

Admin.

October 29, 1996

**Memorandum 96-73****1996-1997 Annual Report: Draft for Approval**

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Attached to this memorandum is a draft of the Commission's 1996-1997 *Annual Report*. If approved, the staff will send it to the printer, subject to any necessary revisions. In several places, material depends on decisions to be made at the November meeting, particularly as relates to new topics. (See Memorandum 96-58 relating to new topics and priorities.)

In order to save copying costs, we have not included the appendices that will be printed with the Annual Report. These items are listed in the table of contents on page 112 of the draft Annual Report. The reports in Appendices 4 and 5 have previously been approved by the Commission. If any Commissioner wishes to examine any of the listed appendices, let the staff know and we will provide a copy for you. In addition, we will have a complete copy available at the November meeting.

Much of the Annual Report language is the same or similar to past reports, but particular attention should be paid to the revised and new material concerning the 1997 Legislative Program (pp. 116-17), Major Studies in Progress (pp. 117-21), and Commission Budget (pp. 128-29).

There is a place reserved for mention of any activities by Commissioners related to the Commission's work, such as any speeches you have given or articles published since the last Annual Report. (See p. 130.) If any Commissioner has something of this nature that he or she wishes to be noted in the Annual Report, please give it to the staff for inclusion.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**STAFF DRAFT**

**1996-1997 Annual Report**

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Cite this pamphlet as *1996-1997 Annual Report*, 26 Cal. L. Revision Comm'n Reports 107 (1996).

## SUMMARY OF WORK OF COMMISSION

### **Recommendations Enacted in the 1996 Legislative Session**

In 1996, four bills effectuating the Commission's recommendations were enacted. Commission-recommended legislation enacted in 1996 concerned the following subjects:

- Administrative adjudication by state agencies
- Statute of limitations in trust matters
- Inheritance from or through child born out of wedlock
- Collecting small estates without administration

Commission recommendations relating to the homestead exemption from enforcement of money judgments and tolling the statute of limitations when a defendant is out of state were not enacted.

### **Recommendations to the 1997 Legislature [Depends on decisions at November meeting]**

In 1997, the Commission plans to submit recommendations on the following subjects to the Legislature:

- Judicial review of administrative adjudication
- Ethical standards for administrative law judges
- Quasi-public entity hearings
- Unfair competition litigation
- Mediation confidentiality
- Best evidence rule
- Tolling statute of limitation when defendant is out of state
- Covenants that run with the land
- Obsolete land use restrictions
- Attachment by undersecured creditors

### **Commission Activities Planned for 1997**

During 1997, the Commission will work on trial court unification, administrative rulemaking, health care decisionmaking, environmental law consolidation, the business judgment rule, derivative actions, the Uniform Unincorporated Nonprofit Association Act, settlement negotiation confidentiality, and Public

Utilities Code restructuring. The Commission will consider other subjects as time permits, including protective proceedings for federal benefits, inheritance from or through a foster parent or step-parent, local agency hearing procedures, and overlapping statutes of limitation in unfair competition litigation [depends on action at November meeting.]

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STATE OF CALIFORNIA

PETE WILSON, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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(415) 494-1335

ALLAN L. FINK, Chairperson  
CHRISTINE W.S. BYRD, Vice Chairperson  
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ROBERT E. COOPER  
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SENATOR QUENTIN L. KOPP  
ARTHUR K. MARSHALL  
EDWIN K. MARZEC  
SANFORD M. SKAGGS  
COLIN W. WIED

November 15, 1996

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

In conformity with Government Code Section 8293, the California Law Revision Commission herewith submits this report of its activities during 1996.

Four of the six bills introduced in 1996 to effectuate the Commission's recommendations were enacted. A concurrent resolution recommended by the Commission was adopted.

The Commission is grateful to the members of the Legislature who carried Commission-recommended bills:

- Senator Kopp (administrative adjudication followup, homestead exemption, tolling statute of limitations, concurrent resolution continuing Commission's authority)
- Senate Judiciary Committee (collecting small estates, Family Code amendments)
- Assembly Member Kaloogian (inheritance involving person born out of wedlock, statute of limitations in trust matters)

The Commission held two two-day meetings and eight one-day meetings during 1996. Meetings were held in Long Beach, Los Angeles, and Sacramento.

