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First Supplement to Memorandum 85-64

Subject: Study L - Drafting Rules and Principles for New Probate Code

From time to time at Commission meetings questions have been raised concerning various drafting matters involved with the new code. The questions have ranged from, "Why aren't the numbers consecutive and why is so much space left between major subdivisions of the code?" to "Why do we say shall instead of must and why do we refer to a subdivision rather than a subsection of a provision?"

Attached to this supplementary memorandum are drafting rules and principles that we have referred to on occasion when such questions have come up. These rules and principles were developed by the Code Commission for use in its work of codifying the entire statutory law of California between 1930 and 1953. All of the codes compiled by the Code Commission follow these rules and principles. The Law Revision Commission has continued to follow the rules and principles of the Code Commission, as has the Legislative Counsel, to help achieve consistency throughout the codes.

The Code Commission's rules and principles were published as Appendix G of its 1949 Annual Report, which is reproduced here in its entirety with the exception of the Introduction (which deals with the procedure used by the Code Commission) and Rule 6 (which deals with the manner in which Code Commission draftsmen display the results of their work). The rules and principles answer the questions referred to above, as well as other questions raised at Commission meetings such as, "Why do we break up long sections into shorter sections?", "Why are parallel provisions consolidated into a single unit?", and "Why are verbose sections rewritten in simpler language?"

Respectfully submitted,

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APPENDIX G

DRAFTING RULES AND PRINCIPLES FOR THE USE OF
CALIFORNIA CODE COMMISSION DRAFTSMEN

1. The draftsman should follow the general style of the make-up of the codes heretofore adopted. The material in a code may be segregated into General Provisions, Titles, Divisions, Parts, Chapters, Articles, and Sections, depending upon the complexity of the material assigned to a particular code. Titles and parts are not used unless essential. The physical structure of a code should be as simple as possible to facilitate citation of portions thereof.

The General Provisions contain the short title for the code, sections designed to aid in interpretation, and definitions which are applicable to the code as a whole. Certain standard sections have been approved by the Code Commission for inclusion in the general provisions of all codes. In some instances nearly all of the definitions in the code will be contained in the General Provisions. In other instances it will be found necessary to provide for definitions at the commencement of a division and occasionally at the commencement of a smaller subdivision. Where the definition is applicable to only one section, it should be included in the appropriate section rather than in the General Provisions. Normally the general provisions are drafted after the rest of the code is completed, but notes should be kept as drafting progresses as to matters which should or should not be included in the general provisions.

Where definitions applicable to a particular subdivision are set out at the commencement thereof, they should be placed in a separate subdivision, i.e., chapter, or article, as the case may be.

We use arabic numbers in designating titles, divisions, parts, chapters, and articles. In some of the earlier codes, roman numerals were used to designate major subdivisions. However, matters of form and style in state printing are determined by the State Printer and when copy is submitted to him for printing either as part of the statutes or in state publications, such matters are changed to conform to the current Style Manual. Several years ago the Style Manual was revised, and the use of roman numerals for main divisions of codes was discontinued.

Each section of a code is given a number which is not preceded by "Sec.," as in the case of general laws.

Each subdivision of the code other than sections is given an appropriate title. One of the sections in the General Provisions provides that these titles do not limit the scope of the subdivision. It is not our practice to write section headings. This rule was not followed in the case of the Vehicle Code, but otherwise has been adhered to. With the exception of the original code sections of the 1872 codes and except for a few isolated instances, the section headings appearing in privately published editions of the codes are not part of the official text, but have been added by the editors. When codifying a section which has a heading, the heading should be deleted.

2. No arbitrary rules can be laid down for the arrangement of the material allocated to a code to fit the framework just outlined. Here the logic and good sense of the draftsman is the primary factor. However, certain points may well be considered.

It is usually desirable to set out administrative provisions before setting forth the powers and duties of the administering officer. Thus, we say, "There is in the department (of finance) the division of state lands, in charge of a chief, etc.," before we say, "The chief shall do so and so."

Where different chapters deal with similar subjects, use the same internal arrangement in each chapter. Thus we have:

- "Ch. 3. Pilots for Humboldt Bay.
- Art. 1. Board of Pilot Commissioners.
- Art. 2. Regulations.
- Art. 3. Suspension and revocation of licenses."

The contents of Chapter 4, "Pilots for San Diego Harbor," should be similarly arranged.

