

Admin.

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Memorandum 97-54

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.

Last year after its annual review of topics and priorities, the Commission decided to:

- Give a priority to the required consultation on **revisions of the Public Utilities Code** required by industry restructuring. That consultation was completed on schedule, by the July 1, 1997, statutory deadline. It is not clear whether the Legislature will request the Commission to do follow-up work on this matter.

- Narrowly address the issue **whether divorce should sever a joint tenancy**. That study is on schedule, with a draft recommendation up for consideration at the September 1997 meeting.

- Undertake studies concerning insolvency — increasing the options of state and local agencies and nonprofit corporations that administer government funded programs to elect **Bankruptcy Code Chapter 9** (adjustment of debts of governmental entities) treatment, and codifying the law governing **assignments for the benefit of creditors**, including expansion of the assignment concept to include reorganization. The staff is attempting to identify appropriate consultants for both of these studies.

- Study the matter of the **time for responding to a demand for production of documents**. The Commission was also interested in reviewing developments to improve discovery in other jurisdictions. The narrower study the staff plans to work into the agenda when staff resources and Commission meeting time become available. The staff has not yet begun a search for an appropriate academic consultant for the broader study.

- Retain an academic consultant for the study of issues involved in the **impact of electronic communications on contract formation**. The staff has deferred this matter in light of work being done in this area by the National Conference of Commissioners on Uniform State Laws.

This memorandum reviews the status of items on the Commission's Calendar of Topics that the Commission may wish to give 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 21 topics on the Calendar of Topics that have been authorized for study by the Commission. The Commission's 1997 authorizing resolution consolidates family law studies and drops the studies of (1) prejudgment interest in civil cases, (2) liability of public entities for inverse condemnation, and (3) injunctions and related matters. The Commission has completed work on many of the other topics that remain on the calendar — 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 (pursuant to statutes extending time for state reports impacted by budget reductions); legislation was enacted. The next Commission review is due by July 1, 2003.

As a separate project, the Commission recommended repeal of the declared homestead exemption in the 1996 legislative session. This recommendation was not enacted. The Commission has decided to revisit the recommendation on the homestead exemption in light of a recent Ninth Circuit decision (*Jones v. Heskett & Kelleher Lumber Co.*). As a low priority, the staff is to investigate how best to resolve technical problems in the application of statutory homestead law.

Attachment. The Commission submitted to the Legislature its report on experience under the statute authorizing attachment where a claim is partially secured. The measure was introduced as AB 1258 (Ackerman) and enacted as 1997 Cal. Stat. ch. 222.

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.

Enforcement of judgments issued by courts in marital dissolution proceedings. The Commission has previously recommended legislation, which was not enacted, untangling the interrelation of the general enforcement of judgment statutes with the special statutes on enforcement of judgments issued by courts in marital dissolution proceedings. The problems have not yet been cured; we need to determine whether the time is right to reintroduce this legislation.

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. The Commission is actively engaged in its study of the Uniform Health Care Decisions Act.

Inheritance from or through foster parent or stepparent. The Commission has circulated a tentative recommendation to clarify the law in this area.

Severance of joint tenancy by divorce. The Commission is actively considering this matter.

Termination of beneficiary designation by divorce. This project grew out of the joint tenancy severance study. The staff has done a fair amount of work on it, and will present it for Commission consideration when time permits.

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 Uniform Probate Code is developing a statute to address the issues. The staff is monitoring 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 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.

Alternative beneficiaries for unclaimed distribution. The concept is that unclaimed property distributed in probate would go to secondary heirs rather than escheat. There is 1997 legislation pending on this matter, which the staff is monitoring.

Filing fees in probate. Years ago the staff did 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. We may want to reactivate this worthwhile matter sometime.

Protective proceedings for federal benefits. It has been suggested that California could perform a service by clarifying the preemptive effect of federal laws on general state fiduciary principles when federal benefits are involved. We have referred this matter to the State Bar Probate Section for comment.

TOD securities registration. The Commission has done work on a statute for transfer-on-death registration for securities, for which there is a Uniform Act. As a result of opposition from the State Bar Probate Section, the Commission deferred this matter until the Uniform Act is more widely adopted and there is some experience under it. Since that time the Uniform Act has been adopted in three-fourths of the states, the attitude of the State Bar is undergoing change, and in

general there is renewed interest in this matter. The staff would reactivate this project if the State Bar indicates its interest.