Respectfully submitted,

Allan L. Fink  
*Chairperson*





## 1996-1997 ANNUAL REPORT

**Introduction**

The California Law Revision Commission was created in 1953 as the permanent successor to the Code Commission and given responsibility for a continuing substantive review of California statutory and decisional law.<sup>1</sup> The Commission studies the law in order to discover defects and anachronisms and recommends legislation to make needed reforms.

The Commission assists the Legislature in keeping the law up to date by:

- Intensively studying complex and sometimes controversial subjects
- Identifying major policy questions for legislative attention
- Gathering the views of interested persons and organizations
- Drafting recommended legislation for legislative consideration

The efforts of the Commission permit the Legislature to determine significant policy questions rather than to concern itself with the technical problems in preparing background studies, working out intricate legal problems, and drafting implementing legislation. The Commission thus enables the Legislature to accomplish needed reforms that otherwise might not be made because of the heavy demands on legislative time. In some cases, the Commission's report demonstrates that no new legislation on a particular topic is needed, thus relieving the Legislature of the need to study the topic.

The Commission consists of:

- A Member of the Senate appointed by the Rules Committee
- A Member of the Assembly appointed by the Speaker
- Seven members appointed by the Governor with the advice and consent of the Senate
- The Legislative Counsel, who is an ex officio member

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1. See Gov't Code §§ 8280-8298 (statute establishing Law Revision Commission) (Appendix 1 *infra*). See also *1955 Report* [Annual Report for 1954] at 7, 1 Cal. L. Revision Comm'n Reports (1957).

The Commission may study only topics that the Legislature by concurrent resolution authorizes for study. The Commission now has a calendar of 26 topics.<sup>2</sup>

Commission recommendations have resulted in the enactment of legislation affecting 18,756 sections of the California statutes: 8,801 sections added, 3,112 sections amended, and 6,843 sections repealed. The Commission has submitted more than 290 recommendations to the Legislature. About 95% of these recommendations have been enacted in whole or in substantial part.<sup>3</sup>

The Commission's recommendations are published in softcover and later are collected in hardcover volumes. A list of past publications and information on obtaining copies are at the end of this Annual Report.

### 1997 Legislative Program

In 1997, the Commission plans to submit recommendations to the Legislature concerning the following subjects:

#### Administrative Law

*Judicial review of agency action.* The Commission will recommend revision of the statutes governing judicial review of state and local agency action.

*Ethical standards for administrative law judges.* The Commission will recommend a code of ethics for administrative law judges, based on the California Code of Judicial Ethics applicable to judicial branch judges.

*Quasi-public entity hearings.* The Commission will recommend that the general provisions of the Administrative Procedure Act, including the new administrative adjudication bill of rights, be applied to statutorily created private entities that conduct statutorily or constitutionally mandated hearings in performance of a state function.

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2. See list of topics under "Calendar of Topics Authorized for Study" in Appendix 2 *infra*.

3. See "Legislative Action on Commission Recommendations" in Appendix 3 *infra*.

**Business Law**

*Unfair competition litigation.* The Commission will recommend revision of the statutes governing unfair competition litigation under Business and Professions Code Section 17200 *et seq.*

**Civil Procedure**

*Tolling statute of limitation when defendant is out of state.* The Commission will recommend repeal of Code of Civil Procedure Section 351 (tolling statute of limitation when defendant out of state), which predates California's long-arm jurisdiction process.

**Debtor-Creditor Law**

*Attachment by undersecured creditors.* [Depends on Commission action at November meeting.]

**Evidence Law**

*Best evidence rule.* The Commission will recommend that the best evidence rule be replaced by a "secondary evidence rule" [in civil, but not criminal, proceedings].

*Mediation confidentiality.* The Commission will recommend that the confidentiality given mediation communications be clarified and extended.

**Property Law**

*Covenants that run with the land.* The Commission will recommend repeal of Civil Code Section 1464, California's codification of the First Rule in Spencer's Case (covenant concerning thing not in being must refer to "assigns" in order to run with the land).

*Obsolete land use restrictions.* The Commission will recommend that the Marketable Record Title Act be applied to obsolete land use restrictions and that a uniform five-year limitations period govern enforcement of land use restriction violations.