The value of this arrangement is obvious, but there are also advantages not immediately apparent. One result is the emphasis placed on points wherein one chapter differs, perhaps unnecessarily, from the other—sometimes resulting in subsequent amendments which will make the chapters uniform. Such amendments may then make a rearrangement of this portion of the code possible in one chapter, as follows:

- "Ch. 3. Bay and Harbor Pilots.
- Art. 1. Board of Pilot Commissioners.
- Art. 2. Regulations.
- Art. 3. Suspension and revocation of licenses."

This last suggested arrangement is one of a type which should be used whenever possible—that is, the consolidation of two or more acts into a single chapter. Aside from the space saved, the uniformity in the law facilitates its administration.

Examples of consolidating several statutes will be found in the Welfare and Institutions Code as originally enacted. There, for instance, it was possible to consolidate the statutes relating to correctional schools into one chapter. The few provisions which were applicable to only one school were set forth in separate sections of this chapter.

3. In numbering the sections of the proposed code, the draftsman must bear in mind, especially in his first draft, that as he proceeds with his work he may become convinced of the need for rearranging portions of the material. Consequently he must leave liberal gaps between subdivisions of the code in order to accomplish this result without the need for a great deal of renumbering of sections.

Even more important than this, however, after the code is adopted, substantial amendments may be made to it at that same session of the Legislature and will certainly be made at subsequent sessions. New articles, chapters, and even divisions, may be added. In adding new material the Legislature (with the assistance of the Legislative Counsel) will attempt to place it at the most logical point in the code. Unless the draftsman has skipped enough section numbers between subdivisions at that "most logical" point, the new sections must be given fractional numbers or numbers plus alphabetical additions, in order to squeeze in the new subdivision. No draftsman who has had legislative experience in preparing amendments to codes heretofore adopted need be cautioned to be liberal rather than stingy in skipping sections.

Just how much room to leave between subdivisions is partly a matter for discretion on the part of the draftsman. In some instances where the likelihood of future amendment appears remote, the number of sections to be skipped need not be as great as in cases where it appears possible or probable that future Legislatures may make changes in the law. The following schedule is suggested as representing the minimum number of sections to be skipped between subdivisions. This schedule should be adhered to unless the editor concurs with the draftsman that an exceptional situation exists. As to whether to skip more sections than the minimum set forth, the draftsman's good judgment should control.

Minimum Number of Sections to Be Skipped

After the general provisions:

To the next even 100.

Between divisions:

500 plus to the next even 500 or 1000 (except between the next to the last division of the code and the last division, which normally is the division setting forth the laws and code sections repealed by the new code, between which divisions a skip of 10,000 or more is desirable).

Between parts:

200 plus to the next 100.

Between chapters:

100 plus to the next even 50 or 100.

Between articles:

20 plus to the next even 5 or 10.

There may be an exception as to the gaps between divisions, depending upon the relationship of the subject matter in successive divisions. Sometimes where a division ends in a number such as 550, the next division can well be commenced with the number 1001 instead of 1501, as would be the case if the foregoing minimum is strictly followed.

In divisions having chapters only and not subdivided into parts, leave larger gaps between chapters, probably 200 sections plus to the next 100.

Sometimes a code is divided into a number of rather short divisions, in which case smaller gaps may be used, particularly where the divisions are not further subdivided into chapters. Suggested minimum: 200 plus to the next 100.

The following example illustrates the application of the above rules:

Proposed Code

General Provisions 1-23

DIVISION 1.

Part 1.

Chap. 1.

Art. 1.

101-123

Art. 2.

151-157

Art. 3.

181-228

Chap. 2.

351-378

Chap. 3.

501-596

Part 2.

800-1250

Part 3.

1500-1570

DIVISION 2.

2001-2350

DIVISION 3.

Chap. 1.

3001-3080

Chap. 2.

3201-3350

Chap. 3.

3501-3700

DIVISION 4.

4501-4820

DIVISION 10 (or 20) Repeals.

10001-10008

One point on which the draftsman should endeavor to be consistent is as to whether each subdivision of the code is commenced with a number divisible by five, or such a number plus one. That is, whether to commence a new article with 100, 150, or 175, or whether the first number of each such article is 101, 151, or 176.

One difficulty with being consistent on this score occurs because of the fact that after a subdivision has been drafted, it may later appear advisable to add one or more sections at the commencement of the subdivision. Where this is done and the article can be conveniently renumbered, that practice should be followed. However, you will find instances where subdivisions commence with numbers like 597 or 598 because of sections added where renumbering would involve changing the numbers of 50 or more sections and possibly changing or failing to change necessary cross references elsewhere in the code.

