

## CALIFORNIA LAW REVISION COMMISSION

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November 1, 1993

<i>Date:</i> November 18-19, 1993	<i>Place:</i> Los Angeles
November 18 (Thursday) 10:00 am – 6:00 pm November 19 (Friday) 9:00 am – 4:00 pm	Sheraton Plaza La Reina 6101 W. Century Blvd. Los Angeles, CA 90045 (310) 642-1111
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.	

## AGENDA

*for meeting of the*

## CALIFORNIA LAW REVISION COMMISSION

**November 18-19, 1993**

1. MINUTES OF OCTOBER 28-29, 1993, MEETING (to be sent)
2. ADMINISTRATIVE MATTERS
  - Annual Report for 1993**  
Memorandum 93-51 (SU) (to be sent)
  - Communications from Interested Persons**
3. EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY (Study F/L-521.1)
  - Revised Draft of Recommendation**  
Memorandum 93-49 (NS) (enclosed)
4. TRIAL COURT UNIFICATION (Study J-1000)
  - (1) **Comparison of 1993 Trial Court Unification Proposals**  
Memorandum 93-69 (RJM) (to be sent)
  - (2) **Branches and Circuits (Study J-1030)**  
Memorandum 93-70 (RJM) (to be sent)

- (3) **Personnel Issues** (Study J-1030)  
Memorandum 93-71 (NS) (to be sent)
- (4) **Voting Rights Act** (Study J-1080)  
Memorandum 93-72 (BSG) (to be sent)  
First Supplement to Memorandum 93-62 (to be sent)
- (5) **Eight Person Jury in Civil Causes** (Study J-1130)  
Memorandum 93-73 (RJM) (to be sent)
- (6) **Urgency Measure Issues** (Study J-1090)  
Memorandum 93-74 (NS) (to be sent)
- (7) **Miscellaneous Matters**  
Memorandum 93-75 (NS) (to be sent)
- (8) **Draft of Tentative Recommendation**  
Memorandum 93-76 (NS) (to be sent)

CALIFORNIA LAW REVISION COMMISSION  
MEETING SCHEDULE

*Scheduled*

<b>November 1993</b>	<b>Los Angeles</b>
Nov. 18 (Thur.)	10:00 am – 6:00 pm
Nov. 19 (Fri.)	9:00 am – 4:00 pm
<b>December 1993</b>	<b>Sacramento</b>
Dec. 9 (Thur.)	10:00 am – 5:00 pm
Dec. 10 (Fri.)	9:00 am – 4:00 pm
<b>January 1994</b>	<b>San Francisco</b>
Jan. 20 (Thur.)	10:00 am – 5:00 pm
Jan. 21 (Fri.)	9:00 am – 4:00 pm

*Tentative*

<b>March 1994</b>	<b>Sacramento</b>
March 24 (Thur.)	10:00 am – 5:00 pm
March 25 (Fri.)	9:00 am – 4:00 pm
<b>May 1994</b>	<b>Sacramento</b>
May 12 (Thur.)	10:00 am – 5:00 pm
May 13 (Fri.)	9:00 am – 4:00 pm
<b>July 1994</b>	<b>Los Angeles</b>
July 14 (Thur.)	10:00 am – 6:00 pm
July 15 (Fri.)	9:00 am – 4:00 pm
<b>September 1994</b>	<b>Sacramento</b>
Sep. 22 (Thur.)	10:00 am – 5:00 pm
Sep. 23 (Fri.)	9:00 am – 4:00 pm
<b>November 1994</b>	<b>Los Angeles</b>
Nov. 10 (Thur.)	10:00 am – 6:00 pm
Nov. 11 (Fri.)	9:00 am – 4:00 pm

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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**NOVEMBER 18-19, 1993**  
**LOS ANGELES**

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A meeting of the California Law Revision Commission was held in Los Angeles on November 18-19, 1993.