**Major Studies in Progress**

During 1997, the Commission plans to work on nine major topics: trial court unification, administrative rulemaking, health care decisionmaking, environmental law consolidation, the business judgment rule, derivative actions, the Uniform Unincorporated Nonprofit Association Act, settlement negotiation confiden-

tiality, and Public Utilities Code restructuring. The Commission will also consider other subjects to the extent time permits.

#### **Trial Court Unification**

Pursuant to legislative directive, the Commission in January 1994 issued its report on *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994). Since then, the legislative directive has been revised to assign the Commission responsibility to report recommendations pertaining to statutory changes that may be necessitated by court unification.<sup>4</sup>

The Legislature has enacted SCA 4 (Lockyer), providing for unification of the trial courts in a county on a vote of a majority of the judges of superior and municipal courts in the county.<sup>5</sup> The matter is scheduled for a vote of the electors at the June 1998 primary election. The Commission plans to work during 1997 to recommend implementing legislation in advance of the election.

#### **Administrative Rulemaking**

Administrative rulemaking is the third phase of the Commission's study of administrative law and procedure, following revision of state agency adjudication and judicial review of agency action. This phase of the study was activated in 1996. The Commission plans to address individual problems in the rulemaking procedure; it will not propose a comprehensive revision of the rulemaking procedure. The Commission has engaged the services of three expert academic consultants to give advice on this project: Professors Michael Asimow (UCLA Law School), Gregory Ogden (Pepperdine Law School), and Gregory Weber (McGeorge Law School).

#### **Health Care Decisionmaking**

The Commission has begun consideration of revisions of health care decisionmaking law. This review considers changes in the law that have occurred throughout the country since California enacted its pioneering durable power of attorney for health care statute in

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4. 1995 Cal. Stat. res. ch. 87 (ACR 14).

5. 1996 Cal. Stat. res. ch. 36 (SCA 4).

1983. The Commission is reviewing of the California Natural Death Act and the proposed Uniform Health-Care Decisions Act (1993). Consideration of durable power of attorney for health care issues was reserved for study when the Commission reviewed the power of attorney statutes culminating in enactment of the comprehensive Power of Attorney Law in 1994.

#### **Environmental Law Consolidation**

In 1996, the Commission was directed to study whether the laws within various codes relating to environmental quality and natural resources should be reorganized in order to simplify and consolidate relevant statutes, resolve inconsistencies between the statutes, and eliminate obsolete and unnecessarily duplicative statutes.<sup>6</sup> The Commission plans to begin active work on this topic during 1997.

#### **Business Judgment Rule and Derivative Actions**

During 1996 the Commission commenced work on two related corporate governance matters — the business judgment rule and derivative actions. The Commission's consultant on this study, Professor Melvin Eisenberg of the University of California, Berkeley, Law School, has prepared background studies on both these matters. See Eisenberg, *Whether the Business-Judgment Rule Should Be Codified* (May 1995); Eisenberg, *The Requirement of Making a Demand on the Board Before Bringing a Derivative Action, and the Standard of Review of a Board or Committee Determination that a Derivative Action Is Not in the Corporation's Best Interests* (October 1995). The Commission has begun consideration of both studies. The Commission plans to complete work on this project during 1997.

#### **Uniform Unincorporated Nonprofit Association Act**

The Commission has retained Professor Michael Hone, University of San Francisco Law School, as a consultant to prepare an analysis of the Uniform Unincorporated Nonprofit Association Act (1992). The Commission plans to begin consideration of this matter when the Professor Hone's analysis is received. The Com-

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6. 1996 Cal. Stat. res. ch. 38 (SCR 43).

mission hopes to complete work on this topic during 1997 and submit a recommendation in the 1998 legislative session.

**Settlement Negotiation Confidentiality**

The Commission will recommend for enactment in 1997 revision of the law governing mediation confidentiality. During 1996 the Commission began consideration of a parallel matter — settlement negotiation confidentiality. The policies affecting the protection to be given settlement negotiations differ somewhat from the policies affecting mediation, with the consequence that a different level of protection is called for. The Commission plans to complete its analysis of these matters during 1997.

