Admin. September 12, 1995

Memorandum 95-50

New Topics and Priorities

BACKGROUND

It is the Commission's practice annually to review the topics on its calendar, consider suggested new topics, and determine priorities for work during the coming year and thereafter.

A year ago after reviewing topics and priorities, the Commission decided to give priority during 1995 to judicial review of agency action, the Uniform Unincorporated Nonprofit Association Act, unfair competition litigation, and business judgment rule and derivative actions. Smaller matters — such as revision of the statute governing covenants that run with the land, tolling the statute of limitations while the defendant is out of state, clarifying the rules of evidence concerning electronically recorded original documents and signatures, and revising the homestead exemption and retirement accounts exemption — could be worked into the agenda as time permits. The Commission decided to defer study of the durable power of attorney for health care and the Uniform Health-Care Consent Act.

The Commission is currently completing work on many of these items. However, the Commission decided not to make a recommendation on retirement account exemptions, and the Commission has not taken up either the Uniform Unincorporated Nonprofit Association Act or derivative actions because the Commission's consultants have not yet delivered the scheduled studies on these matters.

This memorandum reviews other items on the Commission's Calendar of Topics that the Commission might wish to give a priority to during the coming year, and summarizes suggestions we have received for new topics that should be studied. The memorandum concludes with staff recommendations for allocation of the Commission's resources.

TOPICS CURRENTLY AUTHORIZED FOR COMMISSION STUDY

There are 24 topics on the Commission's Calendar of Topics that have been authorized for study by the Commission. Many of these are topics the Commission has completed work on; they are retained in case corrective legislation is needed.

Below is a discussion of the topics on the Commission's Calendar. The discussion indicates the status of each topic and the need for future work. If you believe a particular matter deserves priority, you should raise it at the meeting.

1. Creditors' Remedies

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1982 obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of recommendations to the Legislature.

Exemptions. Code of Civil Procedure Section 703.120 requires that the Law Revision Commission by July 1, 1993, and every ten years thereafter, review the exemptions from execution and recommend any changes in the exempt amounts that appear proper. The Commission completed this task during 1994-95 and legislation is enacted and operative as 1995 Cal. Stat. ch. 196.

As a separate project, the Commission is reviewing the declared homestead exemption. A tentative recommendation on the matter has been distributed to interested persons and organizations for comment.

Judicial and nonjudicial foreclosure of real property liens. This is a matter that the Commission has recognized in the past is in need of work. A study of judicial and nonjudicial foreclosures would be a major project.

2. Probate Code

The Commission drafted the new Probate Code and continues to monitor experience under the code and make occasional recommendations on this subject.

Health Care Decisions. In connection with its work on durable powers of attorney, the Commission decided to study the durable power of attorney for health care and the Uniform Health-Care Consent Act. This study is to be scheduled for the future, based on Commission time and availability of staff

resources. **The staff recommends that the Commission activate this study in 1996.**

Effect of joint tenancy title on marital property. This issue is still alive and is being monitored by the Commission's staff.

Definition of community property, quasi-community property, and separate property. The Commission has received communications addressed to problems in the definition of marital property for probate purposes. We understand the State Bar Estate Planning and Family Law Sections have worked on this jointly from time to time.

Creditors' rights against nonprobate assets. The staff has identified policy issues. The Commission will monitor experience under the new trust claims statute to see whether to proceed with this project.

Application of family protection provisions to nonprobate transfers. A related issue is whether the various probate family protections, such as the share of an omitted spouse or the probate homestead, should be applied to nonprobate assets. The staff believes this issue is important and becoming critical as more and more estates pass outside probate. We have received phone calls from several lawyers about it, and the issues are popping up in the advance sheets. The Commission should address this problem at some point.

Nonprobate transfers of community property. The legislation enacted on Commission recommendation has received a fair amount of criticism from some quarters, particularly from Professor Halbach. The Commission has deferred action on this.

Professor Kasner's study on this matter raised a number of important issues that the Commission deferred. Many of these issues relate to family law and community property as well as estate planning:

> Whether the statute providing for unilateral severance of joint tenancy real property should be extended to personal property such as securities.
> Liberalization of gift statute (de minimis gifts, gifts made with tacit consent).
> Review of policy of Fam. C. § 2640 (separate property contributions to property acquisition).
> Gifts in view of impending death.
> Life insurance (definition of the community property interest of uninsured spouse).
> Federal preemption of community property rules under ERISA.

Terminable interest rule—has it been repealed for purposes of rights at death?
Rights of heirs of consenting spouse after death of consenting spouse; duties of donor spouse until death of consenting spouse.
Revision of transmutation statute.
Are community property presumptions still necessary?
Should rules governing separate and community rights in the case of property improvement be further adjusted?
Review nonprobate transfers of quasi-community property.

Alternative beneficiaries for unclaimed distribution. The concept is that unclaimed property distributed in probate would go to secondary heirs rather than escheat. The Commission decided to wait until the State's finances improve before considering this.

Filing fees in probate. The staff has done substantial work trying to make sense out of the filing fee system in probate, supported by the practicing bar. Court clerical staff had problems with this, and negotiations between clerks and lawyers have apparently lapsed. The Judicial Council has proposed legislation on the same issue. The staff plans to reactivate this worthwhile matter sometime.

Other matters the Commission has deferred for future study. In the process of preparing the new Probate Code the Commission identified a number of areas in need of further study. These are all matters of a substantive nature that the Commission felt were important but that could not be addressed quickly in the context of the code rewrite. The Commission has reserved these issues for study on an ongoing basis. Topics on the "back burner" list include:

Statutory 630 affidavit form
Transfer on death designation for real property
Summary guardianship or conservatorship procedure
Uniform Transfers To Minors Act
Interest on lien on estate property (attorney fees)
Tort & contract liability of personal representative
Rule Against Perpetuities and charitable gifts
Jury trial on existence of trust
Multiple party bank account forms

3. Real and Personal Property

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one

comprehensive topic. The Commission is actively involved in two topics — covenants that run with the land and enforcement of obsolete restrictions.

Adverse possession of personal property. The Commission has withdrawn its recommendation on this matter pending consideration of issues raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

4. Family Law

The study of family law was authorized in 1983, consolidating various previously authorized studies into one comprehensive topic.

Marital agreements made during marriage. California now has the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights upon death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute might involve controversial issues. Also, the issue whether the right to support can be waived in a premarital agreement should be considered.

The List. Many substantive issues raised in connection with drafting the Family Code were preserved on "The List". The List is in the hands of other interested groups and the Judiciary Committees have been active in preparing legislation dealing with many of these matters. There does not seem to be much need to duplicate these efforts.

5. Prejudgment Interest

This topic was added to the Commission's Calendar of Topics by the Legislature in 1971 because some members of the Legislature believed that prejudgment interest should be recoverable in personal injury actions. This topic was never given priority by the Commission. The Commission doubted that a recommendation by the Commission would carry much weight, given the positions of the Consumer Attorneys of California and the insurance companies and other potential defendants on the issue.

6. Class Actions

This topic was added to the Commission's Calendar of Topics in 1975 on request of the Commission. However, the Commission never gave the topic any priority because the State Bar and the Uniform Law Commissioners were reviewing the Uniform Class Actions Act. Only two states—Iowa and North

Dakota—have enacted it, and it has been downgraded to a Model Act. The staff questions whether the Commission could produce a reform statute in this area that would have a reasonable chance for enactment, given the controversial nature of the issues involved. However, it may be a worthwhile endeavor at some point to try simply to codify the existing rules governing class actions.

