

## Second Supplement to Memorandum 88-59

Subject: Topics and Priorities for 1989 and Thereafter (New Topics)

The Commission has received three letters suggesting technical revisions in the statutes. See Exhibits 1 to 3.

Motion for Summary Adjudication of Issues

Jeffrey B. Singer of Downey (Exhibit 1) makes a case that the third sentence of Code of Civil Procedure Section 437c(f), relating to summary adjudication of issues as to which there exists no substantial controversy, erroneously states just the opposite of what is intended. He suggests the following clarifying revision:

(f) A party may move for summary adjudication of issues, either by itself or as an alternative to summary judgment. If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that those issues are without substantial controversy. *Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists a no material, triable controversy, and shall specifically refer to the evidence which establishes a ~~triable issue of fact~~ those facts regarding each of those issues.* At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

The staff does not necessarily agree with Mr. Singer's analysis that the third sentence says the opposite of what it means. It appears more plausible to the staff that the third sentence means just what it says, but that it has been improperly inserted in the wrong spot in the statute and should be relocated.

In any case, this is not a matter the Commission is currently authorized to study. Does the Commission wish to request authority to study it? The staff does not believe this matter is of sufficient importance to warrant a request of authority on it.

It would be nice to have general authority to recommend minor revisions to cure problems such as this that arise in the area of civil procedure from time to time. The Commission has requested authority to study the Code of Civil Procedure before, but the Legislature has not been willing to give such broad authority to the Commission.

#### Proof of Service by Mail

Professor Benjamin Frantz of McGeorge School of Law (Exhibit 2) suggests technical revisions in the wording of Code of Civil Procedure Section 1013a(3), relating to the contents of an affidavit of mailing for proof of service purposes. Basically, the person completing the proof of service affidavit, rather than being required to state that the document "was" deposited for collection in the US Mail, would be required to state in the affidavit that the document "will be" so deposited.

Although Professor Frantz' suggestion seems to make logical sense, this is not a matter the Commission is authorized to study. The statute appears to be functioning just fine in practice despite the logical gap in the wording of the statute. The staff does not believe that this matter merits a Commission study. Here, again, it would be nice to have general authority to act in this area. But, alas ...

#### Probation

Judge Steven Z. Perren of Ventura County (Exhibit 3) suggests that (1) the provisions of Code of Civil Procedure Sections 131.3 to 131.7 governing criminal pre-plea probation officer reports should be relocated to the Penal Code where they belong, and (2) the conflict between Penal Code Section 1203.066(a)(1) (prohibiting probation for child molestation by means of force) and Penal Code Section 1203.065(b) (allowing probation for child molestation by means of force in an unusual case) should be resolved.

The staff would forward these suggestions to the Joint Committee on Revision of the Penal Code.

Staff Recommendation

Because of the frequency with which the Commission receives suggestions for minor statutory revisions to correct technical and other problems, it may be appropriate to seek permanent legislative authority to study and make recommendations concerning these minor matters. This would be much narrower than the general authority to study any topic relating to civil procedure that the Legislature previously rejected. A provision could be added to the Commission's enabling statute along the following lines:

Gov't Code § 8298 (added). Minor and technical revisions

8298. The commission may study and recommend revisions to correct minor or technical defects in the statutes of the state, without prior concurrent resolution of the Legislature referring the matter to it for study.

The explanation in the Annual Report of this addition to the Commission's enabling statute would point out that:

As a general rule, the Law Revision Commission may study only matters referred to it by concurrent resolution of the Legislature. Government Code § 8293. However, the Commission frequently receives letters pointing out technical and minor substantive defects in the statutes that could and should be easily and simply cured with no significant commitment of Commission resources. The Commission should be authorized to recommend such obvious changes to the Legislature without the added time and expense involved in obtaining a prior concurrent resolution of the Legislature. The authority of the Commission to study and make recommendations to the Legislature without prior concurrent resolution would be limited to correction of minor or technical defects.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT 1