**Public Utilities Code Restructuring**

The Legislature has also directed the Law Revision Commission to work with the Public Utilities Commission:<sup>7</sup>

On or before June 30, 1997, the Public Utilities Commission in consultation with the Law Revision Commission shall submit a report to the Legislature on needed revisions of the Public Utilities Code that result from the restructuring of the electrical, gas, transportation, and telecommunications industries.

Pursuant to this directive the Law Revision Commission plans, during the first half of 1997, to review materials prepared by the Public Utilities Commission, focusing on procedural and substantive problem areas identified by the Public Utilities Commission or by other interested persons, and make recommendations to the Legislature on the problem areas.

**Other Subjects**

The major studies in progress described above will dominate the Commission's time and resources during 1997. If time permits, the Commission will work other subjects into its agenda. These subjects include protective proceedings for federal benefits, inheritance from or through a foster parent or stepparent, local agency hearing procedures, and overlapping statutes of limitation in unfair competition litigation.

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7. 1996 Cal. Stat. ch. 856, § 12

### **Calendar of Topics for Study**

The Commission's calendar of topics is set out in Appendix 2 in this Annual Report. Each of these topics has been authorized for Commission study by the Legislature.<sup>8</sup>

The Commission recommends that three topics be removed from its agenda since it is unlikely that the Commission will be doing any further work on them: prejudgment interest, injunctions, and inverse condemnation.

Two other topics — child custody, adoption, guardianship, and related matters, and adjudication of child and family civil proceedings — should be combined with the overlapping authority to study family law. The combined authority would read as follows:

Whether family law (including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code) should be revised.

### **New Topic for Future Consideration**

The Commission recommends that it be authorized to study one new topic:

#### **Criminal Restitution**

[Depends on action at November meeting.]

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8. Section 8293 of the Government Code provides that the Commission shall study, in addition to those topics that it recommends and are approved by the Legislature, any topics the Legislature by concurrent resolution refers to it for study. For the current authorization, see 1996 Cal. Stat. res. ch. 38. In addition, Code of Civil Procedure Section 703.120 requires the Commission to review statutes providing for exemptions from enforcement of money judgments every 10 years and to recommend any needed revisions. The next report will be due in 2003.



### Function and Procedure of Commission

The principal duties of the Commission<sup>9</sup> are to:

- (1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.
- (2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,<sup>10</sup> bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.
- (3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.<sup>11</sup>

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. As a rule, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study.<sup>12</sup> However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution.<sup>13</sup>

### Background Studies

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study may be prepared by a member of the Commission's staff or by a

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9. Gov't Code §§ 8280-8298 (statute governing California Law Revision Commission). See Appendix 1 *infra*.

10. The Legislative Counsel, an ex officio member of the Law Revision Commission, serves as a Commissioner of the Commission on Uniform State Laws. See Gov't Code § 8261. The Commission's Executive Secretary serves as an Associate Member of the National Conference of Commissioners on Uniform State Laws.

11. Gov't Code § 8289. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. See "Report on Statutes Repealed by Implication or Held Unconstitutional" *infra*.

12. Gov't Code § 8293.

13. Gov't Code § 8298.

specialist in the field of law involved who is retained as a consultant. Expert consultants provide the Commission with invaluable assistance and provide an economical alternative to in-house research. Law professors and practicing attorneys who serve as consultants have already acquired the considerable background necessary to understand the specific problems under consideration and receive little more than an honorarium for their services. From time to time, expert consultants are also retained to advise the Commission at meetings.

### **Recommendations**

After making its preliminary decisions on a subject, the Commission ordinarily distributes a tentative recommendation to interested persons and organizations, including the State Bar, local and specialized bar associations, public interest organizations, and business and professional associations. Comments received on the tentative recommendation are considered by the Commission in determining what recommendation, if any, will be made to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation<sup>14</sup> to the Legislature (including a draft of any necessary legislation) is published and distributed in printed form and on the Internet. If a background study has been prepared in connection with the recommendation, it may be published by the Commission or in a law review.<sup>15</sup>

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14. Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. Dissents are noticed in the Minutes of the meeting where the recommendation is approved.

15. For recent background studies published in law reviews, see Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995); Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992); Kasner, *Donative and Interspousal Transfers of Community Property in California: Where We Are (or Should Be) After MacDonald*, 23 Pac. L.J. 361 (1991). A revised version of Prof. Fellmeth's background study on unfair competition litigation was published as Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 Cal. Reg. L. Rep. 1 (Winter 1995).

### Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends. These Comments are included in the Commission's recommendations and may be revised by the Commission in later reports to reflect amendments made in the legislative process.<sup>16</sup> The reports provide background with respect to the Commission intent in proposing the enactment, such intent being reflected in the Comments to the various sections of the bill contained in the Commission's recommendation, except to the extent that new or revised Comments are set out in the report on the bill as amended.<sup>17</sup>

Comments are provided to legislative committee members and staff before a bill is heard and are provided to the Governor's office once a bill is passed.

A Comment indicates the derivation of a section and often explain its purpose, its relation to other sections, and potential problems as to its meaning or application. The Comments are leg-

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For a list of background studies published in law reviews before 1991, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971); 11 Cal. L. Revision Comm'n Reports 1008 n.5, 1108 n.5 (1973); 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976); 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982); 17 Cal. L. Revision Comm'n Reports 819 n.6 (1984); 18 Cal. L. Revision Comm'n Reports 212 n.17, 1713 n.20 (1986); 19 Cal. L. Revision Comm'n Reports 513 n.22 (1988); 20 Cal. L. Revision Comm'n Reports 198 n.16 (1990).

16. Many amendments are made on Commission recommendation to deal with matters brought to the Commission's attention after publication of its recommendation. In some cases, however, an amendment may be made that the Commission believes is not desirable and does not recommend.

17. For an example of such a report, see Appendix 5 *infra*. Reports containing new or revised comments are printed in the next annual report following enactment of a recommendation, and may be found by reference to the "Cumulative Table of Sections Affected by Commission Recommendations" included in each bound volume of Commission reports. For a description of legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App. 3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). On rare occasions, the Commission will approve revised Comments to make important editorial changes or correct obvious errors in past Comments. See, e.g., "Report of the California Law Revision Commission on Corrected Probate Code Comments," Appendix 8 to the *Annual Report for 1991*, 21 Cal. L. Revision Comm'n Reports 1, 75 (1991).

islative history and are entitled to substantial weight in construing the statutory provisions.<sup>18</sup> However, while the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every inconsistent case is noted in the Comments, nor can it anticipate judicial conclusions as to the significance of existing case authorities.<sup>19</sup> Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.<sup>20</sup>

### Publications

Commission publications are distributed to the Governor, legislative leadership, and, on request, to heads of state departments and to lawyers, law professors, courts, district attorneys, and law libraries throughout the state.<sup>21</sup> Thus, a large and representative number of interested persons is given an opportunity to study and comment on the Commission's work before it is considered for enactment by the Legislature.<sup>22</sup>

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18. E.g., *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968); see also *Milligan v. City of Laguna Beach*, 34 Cal. 3d 829, 831, 670 P.2d 1121, 1122, 196 Cal. Rptr. 38, 39 (1983); *Juran v. Epstein*, 23 Cal. App. 4th 882, 893-94, 28 Cal. Rptr. 2d 588, 594 (1994). The Commission concurs with the opinion of the court in *Juran* that staff memorandums to the Commission should not be considered as legislative history. *Id.*, 23 Cal. App. 4th at 894 n.5, 28 Cal. Rptr. 2d at 594 n.5.

Commission Comments are published by Bancroft-Whitney Company and West Publishing Company in their print and CD-ROM editions of the annotated codes, and printed in selected codes prepared by other publishers.

19. See, e.g., *Arellano v. Moreno*, 33 Cal. App. 3d 877, 109 Cal. Rptr. 421 (1973).

20. The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973). See also 1974 Cal. Stat. ch. 227.

21. See Gov't Code § 8291. For availability see "Commission Publications" at pp. \_\_\_\_ *infra*.

22. For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact*

The reports, recommendations, and studies of the Commission are republished in a set of hardcover volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the state. These volumes are available at many county law libraries and at some other libraries. Some hardcover volumes are out of print, but others are available for purchase.<sup>23</sup>

#### **Electronic Publication and Internet Access**

Since June 1995, the Commission has provided a variety of information on the Internet, including online material and downloadable files.<sup>24</sup> Interested persons with Internet access can find current agendas, recent meeting minutes, background studies, tentative and final recommendations, staff memorandums, and general background information.

