

SUBORDINATE JUDICIAL OFFICERS AND MAGISTRATES
BACKGROUND MEMORANDUM
(January 4, 1999)

The Commission's report on *Trial Court Unification* listed as a subject for continuing study the topic of "magistrate as judicial officer of the state or judicial officer of a particular court." The topic was suggested because of some ambiguity in statutes dealing with preliminary hearings as to the precise nature of the magistrate's function and status. Upon further discussion and investigation, it was decided to expand the topic somewhat to encompass the status of subordinate judicial officers. This memorandum is intended to provide preliminary background information regarding magistrates and subordinate judicial officers.

Magistrates

Magistrates are quasi-judicial officers who perform certain constitutionally and statutorily defined functions in connection with the criminal justice system. There is no single, over-arching definition or listing of magistrates' powers, or even of who can be a magistrate. Magistrates are, in short, *sui generis*. As will be discussed, a magistrate is *not* a judicial officer of a particular court and does not exercise any court's trial jurisdiction. Instead, magistrates are judicial officers of the state.

Generally, only judges can act as magistrates. Penal Code § 808. In very limited circumstances, some commissioners are authorized to exercise some portion of a magistrate's power.

If courts in all counties unify, it is doubtful whether any useful purpose would be served by retaining the separate designation of "magistrates." The term was convenient when there were multiple trial courts since it permitted preliminary hearings and certain other routine criminal justice functions (e.g., warrants, bail, and arraignments) to be performed by judges from so-called "inferior" courts who were designated as magistrates. If all courts unify, however, there will be no "inferior" courts, and those functions will necessarily be performed by superior court judges acting in their role as magistrates. The entirely symbolic and seamless changing of roles between magistrate and superior court judge will serve no useful purpose.

In a fully unified state, the term "magistrate" can continue to have significant value only to the extent that someone other than superior court judges can exercise the powers of a magistrate. Under limited circumstances under current law, some

commissioners are authorized to exercise some magistrate power. The question for consideration is whether all commissioners should be given general authority to act as magistrates. If this were done, the term “magistrate” would retain meaning and utility since it would permit commissioners to exercise a well-defined but limited role in criminal justice proceedings.

Status and Function

The two most general provisions defining a magistrate’s powers are found in the California Constitution and in Section 807 of the Penal Code. According to Article I, Section 14 of the California Constitution, “[f]elonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.” *See also* Penal Code § 806 (proceedings before a magistrate). Section 807 defines a magistrate as “an officer having power to issue a warrant for the arrest of a person charged with a public offense.”

Originally, Section 808 of the Penal Code designated as magistrates justices of the supreme court, district judges, county judges, the judge of the municipal criminal court of San Francisco, justices of the peace, and police magistrates in towns or cities. In 1880, the statute was amended to add judges of the superior courts and omit district judges, county judges and the judge of the municipal criminal court of San Francisco. Over the years, the statute was amended at various times to add judges or delete judges. Today, Section 808 of the Penal Code designates as magistrates judges of the Supreme Court, courts of appeal, superior courts, and municipal courts. Section 809 provides that “[t]he night-time commissioner of the Santa Clara County Superior Court shall be considered a magistrate for the purpose of conducting prompt probable cause hearings for persons arrested without an arrest warrant as mandated by law.”

The limits of a magistrate’s function were outlined in an 1897 California Supreme Court case that still is good law:

A superior judge, when sitting as a magistrate, possesses no other or greater powers than are possessed by any other officer exercising the functions of a magistrate The office is purely a statutory one, and the powers and duties of the functionary are solely those given by the statute; and those powers are precisely the same, whether exercised by virtue of one office, or that of another As such magistrate, he is purely a creature of the statute. People v. Cohen, 118 Cal. 74, 78 (1897).