**Commission:**

*Present:* Daniel M. Kolkey, Vice Chairperson  
Christine W.S. Byrd  
Arthur K. Marshall  
Edwin K. Marzec  
Forrest A. Plant  
Colin Wied

*Absent:* Terry B. Friedman, Assembly Member  
Bion M. Gregory, Legislative Counsel  
Bill Lockyer, Senate Member  
Sanford Skaggs, Chairperson

**Staff:**

Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary  
Barbara Gaal, Staff Counsel  
Robert J. Murphy, Staff Counsel

**Consultants:**

None

**Other Persons:**

Joseph S. Avila, California Probate Referee's Association, Los Angeles (Nov. 18)  
Steve Birdleough, Judicial Council of California, Sacramento (Nov. 18)  
Aviva Bobb, Los Angeles Municipal Courts, Los Angeles (Nov. 18)  
Joyce Cook, Los Angeles County Municipal Courts, Planning and Research Unit, Los Angeles (Nov. 18)  
Mary Arleen Finch, California Probate Referee's Association, Los Angeles  
Rose Himrod, Los Angeles County CAO, Los Angeles (Nov. 18)  
Janis R. Hirohama, Los Angeles County Municipal Courts, Planning and Research Unit, Los Angeles  
Clark Kelso, McGeorge Law School, Sacramento  
Gary Klausner, Los Angeles Superior Court, Los Angeles (Nov. 18)  
David Long, State Bar, San Francisco (Nov. 18)

Valerie J. Merritt, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Nov. 18)  
Charlotte Sato, California Attorney General's Office, Sacramento  
Marcia Taylor, Judicial Council of California, Sacramento  
Linda Theuriet, Administrative Office of the Courts, San Francisco  
Roger K. Warren, Judicial Council of California, Sacramento (Nov. 19)  
David Watso, Met News, Los Angeles (Nov. 19)

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MINUTES OF OCTOBER 28-29, 1993, MEETING

The Commission approved the Minutes of the October 28-29, 1993, meeting as submitted by the staff.

## ADMINISTRATIVE MATTERS

### **Meeting Schedule**

The meeting of the California Law Revision Commission scheduled for December 9 and 10, 1993, in Sacramento was changed to January 6 and 7, 1994, in Sacramento. The purpose of the change is to allow interested persons and organizations additional time to review and comment on the Commission's tentative recommendation on trial court unification.

### **Annual Report**

The Commission considered Memorandum 93-51 and its First Supplement concerning the *Annual Report for 1993*. The Commission approved the Annual Report for printing, subject to any needed technical corrections.

### **1994 Legislative Program**

Two recommendations were scheduled to be considered for approval as part of the Commission's 1994 legislative program at the December 1993 meeting, which has been rescheduled. In order to meet legislative deadlines, the Commission authorized the staff to make technical revisions to these recommendations and submit them to Legislative Counsel to be prepared in bill form. Revisions approved by the Commission in January 1994 will be incorporated into the drafted bill.

### **Senate Subcommittee on Efficiency and Effectiveness of State Boards and Commissions**

The Executive Secretary reported that he had been requested to testify at a November 17, 1993, hearing of the Senate Subcommittee on Efficiency and Effectiveness of State Boards and Commissions, reviewing investigatory, disciplinary, prosecution and enforcement process of consumer boards and bureaus. The purpose of the testimony was to outline the Commission's work on administrative adjudication for the subcommittee.

The Executive Secretary stated that he provided copies of the Commission's tentative recommendation on administrative adjudication to the subcommittee members and staff, and at the hearing summarized the tentative recommendation and its status, noting particularly those aspects that would help streamline and expedite the hearing process (which was the primary interest of the subcommittee).

Senators McCorquodale (Chair) and Boatwright were in attendance, appeared interested in this project, and expressed surprise at the scope of the project. Senator Boatwright indicated he thought it would be helpful for the Commission to print its recommendation and obtain interim hearings on it before submitting it to the Legislature.

**STUDY F-521.1 — EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY**

The Commission considered Memorandum 93-49, together with a letter from Team 2 of the State Bar Probate Executive Committee (attached as Exhibit pp. 1-2), relating to the effect of joint tenancy title on marital property. The Commission approved the recommendation for printing and submission to the Legislature with the following revisions.

**Preliminary Part**

On page 3 of the preliminary part, the remark that property decreasing in value “is relatively unimportant” was revised to note that “to date” the majority of decedents’ property has increased in value.

**Civ. Code § 683 (amended). Creation of joint interest**

The Commission replaced subdivisions (a) and (b) with the language suggested by Professor Halbach:

(a) A joint tenancy in real or personal property may be created by a will, deed, or other written instrument of transfer, ownership, or agreement if the document expressly declares that the property is to be held in joint tenancy.

The staff should supplement the draft of the recommendation with commentary indicating the intent to preserve common law incidents of joint tenancy, and with any necessary conforming revisions.