In our codes we endeavor to break up the law into comparatively short sections. The primary purpose of this is to facilitate subsequent amendment and to reduce the length of amendatory bills which must conform to the constitutional requirement that the section amended must be set forth at length. The draftsman must be careful, however, to avoid the use of sections that are too short. This fault is not readily apparent in the original draft of a code. However, if a section is lifted out of its context, as it is in an amendatory bill, its brevity may make it unintelligible. For example, no beneficial purpose is served by placing in separate sections the law specifying that a given state department is under the control of an officer known by a given title, the provisions regarding appointment and tenure, the salary, and the amount of the bond to be filed by him. All of these provisions can be set forth in one well-rounded section that will not be more than ten or fifteen lines in length and which, if taken out of its context, will let the reader know what it is all about. On the other hand, a section reading: "The director is appointed by and holds office at the pleasure of the Governor. The annual salary of the director is \$12,000," is incomprehensible when taken out of its context.

Generally speaking, in determining how much should be placed in a section, we apply the rules of composition as to what would be placed in a paragraph.

Two common exceptions to this rule should be noted. Where other sections in the same article each deal with a separate subject, you may find it necessary to include more than one paragraph in some section where each paragraph is related to the other and all deal with the same subject. The reason for the exception is apparent in cases where one paragraph modifies or limits the preceding paragraph only. Correct interpretation is aided by including both paragraphs in the same section, thus avoiding a possible construction that the modifying paragraph affects all sections in the article.

A second exception is in the matter of enumerations, where each paragraph is designated (a), (b), or (c), etc. It is desirable to include such subdivisions in a single section. The practice (e. g., see Sections 335-341, C. C. P., re limitation of actions) of setting forth in one section incomplete phraseology which does not express a complete thought without reference to another section is not approved. Where the inclusion of all the paragraphs in the enumeration would result in an unduly long section, use the following device:

801. The district may:

- (a) * * *
- (b) * * *, etc.

802. The district may also: (Or a similar phrase.)

- (a) * * *
- (b) * * *, etc.

While enumerations of this type are used frequently with approval, we do not ordinarily use long sections consisting of lettered *subdivisions*. The material included in subdivisions in most statutes may usually properly be placed in separate sections, thus facilitating subsequent amendment.

Incidentally, we do not use the term "subsection." Where such a cross-reference is necessary, say "in *subdivision* (b) of Section 304."

One test that has been suggested for ready determination as to whether a section is too short or too long, is for the draftsman mentally to write a heading for the section. If a single heading will not comprehend all of the contents of a section, it is probably too long insofar as it contains unrelated matters. On the other hand, if a series of short sections seem to call for an identical heading or if they separately cover relatively minor matters that could well be covered by a single major heading, it is probable that the sections could be consolidated.

4. The draftsman must adhere to the accepted rules of composition, grammar, punctuation, and spelling. Wooley's New Handbook of Composition and Webster's New International Dictionary are customarily relied upon in this connection. The draftsman must also keep in mind the principles of statutory construction as expounded by the courts. Remember that it is not enough to convince yourself that you have restated the law in your code without substantive change. The courts may be called upon to decide that question and they may not agree with you if you fail to follow their precepts.

Bear in mind at all times that the purpose of codification is to present not only a *concise* but also a *clear* statement of the law. There is much superfluous verbiage and repetition in the statutes that can be eliminated in the process of codification. However, clarity should never be sacrificed in the interests of brevity. The draftsman should avoid any tendency to use a style similar to that commonly used in writing telegrams. While no useful purpose is served by leaving really unnecessary words and phrases in the law, the draftsman should be careful not to delete phraseology unless he is sure that the remaining context is free and clear from ambiguity and, also, that it reads smoothly and is grammatically correct. The draftsman should not hesitate to add words or phrases to the law whenever doing so avoids ambiguity.

In cases of doubt as to whether a provision is superfluous, give the provision the benefit of the doubt. Leave it in unless satisfied beyond reasonable doubt that it can be deleted. Especially to be avoided is the deletion of a phrase at one point and the failure to delete the same or a like phrase at another point.