Revised Uniform Principal and Income Act. The National Conference of Commissioners on Uniform State Laws in 1997 promulgated a newly Revised Uniform Principal and Income Act. This should be examined for possible enactment in California. Although the Commission drafted the current California version of this statute, the staff suggests the Commission not get involved with the new one — the California Uniform Law Commission and the State Bar Probate Section should be able to handle it.

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 and 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.

Covenants that run with the land and enforcement of obsolete restrictions. The Commission’s 1997 legislation on this matter — AB 707 (Ackerman) — is pending in the Assembly Judiciary Committee as a two-year bill after concerns were raised by the Planning and Conservation League.

Eminent domain law. The Eminent Domain Law was enacted on recommendation of the Commission in 1975. The Commission has agreed to receive suggestions for clarifying revisions from Professor Gideon Kanner. We

have also heard in the context of public utility deregulation that the right of eminent domain given by statute to private utilities is being abused.

Inverse condemnation. The Commission has dropped this as a separate study topic. However, the Commission has agreed to consider the impact of exhaustion of administrative remedies on inverse condemnation, as part of the administrative procedure study. Professor Gideon Kanner is preparing a report for the Commission on this matter.

Adverse possession of personal property. The Commission has withdrawn its recommendation on this matter pending consideration of issues that have been 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 consolidates various previously authorized studies into one comprehensive topic. The current California Family Code was drafted by the Commission, and we maintain a continuing review of it.

Marital agreements made during marriage. California 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 would involve controversial issues. One issue — whether the right to support can be waived — should be addressed in the premarital context as well. The Commission has indicated its interest in pursuing this topic.

Mixed community and separate property assets. We have received a lengthy article from our community property consultant, Professor Bill Reppy, concerning *Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement*, 31 Idaho L. Rev. 965 (1995). The staff intends to solicit comment from other experts on whether the article appears to present a fruitful approach for a legislative solution to this intractable problem.

5. 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.

6. 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. The Commission is currently considering the issue of settlement negotiation confidentiality.

7. Discovery in Civil Cases

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 not under active consideration.

The Commission in 1996 decided to study the time for responding to a demand for production of documents. The staff is preparing material on this on a low priority basis.

The Commission has also decided to review developments in other jurisdictions to improve discovery. The staff has not yet begun a search for an appropriate academic consultant on this matter.

8. 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 and 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. A recent article, "Stopping Groundless Liens Against Public Officials" in *State Legislatures* (July/Aug. 1997) at 11, indicates this is a continuing problem and a number of states have adopted legislation aimed at it.

9. Special Assessments 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.

10. Rights and Disabilities of Minor 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. The health care decisions study involves issues in this area.

11. 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. The pending proposal on the best evidence rule is a result of this project. The Commission has retained a consultant — Judge Joe Harvey — to prepare a background study on this matter. The study is due by June 30, 1999. The National Conference of Commissioners on Uniform State Laws also has a project to review the Uniform Rules of Evidence in light of electronic communications.

12. 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.

13. 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 was enacted in 1995, with cleanup legislation in 1996.

In 1997 the Commission introduced legislation on quasi-public entity hearings, administrative law judge ethics, and judicial review of agency action. The quasi-public entity legislation — SB 68 (Kopp) is enacted as 1997 Cal. Stat. ch. 220. The administrative law judge ethics legislation is not yet enacted. Judicial review of agency action has been referred by the Senate Judiciary Committee for interim study.

The Commission is now actively engaged in a study of state rulemaking procedures.

There are problems in the Information Practices Act of 1977 that the Commission may wish to address. The staff will identify these for the Commission at an appropriate time on a low priority basis.

14. 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 in 1990. 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 currently the subject of reform efforts at state and federal levels. This would be a major study requiring significant staff and Commission resources. The staff recommends that the Commission continue to defer work on it.

15. 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 not delivered and funds available under the contract have reverted. Professor Hone has indicated his desire to complete the work nonetheless, and has prepared a memorandum with a partial statement of issues.

This is a politically sensitive matter, since the relevant committee of the American Bar Association is negative towards the Uniform Act.