7. Offers of Compromise

This topic was added to the Commission's Calendar of Topics at the request of the Commission in 1975. The Commission was concerned with Section 998 of the Code of Civil Procedure (withholding or augmenting costs following rejection or acceptance of offer to allow judgment). The Commission noted several instances where the language of Section 998 might be clarified and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis when staff and Commission time permit work on the topic.

8. Discovery in Civil Actions

The Commission requested authority to study this topic in 1974. Although the Commission considered the topic to be an important one, the Commission did not give the study priority because a joint committee of the California State Bar and the Judicial Council produced a new discovery act that was enacted into law. The Commission in 1995 decided to investigate the question of discovery of computer records; this matter is under active consideration.

9. Procedure for Removal of Invalid Liens

This topic was added to the Commission's Calendar of Topics by the Legislature in 1980 because of the problem created by unknown persons filing fraudulent lien documents on property owned by public officials or others to create a cloud on the title of the property. The Commission has never given this topic priority, but it is one that might be considered on a nonpriority basis in the future when staff and Commission time permit. The staff has done a preliminary analysis of this matter that shows a number of remedies are available under existing law. The question is whether these remedies are adequate.

10. Special Assessment Liens for Public Improvements

There are a great number of statutes that provide for special assessments for public improvements of various types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. (A number of years ago, the Commission examined the improvement acts and recommended the repeal of a number of obsolete ones. That recommendation was enacted.) This legislative assignment would be a worthwhile project but would require a substantial amount of staff time.

11. Injunctions

This topic was added to the Commission's Calendar of Topics by the Legislature in 1984 because comprehensive legislation was proposed for enactment and it was easier for the Legislature to refer the matter to the Commission than to make a careful study of the legislation. The Commission has decided that due to limited funds, it will not give priority to this study, unless there is a legislative directive indicating the need for prompt action on this matter. The Commission in 1994 obtained enactment of statutory clarification of one aspect of the law governing orders to show cause and temporary restraining orders. Due to the Commission's inaction, the 1984 comprehensive legislation was resurrected in 1995 and is currently pending before the Legislature (SB 45).

12. Rights and Disabilities of Minors and Incompetent Persons

The Commission has submitted a number of recommendations under this topic since its authorization in 1979 and it is anticipated that more will be submitted as the need becomes apparent.

13. Child Custody, Adoption, Guardianship, and Related Matters

The Commission obtained several background studies on child custody and adoption pursuant to this 1972 authority, but never pursued them. The Legislature is actively involved in this area and the staff would not devote Commission resources to it.

14. Evidence

The California Evidence Code was enacted upon recommendation of the Commission, and the study has been continued on the Commission's agenda for ongoing review.

Federal Rules of Evidence. Since the 1965 enactment of the Evidence Code, the Federal Rules of Evidence have been adopted. The Commission has available a background study that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules. However, the study was prepared many years ago and would need to be updated before it is considered by the Commission. In addition, a background study by an expert consultant of the experience under the California Evidence Code (enacted 30 years ago) might be useful before the Commission undertakes a review of the Evidence Code.

Electronic Documents. The Commission has decided to study selected admissibility issues relating to electronic data. These are being worked into the Commission's agenda as Commission time and staff resources permit.

Partial or Conditional Waiver of Privilege. In connection with the administrative adjudication study, the issue arose whether a person who waives a privilege by testifying in an administrative hearing may subsequently assert the privilege in a civil proceeding. The Commission felt that the question of a partial or conditional waiver of a privilege is not an issue unique to administrative adjudication, and any action on this matter should be general in nature. The Commission requested the matter be put on the agenda for discussion in connection with new topics and priorities. The staff's general attitude toward this project is negative — once a privilege has been waived, the information is a matter of public record, and the policy served by the privilege can no longer be satisfied. **The staff does not believe it would be a worthwhile expenditure of Commission resources to study this matter.**

15. Arbitration

The present California arbitration statute was enacted in 1961 upon Commission recommendation. The topic was retained on the Commission's Calendar so that the Commission has authority to recommend any needed technical or substantive revisions in the statute.

16. Inverse Condemnation

The Commission has made recommendations to deal with specific aspects of this 1971 topic but has never made a study looking toward the enactment of a comprehensive statute, primarily because inverse condemnation liability has a constitutional basis and because it is unlikely that any significant legislation could be enacted.

17. Administrative Law

This topic was referred to the Commission in 1987 both by legislative initiative and at the request of the Commission It is under active consideration by the Commission. The administrative adjudication portion of the study is pending before the Legislature. The Commission is currently developing a tentative recommendation on the judicial review portion. Remaining topics are rulemaking and nonjudicial oversight.

Administrative rulemaking. The administrative rulemaking portion of the study is of intense interest to state agencies, which believe the current process stymies their ability to promulgate appropriate regulations. On the other hand, the current political climate favors limitations on the ability of government to impose rules that could burden business activity. Because of the politically-charged nature of the debate in this area, the staff is somewhat reluctant to get involved in this subject at present. However, we have been informed by the Office of Administrative Law and others that there is room for improvement in existing procedures that does not reach the level of the policy disputes, and Professor Asimow in his initial report for the Commission on the scope of the administrative law study identifies specific areas amenable to reform. For this reason, **the staff recommends that the Commission take up this project but limit it in scope**.

18. Payment and Shifting of Attorneys' Fees Between Litigants

The Commission requested authority to study this matter in 1988 pursuant to a suggestion by the California Judges Association. The staff did a substantial amount of work on this topic five years ago. The Commission has deferred consideration of it pending receipt from the CJA of an indication of the problems they see in the law governing payment and shifting of attorneys' fees between litigants. The matter is the subject of reform efforts at state and federal levels. The staff recommends that the Commission continue to defer work on it.

19. Family Code

The Family Code project was assigned by the Legislature in 1989 on a priority basis. The Code has been enacted. The Commission should maintain a continuing review under this authority over the next few years to take care of technical problems that may surface.

20. Uniform Unincorporated Nonprofit Association Act

This topic was authorized in 1993 on request of the Commission. The Commission retained Professor Michael Hone of University of San Francisco Law School to prepare a background study. The study was due at the end of 1993. The funds available under the contract have reverted. Professor Hone indicates his desire to complete the work nonetheless. The Commission has approved travel expenses for his attendance at Commission meetings, just in case.

This is a politically sensitive matter, since the relevant committee of the American Bar Association is negative towards the Uniform Act, and Professor Hone has been working with the committee to attempt to resolve the issues. **The staff will seek some resolution of the situation during the next few months.**

21. Business Judgment Rule and Derivative Actions

This topic was authorized in 1993 on request of the Commission. The Commission has received a background study from Professor Mel Eisenberg of University of California, Berkeley, Law School on the business judgment rule and expects to receive a background study from Professor Eisenberg on the demand and excuse provision in derivative actions shortly. The Commission is just commencing work on this topic.

22. Unfair Competition Litigation

This topic was authorized in 1993 on request of the Commission. The Commission is actively involved in this study.