In 1986, the Third District Court of Appeal noted that when a judge acts as a

magistrate, he does not do so as a judge of a particular court but rather as one who derives his powers from the provisions of Penal Code Sections 807 and 808. People v. Superior Court, 187 Cal.App.3d. 648, 654 (1986). The court noted that the appellate jurisdiction of the superior court over inferior courts does not include the orders of a magistrate, which cannot be appealed because the term “inferior court” does not encompass a municipal or justice court judge sitting as a magistrate. Id. “This is a limitation arising out of the nature of the office of magistrate.” Id.

The Second District Court of Appeal in 1967 noted, “By initiating proceedings before magistrates, no trial jurisdiction of any court is invoked.” People v. Scofield, 249 Cal.App.2d 727, 735 (1967).

Witkin has written two pertinent sections on magistrates:

The magistrate’s principal functions, normally exercised by municipal and justice court judges, are issuing arrest warrants, fixing and granting bail, conducting preliminary examinations, and conducting peace bond proceedings. 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Sec. 1809, p. 2142.

A distinction is made in criminal cases between a court or judge and a magistrate. Judges of the various trial and appellate courts are magistrates, exercising special statutory powers of the office, e.g., conducting a preliminary examination of a person charged with a felony by information. When sitting as a magistrate, the judge is not acting as a court or judge, and has only those special statutory powers. 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, Sec. 25, p. 49.

Specific Duties

A magistrate issues arrest warrants (Penal Code §807), search warrants (Penal Code §1523), bench warrants (Penal Code §881), and warrants of commitment (Penal Code §1488); sets bail (Penal Code §815a), conducts the preliminary hearing and binds the defendant over for trial or releases him at the conclusion of the hearing (Penal Code §858 et seq.); and has authority to conduct peace bond proceedings (Penal Code §701-14). Section 810 of the Penal Code requires each superior court to designate an on-call magistrate to handle search warrants, discharges on bail, and other matters when court is not in session.

Preliminary Hearing

A series of code sections about the “Examination of the Case,” Penal Code Sections 858-72, outlines the procedure for the preliminary examination and for disposition by the magistrate depending upon whether probable cause is found. The United States Supreme Court explained the procedure in Press-Enterprise v. Superior Court, 478 U.S. 1, 11-12 (1986):

In California, . . . [e]ven when the accused has been indicted by a grand jury . . . he has an absolute right to an elaborate preliminary hearing before a neutral magistrate. The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. If the magistrate determines that probable cause exists, the accused is bound over for trial; such a finding leads to a guilty plea in the majority of cases.

[U]nlike a criminal trial, the California preliminary hearing cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury.

Arraignments

A number of officials may preside at arraignments, including magistrates.

Several code sections refer to defendants appearing before magistrates for arraignment. Penal Code §853.6, 859b, 991. The arraignment must be made by the court, or by the clerk or prosecuting attorney under its direction. Penal Code § 988. As discussed more fully below, a commissioner of a municipal court may conduct arraignments if directed by the presiding judge. Gov. Code § 72190.1.

Bail

A magistrate has little discretion in setting bail. The magistrate fixes the amount of bail at time of issuing an arrest warrant. Penal Code §815a. The superior and municipal court judges in each county prepare a uniform countywide schedule of bail for allailable felonies, misdemeanors and infractions (except Vehicle Code infractions). Penal Code §1269b.

If a defendant has appeared before a judge on a complaint, indictment or information, bail is fixed by the judge at time of the appearance. If the appearance has not been made, bail is as fixed in the arrest warrant. If no arrest warrant has been issued,

the amount of bail is pursuant to the bail schedule in the county. Penal Code §1269b.

Before a court reduces bail below the schedule for a person charged with a serious or violent felony, the court must find unusual circumstances. Penal Code §1275.

Peace Bonds

Magistrates have authority under Penal Code Sections 701 through 714 to conduct peace bond proceedings. In such proceedings, magistrates take an information that a person has threatened another person or another person's property, issue an arrest warrant, take testimony, decide whether to release the person or to require him/her to provide an "undertaking" up to \$5000 to keep the peace. The peace bond is good for six months and is renewable. If the person gives the bond s/he is discharged; if not, s/he goes to prison until he gives the bond. If a person released on a peace bond breaches the peace, the "undertaking" is broken and the district attorney will prosecute. The offense is called "breach of undertaking."