5. The foregoing paragraphs suggest that something may appropriately be said here regarding the virtue of consistency in style and phraseology in codification. It is not our purpose to deify consistency. It cannot be denied, however, that consistency is of value as an aid to interpretation, that it facilitates use of a code, and that it improves its literary quality. Referring again to "Chapter 3. Pilots for Humboldt Bay" and "Chapter 4. Pilots for San Diego Harbor," if the powers and duties of the board

of pilot commissioners and the pilot regulations are set forth in exactly the same order in each chapter, it is easy to determine quickly wherein the law is the same for each part and wherein it differs. If this practice is not followed, one must read all of Chapter 4 in order to be sure that it does not contain like provisions to those of some section in Chapter 3.

So, also, the draftsman must use extreme care to use the same language to mean the same thing in different parts of the code. This is not as easily done as it might appear. As between Chapters 3 and 4 a comparison may readily be made, but the draftsman may well have forgotten when he reaches Chapter 9 that there are similar provisions in Chapter 3. Each code should be read at least once by the draftsman for the sole purpose of catching inconsistencies in language.

Insofar as inconsistencies in phraseology are carried over into the code from the existing law, the defect is one of style only. The real danger arises when the draftsman recasts a section of deletes or adds a word at one point and neglects to do so in a similar situation at another. This failure may result in an unconscious apparent substantive change and one which may not be caught until after the code is adopted. A court may at some future time determine that the difference in phraseology is intended to convey a different meaning particularly if the court looks only to the code, without reference to the statutes codified in it.

7. If the draftsman will remember that laws are to be written in the English language and not in a stilted, repetitious jargon that "sounds legal," and if he will apply the ordinary rules of grammar and composition in his work, he will have no difficulty completing a draft of his code which will be approved by his editor and the Code Commission committee. Most of the changes in language made in codification are deletions of surplusage and substitutions of simple phrases for cumbersome expressions. Strive to achieve the force and certainty of simplicity in your work. Avoid the tendency of legislative draftsmen to "tie everything together." The statutes are replete with single sentences that extend through one or more printed pages.

"Shall" is declared to be mandatory and "may" permissive by the general provisions. These words may be substituted for numerous phrases.

"The director shall" for—

"The director is hereby authorized and directed"

"It is the duty of the director to, etc."

"The director may" for—

"The director is hereby authorized and empowered"

"The director shall have power to"

"Shall" is substituted for "must," which word is not used in the codes.

State the law in the present tense, simply and directly. "Any person who shall violate any of the provisions of this section shall be guilty of a felony and shall be punished by, etc." "It is hereby declared to be a misdemeanor, etc." Change "If there be" to "If there is."

Where something "is," do not say "shall be deemed (or shall be construed) to be," as "shall be deemed to be guilty of a misdemeanor."

Use an active rather than a passive form. Say "Each licensee shall keep records, etc.," not "Records shall be kept, etc." One hazard avoided is the possibility of neglecting to say who shall keep the records or who is responsible for failure to do so.

The use of "said" and "such" in referring to a person or thing is poor drafting practice—primarily because these terms have been overworked. It is seldom necessary for purposes of certainty to "tie together" phrases with these words. "The court" is usually as free from ambiguity as "Said court" (or, properly, "The said court"). If you must use "said" do not neglect to use "the" preceding it. "Said" is not a substitute for "the," although commonly so used, and the use of "said" does not justify omission of the article.

"The same" as a substitute for a pronoun is disapproved. Someone has said that if the substitution of the proper pronoun for this expression leaves the text ambiguous, recast it at once, because it needs recasting.

"And/or" is taboo. Writers and courts condemn its use.

The use of "hereinbefore" and "hereinafter" is condemned. Avoid these indirect cross-references and use direct cross-references sparingly. Frequently you will find that cross-references in the existing law serve no real purpose and that they may properly be deleted.

"Provided that" and "Provided, however," are taboo. These expressions are seldom used properly. The clauses which they precede are usually not provisos in the true sense of the word. Sometimes "except" is a proper substitute. Frequently proper style calls for striking the phrase, substituting a period, and commencing a new sentence.

We say "'Food' means" in place of "The word 'food' means." The deleted language is superfluous. Note the distinction between "'Food' means" and "'Food' includes." Do not say, "Food means and includes."

"In (or 'of') the State" is frequently surplusage, and "(State) of California" is seldom necessary. Say: "Appear for the people of the State of California." "Any city or county in this state."

In referring to state departments and officers, "state Controller" is usually sufficient. Exceptions may arise in cases where a law refers to both state and county or city departments or officers having like or similar titles.