23. Trial Court Unification

This topic was assigned by the Legislature in 1993, with a report date on the constitutional amendments by February 1, 1994, and statutory recommendations later. The Commission delivered its report to the Legislature on constitutional amendments under SCA 3 on schedule. The Commission's resolution of authority has been revised to provide for a study of statutory changes that may be necessitated by court unification, without reference to a particular bill.

SCA 3 was not adopted by the Legislature. Alternative legislation is pending before the Legislature in the 1995-96 session. Senate Bill 162 (Lockyer) provides that when a municipal court judgeship becomes vacant, the judgeship is converted to a superior court judgeship on a finding by the Governor that sufficient funds are available and the administration of justice would be advanced. The staff's initial impression is that implementing legislation is not necessary for this approach — it is a workload management issue. However, **if the bill passes, the Commission should make an initial review** to ascertain that this is in fact the case.

24. Tolling Statute of Limitations While Defendant Is Out of State

This topic was authorized in 1994 on request of the Commission. The Commission has circulated a tentative recommendation for comment and is in the process of reviewing comments.

PROPOSED NEW TOPICS

During the past year the Commission has received a number of suggestions for study of new topics. These suggestions are discussed below.

Confidentiality of Mediation Communications

The administrative adjudication bill includes provisions protecting the confidentiality of communications made during mediation of administrative adjudication disputes. During the legislative process, we received input on this matter from a coalition of mediation professionals seeking to standardize statutory treatment of mediation. We were able to satisfy them that the Commission's recommendation provides adequate — in fact superior — language on the point.

The mediation coalition also indicated there are other problems in this field that deserve study and revision by the Commission. Specifically, case law is unclear concerning when mediation starts and stops for purposes of applying the privilege. See, e.g., Ryan v. Garcia, 33 Cal. Rptr. 2d 158 (1994). The coalition also suggests it would be appropriate for the Commission to review whether the protection should be cast as a privilege or as a prohibition from disclosure.

The staff notes that a study by the Commission would not be inappropriate, since the basic Evidence Code mediation privilege was enacted on Commission recommendation some years ago. The question the staff raises is whether the

time is now ripe for further review of this area. At the time the mediation privilege was enacted, there was concern that this was a developing area that should be allowed to flourish and not be stifled by statutory regulation. On the other hand, the kinds of issues that concern the coalition are limited in scope and would probably not give rise to concerns about overregulation. **The staff recommends the Commission work these matters into its agenda on a low priority basis.**

Uniform Certification of Questions of Law Act

The National Conference of Commissioners on Uniform State Laws has promulgated a new Uniform Certification of Questions of Law Act (1995). This act addresses the situation where a court of one jurisdiction is required to apply the law of another state but the law of the other state is not clear. The act allows the court to certify a question of law for response by the highest court of the state.

California does not have a version of this act (there are predecessor versions from 1967 and 1990). The staff raises the matter because it is a nice way to handle these kinds of issues in both federal and state courts. A uniform act on the matter would be useful.

However, there are concerns that make adoption of the act in California problematic. First is a constitutional issue. It is not clear that such an act could be adopted in California without a constitutional amendment, since the jurisdiction of the California courts is limited by the constitution, and answering questions on issues arising outside the court's jurisdiction is problematic. This does not mean we cannot address the issue; the Commission has recommended and obtained adoption of constitutional amendments in the past. However, it greatly complicates matters.

A second concern is a practical one. With the court system overburdened and struggling with limited resources, it is unlikely the Supreme Court would want to devote much attention to answering questions posed by out of state or federal courts. However, the court would not need to answer a referral if it didn't want to. And, we could provide a referral fee to help defray administrative costs.

We understand that there was a proposed constitutional amendment some years ago to authorize certification of questions of law, which was sponsored by the Judicial Council. If we undertook this project we would need to track that proposal down, find out why it failed, and address the problems.

Legislative authorization of this study would be necessary. **Although this would make a nice project, we question on balance whether it is really worth the effort.**

Protective Proceedings For Federal Benefits

Attached as Exhibit pp. 1-3 is a letter from Michael J. Anderson of Sacramento, noting a problem with protective proceedings for a minor entitled to federal benefits such as social security or military disability and death benefits. Under the governing federal law, a representative payee may be appointed for the benefits, and the payee must follow federal law directing how the benefits are to be spent; the benefits are not subject to independent state control, such as by a state court in a guardianship proceeding.

After analyzing the interaction of federal and state law in this area, Mr. Anderson concludes:

> Clearly, federal law preempts the field. 42 USC §407(a) bars states from using legal process to control how benefits are spent. 20 CFR §404.2040(a) mandates that benefits be spent for current maintenance of the beneficiary. When the benefits are misspent, anyone (including a state) may, within the social security system, become the representative payee and thereby control the spending of benefits. This federal law, however, has not yet been explicitly applied in a California case. Also, it forecloses on judges' ability to use tools like conservatorship to supervise benefits. Because this law is so far reaching, and because it comes from sources outside California, it is necessary to add a statute which will:
>
> (1) clearly state that a conservatorship or guardianship may not be appointed to supervise funds which are exempt from legal process under federal law (including Social Security benefits);
>
> (2) encourage the state (i.e. public administrator) to investigate misuse of benefits where it is suspected; and
>
> (3) if there is misuse of benefits, encourage the state to apply to become a beneficiary's representative payee, acting within the system set up by federal law.

The guardianship and conservatorship statute was enacted on Commission recommendation, and the Commission retains authority to recommend revisions that may appear appropriate. **The staff believes this would be an appropriate matter for the Commission to investigate, and would work it into the Commission's agenda during the coming year.**

Coordination of Guardianships of Minors

Exhibit pp. 4-5 is a letter from Judge Nancy Hoffman of the Santa Clara County Superior Court. Judge Hoffman points out that there is no good way to determine in a guardianship proceeding whether a guardian has previously been appointed in another county. The only way is to learn from the family, which may or may not give accurate information, intentionally or unintentionally. She proposes that all guardianships be computerized on a statewide basis to allow appropriate checks by Departments of Social Services or probate investigators before guardianships are finalized.

Judge Hoffman also suggests that mandatory county review of placements of minors would be an appropriate safeguard to ensure that the placements meet the needs of the minor. She recognizes the fiscal problems with this suggestion, and states that at least a system by which volunteers could serve as reviewers for the court should be encouraged.

While these suggestions would fall within the Commission's existing authority, the staff believes they are more practical than legal in character and **would be better addressed by some other body than the Commission**. The staff would look for an appropriate entity, such as the state Department of Social Services, to refer Judge Hoffman's letter to.

Contract Formation

In connection with the Commission's study of admissibility of electronic documents, the Commission felt that it would be desirable to make a substantive study of the rules of contract formation and whether statutory revision is necessary in light of the increased use of electronic communications. The staff notes that the rules of contract formation in UCC Article 2 are currently undergoing review by the National Conference of Commissioners on Uniform State Laws from this perspective.

We do not really have the resources to undertake such a study at present, since it would be appropriate to engage an expert consultant in this area. Study of this subject would require authorization by the Legislature. However, it would not hurt to prepare for better budget times by obtaining the Legislative authorization that would be necessary to undertake this study. **The staff recommends that the Commission take steps to have its authority expanded to cover the law of contracts, including the effect of electronic communications**

on the law governing contract formation, the statute of frauds, and related matters.