TREDWAY, BRANDMEYER, BRAZELTON & LUMSDAINE

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March 4, 1988

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California Law Revision Commission  
4000 Middlefield Rd.  
Room D-2  
Palo Alto, CA 94303

RE: Code of Civil Procedure §437c

Dear Sirs:

I have come across what I believe to be a serious, substantive error in the California statute on summary judgments. Specifically, Code of Civil Procedure §437c(f) contains a sentence which appears to be exactly contrary to that which the Legislature intended. Enclosed herewith for your convenience is a copy of that Statute from West's Annotated California Codes, 1988 Cumulative Pocket Part, containing the latest revisions. I have highlighted the sentence which is suspect.

I believe that the highlighted sentence should read essentially as follows:

"Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists no material, triable controversy, and shall specifically refer to the evidence which establishes those facts regarding each of those issues."

As subdivision (g) of the Statute discusses the consequences of a denial of the motion, it is logical to assume that subdivision (f) discusses granting of the motion. In addition, the sentence preceding the highlighted sentence,

California Law Revision Commission  
March 4, 1988


Page 2

and the sentence following the highlighted sentence both discuss the consequences of a court granting a motion for summary adjudication of issues. Indeed, the final sentence of subdivision (f) states that issues "so specified" shall be deemed established, and thereby refers back to the sentence which is highlighted which currently reads that issues so specified are those which are left in controversy and which must be tried at trial.

I welcome any clarification that your Commission or the Legislature may bring to this issue as obviously, the California law on summary judgments, and summary adjudication of issues, is of great importance to the trial litigators bar.

Very truly yours,

TREDWAY, BRANDMEYER, BRAZELTON & LUMSDAINE

  
By: Jeffrey B. Singer

JBS:bvs  
Enc.

West's  
**ANNOTATED  
CALIFORNIA CODES**

**CODE OF CIVIL PROCEDURE**

**Sections 420 to 468**

**Volume 14A**

**1988**

**Cumulative Pocket Part**

Replacing 1987 Pocket Part in back of volume

**Includes laws through the 1987 portion  
of the 1987-1988 Regular Session**

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CODE OF CIVIL PROCEDURE

complaint

complaint, or cross-complaint.

respond to a pleading may serve and file a  
thereof.

the complaint, or a portion thereof, shall  
on 1005.

tion thereof, shall set the hearing thereon

n to strike without demurring to the com-  
default may be entered against \* \* \* that

or complaint, or portion thereof, shall not

Periman v. Municipal Court for Los Angeles  
I Dist. of Los Angeles County (1979) 160 Cal.Rptr.  
C.A.3d 568.

orce proceeding, fact that commissioner had ap-  
complaint in intervention which was presented by  
attorney did not preclude reconciled wife and husband  
subsequently moving to strike complaint in interven-  
Schwartz v. Schwartz (1953) 259 P.2d 33, 119 C.A.2d

needed complaint

er § 937, (repealed) which permitted modification of  
a without notice of certain ex parte orders, the trial  
had no power without notice to strike an amended  
inder filed under order of court duly made, though  
inder was inadvertent. Ross v. Flynn (1920) 189 P.  
C.A. 401.

ishing out cross-complaint

stiffs had standing to move to strike cross complaint  
requirements of § 474 providing, inter alia, that when  
F is ignorant of name of a defendant he must state  
ct in the complaint, and that such defendant may be  
ated in any pleading or proceeding by any name, and  
then his true name is discovered the pleadings or  
ding may be amended accordingly, had not been met,  
cross complainants were not parties against whom a  
of action had been asserted. Dabney v. Shippey  
115 Cal.Rptr. 526, 40 C.A.3d 990.

ons of pleadings

on 435, or at any time in its discretion, and

matter inserted in any pleading.

or filed in conformity with the laws of this

ed by Stats.1983, c. 1167, p. 2857, § 4.)

t thereof" to "Strike out all or any part of any  
s".

ation: Former § 453, enacted 1872.

ss changes or additions by amendment

CODE OF CIVIL PROCEDURE

§ 437c

Law Review Commentaries

Dismissal of frivolous appeals. Thomas Kalley (1979) 54  
S. Bar J. 92.