The staff plans to move ahead on this project when the time seems right.

16. Unfair Competition Litigation

This topic was authorized in 1993 on request of the Commission. The Commission's proposed legislation on this topic — SB 143 (Kopp) — was not enacted.

17. Shareholders' Rights and Corporate Director Responsibilities

This topic was authorized in 1993 on request of the Commission. The Commission is actively involved in the business judgment rule portion of the study, and plans to have a recommendation for the 1998 legislative session. The Commission has considered the derivative action portion briefly.

18. Trial Court Unification

This topic was assigned by the Legislature in 1993. The Commission delivered its report on the constitutional changes that may be required in January 1994. The Commission's resolution of authority has been revised to provide for a study of statutory changes that may be necessitated by court unification.

SCA 4 was approved by the 1996 Legislature. It provides for trial court unification by county, on a vote of a majority of the superior court judges and a majority of municipal court judges in the county. The proposed constitutional

amendment will be on the June 1998 ballot. The Commission is actively engaged in a review of the statutes with the objective of enactment of implementing legislation before the June 1998 election.

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

This topic was authorized in 1994 on request of the Commission. The Commission's recommendation was submitted to the 1996 legislative session but not enacted. The Commission has decided, on a low priority basis, to draft proposed language to amend Code of Civil Procedure Section 351, rather than repeal it, in order to codify existing case law and resolve other identified problems.

20. Law of Contracts

The Commission's 1996 resolution authorizes a study of the law of contracts (including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters). The National Conference of Commissioners on Uniform State Laws is actively engaged in a similar project, which may provide useful guidance for the Commission in the contract law study. The staff is deferring work on this matter in light of the Uniform activity.

21. Consolidation of Environmental Statutes

The Legislature in 1996 added to the Commission's agenda a study of "Whether the laws within the 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." It is conceived by the Legislature that this will be a nonsubstantive compilation, that the Commission will be able to exercise a considerable amount of discretion in determining the scope of the study, and that the Commission will give it some priority. The Commission has engaged two consultants — Professor John Dwyer of Boalt Hall and Professor Brian Gray of Hastings Law School — to prepare a possible Environmental Code outline. This is scheduled for review by the Commission at its September 1997 meeting.

PROPOSED NEW TOPICS AND PRIORITIES

During the past year the Commission has received no suggestions for study of new topics. However, it has received two suggestions for priority study of matters under existing calendar topics.

Allocation of Debts Between Estate and Surviving Spouse

Probate Code Section 11444 provides that debts owed jointly by a decedent and surviving spouse are to be apportioned between the estate and the surviving spouse based on the total assets of each that would be liable for the debt. We have received a letter from Craig J. Bassett of Morgan Hill, who handled a case involving this statute. His conclusion is that the section is cryptic and hard to understand:

If you or your team are able, will you please fix this code section before it does any more damage? There are no published cases construing it. Not one of the published treatises will touch it except for The Rutter Group (*TRG*). All the others simply regurgitate the text of the code without enlightening comment. I am not happy that the commission allowed this statute to be drafted in such an ambiguous style. At the very least there should have been some helpful commentary combined with it such as giving examples of how the statute works, as *TRG* tried to do. No one's perfect, but the ambiguity quantified under my circumstances has cost my client tens of thousands of dollars and worse, has even seriously threatened her mental health because there are no clear answers afforded by the statute.

This provision was originally enacted in 1975 as Section 980(e) of the old Probate Code. It was sponsored by the State Bar with support of the California Bankers Association and Land Title Association. The Commission continued its substance without change on enactment of the new Probate Code. The drafting of the statute could be improved, the allocation formula could be made clearer, some of the explanatory material in the Comment could be codified, and examples could be given in the Comment to help construe and apply the statutory provisions.

This could be done relatively easily by the staff on a low priority basis, if the Commission is interested. Otherwise, we would forward the material we have on it to the State Bar for their consideration.

Revision of Child Custody Laws

We have received a letter from Todi Handsbur of Merced suggesting revision of California's child custody laws, based on her personal experience with her children. This would be within the Commission's authority to study family law.

Ms. Handsbur is concerned about former spouses who have been awarded custody mistreating the children or using them to hurt the other spouse. She would award custody based on a mediation, and after custody is awarded:

(1) Failure to properly treat a medical condition would be a misdemeanor on the first occasion, a felony on the second occasion, and would result in loss of custody on a third occasion.