Business Court

Ed Marzec has forwarded us correspondence he has received from the State Bar Business Law Section concerning the possibility of the Law Revision Commission studying the creation of specialized business law departments or courts. See Exhibit pp. 6-13.

Senator Campbell sponsored legislation last session which would have established a commercial department in Los Angeles County as a pilot project. The bill failed in its first committee by a 2-7 vote. It was supported by commercial interests such as the California Bankers Association, the California Land Title Association, the California Manufacturers Association, the California Association of Realtors, and many other organizations. It was opposed by the (then) California Trial Lawyers Association, the California Judges Association, and the Judicial Council of California.

Among the issues raised concerning this bill were:

(1) Why should commercial cases be favored over other civil cases?

(2) Is a commercial litigation really a specialty area, and are specialized courts really necessary?

(3) Where will the funding come from? The cost of establishing the pilot program was estimated to be $6.2 million, and the annual maintenance cost $2 million.

(4) Would this impair the ability of the judicial branch to manage its own calendar and resources?

The concept of a business court, regardless of its merits, is not viewed with favor by either the legislative or judicial branch. The staff is concerned that the Commission could expend substantial resources on this project, which will end up going nowhere. **We would not study this matter unless there is an indication (as there was with trial court unification) of real legislative interest in the concept.**

CONCLUSION

1996 Legislative Program

The staff would give first priority during the remainder of 1995 to completing projects currently underway, with a view to introduction in the 1996 legislative

session. The staff believes the following are feasible for the Commission's 1996 legislative program:

Unfair competition litigation. A draft tentative recommendation to make some procedural sense out of this area is to be considered at the September meeting. The proposal will need to circulate widely for comment before a recommendation can be finalized and submitted to the Legislature.

Administrative adjudication followup. Miscellaneous items left over from the administrative adjudication bill will be considered at the September meeting. Some of them should be ready for introduction in 1996.

Judicial review of agency action. A tentative recommendation for a comprehensive judicial review overhaul is being circulated for comment. This is a major piece of legislation. Depending on the tenor of the comments, we may be able to have the proposal ready for 1996.

Statute of limitations in trust matters. Comments on the tentative recommendation to clarify the statute of limitations for trust accountings will be considered at the September meeting, and a final recommendation should be prepared in plenty of time for introduction in 1996.

Inheritance from or through child born out of wedlock. Comments on the tentative recommendation to cure an anomaly in the inheritance statute will be considered at the September meeting, and a final recommendation should be prepared in plenty of time for introduction in 1996.

Obsolete restrictive covenants. Comments on the tentative recommendation to codify the law on elimination of obsolete real property use restrictions will be considered at the September meeting, and a final recommendation should be prepared in plenty of time for introduction in 1996.

Covenants that run with the land. Comments on the tentative recommendation to repeal the First Rule in Spencer's Case will be considered at the September meeting, and a final recommendation should be prepared in plenty of time for introduction in 1996.

Tolling statute of limitation when defendant out of state. Comments on the tentative recommendation to repeal the tolling statute will be considered at the September meeting, and a final recommendation should be prepared in plenty of time for introduction in 1996.

Homestead exemption. A tentative recommendation to repeal the declared homestead is currently being circulated for comment. We should be in a position to recommend legislation on this for 1996.

Best evidence rule. A draft tentative recommendation to repeal the best evidence rule will be considered at the September meeting. Assuming it is approved to circulate for comment, we should be able to have a recommendation on the matter ready for 1996.

Priorities for Future Sessions

The staff would give next priority to matters that have been activated by the Commission but that will take longer to complete. Work on these matters would take place primarily during 1996. These topics are:

Business judgment rule and derivative actions. The Commission will consider the consultant's background study on the business judgment rule in September. The study on demand and excuse in derivative actions will be delivered shortly. We should be able to complete work on both matters for the 1997 legislative session.

Health care decisions act. This is a major and important project. We would schedule substantial Commission time on the matter during 1996. Whether the work can be completed in one year is questionable.

Administrative rulemaking. We would activate this study during 1996. Assuming only specific issues, rather than a comprehensive revision, are addressed, it may be possible to complete work on this during 1996.

Uniform Unincorporated Nonprofit Association Act. The staff hopes to come to some resolution with our consultant on this. It is a relatively easy project and should be completed during 1996.

Miscellaneous matters. The projects listed above would absorb most of the Commission's available resources during 1996. However, scheduling is dependent in part on delivery of consultant studies and availability of consultants for meetings. The staff thinks there will be opportunities to work smaller matters into the agenda from time to time, depending on staff workload and meeting schedules. Issues the staff has in mind include:

> **Analysis of trial court unification by attrition.** Assuming enactment of SB 162 (Lockyer), we would do a preliminary analysis to confirm that no special implementing legislation is needed.
>
> **Mediation privilege issues.** Should the law be clarified as to when mediation starts and stops for purposes of the privilege, and should the privilege be recast as a prohibition?

Protective proceedings for federal benefits. The interrelation of federal law and state guardianship proceedings would be clarified.

New Topics

Of the possible new topics that have been suggested for future Commission consideration, the staff suggests that only one be added to the Commission's resolution of authority:

Contract Formation. If authority to study the impact of electronic communications on contract formation were added to the Commission's agenda in 1996, we would be ready to take up the matter as the UCC Article 2 revisions are taking shape.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

BURGER & PLAVAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1000 G STREET, SUITE 350
SACRAMENTO, CALIFORNIA 95814-0840

TELEPHONE
(916) 444-9000
TELECOPIER
(916) 444-2059

FRANK P. PLAVAN
TRENA HARDIN BURGER
JAN ZABRISKIE
JOHN D. FAIRBROOK
PAMELA J. PALMIERI
MICHAEL J. ANDERSON
STEPHEN CRAIG HUNTER
MATTHEW J. GOLDMAN
BILL DI CAPO
STEVEN A. WHITE
ALAN R. VAN STRALEN
WILLIAM S. HAIGH
GRANT A. ROSENBLUM
RHONDA CANBY
JEFFREY L. SIMPTON
TORENE L.M. SCHWAB
MARIA LATHROP WINTER

OF COUNSEL
DONALD M. PACH

Law Revision Commission
RECEIVED
AUG - 9 1995
File:

(950.283)
(3:sm)
(lrc8.8)

August 8, 1995

California Law Revision Commission
400 Middlefield Rd. Suite D-2
Palo Alto, CA 94303-4739

Re: Conservatorships, Guardianships, and Social Security and Other Benefits

To the Law Revision Commission:

Recently, in a case involving a guardianship with respect to a minor child's social security and Air Force benefits, the judge directed the guardian, i.e. the mother, not to spend a substantial portion of those funds, in contravention of federal guidelines on how the benefits should be spent.

Federal law mandates that social security benefits "shall not be transferable or assignable, at law or in equity," and may not be "subject to execution, levy, attachment, garnishment, or other legal process" 42 USC §407(a) (emphasis added). In addition, the Social Security Administration has enacted regulations governing "representative payees," in which a beneficiary's benefits are sent to one who acts on the beneficiary's behalf. See generally 20 CFR §§ 404.2001 - 404.2065. Payment is made to a payee when the beneficiary is under 18, or physically or mentally incapable of managing the payments. 20 CFR §404.2010. The Administration prefers to designate parents, other relatives, or close friends as payees, but may also choose an agency, organization, or institution. 20 CFR §§404.2020, 404.2021. The payee must use the money for the "current maintenance" of the beneficiary, including food, shelter, clothing, medical care, and personal comfort items. 20 CFR §404.2040(a). If the payee misuses the funds, he becomes personally liable to the beneficiary, and the Administration will try to find a new payee. 20 CFR §§ 404.2041, 404.2050. Air Force

disability and death benefits have similar provisions.