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*Finding for Legislation: A Case Study*, 50 A.B.A. J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965). See also Quillinan, *The Role and Procedures of the California Law Revision Commission in Probate and Trust Law Changes*, 8 Est. Plan. & Cal. Prob. Rep. 130-31 (Cal. Cont. Ed. Bar 1987).

23. See "Commission Publications" at pp. \_\_\_\_ *infra*.

24. The URL for the Commission's Website is <http://www.clrc.ca.gov/>.

### Personnel of Commission

As of November 15, 1996, the following persons are members of the Law Revision Commission:

<b>Members Appointed by Governor</b> <sup>25</sup>	<b><i>Term Expires</i></b>
Allan L. Fink, San Francisco <i>Chairperson</i>	October 1, 1997
Christine W.S. Byrd, Los Angeles <i>Vice Chairperson</i>	October 1, 1997
Robert E. Cooper, Los Angeles	October 1, 1999
Arthur K. Marshall, Los Angeles	October 1, 1999
Edwin K. Marzec, Santa Monica	October 1, 1999
Sanford M. Skaggs, Walnut Creek	October 1, 1997
Colin W. Wied, San Diego	October 1, 1999

#### **Legislative Members** <sup>26</sup>

Senator Quentin L. Kopp, San Francisco  
Assembly Member Dick Ackerman, Fullerton

#### **Legislative Counsel** <sup>27</sup>

Bion M. Gregory, Sacramento

Effective September 1, 1996, the Commission elected Allan L. Fink as Chairperson (succeeding Colin W. Wied), and Christine W.S. Byrd as Vice Chairperson (succeeding Allan L. Fink). The terms of the new officers end August 31, 1997.

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25. Seven Commission members are appointed by the Governor with the advice and consent of the Senate. Gov't Code § 8281. These Commissioners serve staggered four-year terms. *Id.* The provision in Government Code Section 8281 to the effect that Commission members appointed by the Governor hold office until the appointment and qualification of their successors has been superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

26. The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov't Code § 8281.

27. The Legislative Counsel serves on the Commission by virtue of office. Gov't Code § 8281.

In November 1995, the Governor reappointed Christine W.S. Byrd, Robert E. Cooper, Arthur K. Marshall, and Edwin K. Marzec to four-year terms ending October 1, 1999.

In April 1996, Assemblyman Dick Ackerman was appointed by the Speaker as the Commission's Assembly Member.

As of November 15, 1996, the following persons were on the Commission's staff:

*Legal*

Nathaniel Sterling	Stan Ulrich	
<i>Executive Secretary</i>	<i>Assistant Executive Secretary</i>	
Barbara S. Gaal	Robert J. Murphy	Brian P. Hebert
<i>Staff Counsel</i>	<i>Staff Counsel</i>	<i>Graduate Legal Assistant</i>

*Administrative-Secretarial*

Lauren M. Trevathan	Victoria V. Matias
<i>Administrative Assistant</i>	<i>Secretary</i>

In October 1996, Brian P. Hebert was appointed to a full-time position on the Commission's legal staff and Lauren M. Trevathan was appointed to the Administrative Assistant position.

During the spring 1996 law school term, Deborah J. Muns, a student at Stanford Law School, worked as a student legal assistant under the work-study program. Cynthia Bradford prepared an analysis of health care decisionmaking law as part of her course work at Stanford Law School in the spring of 1996. Andrew Jaramillo, a student at Stanford Law School, worked as a volunteer student legal assistant during the summer. Starting in the fall 1996 law school term, Elizabeth Eberle a student at Stanford Law School, is working as a student legal assistant under the work-study program. During the spring and fall 1996 law school terms, Tina Chen assisted the Commission as part of the Public Service Program of the University of Pennsylvania Law School, and in the spring term, Matthew Waddell assisted the Commission under the same program.

**Commission Budget**

The Commission's operations are funded from the state general fund. The amount appropriated to the Commission for the 1996-97

fiscal year is \$563,000. This amount represents a substantial increase over the previous year's funding. The increase has enabled the Commission to eliminate its operations deficit and to restore one legal position and one administrative position lost due to earlier funding reductions.