Library References

Pleading ¶361 et seq.  
C.J.S. Pleading § 463.

For basic development of Notes of Decisions, see § 453 in Main Volume.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this  
supplement.

Notes of Decisions

4. Answer

Referee erred in summarily disregarding claimant's an-  
swer due to his apparent belief that she did not knowingly  
file it, where there was no evidence that that pleading either  
was a sham or was irrelevant. In re Marriage of Stephenson  
(App. 2 Dist.1984) 209 Cal.Rptr. 383, 162 C.A.3d 1057.

6. Cross-complaints

Default judgment entered in municipal court in bank's  
action against debtor for amount due on a personal loan was  
not void for municipal court's lack of subject matter jurisdic-  
tion where debtor's cross complaint praying for compensa-  
tory and punitive damages in sum of \$30 million was a  
sham and did not support any claim for damages in excess  
of sum debtor claimed bank loaned him in form of nonlegal  
tender. Security Pac. Nat. Bank v. Lyon (1980) 165 Cal.  
Rptr. 95, 105 C.A.3d Supp. 8.

9. Materiality of pleadings

Trial court had inherent power to dismiss cross complaint  
for equitable indemnity, without notice, when alleged indem-  
nitor had entered into a good-faith settlement with claimant.  
Hale v. Laden (App. 2 Dist.1986) 224 Cal.Rptr. 182, 178  
C.A.3d 668.

14. Frivolous pleading

Trial court was empowered to strike or dismiss frivolous  
complaint by individual against himself, which alleged that  
he was beneficiary and holder of revisionary interest in  
charitable trust created by his birth certificate and sought to  
terminate trust, by West's Ann.Cal.C.C.P. § 436(b), which  
provides that court may strike out all or any part of

pleading not drawn or filed in conformity with laws, even  
though individual as plaintiff sought entry of judgment, as  
the complaint failed to state facts showing a primary right  
by plaintiff or a primary duty devolving on defendant or a  
wrong done by defendant and thus failed to state facts  
constituting a cause of action as required by West's Ann.  
Cal.C.C.P. § 425.10. Lodi v. Lodi (App. 3 Dist.1985) 219  
Cal.Rptr. 117, 173 C.A.3d 628.

Lessor's motion to strike lessee's pleadings to breach of  
lease allegation on ground that lessee was foreign corpora-  
tion transacting intrastate business in state and not qualified  
to do so and that it had failed to pay corporate franchise  
taxes owed to state could not be characterized as "frivolous"  
so as to warrant award of attorneys' fees to lessee on appeal  
from grant of motion to strike, and neither such motion nor  
alleged improper procedure involving extensions of time  
granted by court and "frustration" of settlement negotia-  
tions by lessor's "uncompromising demand for the full  
amount of the balance of rent to become due under the  
lease" warranted imposition of award of attorneys' fees as  
sanction pursuant to Court of Appeal's supervisory power.  
Mediterranean Exports, Inc. v. Superior Court of San Mateo  
County (1981) 174 Cal.Rptr. 169, 119 C.A.3d 605.

21. — Motion to strike

Where lessor showed on its speaking motion to strike that  
lessee had conducted certain business activities in state,  
including maintenance of bank account, office, and employ-  
ee payroll, and lessee showed that activities consisted of  
solicitation of orders by salesmen who were independent  
contractors, that orders placed in state required acceptance  
by lessee in state of incorporation, and that office and staff  
were maintained for soliciting salesmen, substantial fact  
issue existed as to whether activities amounted to transac-  
tion of "intrastate business" which required lessee to obtain  
certificate of qualification, precluding summary judgment.  
Mediterranean Exports, Inc. v. Superior Court of San Mateo  
County (1981) 174 Cal.Rptr. 169, 119 C.A.3d 605.