Because of this scheme of federal law, the Supreme Court of Iowa held that a trial court could not impose a conservatorship on a minor's social security benefits. In re Marriage of Foley (Iowa 1993) 501 N.W.2d 497. There, the trial court had ordered the conservatorship, speculating that the Social Security Administration only did minimal monitoring of payees' use of funds. The Supreme Court of Iowa held that the trial court had "strayed into a field where federal law and agency action are controlling." Id. at 501. The administration's procedures were adequate to protect the children's interests. Id., citing 20 CFR §§ 404.2021, 404.2065. If the children's interests are not served,

> the Social Security Administration alone has the power to enforce the duties of a representative payee through the appointment of a new payee when the current payee "has not used the benefit payments on the beneficiary's behalf in accordance with the guidelines." Id., quoting Kriegbaum v. Katz (2d Cir. 1990) 909 F.2d at 74; 20 CFR §404.2050.

In other contexts, the United States Supreme Court, three federal circuits, and another state's supreme court have all held that these federal benefits are beyond the reach of a state's legal process. See Bennett v. Arkansas (1988) 108 S.Ct. 1204 [485 U.S. 395] (Arkansas could not seize a prisoner's benefits to help defray cost of prison system); Crawford v. Gould (9th Cir. 1995) 56 F.3d 1162 (California could not withdraw benefits deposited into patients' account at state mental hospital); Brinkman v. Rahm (9th Cir. 1989) 878 F.2d 263 (Washington could not apply benefits to cost of care at mental hospital); King v. Schafer (8th Cir. 1991) 940 F.2d 1182 (Missouri could not threaten to seize benefits if bill for treatment at mental hospital was not paid); Kriegbaum v. Katz (2d Cir. 1990) 909 F.2d 70 (New York could not commence special proceeding to secure payment for mental hospital care through benefits); C.G.A. v. State of Alaska (Alaska 1992) 824 P.2d 1364 (Alaska could not garnish money from beneficiary's permanent fund to satisfy unpaid child support).

Although the state cannot use legal process to affect social security benefits, it can work within the social security system. It is precisely because of these safeguards within federal law that Iowa held a conservatorship to be invalid. In re Marriage of Foley, supra, 501 N.W.2d at 501.

The state is entitled to become the representative payee for

a beneficiary. The state, or its agents, representatives, or departments, may alert the Social Security Administration if a beneficiary's interests are not being served, and become the payee or help select a new payee. For example, in C.G.A. v. State of Alaska, cited and discussed above, the court held that the Alaska Department of Health and Social Services had statutory authority to act as payee for the minor beneficiary. The Department could also reimburse itself for providing care, as long as the expenditures were within the Social Security Administration's guidelines. C.G.A., supra, 824 P.2d at 1369.

A similar view of a state's ability to become a beneficiary's payee can be found in King v. Schafer, supra, 940 F.2d at 1185; Fetterusso v. State of N.Y. (2d Cir. 1990) 898 F.2d 322; Ross v. Social Sec. Admin (8th Cir. 1991) 949 F.2d 1021.

Clearly, federal law preempts the field. 42 USC §407(a) bars states from using legal process to control how benefits are spent. 20 CFR §404.2040(a) mandates that benefits be spent for current maintenance of the beneficiary. When the benefits are misspent, anyone (including a state) may, within the social security system, become the representative payee and thereby control the spending of benefits. This federal law, however, has not yet been explicitly applied in a California case. Also, it forecloses on judges' ability to use tools like conservatorship to supervise benefits. Because this law is so far reaching, and because it comes from sources outside California, it is necessary to add a statute which will:

(1) clearly state that a conservatorship or guardianship may not be appointed to supervise funds which are exempt from legal process under federal law (including Social Security benefits);
(2) encourage the state (i.e. public administrator) to investigate misuse of benefits where it is suspected; and
(3) if there is misuse of benefits, encourage the state to apply to become a beneficiary's representative payee, acting within the system set up by federal law.

The same reasoning should apply to other federal benefits as well.

Very truly yours,

BURGER & PLAVAN

Michael J. Anderson

MJA/sm

Superior Court
State of California

Santa Clara County Superior Court Building
191 North First Street
San Jose, California 95113

Chambers of
Nancy Hoffman, Judge

August 18, 1995

Law Revision Commission
RECEIVED
AUG 23 1995
File: 2.3.1

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA. 94303-4739

Dear Commission Members:

In a recent Juvenile Dependency case in my court, the Department of Social Services was in the process of finalizing a guardianship with maternal grandparents only to belatedly discover that a guardianship had been awarded to paternal grandparents in 1988 in another county after a contested hearing. No one knows how the minor came to be living with his father in Santa Clara County. The father has just been convicted of child abuse and torture related to another child.

Apparently the only way the Department of Social Services determines whether another county has already granted a guardianship is by learning it from the family. Such information may not be accurately given, either unintentionally or intentionally. A similar problem exists with respect to guardianships under the probate code.

I propose that all guardianships be computerized on a statewide basis to allow appropriate checks by Departments of Social Services or probate investigators before guardianships are finalized. Additionally, I propose that guardianships established by the Juvenile Dependency Courts be subject to yearly reviews in each county.

When reviewing the law relating to probate guardianships, the Commission may want to consider whether the code, as presently set forth, meets the needs and concerns of placement of minors in today's society. No doubt mandatory rather than non-mandatory county reviews pursuant to Probate Code sec.1513 would be a more appropriate safeguard for minors. However, I do understand that budget constraints may preclude that. Because counties have a difficult time doing these reviews with limited staff, Judge LaDoris Cordell has instituted a procedure in Santa Clara County whereby volunteers will serve as reviewers for the court. Such procedures should be encouraged.

Thank you for your assistance in these matters.

Sincerely,

NANCY HOFFMAN
Judge of the Superior Court

NH:jh

cc: Judge Leonard Edwards
Judge LaDoris Cordell
Kathryn Hogan, Deputy County Counsel
Felicia Brown, Supv. Probate Investigative Officer

BUSINESS LAW SECTION
THE STATE BAR OF CALIFORNIA

Chair
STEVEN O. WEISE, *Los Angeles*
Vice-Chair
ELIZABETH A. HUBER, *Torrance*
Vice-Chair
PHYLLIS ALDEN TRUBY, *Los Angeles*
Secretary
STEVEN M. FLEISHER, *San Francisco*
Treasurer
ROBERT A. ZADEK, *San Francisco*
Advisor
ROLAND E. BRANDEL, *San Francisco*
Section Administrator
SUSAN M. ORLOFF, *San Francisco*

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8870

Executive Committee
The Officers and
MIKEL R. BISTROW, *San Diego*
DEBRA A. CHONG, *San Francisco*
JOHN CHU, *San Francisco*
SUE L. FRAUENS, *Los Angeles*
FRED F. GREGORY, *Los Angeles*
MARIE F. HOGAN, *San Francisco*
D. PETER HUGHES, *San Francisco*
ROBERT M. MATTSON, JR., *Irvine*
CURTIS C. SPROUL, *Sacramento*
HOWARD J. WEG, *Los Angeles*

June 28, 1995

REPLY TO: Joseph F. Troy
Troy & Gould
1801 Century Park East
Los Angeles, CA 90067
(310) 789-1224/FAX 201-4746

Edwin K. Marzec, Esq.
1333 Ocean Avenue
Santa Monica, CA 90401

Re: Business Court Committee

Dear Mr. Marzec:

I am the chair of a State Bar Business Law Section committee, called the Business Court Committee, which has been studying the advisability of creating, in the state of California, specialized business law departments or courts similar to those found in such other states as Delaware and New York. Our committee has recently proposed the formation of a statewide commission to undertake a formal study of this issue and to make a recommendation to the Governor, the Legislature, the Judicial Council and the State Bar. Dan Kolkey, the Governor's legal counsel, has suggested that we discuss the possibility of referring this matter to the California Law Revision Commission rather than creating a new commission.