The Commission receives substantial donations of necessary library materials from the legal publishing community, especially Bancroft-Whitney Company, California Continuing Education of the Bar, and West Publishing Company. The Commission receives additional library materials from other legal publishers and from other law reform agencies on an exchange basis, and has full access to the Stanford University Law Library. The Commission is grateful for their contributions.

### **Other Activities**

The Commission is directed by statute to cooperate with bar associations and other learned, professional, or scientific associations, institutions, or foundations in any manner suitable for the fulfillment of the purposes of the Commission.<sup>28</sup>

#### **National Conference of Commissioners on Uniform State Laws<sup>29</sup>**

The Commission's Executive Secretary participated in the National Conference of Commissioners on Uniform State Laws, in San Antonio, Texas, July 12-19, 1996. Matters considered at the conference included uniform acts on limited liability partnerships, Commercial Code Articles 2, 2B, and 9, interstate family support and child visitation, guardianship and protective proceedings, management of public employee pension funds, and punitive damages.

The Executive Secretary also served on the drafting committee for a new Uniform Trust Act. The uniform act will be based on the

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28. Gov't Code § 8296.

29. The Commission is directed by statute to receive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws. Gov't Code § 8289. The Commission's executive secretary is an associate member of the National Conference.



California Trust Law, a national model enacted on recommendation of the Commission.<sup>30</sup>

#### **California Continuing Education of the Bar**

The Commission's Executive Secretary participated in planning the new edition of the book published by the California Continuing Education of the Bar, *California Administrative Hearing Practice*, and prepared the introductory chapter for the book. The new edition will reflect enactment of the Commission's recommendation on administrative adjudication by state agencies.<sup>31</sup>

The Assistant Executive Secretary reviewed and commented on several chapters of *California Elder Law: An Advocate's Guide* (Cal. Cont. Ed. Bar 1996).

#### **Commissioner Activities**

[To be supplied by Commissioners.]

#### **Consultant Activities**

The Commission's consultant on administrative law and procedure, Professor Michael Asimow, published an article on the revision of the Administrative Procedure Act enacted on recommendation of the Commission.<sup>32</sup> He also gave a number of speeches relating to the Commission's administrative law and procedure study.<sup>33</sup>

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30. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986); enacted 1986 Cal. Stat. ch. 820.

31. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995), enacted as 1995 Cal. Stat. ch. 938 (SB 523). See also *Annual Report for 1995*, Appendix 7, 25 Cal. L. Revision Comm'n Reports 615, 711 (1995).

32. Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, Tulsa L. Rev. (forthcoming Winter 1996).

33. Asimow, *Close Encounters of the Administrative Kind: California's Office of Administrative Law*, Speech to ABA Annual Meeting, Orlando, Fla. (Aug. 1996); Asimow, *The Effect of the New APA on the Unemployment Insurance Appeals Board*, Speech to Administrative Law Judges of UIAB, Sacramento (June 1996); Asimow, *The Revolution in California Administrative Law*, Speech to California Environmental Trial Lawyers, San Diego (June 1996).

The Commission's consultant on unfair competition, Professor Robert C. Fellmeth, published an article on priorities between private litigators and public prosecutors under the unfair competition act.<sup>34</sup>

#### **Bar Associations**

The Commission's Executive Secretary addressed the Sacramento County Bar Association's Business Law Section in March 1996 to provide information on the Commission's study of the business judgment rule. The Executive Secretary addressed the Sacramento County Bar Association's Administrative Law Section in July 1996 to provide information on the Commission's studies of judicial review and administrative rulemaking.

#### **Visitors**

Ms. Bience Gawanas, Chairperson of the Law Reform and Development Commission of the Republic of Namibia visited the Commission office to consult with the staff on law reform issues and experience in August 1996.

#### **Other Activities**

The Commission's Executive Secretary testified before the Conference Committee on California Public Utilities Commission and California Energy Commission Reform in July and August 1996, concerning the Commission's work in the areas of administrative adjudication by state agencies and judicial review of agency action.

The Executive Secretary addressed the regional training session of the administrative law judges of the California Unemployment Insurance Appeals Board in September 1996, concerning the Commission's recommendations on a code of ethics for administrative law judges.

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34. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 Cal. Reg. L. Rep. 1 (Winter 1995).