(2) On reaching the age of 4-1/2 or 5 the child who is capable of making a custody decision should choose.

(3) Custody issues should be viewed in the context of the family situation as a whole.

(4) Low-income parents should receive public representation in custody matters.

(5) Mandatory counseling should be required for parents who have had domestic violence histories.

(6) More public resources should be devoted to family issues and less to defense of criminals.

The staff recommends against the Commission becoming involved in such a project. We would look for an appropriate place to refer Ms. Handsbur's letter — perhaps the State Department of Social Services.

CONCLUSION

Overriding Priority — Trial Court Unification

Because of the June 1998 ballot date and the great volume of statutory material involved, the Commission will need to continue to give trial court unification an overriding priority through the end of 1997 and the beginning of 1998. There will undoubtedly be cleanup legislation required in future years as well.

1998 Legislative Program

The 1998 legislative program will see a substantial amount of staff time devoted to problem matters left over from 1997 as two-year bills, including (1) real property covenants, (2) administrative law judge ethics, (3) judicial review of agency action, and (4) best evidence rule.

During the remainder of 1997 the staff would give priority to completing projects currently underway that reasonably can be completed in time to include in the Commission's 1998 legislative program. These are:

Business Judgment Rule. The Commission has reviewed comments on the tentative recommendation and decided to proceed with this codification project. We should have a revised draft for the October meeting.

Severance of Joint Tenancy by Dissolution of Marriage. We have reviewed comments on this tentative recommendation and a revised draft is ready for Commission consideration.

Settlement Negotiation Confidentiality. Comments on the tentative recommendation are due October 31.

Stepchild and Foster Child Inheritance. We have received comments on this tentative recommendation, and they are scheduled for review by the Commission at the September 1997 meeting.

Work During 1998

Apart from the priority matters discussed above, the staff hopes to be able to achieve the following during 1998:

Health care decisions. Drafting on this major project is well along. We should be able to complete work on it during 1998 for introduction in 1999.

Administrative rulemaking. We would continue to press forward with the study of rulemaking. It may be possible to complete work on all or severable parts of this project during 1998 for introduction in 1999.

Environmental law. Work on this project will depend on the overall approach the Commission decides to take. It may be possible to complete a small severable part of the consolidation during 1998.

Local agency hearing procedures. The concept of this study is a favorable judicial review standard offered as a "carrot" to get local agencies to adopt fair hearing procedures. The scope of the project is fairly narrow and we ought to be able to wrap up work on it during 1998.

Termination of beneficiary designations on divorce. This is a matter of achieving consistent treatment within California's existing statutory framework. This should be manageable within the next year.

Uniform Unincorporated Nonprofit Association Act. If Professor Hone completes work on this, we would work individual issues into the agenda on a low priority basis.

TOD Securities Registration. If the Commission decides to reactive this study, it can easily be accomplished during 1998 with minimal Commission and staff resources.

Time for responding to demand for production of documents. This is a relatively easy matter that the staff will work into the Commission's agenda as staff resources and Commission meeting time become available.

Eminent domain law. The staff is not prepared to suggest the priority to be given this matter until we have heard from Professor Kanner concerning it.

Lower Priority Matters for 1998 and Beyond

Other matters the staff would work into the agenda on a very low priority basis either during 1998 or 1999 include:

- (1) Revision of the statute of limitations tolling recommendation to revise, rather than repeal, Code of Civil Procedure Section 351 to codify existing case law and resolve other identified problems.
- (2) Mechanical and other problems in the homestead exemption.
- (3) Revision of the Probate Code Section 11444 apportionment of debts statute, if the Commission concludes this is something we should address.

Work in Future Years

We currently have a consultant preparing material on Evidence Code revisions to accommodate electronic communications, and the National Conference of Commissioners on Uniform State Laws is working on contract law revisions resulting from electronic communications. We expect to have both products in about two years.

The staff is attempting to identify satisfactory consultants to prepare background studies for consideration in future years on the following topics:

- (1) Bankruptcy Code Chapter 9.
- (2) Assignments for the benefit of creditors.
- (3) Discovery improvements.

Respectfully submitted,

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