**§ 861. Marital property presumptions notwithstanding joint tenancy title**

This section and Comment were revised to read:

861. (a) If married persons hold property in joint tenancy form:  
(1) To the extent the property has a community property source it is presumed to be community property.  
(2) To the extent the property has a separate property source it is presumed to be separate property, subject to commingling, tracing,

reimbursement, gift, and other principles affecting separate property.

(b) The presumptions established by ~~this section~~ subdivision (a) are presumptions affecting the burden of proof and are rebuttable only pursuant to Section 862.

(c) The presumptions established by subdivision (a) do not affect the manner of division of property upon dissolution of marriage or legal separation of the parties pursuant to Division 7 (commencing with Section 2500).

**Comment.** Subdivision (c) makes clear that the community and separate property presumptions of subdivision (a) do not affect the principles governing division of marital property. See Sections 2581 and 2640 (community property presumption subject to reimbursement of separate property contributions). It should be noted, however, that if the marital property has been transmuted to joint tenancy, the property is owned equally by the spouses, which will affect its division at dissolution of marriage. See Section 864 & Comment (effect of transmutation to joint tenancy).

### § 863. Statutory form

The notice contained in the statutory form was revised to read as follows:

#### DECLARATION OF JOINT TENANCY

##### NOTICE

**The Information in this Notice Is a Summary and Not a Complete Statement of the Law. You May Wish to Seek Expert Advice Before Signing this Declaration.**

DO YOU WANT TO GIVE UP YOUR COMMUNITY PROPERTY AND SEPARATE PROPERTY RIGHTS IN THE PROPERTY DESCRIBED BELOW? If you sign this declaration the property will be joint tenancy and will not be community property. You will give up half of any separate property interest you have in the property. Some of the rights you will lose are summarized below.

##### **If You Now Have Community Property ...**

You and your spouse own community property equally and the entire property is subject to your debts. You may pass your share of community property by will or put it in a trust, but otherwise it goes automatically to your spouse when you die and does not have to be probated. The surviving spouse gets an income tax benefit if the property has increased in value.

If you sign this declaration:



- Your community property is converted to joint tenancy, owned equally with your spouse.

- Your share may not be subject to your spouse's debts. However, this may limit your ability to get credit without your spouse's signature.

- You cannot pass your share by will or put it in a trust as long as the joint tenancy remains in effect. When you die your share goes automatically to your spouse without probate. Your spouse will get an income tax benefit only if the property has decreased in value.

Do **not** sign this declaration if you want community property. Instead, you should take title as community property.

#### **If You Now Have Separate Property ...**

You own your separate property absolutely and have full power to manage and dispose of it. If you sign this declaration you make an immediate and permanent gift of half your separate property to your spouse, which you cannot get back at dissolution of marriage and cannot pass by will or trust. When you die your remaining half interest in the property passes automatically to your surviving spouse without probate. You cannot give it by will or put it in a trust as long as the joint tenancy remains in effect.

Do **not** sign this declaration, and you should not take title as joint tenancy, if you want to keep your separate property rights.

#### **§ 864. Effect of transmutation to joint tenancy**

The Comment to this section should note that a severance of the joint tenancy would ordinarily result in tenancy in common and not community property, unless the severing instrument provides for a different result.

#### **§ 868. Reliance on joint tenancy form of title**

This section (set out in the memorandum) was revised to immunize a third party except in case of actual notice or, with respect to real property, recorded notice. The Comment should note that the section is not intended to give substantive rights to beneficiaries of the spouses but only true third parties. Reference should be made to a third party "who" has notice. The section should be located in an appropriate place in the proposed statute.

#### **STUDY J-1000 – TRIAL COURT UNIFICATION**

The Commission considered Memorandum 93-76, together with Memoranda 93-69, 93-70, 93-71, 93-72, 93-73, 93-74, and 93-75, and the attached draft of the tentative recommendation relating to trial court unification. The Commission

approved the tentative recommendation to distribute for comment, after making the following revisions. The explanatory material in the summary and text of the tentative recommendation should be revised to conform with Commission decisions concerning constitutional and statutory language.

### **Summary of Tentative Recommendation**

The first paragraph of the summary should clarify that the Legislature has not asked the Commission whether trial court unification is a good idea. Rather, the Legislature directed the Commission to determine the best means of achieving trial court unification.

The first sentence of the second paragraph should be revised to read: "The Commission finds the structure of SCA 3 basically sound to accomplish its objective of trial court unification."