Enclosed is a draft of the charter for the proposed commission that we had envisioned to study this issue. (Of course, we would have no need for such a commission if the California Law Revision Commission undertook the project, but the draft of the charter should be helpful to you in understanding the scope of the project that we would be proposed the Law Revision Commission to undertake.) Also enclosed is the latest status report of our committee, together with a recent article I have written on this subject, an article by Roland Brandel, and an article on the New York Commercial Parts.

I was delighted to hear from Fred Gregory that you will attend the next meeting of our committee, on Friday, July 7, 9:30 A.M., at the State Bar office in Sacramento, 915 L Street, Suite 1260. I look forward to seeing you then.

Sincerely,

Joseph F. Troy

cc. Fred Gregory, Paul Dubow, Louise Burda Gilbert, Bernard Witkin

SPECIALIZED BUSINESS AND COMMERCIAL LAW DIVISIONS
OF THE CALIFORNIA COURTS

Status Report of the Business Court Committee of the Business Law Section of the State Bar of California

April 24, 1995

I. INTRODUCTION

Problems with the Current System. California does not currently have any specialized courts, divisions or departments to handle business litigation, nor does it have a cadre of specialized judges to which business litigation is routinely assigned.[1] Only a relatively small percentage of all of the judges have had business trial experience before their appointments, and once appointed, few judges have the opportunity to adjudicate on business matters with sufficient regularity to develop significant expertise in business or commercial matters. Litigation in the state courts of California is widely regarded by the business community as entailing inordinate risks of unpredictability, inconsistency, excessive cost, and intolerable delays, leading to the incorporation of many California businesses outside the state and to a decline in the attractiveness of California as a place to do business. The current statewide shortage in judicial resources, together with the advent of "three-strikes," will undoubtedly exacerbate the burdens and risks of civil litigation in the California courts.

The Impact of "Fast Track." Recent steps toward court reform, such as the individual calendaring (or "fast track") system, have substantially reduced delays, but possibly at the cost of further compromising the ability of the courts to develop their collective expertise in handling business litigation. Fast-track cases are usually assigned by lot; with limited exceptions (such as criminal and family law matters), few courts make any attempt to assign cases to judges with specialized experience or expertise.[2] On average, business cases are more complex, take longer to try and are more likely to go to trial than other civil cases. Due to the increase in court backlogs, the priority that must be given to the ever-increasing criminal calendar, and the lack of funds to increase judicial resources to keep up with demand, judges find it increasingly difficult to develop the knowledge, and to provide the thoroughness and care, required for the complex and challenging controversies so often involved in business litigation.

Specialized Business Courts in Other States. For many years, the Delaware Courts of Chancery occupied a unique position as the only court system in the United States that specialized primarily in business and corporate litigation. Delaware has recently created a special commercial law calendar of its trial courts as well. New Jersey and Illinois have chancery courts with specialized business law expertise similar to Delaware's Chancery Court. More recently, a number of states have begun considering the creation of courts with similar specialization. A bill has been introduced in the State of Pennsylvania to create a "small self-contained . . . special chancery court system patterned after the Delaware Courts of Chancery, but with a jurisdiction limited to business and commercial matters." On January 1, 1993, the State of New York created a commercial division (the "Commercial Parts") of its existing trial court system (Supreme Court) in the County of New York.

The Committee's Study. The Business Court Committee ("the Committee") was appointed in 1991 by the Business Law Section of the California State Bar to evaluate the need for a comparable business court system or business law division in California. The Committee has undertaken a study of the Pennsylvania bill, the New York Commercial Parts, the Delaware Chancery Court, specialized courts within the federal court system, specialized divisions of the California Superior Courts, and the English Commercial Court system. The Committee has also considered the alternative dispute resolution ("ADR") option and the

---

[1] For the purpose of this report, the term "division" means two or more specialized departments of a Superior Court, and the term "department" means a single courtroom and judge.

[2] There is no reason, however, why any specialized division could not employ individual calendaring and thereby obtain the benefits of both fast-track (including a single judge for all purposes) and specialization.

nature, volume, speed and cost of California business litigation. Pepperdine Law School has completed a student research project to assist the Committee in compiling relevant statistics on business litigation in the Los Angeles Superior Courts. Their report, dated September, 1992, is entitled "Statistical Sampling and Analysis of Business Cases in Los Angeles County Superior Court, Central Division."

The Preliminary Report. The Committee's preliminary report ("the Preliminary Report"), dated July 20, 1991, concluded that the benefits to the public of a properly structured business court system could substantially outweigh its costs and that the concept of a business law division of the existing courts or of some other system of judicial specialization deserves serious study. This Status Report updates and supersedes the Preliminary Report.

II. Existing Business and Commercial Courts

The Delaware Experience. Few business cases of national importance are decided in California; the California Supreme Court rarely hears business cases; and California does not have a wide body of case law on which to base decisions. By contrast, Delaware's Chancery Court system is fast, efficient, informed and highly respected. Its judges have extensive corporate experience and handle numerous business cases every year. Both lawyers and the public at large "are better able to predict [Delaware] Court opinions, assess risks, and minimize exposure before any action is taken."[3] As Chief Justice Rehnquist said at the Bicentennial of the Delaware Court of Chancery,

> Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court can make such a claim. As one scholar has observed, "[t]he economies of scale created by the high volume of corporate litigation in Delaware contribute to an efficient and expert court system and bar." . . . .
>
> Judicial efficiency and expertise, a well-paid and well-respected judiciary, innovative judicial administration, courageous leadership—these hallmarks of the Delaware Court of Chancery provide a fine example of a somewhat specialized state court system in action.
>
> Today, the existence of state courts that do their job promptly and well is more important than ever before. . . .[4]

The New York Commercial Courts. Effective January 1, 1993, New York County established four specialized "Parts" (the equivalent of Departments of the California Superior Courts) and reassigned four judges with extensive experience in business and commercial law to staff their new, so-called "Commercial Court." The new court "will get the bulk of cases in Manhattan involving commercial issues. These include disputes over contracts and sales, as well as shareholder suits against corporations."[5] Because the new Commercial Court is not a court of separate jurisdiction, but is merely a new division of the existing courts, its implementation was effected by new court rules, and no new legislation was required. The creation of the new court was the direct result of a recommendation of the Review Committee of the Individual Assignment System, a special committee appointed by the New York courts ("the IAS Committee").[6] The IAS Committee recommended the establishment of specialized commercial departments of the New York courts for the following reasons:

---

[3] "Incorporating in Delaware: Where American Business Incorporates," published by Division of Corporations, State of Delaware, 1991, p. 6.