~~"A department of the~~ *There is in the State Government to be known as the Department of Industrial Relations is hereby created.*" (This example is the approved style of codifying provisions of law creating offices. Note, also, the next example.)

~~"shall be deposited in the pension fund, which fund is hereby created continued in existence."~~

"Now or hereafter" is unnecessary in "The director shall perform all duties ~~now or hereafter~~ vested by law in the department." Where "now" has a real significance, as "Each actual settler now occupying tidelands has a preference right, etc.," substitute the appropriate date, which usually is the effective date of the statute being codified.

When making provision for expiration dates of terms of members of existing boards, etc., one device used is, "The terms of the members of the commission in office at the time this code takes effect shall expire on January 15th of that year which for the particular member has heretofore been determined." It is preferable, however, to use the style of Section 1603 of the Business and Professions Code, "The terms of the members of the board in office at the time this code takes effect shall expire as follows: Two members January 15, 1938; one member January 15, 1939; etc. The terms shall expire in the same relative order as to each member as the term for which he holds office before this code takes effect."

Keep in mind the definitions and phraseology used in other codes. For instance, the Insurance Code uses "insurer." Use this term in your code in place of "insurance company."

Various phrases have been used for cross-references. "As provided in Section 23," "under the provisions of Section 23," "pursuant to Section 23," "prescribed by etc.," and "as provided in this article," are only a few. "Pursuant to Section _____," seems adequate and preferable. The draftsman may, perhaps, be allowed some discretion here, but he should endeavor to be fairly consistent. In any case, however, the words "provisions of" seem superfluous. The draftsman will find it helpful to keep a record of cross-references in his code to insure making all necessary changes if he finds it necessary to renumber sections. A convenient method is to note the section numbers of sections where cross-references occur in the margin opposite the section to which reference is made.

When subdividing a section, designate the subdivisions with lower case letters in parentheses, (a), (b), etc., not followed by periods. In subdividing a lettered subdivision, use Arabic numerals in parentheses, thus:

- (b) (1) -----
- (2) -----

When subdividing in cases where the subdivisions relate back to the introductory clause, adopt a style which obviates any need for using "and" or "or" preceding the last subdivision, thus:

"----- who comes within any of the following classes:

- (a) -----
- (b) ----- ('or' unnecessary here)
- (c) -----"

"----- who meets all of the following requirements:

- (a) -----
- (b) ----- (no 'and')
- (c) -----"

Further examples may be found in Sections 2920 and 2921 of the Labor Code, and also in other codes.

We have adopted a rule that, in punctuating a series, a comma shall be used preceding the conjunction: "A, b, and c," and "A, b, or c."

Delete references to payment in "gold coin." Substitute "lawful money."

Where an offense is a misdemeanor and the section also prescribes the penalty, the penalty should be deleted where it is the same as that prescribed by the Penal Code, a maximum of six months or a fine of \$500, or both.

In referring to code sections use Arabic numbers. Generally numbers are spelled out, as "five thousand dollars," and the number is repeated in parentheses (\$5,000). So, "twenty days," but say "June 1, 1937." Sometimes Arabic numbers are preferable, as "\$5,372.50." However, when the proposed code is printed, the State Printer will follow his style manual in this respect.

Although the Constitution and statutes still authorize the incorporation of towns (Section 6, Article XI, Constitution; Statutes of 1856, Chap. 133, page 198), we have found no governmental entity still a going concern which is incorporated as a town, as distinguished from incorporation as a municipal corporation or city. Hence, references to "towns" may ordinarily be deleted.

"Person" is usually defined in the code as meaning persons, firms, corporations, etc. You will find instances where "person" in a statute being codified means an individual. In some cases "natural person" may be used. In the Business and Professions Code, "person" is not defined. Similar problems may arise in other codes.

Check references to titles of officers, departments, etc., to ascertain (a) whether the name is correct and (b) whether the duty imposed may have been transferred to another officer or body. For example, "Board of Control" frequently means "Department of Finance." The old board was abolished in 1927 and the Department of Finance succeeded to its powers and duties. The present Board of Control is quite a different body. Great care must be used, therefore, to determine just which body is meant when you find "Board of Control" in a statute. Note that it is "Director of Finance" and not "of the Department of Finance," and similarly as to other department heads.

Consider the effect of the civil service constitutional amendment (Article XXIV) upon salary, tenure, and appointment provisions. The tenure provisions are usually void, but the salary provisions should usually be retained and also the designation of the appointing power.