The summary should include a summary of SCA 3.

Before point (3) there should be a new point that states, in effect: "An appellate division should be established in the court. The Judicial Council should adopt rules to foster the independence of the appellate division." The last sentence of point (4) should then be deleted as redundant.

Point (5) should be revised to state, in effect: "Authority of the Legislature to prescribe an eight person, rather than a twelve person, jury in civil causes in municipal and justice courts should be extended to any appropriate civil causes in the unified trial court."

Point (6) should clarify that the supplementary recommendation regarding organizational and personnel decisions will be proposed as urgency legislation.

### **General Principles in Formulating Recommendations Concerning SCA 3**

The discussion of general principles should be revised so that the Commission does not offer advice on the politics of SCA 3. Where the Commission's solution to a problem may be politically unacceptable, the Commission may attempt to offer alternative solutions for the Legislature to assess from a political standpoint.

### **Single Level Trial Court**

The discussion regarding the name of the unified trial court should put more emphasis on the potential for confusion between the names "district court," "federal district court," and "district court of appeal." The discussion should also

explain the Commission's reasons for rejecting names such as "circuit court" and "county court."

### **Appellate Jurisdiction**

The statement that "[i]ncreasing the size of the courts of appeal . . . is ill-advised," was deleted from the discussion of appellate jurisdiction.

### **Judges**

The sentence, "Each judge has both strengths and weaknesses," was deleted from the discussion of judges.

The words "may be" were substituted for the word "arguably" in the sentence, "This requirement is arguably improper since the California Constitution sets the exclusive qualifications for superior court judges and does not include a residency requirement."

The draft states that "[t]he Commission does not recommend any temporary or permanent constitutional or statutory immunization for incumbent superior court judges from hearing cases currently within the municipal and justice court jurisdiction." The Commission was informed that this is a matter of great importance to many judges and that in other states that have unified their trial courts, such immunity was made available but hardly any judges invoked it. The Commission concluded that temporarily immunizing present superior court judges from having to hear cases formerly within the jurisdiction of municipal and justice courts would not significantly impair the efficiency of trial court unification, yet might give some assurance to sitting superior court judges. The Commission changed the recommendation to say something like: "The Commission does not recommend any temporary or permanent constitutional immunization for incumbent superior court judges from hearing cases currently within the municipal and justice court jurisdiction. However, it would not be opposed to a statute or rule which would provide for such immunization as a transitional matter as the Legislature or Judicial Council saw fit."

### **Selection of Judges**

The sentence that reads, "A race-conscious effort to draw electoral lines may itself run afoul of the Equal Protection Clause of the Fourteenth Amendment," was deleted.

## Appendices

In the tentative recommendation, the Commission's proposed language for the Constitution and implementing statutes will appear immediately following the narrative portion of the report. SCA 3 will be Appendix 1, and a redlined version of SCA 3 showing the Commission's proposed changes will be Appendix 2.

### Cal. Const. Art. I, § 16. Trial by jury

The Commission heard discussion regarding the limited available data on eight person juries. The Commission concluded that the Legislature should be authorized to provide for an eight person jury in civil causes within the appellate jurisdiction of the superior court. That approach would essentially maintain existing law, which allows the Legislature to provide for eight person juries in civil causes in the municipal and justice courts.

The Commission considered whether to recommend a change in the first sentence of the last paragraph of Article I, Section 16 of the Constitution, which provides: "In criminal actions in which a felony is charged, the jury shall consist of 12 persons." Specifically, the Commission discussed whether the parties could be authorized to stipulate to a lesser number of jurors. The Commission decided against recommending such a change, concluding that it is beyond the scope of trial court unification.

The Commission's tentative recommendation is thus to amend Section 16 to read:

Sec. 16. Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.

In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in municipal or justice court within the appellate jurisdiction of the superior court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.

In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.

**Cal. Const. Art. VI, § 1. Judicial power**

Section 1 was revised to clarify that it makes only the enumerated courts “courts of record”:

Sec. 1. The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, ~~municipal courts, and justice courts.~~ All courts all of which are courts of record.

**Cal. Const. Art. VI, § 4. Superior court**

The Commission discussed at length the degree to which the Legislature and the judiciary should have control over the establishment of branch and circuit courts. The consensus of the Commission was:

(1) The courts should have control over judicial assignments, as they do at present.

(2) The courts should not have unchecked control over court locations, because decisions regarding building, renting, and/or maintaining expensive court facilities require input from funding sources. Such decisions should not be made in a fiscal vacuum.