Witkin notes that this proceeding is designed to prevent commission of a crime and is not a criminal proceeding to punish for a crime; therefore, it does not come within the scope of the constitutional guarantee of a jury trial. 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §26, p. 82.

The cases governing peace bond proceedings are very old. In 1898, the California Supreme Court said:

The magistrate's determination that there is just reason to fear the commission of the offense justifies his order in putting the accused person under bonds to keep the peace, and, in the event of his failure to give the required bonds, then to order him committed to jail. From this order no appeal lies. The justice's [justice of the peace acting as magistrate] jurisdiction is as complete as it is in cases of battery, petty larceny, and other like misdemeanors. His conclusion is . . . a final determination upon the merits of the controversy and his order that the accused person stand committed contains all the essentials of a final judgment. Holliday v. Holliday, 123 Cal. 26, 32-33 (1898).

In 1919, after a defendant appealed a peace bond to the Superior Court, the Second District Court of Appeal noted:

[C]hapter 3, under which the proceeding was had before the magistrate, makes no provision for an appeal Hence it follows that the superior

court acted in excess of its jurisdiction: First, in entertaining the appeal at all; and, second, assuming the order to be the subject of appeal, in making the order complained of without a trial de novo. Ross v. Superior Court of Imperial County, 39 Cal.App. 590, 592 (1919).

Writs of Habeas Corpus by individuals who are in prison for failure to pay a peace bond appear to go directly to the courts of appeal. See, e.g., In the Matter of George E. Satterthwaite, 32 Cal.App.2d 630 (1939).

One author has noted that “The peace bond is an obscure and rarely applied provision in the statutes of most states.” Sidney Childress, Peace Bonds -- Ancient Anachronisms or Viable Crime Prevention Devices?, 31 Am.J.Crim.L. 407, 408 (1994). The writer pointed out that equal protection doctrine eviscerates the usefulness of peace bond statutes against indigent defendants because the peace bond statutes specify a monetary requirement. Childress at 409.

Court Commissioners

The authority of court commissioners is derived from Article 6 of the California Constitution, Sections 21 and 22, which provide for temporary judges and for courts to appoint officers such as commissioners to perform subordinate judicial duties.

The powers and duties of court commissioners are outlined in the Code of Civil Procedure Section 259. The powers and duties of municipal court commissioners are found in Government Code Section 72190.

The legislature has provided that superior courts may appoint a specified number of court commissioners, depending upon the size of the counties, to help the superior courts dispose of their business connected with the administration of justice.

Generally, the powers and duties of court commissioners are:

1. to hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court,
2. to take proof and report findings as to any matter of fact on which information is required by the court,
3. to take and approve and determine objections to bonds and undertakings,
4. to administer oaths and affirmations, and take affidavits and depositions in any action, proceedings or matter,
5. to take acknowledgments and proofs of deeds, mortgages, and other instruments

- requiring proof or acknowledgment for any purpose,
6. to act as temporary judge when otherwise qualified to so act and when appointed for that purpose,
 7. to hear and report findings and conclusions to the court for approval, rejection or change, all preliminary matters including motions or petitions for custody and child support, temporary spousal support and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage or legal separation,
 8. to hear actions to establish paternity and to establish or enforce child and spousal support.
 9. to hear, report on, and determine all uncontested actions and proceedings,
 10. to charge and collect the same fees as notaries public,
 11. to provide an official seal, and
 12. to authenticate the commissioner's acts with the official seal.

Cal. Civ. Proc. Code §259.

Court commissioners have the power to act as temporary judges by stipulation of the parties. The jurisdiction of a court commissioner, or any other temporary judge, to try a cause derives from the parties' stipulation. In the absence of a proper stipulation, a judgment entered by a court commissioner would be void. In re Horton, 54 Cal. 3d 82, 90 (1991).

