

Memorandum

To : Members of the Commission

Date : July 28, 1976

From : FAIR POLITICAL PRACTICES COMMISSION
Ted Prim

Subject: Who is a Judge of Court of Record Within the
Meaning of Gov. Code § 87200

M-76-581

AB 809 amended Gov. Code § 87200 to include "judges of courts of record" among those public officials who must file statements of economic interests. Soon after passage of this legislation, the staff began to receive inquiries concerning the meaning of the phrase "judges of courts of record." Specifically, we have been asked whether commissioners, referees, temporary judges, and judges sitting on assignment are required to file statements of economic interests.

Article 6, Section 1 of the California Constitution provides that the Supreme Court, courts of appeal, superior courts and municipal courts are "courts of record;" justice courts are specifically excluded. The question to resolve, therefore, is whether a commissioner, referee, temporary judge or judge sitting on assignment is a "judge" when he or she sits on the Supreme Court, a court of appeal, a superior court or a municipal court. It is the tentative recommendation of the staff that such persons should not be deemed "judges" within the meaning of Gov. Code § 87200, and, hence, they need not file statements of economic interests.

Article 6, Section 22 of the Constitution authorizes the Legislature to permit trial courts of record to appoint subordinate officers such as commissioners. Gov. Code § 72190 provides that commissioners shall have the status of ex officio deputy clerks. Code of Civil Procedure § 259 provides that the powers of a commissioner include the power to hear and determine ex parte motions for orders and writs, except orders or writs of injunction in the superior court for which he is appointed. In addition, commissioners assist the courts in fact finding.

Traffic referees, as described in Gov. Code § 72400, have the powers of ex officio deputy clerks (§ 72403) and, as such, are similar to commissioners. Also, in certain respects, traffic referees have the powers of a judge. For example, they can set bail, take pleas, and, in some instances, impose fines. §§ 72401, 72402. Referees who are appointed pursuant to Code of Civil

*The Commission accepted the intent theory set forth
in this memo*

Members of the Commission

July 28, 1976

Page Two

Procedure § 639 are empowered to assist the court in the determination of complex factual issues. However, referees appointed pursuant to an agreement between the parties, as provided in Code of Civil Procedure § 638, may possess the full powers of a judge with respect to a particular case. Thus, referees sitting pursuant to a general reference under § 638 and, to a lesser extent, traffic referees may exercise the powers of a judge. However, referees appointed by the court pursuant to § 639 possess a more limited form of power which relates only to fact finding.

Article 6, Section 21 of the Constitution provides that, by stipulation of the parties, the court may appoint a temporary judge to try a matter and to act until a final determination of the cause. Unlike commissioners and referees, temporary judges have both judicial status and judicial power. However, in practice, temporary judges and referees sitting pursuant to a general reference under Code of Civil Procedure Section 638 exercise virtually the same degree of judicial power. Temporary judges differ from permanent judges in that they are not compensated and they are not prohibited from practicing law. In addition, temporary judges are part-time, perhaps serving for only one or two days in a year. The rest of the year they generally are practicing attorneys, commissioners or referees.

Finally, Article 6, Section 6 of the Constitution grants the Chief Justice of the Supreme Court the authority to assign retired judges to sit on any court when their services are needed. Persons sitting on assignment receive full compensation as a judge for the time served and possess the full powers of a judge. Unlike temporary judges, who sit by stipulation, a judge sitting on assignment may be removed only by the Chief Justice or by a complaint brought through the normal process for challenging judges.

It is apparent from the foregoing that commissioners, referees, temporary judges and judges sitting on assignment, or some of these categories, could be deemed "judges." All of the positions involve the exercise of some judicial power and a few of them (judges sitting on assignment, temporary judges and referees appointed pursuant to a general reference under C.C.P. § 638) enjoy full judicial powers with respect to the particular matters over which they preside. They are, therefore, in a sense "judges" of courts of record, albeit not full-time judges. Moreover, their duties create the potential for conflicts of interest which arguably should be disclosed in the same manner that potential conflicts are now revealed by full-time judges.

Nevertheless, there are persuasive reasons which militate against concluding that these positions are "judges of court of

record" as that phrase is used in Gov. Code § 87200. Among those reasons are the following:

- (1) The amendment (AB 809) was not intended to apply to these positions;
- (2) The number of filers will increase dramatically, thereby creating difficulties with respect to adequate review of the statements and the obfuscation of significant information because of the mass of data on file;
- (3) Many individuals may refuse to serve as commissioners, referees, temporary judges or judges on assignment if they are required to file statements of economic interests; and
- (4) Strict compliance with Gov. Code § 87200 would impede the judicial system's ability to use temporary judges and judges on assignment.

By limiting the judges covered by Gov. Code § 87200 to "judges of courts of record" the Legislature excluded judges of justice courts. This would seem to evidence an intention to exclude part-time judges and/or judges with limited jurisdiction, despite the fact that while sitting, a judge of a justice court exercises all of the powers of a judge with respect to those matters which are within his jurisdiction. See C.C.P. § 112. Moreover, the exclusion is significant in light of the fact that judges of justice courts are permitted to practice law and, therefore, the potential for conflicts of interest is great. Apparently, the Legislature concluded that despite this potential, and the concomitant need for disclosure, disclosure by part-time judges with limited jurisdiction was not warranted.

One possible reason why judges of justice courts were excluded is that inclusion would have increased the number of statements of economic interests being filed. Perhaps the Legislature was concerned that this would create problems relative to adequate review of the statements and the obfuscation of important information due to the mass of data on file. If this problem is a legitimate concern, its importance would be greatly enhanced by interpreting the phrase "judges of courts of record" to include commissioners, referees, temporary judges and judges on assignment. It is impossible to determine the precise number of additional statements which would be filed, but, assuming that all of the categories in question were deemed "judges," it undoubtedly would number in the thousands.

An additional consideration which may be relevant to this issue is the deterrent effect of a decision to require statements

of economic interests from commissioners, referees, temporary judges and judges on assignment. Many of the persons involved may decide that, in light of the extra paperwork and what they perceive to be an unwarranted intrusion on their privacy, they would prefer not to accept part-time assignments. Although these contentions also have been made by full-time officials covered by Gov. Code § 87200, they may have more impact coming from part-time officials such as temporary judges and judges on assignment when combined with the other considerations mentioned herein.

Finally, strict compliance with Gov. Code § 87200 may hinder the judicial system's ability to use part-time judges. Judges on assignment and temporary judges, for example, often are appointed on short notice and it might be impossible to comply with the requirement of Gov. Code § 87202 that statements of economic interests be filed "ten days prior to assuming office."^{1/}

The aforementioned considerations lead the staff to conclude that it probably was not the intent of the Legislature to include commissioners, referees, temporary judges and judges on assignment within the coverage of Gov. Code § 87200. Accordingly, we recommend that the Commission not deem such officials to be "judges of courts of record." If, however, the Commission disagrees with this recommendation, there is ample support for the opposite conclusion. Many of the concerns which motivated the Legislature to require permanent judges to disclose their economic interests are applicable to the officials in question. Moreover, since these persons serve "courts of record" and, at least for some purposes, act as judges or perform judicial functions, an argument can be made that they are "judges" within the meaning of Gov. Code § 87200 and that the public interest will be served by full disclosure.

^{1/}There also is some question whether temporary judges, judges on assignment and referees appointed pursuant to a general reference, would have to file anniversary statements pursuant to Gov. Code § 87203 and, if so, when.