§ 437. Grounds for motion to strike; judicial notice; specification

(a) The grounds for a motion to strike shall appear on the face of the challenged pleading or from  
any matter of which the court is required to take judicial notice.

(b) Where the motion to strike is based on matter of which the court may take judicial notice  
pursuant to Section 452 or 453 of the Evidence Code, such matter shall be specified in the notice of  
motion, or in the supporting points and authorities, except as the court may otherwise permit.  
(Added by Stats.1982, c. 704, p. 2858, § 4.)

CHAPTER 5. SUMMARY JUDGMENTS

Section

437c. Grounds for and effect of summary judgment; procedure on motion.

§ 437c. Grounds for and effect of summary judgment; procedure on motion

(a) Any party may move for summary judgment in any action or proceeding if it is contended that  
the action has no merit or that there is no defense thereto. The motion may be made at any time  
after 60 days have elapsed since the general appearance in the action or proceeding of each party

Asterisks \* \* \* indicate deletions by amendment

against whom the motion is directed or at such earlier time after the general appearance as the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made either in writing or orally at the hearing shall be deemed waived.

The provisions of Section 1005 and the provisions of subdivision (a) of Section 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(e) If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f) A party may move for summary adjudication of issues, either by itself or as an alternative to summary judgment. If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that those issues are without substantial controversy. Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists a material, triable controversy, and shall specifically refer to the evidence which establishes a triable

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**CODE OF CIVIL PROCEDURE**

time after the general appearance as the court, direct. Notice of the motion and supporting papers shall be filed at least 28 days before the time appointed for the hearing. The required 28-day period of notice shall be extended to 30 days if the place of the hearing is outside the State of California, 10 days if the place of the hearing is within the State of California, and 20 days if the place of the hearing is outside the United States, and 20 days if the place of the hearing is outside the United States. The filing of the motion shall not extend the time for the filing of responsive pleadings.

Answers, admissions, answers to interrogatories, and responses to requests for production of documents or may be taken. The supporting papers shall set forth and concisely all material facts which the moving party contends shall be followed by a separate statement of sufficient ground for denial of the motion.

Not less than 14 days preceding the noticed hearing, the court may cause orders otherwise. The opposition, answers, admissions, answers to interrogatories, and responses to requests for production of documents may be taken. The opposition papers shall set forth the material facts contended by the moving party and the opposing party agrees or disagrees that those facts are true or false and concisely any other material facts which the moving party contends shall be followed by a separate statement of sufficient ground, in the court's discretion,

by the moving party not less than five days before the hearing for good cause orders otherwise.

Generally at the hearing shall be deemed waived. The provisions of subdivision (a) of Section 1013, extending the time for the filing of responsive pleadings, do not apply to this section.

And if all the papers submitted show that there is no triable issue as to any material fact set forth in the papers, except that to which the moving party is entitled to a judgment as a matter of law, and all inferences reasonably deducible from the evidence granted by the court based on inferences drawn from the evidence, which raise a triable issue.

shall be made by any person on personal behalf shall show affirmatively that the affiant is not qualified to testify.

judgment pursuant to the provisions of this section on the basis of the credibility or for want of cross-examination in support of the summary judgment, except that the only proof of a material fact is an affidavit or declaration made by a party that a material fact is an individual's state of mind established solely by the individual's affirmation.

issues, either by itself or as an alternative to the granting of the motion for summary judgment, or that one or more of the issues raised by a defense is conceded, the court shall find that there is no substantial controversy. Moreover, upon the court's order or oral order recorded verbatim, the court shall adjudge as to which there exists a triable issue to the evidence which establishes a triable issue.

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**CODE OF CIVIL PROCEDURE**

**§ 437c**

issue of fact regarding each of those issues. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

(i) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur.

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

(k) In actions which arise out of an injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(l) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within 10 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding 20 days as the trial court may for good cause allow, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States.

(m) Nothing in this section shall be construed to extend the period for trial provided by Section 1170.5.