[4] W. H. Rehnquist, The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice, 48 Bus. Law. 354 (Nov. 1992).

[5] *Wall Street Journal*, January 5, 1993, p. B1.

[6] "Report to the Chief Judge and Chief Administrator of the Review Committee on the Individual Assignment System," dated September 1992, Jonathan Lippman, chairperson.

(i) "The establishment of specialized commercial parts . . . will allow judges to become intimate with and expert in the fine points of commercial law and practice."[7]

(ii) "In addition, it will allow for consideration of specialized rules for the treatment of commercial cases that will most effectively guide their case progress under IAS."[8]

(iii) "Moreover, specialized parts promote consistency in dispositions."[9]

(iv) "In addition, if the courts grow more efficient at handling business cases, some businesses that have turned to private mediation and arbitration services may return to the public court system to resolve disputes. While private alternative dispute resolution is praised by many who use it, critics suggest that a vibrant court system also is needed so that judge-made law can evolve case by case and the public can be kept informed of commercial conflicts that might otherwise be resolved in secret."[10]

Preliminary indications on the New York experiment are highly favorable. The Commercial Parts have managed to dispose of their caseloads much more rapidly than the nonspecialized courts. The disposition rate of trial-ready commercial cases increased 35% in 1993 (the first year the Commercial Parts were in operation) over 1992; this dramatic increase has been attributed entirely to the productivity of the Commercial Parts.[11]

The *New York Law Journal* recently completed a survey of 317 lawyers who have handled cases in the Commercial Parts since they began operation. The results were very encouraging:

1. "A significant majority (78 percent) of the lawyers surveyed reported that the new system works better than the one it replaced under which commercial cases were randomly assigned to any judge. . . ."[12]

2. "Eighty-six percent said more commercial parts should be created in other parts of the state. . . ."[13]

3. "The positive ratings were consistent among lawyers from firms of widely varying sizes." ("A substantial majority of the 317 lawyers who responded to the survey reported they practiced in small firms.")[14]

4. "They rated the judges 'good' or 'excellent' in the following areas: expertise on commercial law issues, 79 percent; pretrial case handling, 68 percent; legal reasoning, 66 percent; treatment of lawyers, 64 percent; length of trials, 62 percent; and judge's knowledge of the case, 59 percent."[15]

---

[7] *Id.* at p. 14 (introductory Executive Summary).

[8] *Id.* at p. 14 (introductory Executive Summary).

[9] *Id.* at p. 67.

[10] *Wall Street Journal*, January 5, 1993, p. B1.

[11] Nomination petition by New York Chief Administrative Judge E. Leo Milonas to the National Association for Court Management nominating the Commercial Parts for the 1994 NACM Justice Achievement Award, January 1994, p. 14.

[12] *New York Law Journal*, January 9, 1995, p. 1.

[13] *Id.*

[14] *Id.*

[15] *Id.* at p. 2.

5. "A bare majority (51 percent) reported satisfaction with the justices' speed in deciding substantive motions."[16]

6. "The one performance area where support for the commercial part justices sagged involved assistance with settlements, with only 44 percent giving the commercial part judges an 'excellent' or 'good' rating. Lawyers with active commercial practices suggested that the law rating may be a structural offshoot of having one judge for all matters, including trial. Knowing they will have to try a case before a judge, lawyers may be reluctant to lay bare all a matter's weaknesses during settlement discussions. . . ."[17]

7. "According to data compiled by the OCA, the judges have succeeded in paring down a mountain of cases to more manageable proportions . . . despite an exceptionally heavy motion practice."[18]

8. "The five judges who have been assigned to a commercial part have been affirmed on appeal 81 percent of the time."[19]

9. According to the presiding judge, the Commercial Parts are "a fine example of an innovative program calculated to improve the quality of justice in this venue."[20]

More recently the 1600-member commercial and federal Litigation Section of the New York State Bar endorsed the creation of a separately funded statewide branch within the New York Supreme Court to handle commercial cases.[21] The New York State Bar conducted a survey of 41 in-house counsels at large corporations and found that a substantial majority of them "reported dissatisfaction with the way business cases are handled in the state system, especially with the amount of time and money taken to resolve such matters."[22] The question posed in the survey had a statewide focus, of course, and did not relate to the handling of cases in the Commercial Parts. The report recommended a higher scale of fees for commercial cases than for ordinary litigation because the per-case cost of handling such matters is higher than for other types of cases. The report also proposed making court-annexed mediation available and empowering judges to require parties to participate in nonbinding mediation.

III. Specialization Within the Existing California Court System

Specialized Divisions. The Superior Courts, which are the trial courts of general jurisdiction in the State of California, are given broad discretion in the organization of their work. Each Superior Court is free to assign particular cases or types of cases to judges with the expertise to handle them most efficiently. Despite the recent trend to assign cases by lot, most of the Superior Courts have separate civil and criminal calendars, and some have special systems of case assignment for certain civil case classifications in the form of separate probate divisions, separate family law divisions and, in the larger counties, a variety of other separate divisions and departments. The Committee has analyzed available data on these specialized civil divisions and found, generally, that they dispose of a greater number of cases annually at a lower cost and in less time than the general departments of the Superior Court.[23]

---

[16] *Id.*

[17] *Id.*

[18] *New York Law Journal*, January 10, 1995, p. 1.

[19] *Id.* at p. 6.

[20] *New York Law Journal*, January 18, 1995, p. 2.

[21] *New York Law Journal*, January 19, 1995, p. 1.

[22] *Id.*

[23] A Specialized Business Court for the State of California, Preliminary Report of the Business Court Committee of the Business Law Section of the State Bar of California, July 20, 1991, p. 15.

Trial Court Realignment and Efficiency Act of 1991. In an effort to improve the efficiency of the courts, the Legislature adopted the Trial Court Realignment and Efficiency Act of 1991 (A.B. 1297), which requires all trial courts to prepare and submit to the Judicial Council coordination plans designed to achieve maximum utilization of judicial and other court resources and requires that the plans take into consideration standards adopted by the Judicial Council, which "shall include . . . the establishment of separate calendars or divisions to hear a particular type of case." Government Code §68112(b)(6). Pursuant to this provision, the Judicial Council adopted Element 8 in Section 29 of the Standards of Judicial Administration, effective January 1, 1992, which requires coordination plans "to address" (i.e., presumably to consider the need for) "the establishment of separate calendars or divisions to hear a particular type of case, *but not the establishment of a specialized court.*" [Emphasis added.] By adding the language not found in the statute, the Judicial Council is apparently attempting to negate any possible inference that the encouragement of specialized new divisions would extend to the creation of courts of separate jurisdiction. In short, the drafters of the Trial Court Realignment and Efficiency Act did not intend, according to the Judicial Council, to breach the unitary jurisdiction rule. On the other hand, the Act clearly does contemplate the establishment of specialized divisions ("separate calendars or divisions to hear a particular type of case") within the existing Superior Courts when doing so would enhance judicial efficiency.