(3) The existing system for determining court locations involves healthy interplay between the courts and their funding sources, and should continue.

Instead of trying to spell out the roles of the Legislature and the judiciary in the Constitution (as in Memorandum 93-76 at pages 49-50, Memorandum 93-70 at page 3, or some similar approach), the best way to effectuate this intent would be to change the existing Constitution as little as possible. Specifically, Section 4 should remain unchanged, except that the last sentence (regarding the county clerk serving as ex officio clerk of the superior court) should be deleted. The decision to recommend retention of the first paragraph of Section 4 intact reflects the intent to maintain the present balance of power between the Legislature and the judiciary. The report on SCA 3 should explain this.

The Commission rejected the concept of specifying in greater detail in the Constitution the manner in which court locations are to be determined. In addition to promoting the Commission’s goal of preserving the existing balance of power, this approach reflects the view that the Constitution should be a flexible document, readily adaptable to future situations. If the Constitution were to lock into place a specific process for establishing court locations, it might yield absurd results with respect to unanticipated future developments (such as new means of assessing and accounting for the environmental impact of a proposed

court location). If the details regarding establishment of court locations are in statutes instead, changes to accommodate new developments can be readily made.

The Commission also discussed whether Section 4 should give the Legislature authority to “provide for the officers and employees of each superior court.” At its meeting on October 28-29, 1993, the Commission tentatively decided that this language should be deleted, so that the Legislature would not have to pass detailed legislation regarding the various court personnel, and the courts would have control over their own personnel.

The Commission reversed this decision at its November meeting. The Commission reasoned that courts should not have unchecked control over their personnel. Rather, the Legislature, as the funding authority, should and currently does have input. The Commission decided that trial court unification should not serve as an occasion to alter this balance of power.

In its statutory recommendations to the Legislature, the Commission will suggest that the Legislature delegate some of its authority over court officers and employees, as it does at present. The language of Section 4, stating that the Legislature shall “provide for the officers and employees,” is broad enough to permit such delegation.

Thus, the Commission’s conclusion regarding Section 4 was to amend it as follows:

In each county there is a superior court of one or more judges. The Legislature shall prescribe the number of judges and provide for the officers and employees of each superior court. If the governing body of each affected county concurs, the Legislature may provide that one or more judges serve more than one superior court.

~~The county clerk is ex officio clerk of the superior court in the county.~~

**Cal. Const. Art. VI, § 6. Judicial Council**

The Commission considered whether the Constitution includes sufficient authority to require judges to comply with instructions from their presiding judges regarding assignments. The Commission concluded that the Constitution does include such authority. In particular, the last sentence of Section 6 states that judges “shall cooperate with the council and hold court as assigned.”

### **Cal. Const. Art. VI, § 10. Original jurisdiction**

The Commission spent considerable time discussing Section 10. The draft would amend it as follows:

Sec. 10. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. ~~Those courts also have original jurisdiction and in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition, except that original jurisdiction for review of proceedings in the superior courts is limited to the Supreme Court, courts of appeal, appellate divisions of the superior courts, and their judges.~~

Superior courts have original jurisdiction in all causes ~~except those given by statute to other trial courts.~~

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

There was concern that the proposed provision might be difficult to understand.

The Commission's intent is that (1) the appellate division of the superior court may issue writs to other judges of the court, (2) within the superior court, **only** the appellate division has authority to issue writs to other judges of the court, and (3) every judge in the superior court may issue writs to administrative agencies and other non-judicial entities and individuals. The Commission considered whether to constitutionally specify that the appellate division could only issue writs in cases that would be within the jurisdiction of the appellate division if appealed. The Commission decided that there need not be such a constitutional limitation. Rather, defining the jurisdiction of the appellate division could be done by statute, thereby affording greater flexibility.

The Commission discussed in detail how to draft Section 10 to properly reflect its intent. The consensus was that the best (albeit perhaps still imperfect) language proposed was the following:

Sec. 10. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Superior courts have original jurisdiction in all causes ~~except those given by statute to other trial courts.~~ Only the appellate division of the superior court may exercise the jurisdiction of the

superior court in proceedings for extraordinary relief directed to the superior court.

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

### **Cal. Const. Art. VI, § 11. Appellate jurisdiction**

The draft would amend Section 11 follows:

Sec. 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction, except in causes within the appellate jurisdiction of the superior courts and in other causes prescribed by statute.

