert #2. There is no legislatively blessed “packet” of documents known as an “Assembly Final History” or “final history” providing substantive commentary in letters, analyses etc. (A publication with the same title records *procedural* actions such as amendment and hearing dates.)

As such, we are left with the following facts:

- The *Cequell* letter and accompanying analysis were found in a committee bill file and were admitted in spite of the fact that they had not been “communicated to the Legislature as a whole.”
- Such records fall within two *Kaufman*-banned categories: “L. Subjective Intent Reflected by Statements of Interested Parties ... Not Communicated to Legislature as a Whole” and “M. Views of ... Other Interested Persons” (*Kaufman* at 38).

Government Code section 9080 establishes the relevancy of records found in legislative committee, floor, and partisan caucus bill files. The broader, much less restrictive outlook in both *Cequell* and *Soukup* is consistent with § 9080, which was added by Stats. 1996, c. 928, § 2, SB 1507 (Petris) and sponsored by the California law librarian community (NOCALL and SCALL).² I and Judy Janes from the University of California Davis Law Library were the primary drafters of the legislation for the NOCALL Government Relations Committee chaired by Catherine Hardy.

- **Subdivision (a)** states: “The Legislature finds and declares that legislative records relating to bills ... before the Legislature provide evidence of legislative intent that may be important in the subsequent interpretation of laws enacted in the Legislature.”
- **Subdivisions (a) & (b)** mandate the preservation of “legislative records” found in “committee” bill files for public access.
- **Subdivision (c)** defines “[c]ommittee” in a manner that reaches any “entity of the Senate or Assembly” that produces analyses utilized by members for voting purposes. Thus, it applies to legislative committees, the Assembly and Senate floors, and partisan caucuses. (Legislative author bill files were not included because legislators preferred the *option* of withholding their records – not because such records were considered inappropriate sources of legislative intent. Significantly, the *Soukup* Court admitted an “entire legislative history” without distinguishing among sources of records.³)
- **Subdivision (d)** defines “[l]egislative records” contained in “official committee files” as “including, *but not limited to*: (1) Committee staff analyses. (2) Written testimony. (3) Background material submitted to the committee. (4) Press releases. (5) Written commentary submitted to the committee ... [exclusive of fiscal committee bill file materials and confidential communications]. (6) Versions of bills ... (7) Relevant interim hearing materials, studies, case materials, and articles.” (Emphasis added)

In light of the *Soukup* repudiation of the *Kaufman* limits, the *Cequell* expansion of *Kaufman* and the chronically overlooked but dispositive § 9080, all relevant materials

found in *any* legislative bill file – including correspondence – should be considered as long as the records in question shed light on the Legislature’s intent.

¹ Alas, the 1000-word article limit forecloses further discussion here.

² It is also consistent with numerous pre-*Kaufman* cases, but see footnote 1.

³ See footnote 1.