(n) The provisions of subdivisions (a) and (b) shall not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

(Added by Stats.1973, c. 366, p. 807, § 2. Amended by Stats.1976, c. 675, p. 1664, § 1; Stats.1978, c. 949, p. 2930, § 2; Stats.1980, c. 57, p. 151, § 1; Stats.1982, c. 1510, p. 5855, § 1; Stats.1983, c. 490, § 1; Stats.1984, c. 171, § 1; Stats.1986, c. 540, § 3.)

**1973 Legislation.**  
Former § 437c was repealed by Stats. 1973, c. 366, p. 807, § 1.

**1976 Amendment.** Inserted the alternative in the second sentence of the first paragraph [now subd. (a)] authorizing motion at such earlier time after general appearance as the court with or without notice upon good cause may direct.

**1978 Amendment.** Inserted the fourth sentence in the first paragraph [now subd. (a)] relating to 45 days notice.

**1980 Amendment.** Inserted the second sentence in the second paragraph [now subd. (b)]; and in the second sentence of the third paragraph [now subd. (c)] deleted the word "admissible" preceding the first use of the word "evidence" and added the exception following "papers".

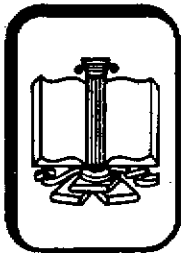
Section 2 of Stats.1980, c. 57, p. 153, provided:

"The amendments to Section 437c of the Code of Civil Procedure made by this act shall not apply to any appeal if the notice of appeal is filed prior to January 1, 1981."

**1982 Amendment.** Inserted the subdivision lettering, and inserted subd. (j).

**1983 Amendment.** Substituted, in the third sentence of subd. (a), "on all other parties" for "on the other party"; in the same sentence, increased the time for service from 10 to 28 days and substituted, near the end of the sentence, "appointed for hearing" for "fixed for the hearing"; added the fourth sentence of subd. (a); decreased, in the fifth sentence of subd. (a), the time for hearing from 45 to 30 days prior to trial date; deleted, from the first sentence of subd. (b), "or opposed" following "be supported"; added the second, third and fourth sentences to the first paragraph of subd. (b); added the second, third and fourth paragraphs of subd. (b); transferred the former second sentence of the first paragraph of subd. (b), relating to evidentiary objections, to appear as the second sentence of the third paragraph of subd. (b); in the second sentence of subd. (c), substituted "all inferences reasonably deducible" for "all inferences reasonably deductible" at the first appearance of

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**McGEORGE SCHOOL OF LAW**

CA LAW REV. COMM'N

**JUN 09 1988**

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WRITER'S DIRECT DIAL NUMBER

June 8, 1988

California Law Revision Commission  
4000 Middlefield Road, Suite D2  
Palo Alto, California 94303-4739

Attention: Mr. John H. DeMouilly, Executive Secretary

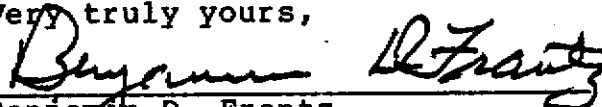
Subject: Code of Civil Procedure section 1013a

Dear Mr. DeMouilly:

The addition of subdivision (3) to Code of Civil Procedure section 1013a is undoubtedly the best piece of legislation that was ever accomplished. It has made honest people out of the thousands of lawyers and legal secretaries that mail legal papers.

Because of its virtue in being prospective in operation, I suggest the enclosed amendments so that the future tense will appear throughout the subdivision. Because "notice or other paper" is used in section 1013, I suggest similar wording in this subdivision.

Very truly yours,

  
Benjamin D. Frantz  
Professor of Law

BDF:jca

(3) An affidavit setting forth the exact title of the document served and filed in the cause, showing (A) the name and residence or business address of the person making the service, (B) that he or she is a resident of, or employed in, the county where the mailing occurs, (C) that he or she is over the age of 18 years and not a party to the cause, (D) that he or she is readily familiar with the business business practice for collection and processing of correspondence and other papers deposited for mailing with the United States Postal Service, (E) that the notice or other paper will ~~correspondence would be~~ deposited with the United States Postal Service that same day in the ordinary course of business, (F) the name and address of the person served as shown on the envelope, and the date when and ~~place of of business where the notice or other paper will be~~ deposited ~~correspondence was placed for deposit~~ in the United States Postal Service, and (G) that the envelope will be ~~was~~ sealed and placed for collection and mailing on that date following ordinary business practices. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit.