~~Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.~~

An appellate division shall be created within each district court. The appellate division has appellate jurisdiction in criminal causes other than felonies, and in civil causes prescribed by statute or by rule adopted by the Judicial Council not inconsistent with statute, that arise within that district court. The Judicial Council shall adopt rules to ensure the independence of the appellate division.

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

The Commission considered whether the Legislature should be able to make certain matters nonappealable. The last sentence of the first paragraph of the draft would seem to allow this. It is not altogether clear whether a right of appeal currently exists, such that proposed Section 11 would represent a dramatic change from existing law. The Commission decided that it did not want to become involved in this side issue with potential due process complications. Thus, it will not recommend any changes in the Constitution that would tend to affirm or negate the existence of a right of appeal.

The Commission also concluded that the jurisdiction of the Courts of Appeal should continue to include not only cases within the original jurisdiction of the superior courts, but also any other cases that the Legislature adds by statute. The last sentence of the first paragraph of Section 11 should be re-written accordingly, and the exceptions in that sentence placed together for clarity, rather than separated.



“Superior court” should be substituted for “district court” in the paragraph of Section 11 creating the appellate division of the superior courts. The phrase “civil causes provided for by statute” should be substituted for “civil causes prescribed by statute” in the same paragraph.

The Commission discussed in some detail how to promote independence of the appellate division of the superior courts. The Commission decided that the Constitution should provide: (1) that the Chief Justice shall appoint judges to the appellate division for a specified term, and (2) that the Judicial Council shall adopt rules not inconsistent with statute to encourage the independence of the appellate division.

The Commission considered whether to constitutionally mandate rules *ensuring* the independence of the appellate division, instead of rules merely *encouraging* the independence of the appellate division. The Commission rejected the word “ensure” because it could be deemed to create a new constitutional right: the right to an independent appellate division.

The Commission also considered whether the Judicial Council’s rules should be required to be “not inconsistent with statute.” The Commission concluded that adding such a qualifier would be most consistent with preserving the existing balance of power.

The Comment to Section 11 should make clear that the appellate division of the superior court need not consist solely of judges from within the county, but could also include (or even consist entirely of) judges from other counties. Without such flexibility, the concept of an appellate division would be unworkable in small counties.

A reference to “appellate divisions” should be added to the last paragraph of Section 11 after the reference to “appellate courts.” The phrase “appellate courts” arguably would be broad enough to include “appellate divisions,” but by referring to “appellate divisions” expressly, any possible uncertainty on this point is eliminated.

### **Cal. Const. Art. VI, § 15. Qualifications of judges**

The Commission concluded that the proposed Comment to Section 15 adequately clarifies any ambiguity inherent in referring to “selection” of judges, rather than “appointment or election.” The Commission also observed that the federal courts are “court[s] of record in this State.” Thus, proposed Section 15

would be broad enough to cover a judge who sits on the federal bench prior to being selected to the state bench.

**Cal. Const. Art. VI, § 16. Elections of judges**

The Executive Secretary reported that Judicial Council expert Professor Butler regards the memorandum prepared by John Sparks of Brobeck, Phleger & Harrison attached to Memorandum 93-72 as basically sound. The memorandum draws the following conclusions:

(1) A statewide challenge to countywide elections is unlikely. But challenges to the use of countywide elections in particular counties probably will be made and might be successful.

(2) It is difficult to predict the likelihood of success for potential challenges to the use of countywide elections in any particular county. Making such predictions would require very detailed analysis. Moreover, the applicable legal standards are unclear.

(3) Although it is impossible to predict with certainty the results in any county, the Supreme Court has recognized that states have an interest in using election districts that coincide with judges' jurisdictional bases (*i.e.*, judges should be elected from the same area that they serve, not a lesser subset of that area.) This principle weighs in favor of the use of countywide elections.

(4) Although using county lines may not be foolproof, it is the best available alternative.

The Executive Secretary raised the issue of whether countywide elections make sense in a county as huge as Los Angeles County. It was pointed out that dividing the county up into smaller districts would mean that some judges might have to run for election in places other than where they currently reside, and might even have to consider moving to another part of the county. It may be important to take Voting Rights concerns into account in structuring trial court unification, but there may not be any answer to those concerns.

The Commission was informed that in Los Angeles County, the majority of municipal court judges would prefer to run for election countywide. Historically, minority judges in Los Angeles County have done better in countywide elections than in smaller election districts.