IV. Issues Presented by a Specialized System for Business Law Matters

Alternative Dispute Resolution. Many litigants in business disputes have sought to bypass the perceived inefficiencies and lack of expertise of the public court system by electing to resolve their disputes by arbitration or other alternative dispute resolution mechanisms. ADR alone cannot solve the problems found in our existing court system, however, because it is purely voluntary in nature, requiring the consent of all parties; does not establish precedents; does not create a public record; does not give litigants the opportunity of trial by jury; is often not binding and therefore can lead to further and duplicative litigation; and is available only to those who can afford the substantial additional cost. Moreover, many of the useful features of ADR could be adopted by and appended to a specialized business court or business law division as an adjunct to it. (For example, a judge of the business court or division could delegate certain fact-finding responsibilities to a specialized master or could assign appropriate cases to mediation or arbitration.)

A Separate Court vs. a New Division or System of Specialized Assignments. Creating a specialized business law division of the existing Superior Court system (as in New York) or a system of specialized assignments in lieu of an entirely new business court of separate jurisdiction (as proposed in Pennsylvania) would create no new jurisdictional problems, would maximize the administrative flexibility of the courts, and, absent the need for funding new judicial positions, would require no new legislation. Yet, as with a totally separate court system, in theory it should ultimately develop an experienced business trial bench, reduce trial delays and costs, and produce more consistent, predictable and well-reasoned decisions at the trial level. A new division or specialized assignment system would be consistent with Element 8 in Section 29 of the Standards of Judicial Administration promulgated by the Judicial Council, which calls for, "the establishment of separate calendars or divisions to hear a particular type of case, but not the establishment of a specialized court."

Fairness and Objectivity. Any business law division or system of specialized assignments must, in the Committee's view, be completely fair and objective and must be operated in a manner which avoids bias—either actual or perceived. It is essential to the success of any such system that it provide equal access and equal justice to all litigants, and that individuals, small businesses, investors, shareholders and ordinary citizens find it just as advantageous to use as the largest corporations. Similarly, care must be taken to ensure that the new system does not drain resources from the balance of the courts.

Jurisdiction or Purview. A key issue to be addressed is the appropriate "jurisdiction" (or "purview" as the Committee has chosen to call it) of any business and commercial law division. The following are the types of cases that the Committee has considered classifying as "business and commercial" for the purpose of specialized assignments:

1. Breach of contract, fraud or misrepresentation actions involving:

   (a) Purchase or sale of securities.

(b) Purchase or sale of the assets of a business, or merger, consolidation or recapitalization of a business.

(c) Purchase or sale or lease of, or security interest in, commercial real or personal property.

(d) Partnership, shareholder or joint venture agreements.

(e) Franchise, distribution or licensing agreements.

2. Shareholder derivative actions.

3. Dissolution or liquidation of corporations.

4. Actions involving liability and indemnity of corporate directors and officers, general and limited partners and shareholders (*e.g.*, actions alleging breach of fiduciary duty).

5. Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretation of articles or by-laws.

6. Commercial loans (including failures to make commercial loans), negotiable instruments, letters of credit and bank deposits.

7. Actions primarily involving allegations of unfair competition, interference with business advantage or contractual relations.

8. Actions involving employment agreements or employee incentive or retirement plans, but not including wrongful termination actions.

9. Breach of contract or declaratory relief actions involving the following kinds of insurance: commercial general liability, commercial property and casualty, financial institutions blanket bonds, commercial surety contracts, directors' and officers' liability, professional errors and omissions, group life, accident or health or environmental impairment.

10. Liquidation or conservatorship of banks, credit unions, insurance corporations or savings and loan associations.

11. Such other cases as may be designated by the presiding judge or his/her designee.

Court of Appeal. The addition of justices of the Court of Appeal with experience in business law would be an important step in improving the quality and predictability of appellate decisions in the business area. A further such step would be the assignment of business appeals to one or more special panels within the Court of Appeal.

Adequacy of Resources. The recent press is replete with accounts of funding shortfalls in the state courts and concerns about the inadequacy of resources to meet the demands of the judicial system with the advent of "three strikes."[24] Accordingly, some judges have questioned whether the courts have adequate resources to implement any new programs, whether for specialization or otherwise. On the other hand, the New York experiment has shown that specialization in commercial matters results in a substantially faster disposition rate, which should thereby save funding for the courts. Even if specialized systems of assignment do not save money, there is no reason why they should cost the courts additional funds. Nevertheless the recent funding crisis in the courts have created an atmosphere in which it may be difficult to carry out any new programs successfully, even if those new programs would ultimately save substantial funds.

V. CONCLUSION

The Committee believes that the creation of specialized business and commercial law divisions of the existing Superior Courts, staffed by judges with extensive experience in such litigation, or systems of

---

[24] *See*, e.g., "Klausner, Byrne Discuss State of Their Courts," *Los Angeles Daily Journal*, January 20, 1995, p. 1.

assigning business law cases to specialized judges, panels or calendars, would help to solve many of the problems litigants and attorneys perceive with the current system—problems that have lead many of them to abandon it in favor of alternative dispute resolution mechanisms and private judging. The objectives of creating such a specialized system would be the following:

1. **Improvement in California's Economic Climate.** To instill confidence in companies considering doing business in California that our courts will have sufficient expertise or resources to decide challenging, complex business and commercial law cases efficiently, promptly and predictably.

2. **Higher Quality Decision-Making.** To allow judges to develop expertise in the fine points of commercial and business law and in the procedures of complex business litigation and to enable the California courts to assume a role of national leadership in deciding important business and commercial law cases.

3. **Increased Consistency and Predictability of Decisions.** To promote consistency in dispositions, to reduce the incidence of aberrant, incorrect or unpredictable decisions, and to ensure that agreements and commercial arrangements will be interpreted by knowledgeable judges with a sophisticated understanding of applicable statutes and case law precedents.

4. **Improved Efficiency and Lower Cost.** To take advantage of the economies of scale and greater expertise inherent in specialized courts and thereby to achieve a higher degree of efficiency, with earlier dispositions and a lower overall cost to the litigants.

5. **Relief from Court Congestion.** To provide California's trial courts some relief from growing congestion and overburdened staffs, freeing up court resources for the handling of other matters, by the more expeditious and efficient disposition of business and commercial matters, which are now more likely to be tried and take longer to try than the average matter. The data from the New York experience demonstrate that special courts for business litigants not only do not strip scarce resources away from other civil filings, but actually add to the resources available for other filings as a result of the increased productivity of the Commercial Parts.

6. **Eliminating Disadvantages of the Public Courts as Compared with ADR.** To restore the competitiveness of the public courts in handling business and commercial matters and thereby to reduce the flight by litigants to private dispute resolution alternatives, which deprive both the legal and business community of the advantages of a developing body of case law.

7. **Fulfilling Existing Public Policy.** To fulfill the public policy that motivated the specialization provisions of the Trial Court Realignment and Efficiency Act of 1991, which requires that all California courts consider plans for the establishment of specialized calendars or divisions.

8. **Giving Business Litigants the Same Specialized Assignment System Available to Probate, Divorce and Criminal Litigants.** To bring business litigants the same benefits of judicial specialization now available for criminal, probate and family law matters.

Accordingly, the Committee now proposes the formation of a statewide Blue Ribbon Commission to address the issues raised in this report, to evaluate the need for specialization in business law matters within the state court system and, if the need exists, to recommend a plan for achieving such specialization.