1 PROOF OF SERVICE BY MAIL

2 (Code of Civil Procedure section 1013a)

3 At all times herein mentioned, I was over the age of 18  
4 years, not a party to this cause, and employed in the County of  
5 Sacramento, State of California, at 400 Front Street, Sacramento,  
6 California 95814. I am readily familiar with the business  
7 practice for collection and processing of correspondence for  
8 mailing with the United States Postal Service.

9 A copy of the foregoing \_\_\_\_\_  
10 \_\_\_\_\_  
11 \_\_\_\_\_  
12 \_\_\_\_\_  
13 \_\_\_\_\_

14 will be deposited with the United States Postal Service this day  
15 in the ordinary course of business, the name and address of the  
16 person served as shown on each envelope being as follows:  
17  
18  
19  
20

21 Each envelope will be sealed with postage thereon fully paid  
22 and placed for collection and mailing on this date at Sacramento,  
23 California, following ordinary business practices.

24 I certify under penalty of perjury under the laws of the  
25 State of California that the foregoing is true and correct.

26 DATED: \_\_\_\_\_, 198\_\_

27 \_\_\_\_\_  
28 Suzy Sekretree

EXHIBIT 3

CA LAW REV. COMM'N

CHAMBERS OF  
**The Superior Court**

**AUG 23 1988**

**STEVEN Z. PERREN, Judge**  
HALL OF JUSTICE  
800 SOUTH VICTORIA AVENUE  
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August 16, 1988

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303

Re: Clean-up Legislation: C.C.P. sections 131.3 et seq;  
P.C. section 1203.065(b)/P.C.1203.066(a)(1)

Gentlepersons:

I have observed in the course of sentencing, that two statutes appear to be either in the wrong section of the code or inconsistent with a sister statute. I refer to C.C.P. sections 131.3 et seq., and P.C. section 1203.065(b)/P.C. section 1203.066(a)(1).

1. C.C.P. sections 131.3-131.7: These sections deal with pre-plea reports. Should a criminal defendant wish to have a review of possible sentencing dispositions conducted by the sentencing judge prior to the entry of a guilty plea, a referral may be made to the probation office to conduct an investigation. The great body of law concerning probation officer responsibilities with respect to investigations is generally contained in P.C. sections 1202.7 et seq., and, specifically, P.C. section 1203. There does not appear to be any reason or logic for the placement of the pre-plea section in the Code of Civil Procedure since both judges and lawyers alike would be inclined to look in the Penal Code and the sections logically belong there.

May I suggest that commencing at Title 6, we have chapter .5 and commence with the section 975 et seq., in which the pre-plea sections could be placed.

2. P.C. sections 1203.065(b)/1203.066(a)(1): The Penal Code is replete with limitations upon the discretion of a judge to grant probation. Some provisions allow for a grant of probation only after the judge has determined that the case is an unusual one and is to be governed by Rule 416 of the California Rules of Court. Still others expressly prohibit probation.

California Law Revision Commission  
Page 2  
August 16, 1988

Penal Code sections 1203.065 and 1203.066(a)(1) are in direct conflict. Each proposes to deal specifically with child molest by means of force as prohibited by section 288(b) of the Penal Code. Penal Code section 1203.065(b) allows the court to grant probation in the "unusual case;" Penal Code section 1203.066(a)(1) expressly prohibits any grant of probation for the same conduct. These statutes are in direct conflict and the inconsistency ought to be remedied.

Very truly yours,



STEVEN Z. FERREN  
Judge of the Superior Court

SZP:rrc

cc: Senator William Lockyer  
Chairman, Senate Judiciary Committee