The Commission considered the possibility of recommending to the Legislature that retention elections might help reduce the risk of successful Voting Rights Act claims. It is possible that using retention elections would not

eliminate the problem. It is arguable, however, that retention elections do not raise the type of issues that are the focus of the Voting Rights Act. Specifically, the Voting Rights Act focuses on whether the structure of an election prevents a minority group from electing the candidate of its choice. Retention elections implicate a different issue: whether a minority group can defeat a candidate not to its liking.

Under subdivision (d) of Section 16, the voters of a county may choose to use retention elections, so long as they do so in a manner provided by the Legislature. Subdivision (b) should include a cross-reference to subdivision (d) as follows:

(b) Judges of superior courts shall be elected in their counties at general elections except as otherwise required to comply with federal law, in which case the Legislature may provide for election by the system prescribed in subdivision (d) or by other arrangement. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

This cross-reference should help make clear that retention elections are an alternative to consider in the event that countywide elections cannot be used in a particular county. The Commission did not go farther than this, however, in advocating retention elections in the context of trial court unification.

The phrase "required to comply with federal law" should be used instead of the phrase "required by federal law," in the draft of subdivision (b). The latter phrase is unworkable, because federal law does not require any specific voting arrangement, it only makes certain arrangements impermissible.

The Commission also discussed how the phrase "other arrangement" in subdivision (b) should be interpreted. In particular, would the phrase be broad enough to include a private settlement of a Voting Rights case? The Commission's intent is that it should be interpreted broadly, to cover such a settlement and any other arrangement that works.

The Commission reconsidered its decision regarding when a newly appointed trial judge must run for election. Because the existing scheme for superior court judges requires them to stand election shortly after being appointed, it hampers selection of the most qualified persons, who may be reluctant to abandon their practices without assurance of serving as a judge for a meaningful length of time. Additionally, a delayed election scheme would decrease the likelihood that judges will be voted out of office based on their

political views, as well as the likelihood that judges will decide cases based on how popular the decision will be with the electorate. It would also mean that voters will have a track record to evaluate when voting on judges, rather than having to vote when less information is available. In light of these considerations, the Commission adopted the Judicial Council's proposal that judges need not run for election until three years after being appointed.

**Cal. Const. Art. VI, § 23. Transitional provision**

The Executive Secretary reported that the Judicial Council is awaiting the results of a study of coordination activities in the trial courts that will shed light on how best to resolve the many personnel issues involved in trial court unification. The results will not be available in time to incorporate into the Commission's initial report to the Legislature, which is due by February 1, 1994. The Executive Secretary therefore recommended that the Commission make a supplementary recommendation to the Legislature once the results of the study become available. This recommendation would include a proposed statute setting forth a mechanism for resolving the personnel issues. The Commission agreed with this approach.

The Commission reviewed Article IV, Section 8(d) of the California Constitution, which imposes limits on the use of urgency legislation. To expeditiously accomplish trial court unification, there should be an express exception to Article VI, Section 8(d) in the transitional provision along the following lines: "Notwithstanding Section 8 of Article IV, implementation of, and orderly transition under, this measure may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests." The phrase "where otherwise permitted under this Constitution" should be added to clarify that the exception only modifies the rules regarding urgency legislation, not any other rules.

The transitional provision relating to pending proceedings should be revised to make clear that, absent contrary legislative action, a pending matter becomes pending in the unified superior court pursuant to the rules and law applicable to the matter prior to unification.

The provision for education and training should not be limited to municipal and justice court judges, and should be put into a separate sentence.

The reference in the transitional provision to previously selected officers and employees should be expanded to include personnel serving the court. This will avoid any ambiguity whether sheriffs, marshals, constables, court reporters, interpreters, and other personnel serving the court are covered by the provision.

With respect to small claims trials *de novo* and motions pursuant to Penal Code Section 995, any matter formerly reviewable by a superior court judge should remain so reviewable in the unified court (provided that the reviewing judge is not the judge who made the original decision). Allowing only judges of the appellate division to hear such matters may seriously impede the court's efficiency and efficacy. The words "or otherwise" were deleted from this portion of the transitional provision.

"The Legislature may provide for implementation of this measure," was deleted from the transitional provision. The sentence is unnecessary in light of the language added regarding urgency legislation, and could imply that the judiciary has no role in implementation.