### **Legislative History of Recommendations Submitted to 1996 Legislative Session**

The Commission's recommendations were included in six bills and a concurrent resolution recommended for enactment at the 1996 legislative session. Four of these bills were enacted and the concurrent resolution was adopted.

#### **Administrative Adjudication by State Agencies**

Senate Bill 794 (1996 Cal. Stat. ch. 390) was introduced by Senator Quentin L. Kopp to implement Commission-recommended technical revisions to the Administrative Procedure Act. The bill was enacted after a number of amendments were made. See *Report of the California Law Revision Commission on Chapter 390 of the Statutes of 1996 (Senate Bill 794)*, 26 Cal. L. Revision Comm'n Reports \_\_\_\_ (1996) (Appendix 4 *infra*).

#### **Probate and Trust Law**

Senate Bill 392 (1996 Cal. Stat. ch. 563) was an omnibus probate law bill introduced by the Senate Judiciary Committee, which included a Commission recommendation. See *Collecting Small Estate Without Administration*, 26 Cal. L. Revision Comm'n Reports 21 (1996). The recommendation was enacted without change.

Assembly Bill 2751 (1996 Cal. Stat. ch. 862) was introduced by Assembly Member Howard Kaloogian, and included two Commission recommendations. See *Statute of Limitations in Trust Matters: Probate Code Section 16460*, 26 Cal. L. Revision Comm'n Reports 1 (1996); *Inheritance From or Through Child Born Out of Wedlock*, 26 Cal. L. Revision Comm'n Reports 13 (1996). Both recommendations were enacted without change.

#### **Family Law**

Senate Bill 1033 (1996 Cal. Stat. ch. 1061) was an omnibus family law bill introduced by the Senate Judiciary Committee, which included a Commission-recommended technical amendment of Code of Civil Procedure Section 664.5. See *Report of the California Law Revision Commission on Chapter 1061 of the Statutes*

of 1996 (*Senate Bill 1033*), 26 Cal. L. Revision Comm'n Reports \_\_\_\_ (1996) (Appendix 5 *infra*).

#### **Civil Procedure**

Senate Bill 1510 was introduced by Senator Quentin L. Kopp, and included a Commission recommendation. See *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83 (1996). Most of the recommended revisions were removed from the bill in the Senate Judiciary Committee. The bill was vetoed by the Governor for reasons unrelated to the part of the Commission's recommendation remaining in the bill. (The Commission plans to resubmit the recommendation in the 1997 legislative session.)

#### **Debtor-Creditor Relations**

Senate Bill 197 was introduced by Senator Quentin L. Kopp to effectuate a Commission recommendation. See *Homestead Exemption*, 26 Cal. L. Revision Comm'n Reports 37 (1996). The bill failed passage in the Assembly Judiciary Committee.

#### **Resolution Authorizing Topics for Study**

Senate Concurrent Resolution 43 (1996 Cal. Stat. res. ch. 38) was introduced by Senator Quentin L. Kopp. It continues the Commission's authority to study 24 topics previously authorized and adds authority requested by the Commission to study one new topic, the law of contracts.<sup>35</sup> The resolution also added new authority to study environmental law, in the following terms:

Whether the laws within various codes relating to environmental quality and natural resources should be reorganized in order to simplify and consolidate relevant statutes, resolve inconsistencies between the statutes, and eliminate obsolete and unnecessarily duplicative statutes.

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35. See *Annual Report for 1995*, 25 Cal. L. Revision Comm'n Reports 615, 628-29 (1995).

### **Report on Statutes Repealed by Implication or Held Unconstitutional**

Section 8290 of the Government Code provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared<sup>36</sup> and has the following to report: [research in progress]

- No decision holding a state statute repealed by implication has been found.
- No decision of the United States Supreme Court holding a state statute unconstitutional has been found.
- No decision of the California Supreme Court holding a state statute unconstitutional has been found.

### **Recommendations**

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized<sup>37</sup> and to study the new topic recommended for study.<sup>38</sup>

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36. This study has been carried through \_\_\_ Cal. Rptr. 2d \_\_\_ (1996) and 116 S. Ct. (1995-96 Term).

37. See "Calendar of Topics Authorized for Study," Appendix 2 *infra*.

38. See "Topic for Future Consideration" *supra*.