Commissioners of municipal courts have the same powers as commissioners of superior courts and additional powers as may be prescribed by law. Gov. Code §72190. Municipal court commissioners may conduct arraignments, issue and sign bench warrants. Gov. Code 72190.1.

The line between the powers of judges that may properly be delegated to a court commissioner and those judicial powers which under the constitutional separation of powers are not so delegable is not always easy to define. A court commissioner has no power to appoint a receiver, to punish an individual by fine or imprisonment for contempt or to order discharge of attachment. 16 Cal.Jur.3d (Rev) Part 1 Courts §39.

Court Commissioners as Magistrates

The second district court of appeal has discussed the status of court commissioners and their relationship to magistrates:

A court commissioner is a judicial officer authorized by the California

Constitution. The purpose of commissioners is to assist an overburdened judiciary with the performance of subordinate judicial duties. Under Penal Code section 808, all judges are magistrates. But “section 808 does not make that an exclusive list. It does not say that other judicial officers cannot be magistrates.” Branson v. Martin, 56 Cal. App. 4th 300, 305 (1997).

The court in Branson found that a commissioner acted as a magistrate in a traffic infraction proceeding. Id. at 306.

The issue of whether commissioners can be magistrates was addressed in two California Attorney General Opinions issued before the Branson decision. In 1978, the attorney general found that a commissioner of the municipal court who was sworn as a temporary judge of the municipal was not a magistrate and therefore could not issue arrest warrants or search warrants. 61 Ops.Cal.Atty.Gen. 487 (1978). The rationale was that Penal Code § 808 does not list a temporary judge of the municipal court as a magistrate and, therefore, a temporary judge does not have the power to issue a search warrant or an arrest warrant. However, in a situation where a defendant on bail had stipulated to the use of a temporary judge, and then that defendant failed to appear, the temporary judge would have the power to issue a bench warrant. Id.

In 1984, the attorney general found that a municipal court commissioner who is not a temporary judge, when he or she is conducting an arraignment in a criminal case, may be assigned only subordinate judicial duties, which are duties not involving serious, complex or diverse issues of fact or law. 67 Ops.Cal.Atty.Gen. 162 (1984). Therefore, a court commissioner is prohibited from taking and entering a guilty plea at an arraignment. Id. However, a commissioner may take and enter a not guilty plea. Id.

The attorney general also found that the legislature has not authorized municipal court commissioners to conduct preliminary hearings in felony cases and that to preside over a preliminary hearing the municipal court commissioner must have the stipulation of the defendant and prosecutor which authorizes him to act as a temporary judge. Id. Therefore, a municipal court commissioner who is not a temporary judge does not have the authority to preside over the preliminary hearing of a defendant charged with a felony offense. Id. The attorney general noted that this opinion does not encompass court commissioners who are temporary judges acting upon stipulation of the litigating parties, who have full judicial power, or court commissioners acting as traffic referees or traffic trial commissioners. Id.

Referees

Unlike Magistrates and Court Commissioners, which derive some of their authority from the California Constitution, referees appear to be entirely statutory creations.

Code of Civil Procedure Sections 638-44 provide for reference, or referral to a referee. Code of Civil Procedure Section 638 provides that references may be ordered upon the agreement of the parties “to try any or all issues of fact or law and report a statement of decision.”

A reference, whereby a person is appointed by the court to take testimony or exercise other judicial powers and report his findings, is a quasi-judicial proceedings and has been sustained against the constitutional objection that it constitutes an improper delegation of judicial authority. 55 Cal.Jur.3d. Referees Summary at 211. A general reference is a trial before a referee on all issues of fact or of law. Such references only may occur with the consent of the parties and the referee’s findings stand as the findings of the court. Id. A special reference does not determine the whole issue and the referees report requires further court action. Id. A reference on agreement of the parties in an action at law constitutes a waiver of the right to jury trial. Id. In the absence of consent of the parties, references may be compelled only in actions which are equitable and only when otherwise authorized by statute. Id. According to Code of Civil Procedure Section 644, the decision of the “referee or commissioner upon the whole issue must stand as the decision of the court.”

Respectfully submitted,

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