The Commission considered the possibility that retired municipal and justice court judges may contend that municipal and justice court judgeships are preserved and upgraded in the trial court unification, any salary increase for those judgeships thereby resulting in a possible windfall for retired judges. The Commission agreed that retired municipal and justice court judges should not receive a unification windfall. Section 23 and the rest of the tentative recommendation should be revised as appropriate to make clear that municipal and justice court judgeships are being abolished and replaced with new offices. This may help to avoid any implication that municipal and justice court judgeships are being perpetuated in modified form.

### **Gov't Code § 68070.3. Transitional rules of court**

The Commission deleted the parts of proposed Section 68070.3 regarding the manner in which rules are to be adopted. The procedures for adopting rules are spelled out elsewhere in California law, making it unnecessary to include them in the proposed statute.

### **Gov't Code § 68122. Superior court electoral districts**

Proposed Section 68122 was deleted as unnecessary.

**Gov't Code § 68123. Preclearance of trial court unification**

The Commission directed the staff to double-check whether the officer seeking preclearance should be the Attorney General, rather than the Secretary of State. The last sentence of the Comment to proposed Section 68123 was deleted, the numerical reference in the clause adding Section 68123 was corrected, and the Comment to Section 68123 should explain why the Attorney General is to seek preclearance, rather than the Secretary of State.

**Gov't Code § 69500. Interim administration of unified court**

The Commission deleted proposed Section 69500. The provision is not a necessary part of the Commission's initial recommendation to the Legislature regarding SCA 3. The Legislature historically has not been involved in selection of presiding judges, nor in defining the role of presiding judges. The Commission will revisit some issues at a later date. In particular, further thought will be given to prohibiting discrimination against former municipal and justice court judges, while also according former superior court judges temporary immunity from hearing cases formerly within the jurisdiction of the municipal and justice courts.

**Gov't Code § 71001. Laws applicable in unified court**

Subdivisions (a) and (b) were deleted from proposed Section 71001, leaving only the material appearing in subdivision (c).

STUDY L-521.1 — EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

See Study F-521.1.

- APPROVED AS SUBMITTED
- APPROVED AS CORRECTED  
(for corrections, see Minutes of next meeting)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**

*Chair*

VALERIE J. MERRITT, Glendale

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MICHAEL V. VOLLMEER, Newport Beach

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REPLY TO:

November 17, 1993

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Re: Memorandum 93-49: Effect of Joint  
 Tenancy Title on Marital Property

Dear Nat:

Team 2 had a conference call earlier this evening to discuss Memorandum 93-49. We wholeheartedly recommend that the Commission adopt and circulate the proposed Recommendation on the Effect of Joint Tenancy Title on Marital Property, with few modifications.

Team 2 strongly disagreed with the conclusion of Judge Arnold H. Gold that there is little problem with the current law, and that the proposed recommendation would cause more problems than it will solve. Team 2 believes that the proposed recommendation would solve many more problems than it would cause. We believe that some of the issues already caused by the current law never see the light of any courtroom, or are the subjects of suits for constructive or resulting trusts in other branches of the Court than probate. Furthermore, Commissioner Julee Robinson, who sits in Probate matters in Orange County, is a member of Team 2 and supports the recommendation. Apparently there is a divergence of opinion

November 17, 1993

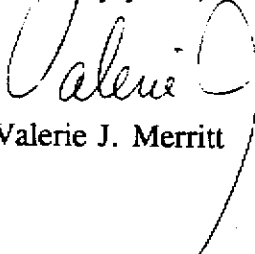
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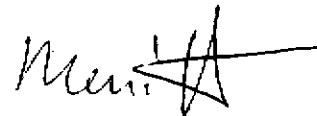
among those who sit in probate.

Team 2 commends you for your proposed new Section 868 to deal with reliance on title by third parties. We recommend that "actual or record notice" be changed to "actual or constructive notice." The former term is not in common usage; the latter term is defined in Civil Code §18, and Civil Code §1213 deals with the effect of recorded documents (which give constructive notice). We believe the statute would be better worded if it used the terms of art of the Civil Code. It would also help to include reference to these sections of the Civil Code in the comment to the section.

We do not want to suggest that there is no room for improvement in this recommendation. As you know, this is an exceedingly complex area of the law, and great study is required to fully understand the issues. We would not be surprised to find that others have suggested improvements to make to the proposal as it goes through the legislature. What we would recommend is that it be submitted as part of your legislative package.

Sincerely yours,

  
Valerie J. Merritt



VJM: