Admin. September 3, 1998

Memorandum 98-56

New Topics and Priorities

OUTLINE OF MEMORANDUM

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.

This memorandum reviews the status of items on the Commission's Calendar of Topics to which the Commission may wish to give priority 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 during 1998-99.

STATUS OF 1997-98 PRIORITIES

Last year after its annual review of topics and priorities, the Commission decided that for 1997-98 it would:

• Give an overriding priority to completion of work on statutory revisions required by **trial court unification**. [The Commission's recommendation on trial court unification is now in print and the implementing legislation is awaiting the Governor's signature.]

• Complete work on **health care decisions** for introduction in 1999. [The Commission's tentative recommendation on health care decisions for incapacitated adults has been circulated for comment, and the comments will be considered at the September meeting.]

• Make progress on the study of **administrative rulemaking**, completing work on all or severable parts of this project for introduction in 1999. [The Commission's tentative recommendations on advisory interpretations and consent regulations have been circulated for comment, and the comments will be considered at the September meeting.]

• Complete a severable part of the **Environment Code** for introduction in 1999. [The Commission's tentative recommendation on Parts 1-4 of the Environment Code has been circulated for comment, with a deadline of November 15, 1998.]

• Wrap up work on **local agency hearing procedures**, offering a favorable judicial review standard offered as a "carrot" to get local agencies to adopt fair hearing procedures. [The Commission has reviewed the possibility of working out a favorable judicial review standard for fair local agency hearing procedures and has concluded not to pursue this matter.]

• Complete work on **termination of beneficiary designations on divorce.** [The Commission has approved preparation of a final recommendation on termination of beneficiary designations on divorce, subject to one detail to be considered at the September meeting.]

• Work individual issues on the **Uniform Unincorporated Nonprofit Association Act** into the agenda on a low priority basis, when Professor Hone delivers his background study. [Professor Hone has not yet delivered his background study on the Uniform Unincorporated Nonprofit Association Act.]

• Reactivate the **Uniform TOD Security Registration Act.** [The Commission has submitted its recommendation on the Uniform TOD Security Registration Act and implementing legislation has been enacted as Chapter 242 of the Statutes of 1998.]

• Consider the **time for responding to demand for production of documents.** [The Commission has submitted its recommendation on the time for

responding to a demand for production of documents in discovery, and implementing legislation is awaiting the Governor's signature.]

• Study selected issues in **eminent domain law** after other priorities for 1998 are addressed. [The Commission is currently reviewing condemnation by privately owned public utility and date of valuation issues under the eminent domain law.]

• Work into the agenda on a very low priority basis mechanical and other problems in the **homestead exemption**. [Homestead exemption problems are scheduled for discussion by the Commission at the September 1998 meeting.]

• Obtain consultants for the following topics:

(1) **Bankruptcy Code Chapter 9**. [We have executed a contract with Professor Frederick Tung of University of San Francisco Law School to prepare a background study on this matter. The study is due September 30, 1999.]

(2) **Assignments for the benefit of creditors**. [We have executed a contract with David Gould of McDermott, Will & Emery, Los Angeles, to prepare a background study on this matter. The study is due December 31, 1999.]

(3) **Discovery improvements**. [We have executed a contract with Professor Gregory Weber of McGeorge Law School to prepare a background study on this matter. The study is due September 1, 2000.]

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 has completed work on a number of the topics 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 affected 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 and amendment of the automatic 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 number of cases illustrating the confusion of the courts and litigants arising from defects in the law. See, e.g., the Ninth Circuit decision in *Jones v. Heskett & Kelleher Lumber Co.* As a low priority, the staff has investigated how best to resolve technical problems in the application of statutory homestead law. We are activating this matter at the September 1998 Commission meeting.

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.

Bankruptcy Code Chapter 9. The issues here are whether California law should be revised to increase 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. The Commission's consultant is Professor Frederick Tung of University of San Francisco Law School; his background study is due September 30, 1999.

Assignments for the benefit of creditors. The issues here are whether California law should be revised to codify, clarify, or change the law governing general assignments for the benefit of creditors, including but not limited to changes that might make general assignments useful for purposes of reorganization as well as liquidation. The Commission's consultant is David Gould of McDermott, Will & Emery, Los Angeles; his background study is due December 31, 1999.

2. Probate Code

The Commission drafted the Probate Code and continues to monitor experience under it and make occasional recommendations on it.

Health care decisions. The Commission is engaged in a study of health care decisions for incapacitated adults.

Uniform Principal and Income Act. The Commission is engaged in a study of the newly revised Uniform Principal and Income Act.

Inheritance from or through foster parent or stepparent. The Commission has issued its recommendation to clarify the law in this area. The recommendation was ejected from the Assembly Judiciary Committee's omnibus bill of "noncontroversial" probate changes. We need to find an appropriate vehicle for its enactment.

Severance of joint tenancy by divorce. This study is now combined with the study of termination of beneficiary designations by divorce.

Termination of beneficiary designation by divorce. This project grew out of the joint tenancy severance study. The Commission has directed preparation of a final recommendation on this matter.

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 Probate 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 now has a procedure for dealing with this matter. This is an important issue that the Commission should take up when resources permit.

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. The Uniform Probate Code deals with statutory allowances to the decedent's spouse and children.

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

Professor Jerry Kasner's background study for the Commission 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.

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.

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.

In addition, a number of smaller matters have been brought to the Commission's attention over the years that the Commission has also deferred, due to intervening legislative priorities. See, e.g., Memorandum 93-44 (miscellaneous probate issues).

Topics on the "back burner" list include:

Transfer on death designation for real property
Summary guardianship or conservatorship procedure
Tort and contract liability of personal representative
Rule Against Perpetuities and charitable gifts
Jury trial on existence of trust
Multiple party bank account forms
Joinder of estates of spouses
Determination or confirmation of property belonging or passing to surviving spouse
Liability for unmatured debts

Some of these matters are quite manageable and could easily be worked into the Commission's agenda on a low priority basis.

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.

Eminent domain law. The Eminent Domain Law was enacted on recommendation of the Commission in 1975. The Commission is engaged in an update project focusing on specific issues.

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. The study was to be delivered at the end of April, but the Executive Secretary has extended the deadline due to current court activity and unexpected complexities in the area.

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.

Severance of personal property joint tenancy. A back burner project is statutory authorization of unilateral severance of a personal property joint tenancy (e.g., securities). This would parallel the authorization for unilateral severance of real property joint tenancies.

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.

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 California Supreme Court in 1998 agreed to review a case on this point. 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 is soliciting comment from other experts on whether the article appears to present a fruitful approach for a legislative solution to this intractable problem.

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; the staff is activating this matter at the September 1998 Commission meeting.

District Attorney support enforcement. At the time the Family Code was compiled, it was thought that the district attorney support enforcement statutes might ultimately be made a part of the code. Those statutes are currently located in the Welfare and Institutions Code. This project involves mainly staff resources.

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 and our experience with unfair competition law.

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 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 has also decided to review developments in other jurisdictions to improve discovery. Professor Gregory Weber is the Commission's consultant; his background study is due September 1, 2000.

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. 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.

9. Special Assessments for Public Improvements

There are a great many 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 many years ago had a background study prepared that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules. The study would need to be updated before it could be considered by the Commission. In addition, a background study by an expert consultant of the experience under the California Evidence Code might be useful before the Commission undertakes a project of this type.

Electronic Documents. The Commission has decided to study selected admissibility issues relating to electronic data. The repeal of 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 1998 the Commission obtained enactment of legislation imposing a code of ethics on administrative law judge ethics. 1998 Cal. Stats. ch. 95.

Legislation proposed by the Commission to reform the law governing judicial review of agency action was heard in the 1997-98 legislative session, but was not enacted.

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

14. Payment and Shifting of Attorney's 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 attorney's 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.

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. Despite delays, Professor Hone has indicated his desire to complete the work, and has prepared a memorandum with a partial statement of issues.

This study is not free from controversy, since key members of relevant committees of the State Bar and the American Bar Association are negative towards the Uniform Act.

16. Unfair Competition Litigation

This topic was authorized in 1993 on request of the Commission. The Commission proposed legislation on this topic in the 1997 session, which was not enacted.

17. Shareholders' Rights and Corporate Director Responsibilities

This topic was authorized in 1993 on request of the Commission. The Commission's proposed legislation to codify the business judgment rule was introduced in 1998 but was not enacted. The Commission has considered the derivative action portion of this study briefly.

18. Trial Court Unification

This topic was assigned by the Legislature in 1993.

The Commission delivered its report on constitutional changes for unification in January 1994. SCA 4, implementing the report, was approved by the voters on the June 1998 ballot.

The Commission submitted its report on statute revisions for unification in July 1998. The implementing legislation, SB 2139 (Lockyer), has passed the Legislature and is awaiting the Governor's signature.

SB 2139 directs the Commission to study the additional issues in judicial administration identified in the Commission's report on statute revisions for unification.

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 to discontinue work on this topic.

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 Law Commission 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 was conceived by the Legislature that this would be a nonsubstantive compilation, that the Commission would be able to exercise a considerable amount of discretion in determining the scope of the study, and that the Commission would give it some priority.

This study is active. The Commission has circulated a tentative recommendation to enact Divisions 1-4 of the Environment Code, with a comment deadline of November 15, 1998.

PROPOSED NEW TOPICS AND PRIORITIES

During the past year the Commission received a bumper crop of suggestions for study of topics. (A suggested topic may fall within existing Commission authority; in that case we would treat it as a suggestion to give priority to the matter.) A great number of significant and meritorious topics have been proposed. The suggested new topics and priorities are discussed below. We have grouped them according to general subject matter — civil procedure, family law, probate, real property, administrative law, and miscellaneous.

CIVIL PROCEDURE:

Issues in Judicial Administration

Government Code Section 70219 (included in SB 2139) directs the Commission to study and report to the Governor and Legislature on the issues identified for future study in the Commission's report on trial court unification. The Commission's report identifies the following issues:

- Reexamine the tripartite system of civil actions, limited civil actions, and small claims, in light of unification, including possible elimination of unnecessary procedural distinctions, reassessment of the jurisdictional limits for small claims procedures and economic litigation procedures, and reevaluation of which procedures apply to which type of case. This is a joint study and report with the Judicial Council.
- Obsolete statutes relating to expired pilot projects or other expired programs.
- Whether to conform the statutory provisions on circumstances for appointment of a receiver.
- Procedure for good faith improver claims.

- Procedure for obtaining a stay of a mechanic's lien foreclosure action pending arbitration.
- Clarification of provisions relating to obtaining counsel for defendant in a criminal case.
- Role of court reporter in a county in which the courts have unified, particularly in a criminal case.
- Appealability of order of recusal in a criminal case.
- Publication of legal notice in a county with a unified superior court.
- Resolving the numbering conflict in the two Chapters 2.1 (commencing with Section 68650) of Title 8 of Government Code.
- Default in an unlawful detainer case.
- Whether to make revisions regarding the repository for the duplicate of an affidavit pursuant to Fish and Game Code Section 2357.

The staff believes we should give these matters a priority in order to wrap up our work on trial court unification. We will work them into the Commission's agenda as staff and Commission resources permit.

Attorney's Fees

A recent case, *Sears v. Gaccaglio*, 70 Cal. Rptr. 2d 769 (1998), attempts to harmonize the standards for awarding to the "prevailing party" in a contract action (1) costs under Code of Civil Procedure Sections 1032 and 1033.5 and (2) attorney's fees under Civil Code Section 1717. The attempted harmonization draws a strong dissent in the case, which has been denied review by the Supreme Court.

Commissioner Skaggs has sent us a note that, "Although the courts may now have resolved all of the arguments about this, it remains a confusing area. Would it be worthwhile for us to consider revisions to the statutes to codify the decisions and to clarify any remaining areas of uncertainty?"

The payment and shifting of attorney's fees between litigants is one of the Commission's authorized study topics. The staff has previously done a substantial amount of research on it, but the study is on hold for now. **A clarification of the law such as that suggested by Commissioner Skaggs would be an appropriate matter for the Commission to study.**

Judicial Rulemaking; Summary Judgments

The Judicial Council's Civil and Small Claims Advisory Committee has forwarded to us a copy of Koppel, *Populism, Politics, and Procedure: The Saga of*

Summary Judgment and the Rulemaking Process in California, 24 Pepperdine L. Rev. 455 (1997). The Committee's transmittal letter refers to the Commission as a "neutral body" on this matter, for reasons that will immediately become apparent.

The thrust of Professor Koppel's article is that the power to prescribe rules governing judicial procedure in California should be shifted from the Legislature to the Judicial Council. Professor Koppel notes that in the federal system and in all other states (except New York which, like California, is a Field Code state), the judiciary controls procedural rules. He argues that procedural rules are a battleground of plaintiff and defendant special interests, and for this reason allowing procedures to be determined by the legislative process results in the expected procedural mess.

Professor Koppel cites as an example the rules governing summary judgments, which illustrate the interplay of the plaintiff's interest in full procedural justice and the defendant's interest in prompt and inexpensive resolution. The summary judgment debate focuses on whether the moving party (the defendant in the case) must bear the burden to show there is no triable issue as to a material fact or whether the respondent (the plaintiff in the case) must bear the burden to show that there is. Professor Koppel details the legislative history of, and resultant defects and ambiguities in, the current statute, and demonstrates that the California law on this point is hopelessly confused.

Professor Koppel concludes that California's summary judgment law needs to be reformed, if not completely overhauled. However, he does not think the legislative process is capable of achieving this result. He argues that the process for drafting the rules of civil procedure in California needs to be removed from the Legislature and given to the Judicial Council.

Intriguing as Professor Koppel's suggestion may be, the staff does not think it is worth the Commission's resources to pursue it. Because the procedural rules control substantive rights, the Legislature wants to maintain control of them. Moreover, tension between the legislative and judicial branches has been high in recent years, and the Legislature is in no mood to transfer any of its authority to the courts.

A more productive study for the Commission might be to clarify the rules governing summary judgment. But if Professor Koppel's argument is correct that these rules are at the heart of the political debate between plaintiffs' and defendants' interests, the prospects are not promising. We have not fared well in

the Legislature in recent years with any proposal opposed by the plaintiffs' lobby — e.g., eliminating tolling of statutes of limitation for out of state defendants, reform of unfair competition litigation procedure, reform of judicial review of agency action, codification of the business judgment rule.

Discovery

Existing law limits the number of interrogatories that may be propounded, but permits two supplemental interrogatories before the initial setting of a trial date and one after the initial setting of a trial date; the court is also allowed to grant additional interrogatories for good cause. Code Civ. Proc. § 2030(c)(8).

Richard L. Haeussler of Costa Mesa has written to suggest that if the trial date in a matter is continued for more than 120 days, a party as a matter of right should be allowed a supplemental interrogatory. The interrogatory would have to be served at least 75 days before the continued trial date. "This would get away from the requirement that a party would have to make a motion as provided for now." See Exhibit p. 1.

Mr. Haeussler has also sent this proposal to the State Bar. The Committee on Administration of Justice was split on this proposal, CAJ South approving it and CAJ North disapproving. CAJ North was concerned about too many discovery opportunities and imposing unreasonable burdens on litigants. The Litigation Section of the State Bar also opposes Mr. Haeussler's proposal. They are concerned that the increased opportunity for supplemental discovery will reward lax trial preparation and encourage requests for continuance for the sole purpose of obtaining further discovery.

Would it make sense to refer this matter to our discovery consultant, Prof. Weber, for review along with his review of discovery innovations of other jurisdictions?

Statutes of Limitation

Andrew Wistrich, a United States Magistrate Judge in Los Angeles, has sent us copies of two articles he has co-authored on statutes of limitation. See Exhibit p. 2.

Legal Malpractice Actions. One article deals with the continuing problems the courts have encountered in applying the statute of limitations in legal malpractice actions. Ochoa & Wistrich, *Limitation of Legal Practice Actions:*

Defining Actual Injury and the Problem of Simultaneous Litigation, 24 S.W.U. L. Rev. 1 (1994).

The statute of limitations in legal malpractice actions is the earlier of (1) four years after the date of the malpractice or (2) one year after the client discovers or should have discovered the malpractice. However, these periods are tolled during the time the client has not sustained actual injury. Code Civ. Proc. § 340.6(a).

The article focuses on problems in applying this rule where the malpractice arises out of the attorney's handling of litigation. If the limitation period for the malpractice action expires before the underlying litigation is concluded, the client is forced to litigate two lawsuits simultaneously, creating a host of legal and practical problems, including collateral estoppel, inconsistent outcomes, and waiver of attorney-client privilege.

The article suggests that these difficulties can be resolved through application of the doctrine of "equitable tolling" of the limitation period for the malpractice action until an adverse judgment or other appealable order is entered against the client at the trial court level in the underlying action. The courts have not to date applied the doctrine of equitable tolling, however, perhaps because the legal basis for it is dubious. Code of Civil Procedure Section 340.6(a) states that "in no event" shall the time for commencement of a legal malpractice action exceed four years except for specific tolling circumstances prescribed in the statute. That is where we come in.

This 1994 article correctly predicts ongoing problems with the determination of when "actual injury" occurs and how the law should be applied in the context of simultaneous litigation. In fact, the California Supreme Court has issued four opinions on this statute in the past four years. The most recent is its July 30 decision in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 76 Cal. Rptr. 2d 749 (1998). The majority in this case finds no problem in applying the one year statute notwithstanding ongoing litigation in the underlying case; the court's decision draws separate dissents from both the Chief Justice (George) and the senior Justice (Mosk).

We would need specific legislative authority if we were to undertake this study. The article is quite thorough and could be used as a background study if we were to proceed on this matter.

Rationalization of Statutes of Limitation. A second article provided by Judge Wistrich analyzes the policies favoring and disfavoring statutes of

limitation in general. Ochoa & Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L. J. 453 (1997). The authors hope, by describing the variety of purposes served by limitation of actions, to encourage legislators, courts, and scholars to reconsider how well those purposes are being served.

The article concludes that the law of limitation of actions is ripe for legislative reexamination (28 Pac. L.J. at 514 (fn. omitted)):

> The current patchwork of overlapping classifications and innumerable exceptions provides only the illusion of repose and may cost society more in terms of time, money and judicial resources, not to mention frustration and the appearance of unequal treatment, than is justified by the intangible benefits that it actually manages to provide. While we believe the goals of the limitation system are worthy, the benefits that it seeks to foster can only be achieved by a system of rules that operates with greater certainty, and with fewer transaction costs, than our present system.

The article does not make any specific suggestions for comprehensive reform.

The Commission has done work on statutes of limitation in the past. For example, the Commission's recommended overhaul of the statutes of limitation for felonies was enacted in 1984. Our 1996 recommendation to eliminate tolling for out of state defendants was not enacted, due to opposition from the plaintiffs' bar.

While the staff agrees that the current collection of statutes of limitation has developed haphazardly and could benefit from some rationalization, the staff does not recommend such a study. Absent a showing of real problems, we do not think it will be profitable to work in this area, where vested interests zealously guard their existing protections and opportunities.

FAMILY LAW:

Child Custody, Visitation, and Support

The Commission has received a number of letters concerned about child custody, visitation, and support matters.

Grant Leahy writes to request revision of the laws governing child custody, visitation, and support to give fathers equal rights. "Fathers in California in most cases involving custody have to spend thousands and sometimes tens of

thousands just to get joint custody, even if the mother has not provided a decent home or care for the child involved." Exhibit p. 3.

A similar comment is provided by Lowell Jaks of the Alliance For Non-Custodial Parents Rights, who suggests a presumption of 50/50 joint physical custody. "Currently, the law states that the preference is joint legal and physical custody, but it needs to specify a preference for the 50/50 split." Exhibit p. 4.

A custodial parent, Stephanie D. Davis, is frustrated with inequitable visitation laws and enforcement practices. "Why is it that if one parent is mad at the other, they are allowed to keep taking the other parent back to Court over and over for the same issues raised in the very beginning? ... When do the children matter in cases like this, how old do they have to be to be heard?" Exhibit pp. 5-8.

Robert M. Allen, of San Jose, objects to Family Code Section 4071.5. Under that section, a parent is not eligible to take advantage of provisions of law that would allow reduction of the parent's child support obligation in hardship situations, if any welfare payments are being made on behalf of any child of the parent. Mr. Allen argues that the provision is unfair, discriminatory, and either ambiguous or illogical. Exhibit p. 9.

The staff recommends against the Commission becoming involved in issues of child custody, visitation, and support. These matters are continually before the Legislature, which continually fine-tunes them. The emotions and politics generated by these issues are such that they are not readily amenable to the type of law reform work done by the Commission.

Limiting Dissolution Litigation Expenses

Exhibit pp. 10-13 is a condemnation of family law attorneys by Dr. Barry Fireman of Malibu, whose theme is that, "Only through fee limits and restrictions will matrimonial lawyers be forced to be efficient, induced to mediate settlements and pressed to promulgate a more tranquil environment in which separating spouses dissolve their marriages." His suggestion is a fee schedule based on a percentage of the marital estate, with provision for special allowances on court authorization.

Dr. Fireman's suggestion appears to the staff to be similar to the much-maligned probate attorney fee system, which the Commission has recommended be abolished in favor of reasonable fees. The Commission's recommendation was

not enacted. **The staff recommends that the Commission not pursue this matter.**

Mixed Community and Separate Property Assets

A perennially vexing problem in family law is the treatment of property acquired with or improved by a mix of community and separate funds. Historically, California law treated a martial asset as community or separate property, based on the inception of title to the property, with various gift presumptions for contributions to it. The law has evolved to a confusing hodgepodge of gift-presumption, reimbursement, and part-ownership theories in case law and statute. A key statute, enacted on recommendation of the Commission, provides that on dissolution of marriage, separate property contributions are reimbursed without interest, and any appreciation in the value of the property belongs to the community. Fam. Code § 2640.

A recent Supreme Court case, *In re Marriage of Walrath*, 72 Cal. Rptr. 2d 856 (1998), addresses a matter not covered by Family Code Section 2640 — if a marital asset acquired with separate property funds is refinanced and the proceeds are applied to acquire other assets, is there a reimbursable separate property contribution to the other assets? The Supreme Court holds that Section 2640 should be construed to allow tracing of separate property contributions to other assets, although two separate opinions in the case dissent as to the manner of tracing prescribed by the court.

A recent article characterizes the law in this area as confusing and illogical, and based on misconceptions, faulty principles, and errors compounded over the years. The article considers the question of marital mortgage payments and concludes that the issue of whose funds contributed to whose property — and how to provide offsets or reimbursement — is far from settled in California. Starr, *Mortgage Trust*, Cal. Law Business 32 (April 6, 1998).

Our community property consultant, Professor Bill Reppy of Duke Law School, has sent us a copy of his article on the whole community and separate property mix question. Reppy, *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 title of this article says it all — he recommends getting rid of the vestiges of California's presumption of gift rules, along with the corrective Section 2640, and all the

complexities of trying to make it work. Instead, we would complete the transition to a buy-in to title scheme, enforceable by reimbursement.

This would be a substantial and complex study. **It is probably timely to revisit the Section 2640 concept now that there is significant practical experience under it.**

PROBATE:

Informal Probate Administration

One of the Commission's main legislative assignments is to study "Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code." Pursuant to this provision, the entire Probate Code has been recodified on Commission recommendation, and a number of important provisions of the Uniform Probate Code have been incorporated into it.

However, the Commission has never made a recommendation to the Legislature on the key point of the Uniform Probate Code — simplified informal estate administration, without extensive court (or lawyer) involvement. The concept of the Uniform Probate Code is straightforward — the personal representative administers the estate without court supervision except to the extent an interested person requests court intervention on an issue. This is the same manner in which trusts are administered. We have not pursued this matter, largely due to the opposition of the Probate Section of the State Bar and of other vested interests, such as probate referees and legal newspapers, that have a stake in the existing system.

We have received a letter from Murray S. Bishop, a certified paralegal, pointing out that because of the complicated nature of probate in California, (1) the ordinary person cannot handle an estate, and (2) use of revocable living trusts has become a popular (and increasingly abused) alternative to probate. "Its my opinion the current probate process itself is driving the abuses mentioned above and that only a fundamental change to that process will result in a long term solution." Exhibit pp. 14-15. He believes that the Uniform Probate Code process for transfer of property represents a substantial improvement over what we have in California.

Despite the long-standing opposition of the probate bar to adoption of the Uniform Probate Code in California, there is now a substantial movement within

the bar to adopt a comparable informal administration procedure as an alternative to mandatory court supervised administration. The Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section has circulated to its members a proposal for simplified administration, analogous to the Uniform Probate Code system. See Exhibit pp. 16-18.

The State Bar Executive Committee points out that the popularity of trusts for probate avoidance is strong evidence of the desire of people to minimize court involvement in estate administration.

> The Committee believes that California consumers in many cases can be better served by using simple and inexpensive wills and powers of attorney, couple with simplified and mostly private post-death administration procedures which involve the court system only when problems arise. The Committee recognizes the value of the California Probate Code and the concern of the courts to protect the rights of estate beneficiaries from the negligence or malfeasance of personal representatives and supports the continued utilization of our current court supervised procedures where problems or potential abuses exist. However, the Committee strongly believes that the overwhelming number of post-death administration cases involve estates in which family members who deal with each other regularly can pursue estate administration privately with cost effective legal assistance but without mandatory court supervision.

This proposal has generated a huge response from within the bar; we are in possession of copies of the correspondence. There are many probate practitioners who strongly support it, but many more who strongly oppose it. Because of the deep division and lack of consensus of its membership on this issue, the Executive Committee has decided it cannot proceed with this proposal; reform must come from outside the bar. Executive Committee members have forwarded the material to the Law Revision Commission for review.

We know from past experience in this area that a proposal such as this will be quite controversial. But the fact that there is a substantial portion of the bar that now supports it, and that the Probate Section of the bar will take no position on it due to the internal division of its membership, puts this matter in a new light. The staff is particularly impressed with the quality of the support in the bar. Many eminent and influential practitioners who have led the opposition to the Uniform Probate Code now favor some form of simplified administration — e.g.,

Chuck Collier ("strongly support the concept"), Bruce Friedman ("with the benefit of more experience, I support in principle the changes").

This would be a significant project, but we have two existing drafts available for our immediate use — the Uniform Probate Code and the Executive Committee proposal. The politics of obtaining enactment of such a proposal would be intense, but we could expect the active support of Association for the Advancement of Retired Persons and of members of the State Bar interested in advancing the concept.

Rules of Construction of Estate Planning Instruments

Probate Code Sections 21101-21140 contain rules of construction for wills, trusts, deeds, and other donative instruments, such as whether a transfer to a class (e.g., "my grandchildren") should be construed to include only class members living at the transferor's death or whether it includes predeceased and afterborn members. These rules were originally drafted for wills, but were extended by 1994 legislation to apply to nonprobate transfers.

The current statutes have been criticized as confused and causing problems. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hastings L.J. 667 (1997). CEB commentary on the 1994 legislation likewise points out that "the rules of construction designed for instruments which result in future transfers are not necessarily appropriate for instruments which result in immediate transfers." Two of the Commission's former probate consultants, Professors Jesse Dukeminier and Susan French of UCLA Law School, have previously written urging the Commission to propose clarifying legislation for these problems.

The State Bar Estate Planning, Trust and Probate Law Section, which sponsored these rules, now believes they have serious shortcomings and that they should be reexamined by the Law Revision Commission. The Section provides examples of problems with the statutes at Exhibit pp. 19-22.

> In conclusion, the Section believes that the existing rules clearly need clarification and correction, and we strongly urge the Law Revision Commission to study this matter. Instead of piecemeal change to the existing statutes, a new comprehensive set of rules of construction — rules which properly distinguish between different transfer instruments and between testamentary and nontestamentary gifts — would appear preferable.

The staff believes this is a worthwhile and important project. The Uniform Probate Code has recently tailored its rules of construction for nontestamentary instruments. There are well-qualified consultants who undoubtedly would be interested in providing the Commission a good study of this matter.

Liability of Nonprobate Assets for Debts of Decedent

Probate law provides carefully worked out procedures by which a creditor of the decedent may file a claim against the decedent's estate. Due process considerations govern notice to creditors, and distributions may not be made until claims have been satisfied. See Prob. Code §§ 9000-9399.

Similar provisions do not exist for nonprobate transfers generally. The Trust Law provides that trust assets are available to the decedent's creditors to the extent the probate estate is inadequate, but spells out not procedures that a creditor should follow. The Trust Law also provides a notice procedure that the trustee may (but is not required to) use to cut off creditor claims.

The lack of creditor protection is a significant gap in the law applicable to nonprobate transfers. The law is developing in a haphazard manner as nonprobate transfers become ever more important in the intergenerational transmission of wealth.

The Uniform Probate Code has now adopted provisions to address this matter. This provides us an opportunity easily to monitor developments in the area. **The staff would continue to defer work on this matter until we see how the Uniform Probate Code provisions function in jurisdictions that adopt them.**

Miscellaneous Probate Issues

Because the Commission drafted the Probate Code, we often receive letters bringing to our attention miscellaneous issues or problems in probate law. Individually, these matters don't require a substantial commitment of staff or Commission resources, but they should be addressed.

A recent Commission recommendation of this type would clarify the law on inheritance from or through a foster parent or stepparent. This recommendation is too small to warrant a separate bill, and we transmitted it to the Assembly Judiciary Committee for inclusion in this year's omnibus probate bill of noncontroversial changes. Unfortunately, the provision was removed from the bill when it was in the Senate Judiciary Committee because of that committee

staff's belief that this recommendation is "not without controversy. [I]t would have resolved a dispute between two conflicting court opinions by taking one side over the other."

We need to look for another vehicle for this recommendation in 1999. Alternatively, we could combine it with a number of other smaller Commission recommendations to clean up miscellaneous probate issues. For example, issues relating to (1) joinder of estates of spouses, (2) determination or confirmation of property belonging or passing to a surviving spouse, and (3) liability for unmatured debts, would all be appropriate for this sort of disposition. See Memorandum 93-44 (miscellaneous probate issues). **The staff would work some of these issues into the Commission's agenda over the coming year on a low priority basis with the view to a consolidated Commission recommendation and bill.** (This would also provide a convenient opportunity to revise the recommendation on inheritance from or through a foster parent or stepparent to reflect the fact that, rather than resolving a conflict in court of appeal decisions, it would now reverse the Supreme Court decision that has resolved the conflict.)

Joint Tenancy and Community Property

The joint tenancy and community property saga continues. The Commission has struggled to make sense out of this area of law. Its last legislative proposal in the area would have provided a statutory form for transmuting community property into a true marital joint tenancy; this proposal was not enacted. The Commission is currently working on a recommendation to provide that dissolution of marriage severs a joint tenancy.

Meanwhile, another case illustrating the problem has come through the appellate courts. In *Dorn v. Solomon*, 67 Cal. Rptr. 2d 311 (1997), husband and wife held the family home as joint tenants. They separated in 1992, and in 1993, the day before she died, the wife deeded her share of the property to a trust for her daughter by a former marriage. The severing deed was held invalid because it was not recorded within seven days after the wife's death (Civ. Code § 683.2); the surviving husband took the whole property by right of survivorship under joint tenancy, thereby defeating the wife's dispositive intent and the interests of her heirs. The State Bar Probate Section is currently studying whether the seven day time limit is too short and should be extended.

In a major decision, the Tax Court has upheld the IRS position that community property held in joint tenancy form will be taxed as joint tenancy in

California, notwithstanding a probate court's determination that the property is community. *Estate of Young v. Commissioner*, 110 T.C. No. 24 (1998). In his analysis of the impact of this case, Jerry Kasner (the Commission's consultant on this matter) observes that, "In the case of appreciating California property, this is disastrous." Kasner, *Tax Court Ignores "Community Property" Ruling*, Tax Notes 80, 81 (July 6, 1998).

Perhaps with these developments, the magnitude of the problem is more clear to the vested interests that have resisted reform in the past. California is the only community property state that has not addressed the problem in some way. All the others have either created a new title form ("community property with right of survivorship"), recognized a spousal survivorship agreement in community property, created a community property presumption, or prohibited joint tenancy. **Is the Commission interested in reactivating this matter?**

REAL PROPERTY:

Common Interest Developments

Senator Kopp has forwarded us material received from the Common Interest Consumer Project, with the request that we consider reviewing the current statutory scheme regulating common interest development (CID) housing. See Exhibit pp. 23-26. As Senator Kopp notes, such a study would probably fall within the Commission's existing authority to study real property law. However, the staff thinks that this is a major project with significant political implications such that, if the Commission decides to undertake it, we should seek an express legislative authorization for it.

Common interest housing developments are characterized by (1) separate ownership of dwelling space coupled with an undivided interest in common areas, (2) covenants, conditions, and restrictions that run with the land, and (3) administration of common property by a homeowner association.

The Common Interest Consumer Project urges that the various statutes affecting common interest developments should be reviewed in toto with the goal of setting a clear, consistent, and unified regulatory policy with regard to their formation and management and the transaction of real property interests located within them. The objective of the review would be to assist the Legislature in determining to what extent common interest developments should be regulated in the future, to clarify and eliminate unnecessary or obsolete

provisions in the law, and to consolidate existing statutes relating to common interest developments in one place in the codes.

In support of this proposal, the Common Interest Consumer Project points out that the main body of law governing common interest developments is the Davis-Stirling Common Interest Development Law (Civ. Code § 1350 *et seq.*), but other statutes based on separate ownership models still control many aspects of the governing law, including real estate disclosures (Civ. Code §§ 1102 *et seq.*, 2079 *et seq*.). They also note that there is no authorized state regulatory authority over these developments, other than under the Nonprofit Mutual Benefit Corporation Law (Corp. Code § 7110 *et seq.*), and that enforcement by the Attorney General under that law is spotty.

The Common Interest Consumer Project has provided the Commission with a copy of a report by the Public Law Research Institute indicating that, besides the Davis-Stirling Law, other key statutes include the Subdivision Map Act, the Subdivided Lands Act, the Local Planning Law, and the Nonprofit Mutual Benefit Corporation Law, as well as various environmental and land use statutes. The report indicates that these statutes are under constant revision by the Legislature.

The Common Interest Consumer Project argues that the public's understanding of the nature of these developments is cloudy, and that questions have arisen as to whether the law allows housing consumers to clearly and readily understand and exercise their rights and obligations. The current statutory scheme is too complex for the lay volunteers that administer these developments through elected boards made of unit owners, and has no practical enforcement provisions to deter violations. "The Commission should develop recommendations for the Legislature with regard to the creation of a regulatory agency authority to oversee the law under a unified statutory scheme."

The staff believes a project of this type would be suitable for Commission study. The Common Interest Consumer Project is not alone in identifying defects in existing California law on common interest developments. The California Research Bureau's report, *Residential Common Interest Developments: An Overview* (March 1998), identifies a number of policy issues and indicates the need for further research. The National Conference of Commissioners on Uniform State Laws has developed and updated the Uniform Common Interest Ownership Act, which has been enacted in a half-dozen states.

This would be a major project, however, and a substantial commitment of Commission and staff resources. The number and variety of interests that would be affected is substantial, and many of the issues would be quite contentious. The Legislature last year created a working group to review the existing statute, including representatives of builders, common interest development owners, community association boards, management companies, realtors, and other practitioners; however, the working group has dissolved in acrimony, without having made a report. The staff has consulted with legislative staff, who have suggested that this is a morass the Commission would be well-advised to avoid. In light of the character of this project, if we proceed, we should request specific legislative sanction for this project.

Procedure for Removal of Invalid Liens

This study topic has been on the Commission's calendar for 18 years. A recent article, *Stopping Groundless Liens Against Public Officials,* State Legislatures 11 (July / Aug. 1997), indicates this is a continuing problem and a number of states have adopted legislation aimed at it.

A September 1997 report by the Senate Office of Research indicates that anti-government extremists are engaging in "paper terrorism" by filing false liens and other encumbrances on the property of government agencies, public officers, and public employees. Motivations for filing the false documents run from scams to extract money from financial institutions and private citizens to harassing the public officer or employee whom the filer blames for perceived wrongs committed against them. The report notes that anti-government militia groups operate in urban, suburban, and rural areas throughout California. The Freemen and other anti-government groups have instructed hundreds if not thousands of Californians on how to file bogus liens and other encumbrances on the property of government agencies and public employees. The Los Angeles County Recorder's Office reports that it receives at least one attempt a day by a person to record a false lien. Half of the filers whose liens are rejected resort to threatening the county employee for refusing to file the false document. Between 1,500 and 5,000 bogus liens or encumbrances are on the books today.

California in 1997 enacted legislation making it a crime to persistently attempt to record a document determined by the county recorder to be an unrecordable document. Legislation was added in 1998 to provide a $5,000 civil penalty for filing a lien or encumbrance against a public officer or employee,

knowing it is false, with the intent to harass the officer or employee or to influence or hinder the public officer or employee in discharging official duties.

Legislation is also pending to provide an expeditious procedure for removing liens of this type. See Senate Bill 1759 (Ayala), which has passed the Legislature and is awaiting action by the Governor. Under this procedure the victim could petition the superior court for an ex parte order to strike the lien, serve the lienholder with a 14 day order to show cause, and recover costs and attorney's fees incurred to obtain the order striking the lien. State and local agencies would be authorized to provide counsel for public employees. A stricken lien would be nonreportable by consumer credit agencies.

Given the current legislative activity in this area, the staff believes a Commission study is unnecessary. **We would drop this matter from our calendar of topics.**

ADMINISTRATIVE LAW:

Exhaustion of Administrative Remedies

California case law holds that an agency's administrative decision is not judicially reviewable unless a petition for rehearing has first been sought from the agency. *Alexander v. State Personnel Board*, 22 Cal. 2d 198, 137 P. 2d 433 (1943). A recent court of appeal decision criticizes this case and calls upon the Legislature to abrogate the rule. "[I]n our view, the rule in *Alexander* is incorrect and outmoded. It presents a fitful trap for the unwary." *Sierra Club v. San Joaquin Local Agency Formation Commission*, 98 Daily Journal DAR 6712, 6714 (June 23, 1998).

A concurring opinion in the case disagrees with this assessment, noting that the rule is venerable, readily understood, easy to comply with, and consistent with the purpose of the doctrine of exhaustion of administrative remedies — to conserve judicial resources. "The problem here was not with the rule but with the fact petitioner's counsel were unaware of it, or if aware of it, did not comply with it." 98 Daily Journal DAR at 6714

The Commission, in its report on judicial review by state agencies, has also recommended that *Alexander* be overruled.

> **§ 1123.320. Administrative review of adjudicative proceeding**
>
> 1123.320. If the agency action being challenged is a decision in an adjudicative proceeding, all administrative remedies available within an agency are deemed exhausted for the purpose of Section

1123.310 if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review.

Comment. Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § 11523; Gov't Code § 19588 (State Personnel Board). This overrules any contrary case law implication. *Cf.* Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P. 2d 433 (1943).

Administrative remedies are deemed exhausted under this section only when no further higher level review is available within the agency issuing the decision. This does not excuse a requirement of further administrative review by another agency, such as an appeals board.

The Commission's recommendation was part of a comprehensive judicial review proposal that was not enacted. But it was a well thought out and carefully drawn proposal that, in the staff's opinion, would have made a significant improvement in existing law. The recent case is a good illustration of the benefit of the Commission's comprehensive judicial review recommendation. The proposal would not only have improved the law, but it would have laid the law out clearly so that people would not be trapped by arcane procedural requirements buried in case law.

Although the Commission has decided not to pursue the subject of judicial review further, the staff wonders whether it might not make sense to seek enactment of individual provisions such as this that would make a significant improvement in the law. During the legislative process no objection was made to this provision.

Public Records Law

Here is a suggestion originating with the Commission's staff. It arises out of our effort to ensure that the Commission is in compliance with the state's public records laws.

The Public Records Act is intended to foster government openness by permitting broad disclosure of public records. See Gov't Code §§ 6250-6270. The Information Practices Act of 1977 protects personal privacy by limiting disclosure of public records containing personal information. See Civ. Code §§ 1798-1798.77. These two acts are not well integrated. It is only by carefully comparing them

that the scope of the Information Practices Act's privacy protections can be understood. Also, the two acts provide slightly different procedures for disclosure of public records. These statutes should probably be consolidated and revised to clarify the scope of required disclosure and to create a single set of disclosure procedures. It is also worth noting that the Information Practices Act is poorly drafted and contains many ambiguities and other defects.

While the Public Records Act clearly includes computer records in its definition of a "public record" subject to disclosure, the statute does not distinguish between "traditional" forms of computer records (such as databases and spreadsheets) and newly important forms (such as email and web pages). It would be worthwhile to study whether such a distinction should be made.

These topics could be studied under the Commission's existing authority to study administrative law. **However, the staff thinks a specific legislative sanction for this study would be advisable.** These laws are under constant revision by the Legislature (there were half a dozen bills in the 1998 session to modify these laws), and the Legislature should be made aware that we plan to review them.

Administrative and Judicial Review of Parking Citations

We have received two complaints about the current scheme for administrative and judicial review of parking citations. That scheme may be found in Vehicle Code Sections 40215 and 40230.

Attached as Exhibit pp. 27-28 is a letter from Charles L. Smith of Berkeley. He complains that the first level administrative review is held in secret, with the cited person not allowed to appear. In the second level administrative review, the issuing officer cannot be called for cross-examination. And judicial review in the municipal court is limited to a review of the record below; discovery is not allowed and the decision is not appealable.

Gerald Genard of Walnut Creek states (Exhibit p. 29):

> I realized that under the new legislative scheme for handling parking citations, there is no way I would get an impartial hearing until I reached the municipal court. Accordingly, after being turned down in a perfunctory manner by both the Capitola Police Department and the hearing examiner, I called to ask about a further appeal to the municipal court. I was told that I could appeal by paying a $25.00 nonrefundable fee for the appeal. The parking ticket fine is $33.00.

He suggests that the law be revised to eliminate administrative review by the agency that issued the citation and by a hearing examiner — "This system does not give the appearance of impartial justice and probably is not impartial." Exhibit p. 30. Instead, he would allow a hearing before an impartial examiner, appointed by and acting under the supervision of the municipal court, with one additional appeal to the appellate department of the superior court. No fee or charge would be imposed for the hearing or appeal.

This is not the first time we have heard about the quality of justice in local agency administrative hearings. During our study of state agency hearing procedures we were led to understand that the problems are much more serious at the local level. However, we chose not to attempt to clean up local proceedings for a number of reasons, including their vast variety. **But the parking violation hearing procedure is a narrowly focused and detailed statutory procedure that would be amenable to Commission review, if the Commission is so inclined.**

In this connection, the staff notes that the hearing procedures were overhauled by the Legislature in 1995, in an effort to achieve greater fairness. And although the municipal court filing fee in these cases is $25, that fee is reimbursable if the contestant prevails. Veh. Code § 40230(b).

MISCELLANEOUS:

Criminal Sentencing

Commissioner Howard Wayne, a former supervising Deputy Attorney General, has requested that the Commission consider a study of the criminal sentencing statutes, with the view to proposing a reorganization and clarification of the statutes governing sentencing procedures. He notes that this would be a nonsubstantive project intended to make the statutes more logical and understandable. The statutes have grown haphazardly without an overriding organization, with the result that they are now complex and convoluted. He observes that a third of the appeals in criminal cases involve sentencing error. He believes the statutes can be simplified and made easier to understand.

We have spoken with criminal defense lawyers, who say that existing law is "worse than the Tax Code" and "impossible to make sense out of"; a cleanup would be a tremendous service. Legislative committee staff agree the law is a mess and needs an overhaul.

This would be a major project, and we would have to proceed extraordinarily carefully to avoid it becoming political. Moreover, some substantive change may be inevitable with a project of this type, resulting in a political battle. This was the case with Senator Lockyer's efforts to reform the sentencing laws for the past decade. It is possible even that the authorizing resolution for such a study would become a political football. **Perhaps introduction of the resolution would be the way to test whether this would be a feasible project.**

Computation of Traffic Fines

Attached as Exhibit pp. 32-34 is a letter from Gerald Genard of Walnut Creek, suggesting that the statutes governing traffic fines be organized or cross-referenced in a way that makes the fines more readily ascertainable.

He gives as an example of the problem the fine for a traffic light violation. The fine appears to be $100 pursuant to Vehicle Code Section 42001.15. However, this is supplemented by fees and penalties that are not otherwise apparent on the face of the statute, including:

> (1) A "state penalty" of $10 per $10 of fine assessed, pursuant to Penal Code Section 1464.
>
> (2) A "county penalty" of $7 per $10 of fine assessed, pursuant to Government Code Section 76000.
>
> (3) A $10 "court administration fee" pursuant to Vehicle Code Section 40508.6.
>
> (4) A $1 "night court fee" pursuant to Vehicle Code Section 42006.

This yields a total amount due of $281 on a nominal $100 fine. "I suggest that by simplifying the legislation, putting the total fine in one statute and one code, you not only satisfy the public's right to know, but you reduce government inefficiency and expense." Exhibit p. 33.

The staff agrees that a service would be performed by a restructuring of these statutes in some way. However, the staff thinks the Judicial Council may be better suited for this task than the Law Revision Commission. **We would refer the matter to the Judicial Council.**

Motor Vehicle Damage

Existing law requires a dealer, when selling a new motor vehicle, to disclose any repairs of "material damage" to the vehicle. "Material damage" is defined to

include damage that exceeds the greater of $500 or 3% of the manufacturer's suggested retail price. Veh. Code § 9990.

Ron Balchan writes to seek revision of the law to require the dealer to disclose any repairs, regardless of amount. Exhibit p. 35. He was sold a new vehicle with 42% damage to the rear quarter panel. "I bought a new vehicle not a repaired and repainted vehicle. I should have been told up front and given the opportunity to walk away from the deal."

The staff would forward Mr. Balchan's message to the Department of Consumer Affairs and to the Consumer's Union.

Derivative Actions

The Commission has existing authority to study whether Corporations Code Section 800(b)(2), which requires that the plaintiff in a shareholder's derivative action allege the plaintiff's efforts to secure board action or the reasons for not making the effort, should be revised. The Commission has contracted for and received a background study on the matter from its consultant, Professor Mel Eisenberg. The question is, whether this matter should be given a priority.

The staff recommends against proceeding with this project in the current political climate. It is an enormously controversial issue, and legislation addressed to it in recent years, sponsored by the Governor's Office, has proved to be not enactable. We were unable last session to obtain enactment of a simple codification of the business judgment rule. Legislation on derivative actions would likely fare even worse.

The real question, to the staff's mind, is whether we drop the topic of derivative actions and the business judgment rule from our Calendar of Topics completely. We would hold off for awhile. One of the arguments against codification of the business judgment rule is that the Supreme Court has not ruled on it. The Court has now accepted review of *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 72 Cal. Rptr. 906 (1998), which deals with the applicability of the business judgment rule to a homeowner association's duty of repair and maintenance. The Court of Appeal, en route to deciding that the association's decisions should not be protected by the business judgment rule, gave a typically confused recitation of the rule. It is possible the Supreme Court will try to give a clear statement of the rule, perhaps relying upon the Commission's work in the area. **In any event, we would monitor this case before deciding that this study topic should be jettisoned.**

CONCLUSION

While many worthy new topics and priorities have been suggested this year, a significant number of them are major studies, and the Commission lacks the resources to do them all. The staff's suggestions are set out below.

1999 Legislative Program

The first priority should be to complete work on matters to be included in the Commission's 1999 legislative program. We have the September and December meetings to do this. These matters include:

(1) **Health care decisions**. We will consider comments on the tentative recommendation in September.

(2) **Administrative rulemaking**. We will consider comments on the advisory interpretation tentative recommendation and the consent regulation tentative recommendation in September.

(3) **Confidentiality of settlement negotiations**. We will consider comments on the tentative recommendation in September.

(4) **Uniform Principal and Income Act**. We will make progress toward approval of a tentative recommendation in September.

(5) **Public utility condemnation**. We hope to approve a tentative recommendation in September.

(6) **Effect of dissolution of marriage on nonprobate transfers**. We hope to finalize the Commission's recommendation in September.

(7) **Enforcement of judgments**. Homestead exemption and Family Code enforcement issues are on the agenda for September.

(8) **Environment Code**. We will consider comments on the tentative recommendation in December.

(9) **Trial court unification**. We will almost certainly need to propose some cleanup legislation, which we will develop in September and December, and during the legislative process in 1999.

This is a substantial legislative program, and it will consume a significant amount of staff resources during 1999.

Work During 1999

Apart from any new priorities the Commission decides upon, projects we expect to work on during 1999 include:

Administrative rulemaking. We would continue to press forward with the study of rulemaking. It may be possible to complete work on the remaining parts of this project during 1999 for introduction in 2000.

Environment Code. Assuming the Commission decides to proceed with this, and that the Legislature enacts the first four divisions, we would continue on with the Environment Code draft. We would skip over Division 5 (water resources) temporarily because of its size, and hope to complete Division 6 (toxic and hazardous substances) and perhaps one other manageable division.

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.

Eminent domain law. We would continue to work miscellaneous issues into the agenda as Commission and staff resources permit.

Trial court unification. There will be a continuing need to consider issues arising out of trial court unification as experience in the unified counties discloses problems.

Miscellaneous probate issues. We would work small severable matters into the Commission's agenda on a low priority basis.

Evidence Code. The background study on Evidence Code changes required by electronic communications is due June 30, 1999, from the Commission's consultant, Judge Joe Harvey.

Bankruptcy Code Chapter 9. The background study on adjustment of debts of governmental entities (and nongovernmental organizations administering governmental programs) is due September 30, 1999, from the Commission's consultant, Professor Fred Tung.

Recommended New Topics

A number of the suggested topics received during the year would require (or it would be advisable to seek) legislative authorization for study. Of these, the staff recommends requesting authority to study the following matters:

Statutes of limitation for legal malpractice actions. While the staff thinks that in general the Commission should avoid tort matters, this one is narrowly-focused, for which a good law review article is already available, and for which the Commission may be well suited.

Public records law. This arguably falls within our existing administrative law authority. Because of the importance and politically sensitive nature of the

statute, the staff would request express legislative authorization for a narrowly focused study of the issues identified above.

Criminal sentencing. This would be an important and major study, with political overtones. We would need express legislative sanction.

Recommended New Priorities

A number of the suggested topics received during the year relate to matters the Commission is already authorized to study. No new legislative authorization is required. Of these, the staff recommends activation of the following matters:

Issues in judicial administration. These are matters identified in the Commission's report on trial court unification as appropriate for future study. They are not required by trial court unification but grow out of it, such as a review of publication requirements tied to judicial districts and the size of cases to which economic litigation procedures should apply.

Attorney's fees. The suggested harmonization of conflicting standards under the general statute and the contract statute would be a narrowly-focused and beneficial study. It could establish a foundation for the broader study on the Commission's agenda.

Discovery. The proposal for an automatic supplemental interrogatory in case of a continuance we would refer to our consultant on discovery matters.

Rules of construction for estate planning instruments. We would get a consultant to prepare a background study.

Exhaustion of administrative remedies. We would pick off salutary individual recommendations from the judicial review study and work them up as separate proposals.

Hanging in the Balance

The following suggested new topics and priorities are ones the staff believes are meritorious, but we have some reservations about them. We could go either way on these. The Commission needs to decide whether it is interested and wants to devote its resources to these important projects:

Mixed community and separate property assets. This is a complex and difficult matter. The fact that one of the key statutes (which either helps or hurts the law in this area, depending on your perspective) was enacted on Commission recommendation may provide a moral imperative.

Informal probate administration. This is a significant study, but would be subject to vested interest politics.

Joint tenancy and community property. The time may or may not be right to reactivate this study. Every year there are new developments in the law that reinforce the untenability of the current system.

Common interest developments. This would be a major and contentious project. Although it arguably falls within our existing real property authority, the staff would request express legislative sanction for it. If the Legislature approves this project, we would obtain a consultant to prepare a background study.

Administrative and judicial review of parking citations. People are irate about the current system; one of the Commission's staff members has personal experience with it. We would need to limit our inquiry to due process defects in the system.

Recommended Deletions from Calendar

Of the suggested new topics and priorities, those not mentioned above as either "recommended" or "hanging in the balance" the staff would not pursue.

In addition, the staff does not anticipate any work, or further work, on a number of topics. We recommend that they be dropped from the Commission's Calendar of Topics:

5. Class Actions
8. Procedure for Removal of Invalid Liens
16. Unfair Competition Litigation
19. Tolling Statute of Limitations While Defendant Is Out of State

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Richard L. Haeussler,2/26/98 6:41 PM -0800,Suggested amendment to CCP 203 1

From: "Richard L. Haeussler" <haeu@ix.netcom.com>
To: <RMurphy@clrc.ca.gov>
Subject: Suggested amendment to CCP 20309c)(8)
Date: Thu, 26 Feb 1998 18:41:59 -0800

I have previously suggested that CCP sec 2030(c)(8) be amended to provide that if the trial date in a matter is continued for more than 120 days, that a party may send as a matter of right a supplemental interrogatory to update the information.

This would get away from the requirement that a party would have to make a motion as provided for now.

The section would read

"..... Section 2024, once after the initial setting of a trial date. Provided however, that if any trial date is continued for 120 days or more, a party may propound an additional supplemental interrogatory to elicit any additional later acquired information bearing on all answers previously made by any party for each such continuance. However, on motion, for good cause [etc]..."

I would also suggest that the interrogatory would have to be served at least 75 days prior to the continued trial date, but do not know how you would put that in.

I hope that the Law Review Commission will consider my recommendation

RICHARD L. HAEUSSLER
3151 Airway Ave., Suite A-3
Costa Mesa, CA 92626-4620

714=641-9110
fax 714-641-5016

<mailto:haeusslerlaw@juno.com>haeusslerlaw@juno.com

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
ANDREW J. WISTRICH
MAGISTRATE JUDGE

TELEPHONE
(213) 894-2523

September 24, 1997

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middle Field Road, Room D-1
Palo Alto, California 94303

Dear Mr. Sterling:

I understand that the Law Revision Commission considers possible changes to California's statutes of limitation from time to time. In that connection I thought I might pass along two articles which I thought might be of interest to the Commission and its staff. The first, which was published a couple of years ago, deals with the continuing problems the courts have encountered in applying the statutes of limitations in legal malpractice actions. See Cal.Civ.Proc. Code § 340.6. The second article analyses the policies favoring and disfavoring statutes of limitation in general, and was published in the current issue of the Pacific Law Journal.

I enjoyed speaking with you earlier today.

Sincerely,

Andrew J. Wistrich
United States Magistrate Judge

AJW:tw
Enclosures

File: 23-1

From: Leahy Grant R <Leahy_GR@exchange.phs.com>
To: "'commission@clrc.ca.gov'" <commission@clrc.ca.gov>
Subject: Family Law Revisions
Date: Mon, 2 Feb 1998 16:55:41 -0800

Thanks for the quick response.

The reason for this email is that a majority of fathers including myself feel that there needs to be ammendments and/or revisions made in Legislation to many of the areas in Family Law specifically where it pertains to fathers rights regarding 1)child custody 2)visitation and 3)child support. As you probably already know, in most all custody cases women usually win custody and they are the ones receiving child support from the father except in vary rare cases. I'm not asking for fathers to get everything,it just should be fair-which up till now is not! If you've been involved in any custody cases yourself or know anybody that has,you know what i'm talking about.I'm talking from my own experience but I'm not alone-look at www.cfli.com/cfligbk for just a few more of many examples.

Fathers in California in most cases involving custody have to spend thousands and sometimes,tens of thousands just to get joint custody even if the mother has not provided a decent home or care for the child involved.I should know-I'm one of these fathers. This is obviously not right and needs some type of change-thats why i'm sending this email.I understand the Commission can and has changed existing Legislation and updated many sections of law that needed reform. Would such a change as the one i've described above need a petition? How can we start the ball rolling on this? What can I do that would help? I understand this is a big issue but it needs a major change. We've already started welfare reform-why not this? Please let me know what you think.

Thanks for the help,

G. Leahy
Internet: Leahy_gr@exchange.phs.com

F.6 : 2.3.1

Date: Mon, 08 Dec 1997 15:05:16 -0800
From: PUBLIC WEBSTATION <DO@NOT.REPOND.TO.THIS.ADDRESS>
Reply-To: DO@NOT.REPOND.TO.THIS.ADDRESS
Organization: UCSB
Mime-Version: 1.0
To: comment@clrc.ca.gov
Cc: ljaks@ancpr.org
Subject: suggestion

The commission should look into revising Family Law so that there is a presumption of 50/50 joint physical custody in divorce where children are involved. Currently, the law states that the preference is joint legal and physical custody, but it needs to specify a preference for the 50/50 split. Numerous studies show that increased time with both parents after divorce is best for the children.

For More information contact
Lowell Jaks
Ancpr, Alliance for Non-Custodial Parents Rights
9903 Santa Monica Blvd., #267
Beverly Hills, CA 90212
310-289-5465
www.ancpr.org
ljaks@ancpr.org

Stephanie D. Davis
13408 Aster Street
Trona, CA 93562-2086
760-372-0048

Law Revision Commission
Mr. Nathaniel Sterling
4000 Middlefield Rd. Suite D-2
Palo Alto, Ca 94303

Dear Mr. Sterling:

Recently I wrote a letter for help in starting an investigation into the practices of the Public defenders office, District Attorney's office, and a temporary retired Judge Lee Cooper of Superior Court. I feel you might like to know the results of 2 hearings I recently had to appear at concerning this case, this has been an ongoing battle for almost 7 years.

December 10,1997, I rode a bus to Big Pine California, stayed the remainder of the night at my sons home, got a ride to Independence the next morning to appear in Superior Court for a Modification of Custody and Visitation hearing set for 9:00 am. In attendance were, Mr. Ray Billingsley, my ex-husband, myself, Court Appointed Attorney for the children, Ms. Kenny Scruggs, District Attorney's Office representative for Child Support Division, Linda Anisman, and Judge Lee Cooper. During the beginning of this hearing, Ms. Scruggs accused me of denying visitation to Mr. Billingsley if he did not provide transportation for the visitation both ways due to my lack of transportation. I explained to Judge Cooper that I have not said this to Mr. Billingsley, I told Mr. Billingsley it would be in the best interest of the children, if he were to make the financial arrangements to provide the transportation both ways considering I have no running transportation and no available financing to supply any bus tickets for the children. The Judge then sent Mr. Billingsley, myself, and Ms. Scruggs into mediation to devise a plan for the transportation problem that has been a very large issue for many years.

We went into mediation. I suggested that considering the mileage involved and the number of hours spent driving that we modify the visitation to Alternating Holidays only and Mr. Billingsley supply the transportation and finances needed due to his income and the vehicles he presently owns compared to my one. I then also let it be known that Mr. Billingsley was the one who moved away from the children farther each time, 3 times in the last 6 years. And just because I moved once, even though it was farther away than previously, I should not be punished for moving and trying to start a new life for ourselves. Mediation did not work that way. My suggestions were laughed at and I was criticized and punished for moving in the first place.

Ms. Scruggs did not agree with my suggestion, even though Mr. Billingsley said nothing. Instead I have to pay Mr. Billingsley 100.00 dollars on December 26,1997 to bring the children home on January 3,1998, and another 100.00 dollars on February 14 to bring the children home on february 21,1998. Mr. Billingsley claims that it cost him 100.00 dollars for a round trip from his residence to mine and back again. No receipts have been given to prove this and I find it to be rather high in expense. Mr. Billingsley drives either a diesel f250 or a 1997 Saturn. Both of which get very good gas mileage. If my car were working I could make the round trip on 40.00 dollars of gas only. That is 2 tanks of gas, and that is even when it does not get good mileage. Mr. Billingsley makes a very good living for himself and owns 4 vehicles 3 of which run rather well, he owns property in Fallon Nevada and his house in Empire Nevada. The Child Support Division of the District Attorney's office wanted to raise his child support from 300.00 dollars a month to 800.00 dollars a month due to the Federal Law Guideline for Child Support. If he makes enough money for the child support to go up that drastically in one month, then why can't he pay for the expenses of transportation for visitation? I do not have the financing available to pay Mr. Billingsley unless I do not pay utility bills. Then I have to try and figure out how I can keep my utilities turned on for the children. Ms. Scruggs did not care about this position she put me in and neither did Mr. Billingsley or Judge Cooper. Is this how your Court system is supposed to work? How am I supposed to raise my children on A.F.D.C. of 641.00 dollars a month and supply Mr. Billingsley with money he already has?

Now For The Next Problem: In September 1997, I was in Bishop California taking care of business with the District Attorney's office on another matter when I was told I needed to talk to another member of the district Attorney's office concerning the possibility of charges being filed against me for contempt of court. I was then asked to wait in the hallway for this other person. While waiting I was approached by a man Named Frank Fowles of the Public Defenders office. He asked to speak to me in private and so we went into a room to talk. I was then told that the District Attorney's office had filed a Felony Contempt of Court against me for Concealing the children by moving to Trona, and that a warrant for my arrest had been issued and we had to appear in front of the Judge in the next few minutes to be arraigned. I explained that I was not trying in any manner to conceal the children and did not understand why me moving has anything to do with concealment when Mr. Billingsley has the address and phone number of where I live with the children and has already talked to the oldest daughter from this marriage on the phone on her birthday.

From there we went into the Municiple Courtroom, before the Municiple Court Judge, I plead not guilty, was let out on my own recognizance, and ordered to appear for a settlement conference. The warrant for my arrest was canceled and I was ordered to go to the sheriff's office to be booked on Felony Contempt of Court. I went to the sheriffs department with a deputy, was finger-printed, and picture taken. Then released. Two days later the local paper ran and article saying I was arrested for Felony Contempt of Court and let out on my O.R..

I went back today for the settlement conference. The District Attorney's office wanted me to plea to a misdemeanor and accept 36 months of probation. I said no, I did not try to conceal the children, they are and have been using their given names, Mr. Billingsley had the address of our residence and phone number and when we moved into our own house he was advised again of the address and phone number. The public defender tried to get the charges dropped but, it did not work that way. The Felony Contempt of Court charges against me have been held over until June 15,1998, and if there are not problems what-so-ever in the next 6 months with visitation the charges will be completely dropped. It doesn't work this way with Mr. Billingsley. I can follow the court orders exactly and he will still file contempt of court charges against me for something, he has been doing it for the last 7 years and gotten away with it each time, even when I had proof of my defense.

I have no legal documents of these charges, I have been served with nothing concerning contempt of court, and yet I am defending myself from probation or possible jail time? Does this make sense to you? It does not make sense to me, I do not even know what the exact charges are that I am being accused of. There is nothing in any of the custody and visitation court orders that says I cannot relocate my residence, there is nothing that says I have to ask the court for permission to relocate, so why am I being punished, again, for relocating my family?

I am starting to get extremely frustrated and confused with our legal system in Inyo County. Apparently the District Attorney's office, Public Defenders office, and Judges can do as they please no matter who it hurts or how wrong it really appears. If you can explain this to me so I can understand how they are getting away with this please, give it your best shot. In the meantime, I suggest you start looking into this matter in Inyo County before somebody else gets hurt and it is more serious than my case. You need to remember, I am not the only victim being hurt by the court system. I have 3 daughters at home and they are being hurt by this as well. I do not live by myself, I do not choose to, I enjoy my girls, but we are in jeopardy of being torn apart with no hope of getting back together if the court system in Inyo County is allowed to keep abusing whom-ever they choose. Between the Attorney's, the Judge, and Mr. Billingsley, we are being severely abused in every manner possible and somebody has to do something to stop it.

How is it that there are no decent laws that give time limits to the same accusations over and over again when it comes to family law? How is it that in family laws, this battle can get as ugly as the Judge allows and nothing is ever done to stop the accusations, and slander? Why is it that if one parent is mad at the other, they are allowed to keep taking the other parent back to Court over and over for the same issues raised in the very beginning? Why are there no time limits for family law cases like there are for other parts of the law? How can a person get a family law, civil case, closed once and for all? Why isn't there a governing office to review family law cases and govern the Judges and Attorney's of family law?

I am sending this letter on to other public officials in the state in hopes somebody will care enough about the children and the abuses in the legal system to do something about it. When do the children matter in cases like this, how old do they have to be to be heard? These are some very serious questions I am asking, nobody seems to have any answers, as to who can help solve this matter and help put an end to this non-stop battle over the same issues as 7 years ago that were all unproven allegations.

Sincerely,

Stephanie D. Davis

Stephanie D. Davis

ROBERT M. ALLEN
ATTORNEY AT LAW
152 NORTH THIRD STREET, SUITE 510
SAN JOSE, CALIFORNIA 95112
(408) 298-8262
FAX (408) 298-8010

January 9, 1998

California Law Revision Commission
100 Middlefield Rd., Rm. D-1
Palo Alto, CA 94303-4739

Re: Family Code Section 4071.5 (formerly Civil Code Section 4722.5)

To Whom It May Concern:

I am requesting the Commission to give serious consideration to action which will either repeal Family Code Section 4071.5 or will severely restrict its application by amendment.

My first objection to the statute is that it unfairly, and probably unconstitutionally, discriminates against child support that is payable and received in non-welfare families from children in welfare families.

Also, when the hardship is being claimed by the child support payor for a child of a different marriage or relationship which he/she is primarily supporting in his/her household, the law unfairly, and probably unconstitutionally, deprives the child in the payor's household of the same protection for adequate support that is allowed similar hardship children in non-welfare cases.

The statute is also either ambiguous or illogical. Is the statute also meant to apply to the custodial parent payee when he/she seeks a hardship deduction for another child in his/her household by a different father for whom he/she receives public assistance? The literal wording of the statute would seem to prohibit the custodial parent from claiming the hardship deduction. This seems illogical, and perhaps an unintended result of the law.

Thank you for your anticipated consideration.

Very truly yours,

Robert M. Allen

Robert M. Allen

RMA:ca

RMALTR/CLRC.109

DR. BARRY FIREMAN
27860 WINDING WAY
MALIBU, CALIFORNIA 90265
310-457-3161
FAX 310-457-3690

California Law Revision Commission
4000 Middlefield Rd., Room D-1
Pala Alto, CA. 94303

Dear Sir;

I would like to submit the enclosed described issue for consideration. The topic is ' Limiting Dissolution Litigation Expenses.' Thank you in advance.

Sincerely,

Barry I. Fireman, Ph.D., J.D.

It is well known that fully half of all marriages end in divorce. Divorce is where most Americans get their first hand experience of the judicial system. Unfortunately, the painful decision to dissolve the marriage, is but a prelude to the suffering, antagonism and deceit that awaits both husband and wife at the hands of matrimonial lawyers.

Divorce and child custody law has become the most acrimonious of all litigation. It is not unusual to read reports of family law attorneys being assaulted, maimed and murdered by their own clients and the spouses against whom they prosecute. Malpractice claims by litigants against their own attorneys, post- settlement and decree, are the highest of any of the legal specialities. Fee collection by family law attorneys is the worst in all legal practice. Sexual liaisons among matrimonial lawyers with their clients and their clients' spouses exceeds that of any other personal service professional. Family law, frequently attracts, by its very nature, angry individuals who have experienced failed relationships and whose personal vendettas are acted out against unsuspecting clients and their spouses. They are frequently individuals with character disorders who create a combative and explosive milieu which feeds their own destructive impulses. They ingratiate themselves as surrogate husband or wife, thereby controlling their client, and engender feelings of suspicion, vengeance and retribution.

The vast majority of all lawyers are primarily motivated by fees. However, it is the unscrupulous family law practitioner, more than any other, who avoids efficient fact finding or settlement in order to financially benefit. He offers to his client, the expectation of property and/or support awards almost never achieved. He implies, through carefully worded assurances, that attorney fees will be borne by the other spouse. His fees,

regularly secured by property liens on the community residence, often wipe out the joint and separate property holdings of both spouses.

There appears to be no subjective way to prevent unscrupulous, dysfunctional family law practitioners from taking advantage of a system out of control. Certainly self- monitoring by the Bar has proven ineffective and the courts are already overwhelmed with ever increasing work loads.

It appears that the only solution is legislative. Only statute can influence the underlying motivation behind these unethical practices. Only through fee limits and restrictions will matrimonial lawyers be forced to be efficient, induced to mediate settlements and pressed to promulgate a more tranquil environment in which separating spouses dissolve their marriage.

This can be done through statutorily enforced maximum sliding fees to be borne by the joint estate of husband and wife. (Statutes, currently in place, determine upon whom and to what extent either party contributes to the total fee.) The maximum fee of the total litigation would be a percentage of the total assets of the entire estate, ultimately determined by the court. Exceptions to the formula would only be permitted by specific objective criteria established by statute and applied by the court. These exceptions would cover extraordinary or extremely complicated circumstances. This approach should eliminate the most avaricious and virulent of those professional predators who nourish themselves at the expense of human suffering. They will have to seek their

fortune and exercise their aggression and manipulation elsewhere. It will likewise compel agreement between husband and wife's counsel to negotiate an equitable division of fees and rational case management.

One such sliding fee formula might be:

Where the total estate is between $100,000 and $1million, the maximum fees would be 10% of the estate. There would then be a progressive scale beyond $1million, at intervals of $100,000, beginning at well beneath 10% and graduating upwards. In no case would the maximum fee exceed 10% of the total estate.

The precise scale is not important. What is essential is that the public be served by its legislature to promote, through public policy, a system in which separating spouses may be served by the Bar to efficiently and ethically dissolve their marriages in the most gentle means possible.

Murray S. Bishop CFP, EA
Certified Paralegal
535 Main Street
Martinez, CA 94553
510-372-9307

February 17, 1998

Law Revision Commission
RECEIVED
FEB 18 1998
File: 2-3-1

Mr. Nat Sterling
Law Revisionm Committee
4000 Midelfield Road
Suite D2
Palo Alto, CA 94303

Dear Mr. Sterling:

Below is a letter written to Profs. Bost (SDSU), Wellman (Univ. of Georgia), and Halbach (Cal Boalt Hall). The letter is self explanatory. The professors are or have been very involved in the development and placement of the Uniform Probate Code and are very aware of the problems we've had in California in bringing about any meaningful change to our probate methods. The problem is directly related to the State Bar and its subcommittee which deals with this issue. In spite of their comments to the contrary, and I have spoken to one of the members (Mark Hankins) they are the problem. As a citizen I'm offended that a special interest group can dictate social policy which is so clearly self serving and at odds with the general interest of the larger community.

Change needs to occur and it needs to occur now. I've never gotten involved politically in my life but for some reason I've gotten into the middle of this can of worms. However make no mistake about it, bad things are happening out there because of an out dated system controlled by a self serving interest group. Once we've become aware of the problem we have a responsibility to do something about it. That seems to be my motive and hopefully it will become yours.

I have no idea of how one approaches changing the law. As a first step I'm contacting you for any suggestions/assistance, my Assemblymen and the Law Revision Commission to see where one goes from here. Any help will be appreciated.

Sincerely,

Murray S. Bishop

P.S. Letter sent to Sub Committee on Aging
c/o Robert McLaughlin

Have any ideas?

Murray S. Bishop CFP, EA
Certified Paralegal
535 Main Street
Martinez, CA 94553
510-372-9307

February 17, 1998

Re: California Probate Reform

Dear Prof. Bost:

Because of the complicated nature of probate here in California, a number of problems have evolved:

1. In many locales, Alameda County comes to mind, the process itself is hostile to the laymen who attempts to do it Pro Per. You have to experience this first hand to appreciate the problem.

2. In part because of these problems, the use of Revocable Living Trusts have become a very popular alternative to probate. Unfortunately a number of abuses have also evolved as more and more "suppliers" of these Trusts market this tool.

I meet with Elders through appointments set up through the Senior Centers they go to, to answer questions they have about their own estate planning efforts. Over the course of the last 3 months I've seen more than one elder taken advantage of by "trust mills", local attorneys failing to advise the elder on the importance of trust funding, and other attorneys whose efforts were clearly self serving and not in the best interest of the elder client they were working with. In one particular situation I advised the elder to go to the local bar association with his complaint. I could go on but the important point here is to remember I'm only one person. These problems I've mentioned must be happening all over the state and creating pain, worry and confusion in their effect on the most vulnerable segment of our communities - the elder.

Its my opinion the current probate process itself is driving the abuses mentioned above and that only a fundamental change to that process will result in a long term solution.

I've had to read your text book "Estate Planning and Taxation" twice now and I'm left with the impression that the UPC transfer process represents a substantial improvement over what we have here in California now. In effect the families can have as much or as little court supervision as they think they need. If this is true then the solution to all these problems is for us to substitute our current process with the UPC model.

Do you think adopting the UPC model would be an improvement?

I'm tired of seeing people taken advantage of, especially if the "system" is at fault and can be corrected. However before I run with this through the development of a grass roots effort, I'd like your opinion first. Please give me call and/or a short note with your point of view.

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

October 31, 1995

SUMMARY OF PROPOSED LEGISLATION FOR INFORMAL ADMINISTRATION OF DECEDENTS' ESTATES IN CALIFORNIA

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California has adopted a recommendation for enactment of a new Division 9 of the California Probate Code to provide for informal administration of decedents' estates as an alternative to mandatory court supervised probate. The recommendation has been released for comment and input from members of the Bar, courts and other groups who are involved with the administration of decedents' estates.

The burgeoning popularity of living trusts used solely as a "probate avoidance" device is strong evidence of the desire of the people of California to minimize court involvement in post-death estate administration. This desire has evidenced itself not only in carefully drafted and often complex trusts, but also in the mass-marketing of preprinted trust documents, in which testamentary desires are often lost in the complexities of trust boilerplate. The Committee believes that California consumers in many cases can be better served by using simple and inexpensive wills and powers of attorney, coupled with simplified and mostly private post-death administration procedures which involve the court system only when problems arise. The Committee recognizes the value of the California Probate Code and the concern of the courts to protect the rights of estate beneficiaries from the negligence or malfeasance of personal representatives and supports the continued utilization of our current court supervised procedures where problems or potential abuses exist. However, the Committee strongly believes that the overwhelming number of post-death administration cases involve estates in which family members who deal with each other regularly can pursue estate administration privately with cost effective legal assistance but without mandatory court supervision.

Under the proposal, the will, if any, is admitted and the personal representative is appointed by court order after a noticed hearing in the same manner in which a court supervised administration is commenced under current law. (The Committee considered and rejected by a small margin an administrative opening of informal administrative proceedings without any court involvement at all.) In the petition for probate, the personal representative can seek the issuance of letters either for court supervised administration under Division 7 of the Probate Code or for informal administration under new Division 9. If there are no objections by interested parties, a personal representative can be appointed for informal administration under Division 9, and the estate can then be administered without further mandatory court involvement.

The personal representative is required to prepare and mail an inventory to all residuary beneficiaries within three months of appointment, and estate assets are valued by the personal representative using appraisers and experts where appropriate.

Under the proposal, the personal representative is required to send a "Notice of Proposed Action" to all interested parties before undertaking certain significant acts or transactions which typically transpire in the administration of a decedent's estate. The acts requiring prior notice to beneficiaries include sales of assets, grants of options, abandonment of property, acting on debts and claims between the estate and the personal representative, payment of compensation to the personal representative or the attorney for the personal representative, and distribution of estate assets. If an interested party objects to any proposed action, the personal representative must seek and obtain court confirmation or approval before proceeding with the proposed act or transaction.

A personal representative appointed for informal administration is required to keep beneficiaries informed as to the progress of the administration and to provide beneficiaries with an account of the administration of the estate unless an accounting is waived.

Personal representatives and their professional advisors, including attorneys, are entitled to reasonable compensation, but no payment of compensation may be made before a Notice of Proposed Action has been provided to interested parties.

The personal representative may make preliminary or final distribution of estate assets 30 days after appointment. However, the personal representative will be personally liable if distributions are made during the first 4 months after appointment of the personal representative. This liability is imposed because there may be unpaid creditors and the time for filing a will contest will not have expired. Distributions of estate assets are effected by deed, assignment or other appropriate documents of transfer.

The proposal requires a detailed form of notice, receipt and release for use in connection with distributions in order to fully inform beneficiaries of their rights. Once

the release and receipt has been executed by a beneficiary, the personal representative generally has no further liability to that beneficiary. If all beneficiaries execute receipts and releases, the effect is that of an informal discharge of the personal representative.

While the proposal for new Division 9 of the Probate Code provides personal representatives and beneficiaries with the ability to avoid mandatory court supervision after the initial appointment of the personal representative, the court remains accessible as needed to solve any problems which may arise during administration. The proposal specifically provides that in estates which are subject to informal administration, either the personal representative or any interested person may petition the court to implement any of the procedures or relief which are currently available in court supervised administrations under existing Division 7 of the Probate Code. However, such petitions are limited to the specific relief sought and do not subject the entire estate to court supervised administration under Division 7.

A detailed analysis of the Committee's proposal (which includes a discussion of some alternative provisions considered by the Committee) and a copy of the complete text of the proposed legislation are available for review and comment and can be obtained by sending a self-addressed stamped envelope to:

Informal Administration Committee
State Bar of California
555 Franklin Street
San Francisco, CA 94102
Attention: Susan Orloff, Section Administrator

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

555 FRANKLIN STREET
SAN FRANCISCO, CALIFORNIA 94102
(415) 561-8206

April 22, 1998

Robert J. Murphy
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Rules Of Construction

Dear Mr. Murphy:

You have earlier solicited the views of the Executive Committee of the State Bar's Estate Planning, Trust and Probate Law Section regarding the rules of construction found in Probate Code sections 21101-21140. Specifically, you have asked whether the Section believes the Law Revision Commission should study this matter, time and workload permitting.

As you know, Probate Code sections 21101-21140 were enacted in 1994 in response to concerns that the then existing statutes addressing construction problems of wills did not apply to other instruments, particularly revocable trusts. The response was to essentially broaden the application of the then existing statutes (former Probate Code sections 6140-6179) to any "instrument," which includes "a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property." (Probate Code section 45.)

The Section's Estate Planning and Tax Committee has reviewed various materials pertaining to the rules of construction contained in the new Code sections, including the materials you earlier sent us. Generally speaking, consistent rules of interpretation are beneficial. However, the Committee shares the viewpoint expressed by the CEB commentary to the 1994 legislation that "the rules of construction designed for instruments which result in future transfers are not necessarily appropriate for instruments which result in immediate transfers." The Committee also notes that the language of certain sections is firmly rooted in the context of probate transfers and is not as readily applicable to nonprobate transfers, despite the apparent legislative intent.

Some examples of the issues we believe should be studied include:

Section 21109. This section states, among other things, that a transferee who fails to survive the transferor does not take under the instrument. While this rule makes sense in the case of a will, revocable trust, or beneficiary designation, it makes no sense in the case of a gift deed or an irrevocable trust.

Section 21110. This section extends the antilapse rules, formerly applicable only to wills, to include inter vivos transfers. This rule works in tandem with the survival rule found in section 21109 and, like that section, the antilapse rules do not work well in cases of current gift instruments such as deeds or irrevocable trusts.

Section 21113. This section deals with class gifts and provides rules for identifying the class members. In their letter to the Law Revision Commission dated January 9, 1996, Professors Dukeminier and French criticize this section. They contend that this section does not clearly follow the "common law rule of convenience" which governs the closing of a class, and that clarifications are needed to conform this section to the rule of convenience. We defer on this issue to Professors Dukeminier and French.

Section 21118. As the 1994 CEB commentary pointed out, this section carries over the outdated legislative response to Rev. Proc. 64-19 found in former Probate Code section 21120(a). This section should be updated to require that pecuniary gifts (including pecuniary formula gifts) should be satisfied using only date-of-distribution values or the "fairly representative" alternative sanctioned for both marital deduction and GST tax purposes.

Section 21120. This section states in part that, for purposes of choosing between different interpretations, one that prevents intestacy is favored over one that creates an intestacy. The application of this rule to instruments other than wills is unclear. Presumably, the concept of intestacy should be replaced with the concept of an incomplete disposition of the property subject to the instrument.

Section 21131. This section contains the anti-exoneration rule applicable to gifts of mortgaged property. However, its probate roots are revealed by the express reference to a mortgage or other lien "existing at the date of death." It would seem that a more inclusive "date of transfer" rule should apply.

Sections 21132-21134. These sections provide the rules of ademption applicable to different types of specific gifts. Again, these rules generally work well in the context of testamentary gifts (and should be so limited), but make little sense in the context of current lifetime gift instruments. Additionally, these sections suffer from the limiting effect of words such as "estate" or "conservator" which preclude application to revocable trusts.

In conclusion, the Section believes that the existing rules clearly need clarification and correction, and we strongly urge the Law Revision Commission to study this matter. Instead of piecemeal change to the existing statutes, a new comprehensive set of rules of construction -- rules which properly distinguish between different transfer instruments and between testamentary and nontestamentary gifts -- would appear preferable.

We note that, since the 1994 enactment of sections 21101-21140, the Legislature has extended the pretermission rules to revocable trusts in Probate Code sections 21600-21630, and that the Law Revision Commission is currently studying proposed legislation to prevent the operation of nonprobate transfers to a former spouse. These extensions of important rules to nonprobate transfer instruments are extremely important in the quest of conforming California's laws to current estate planning practices. The Legislature's initial workproduct in the area of rules of construction, though a laudatory first step, has serious shortcomings and should be reexamined by the Law Revision Commission.

Naturally, the Estate Planning, Trust and Probate Law Section will be happy to support and assist the Commission in this project.

Sincerely,

Randolph B. Godshall
Chair, Estate Planning & Tax Committee

cc: Robert E. Temmerman, Jr. Esquire
Susan T. House, Esquire

SACRAMENTO ADDRESS
STATE CAPITOL, ROOM 2057
SACRAMENTO, CA 95814
(916) 445-0503

E-MAIL: SENATOR.KOPP@SEN.CA.GOV

DISTRICT OFFICE
2171 JUNIPERO SERRA BLVD.,
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JOINT COMMITTEES
JOINT COMMITTEE ON FAIRS ALLOCATION AND CLASSIFICATION

JOINT COMMITTEE ON LEGISLATIVE AUDIT

JOINT COMMITTEE ON RULES

California State Senate

STATE SENATOR
QUENTIN L. KOPP
EIGHTH SENATORIAL DISTRICT
REPRESENTING SAN FRANCISCO AND SAN MATEO COUNTIES

STANDING COMMITTEES:
TRANSPORTATION - CHAIRMAN
AGRICULTURE & WATER RESOURCES
BUDGET AND FISCAL REVIEW
FINANCE, INVESTMENT & INTERNATIONAL TRADE
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LOCAL GOVERNMENT
PUBLIC SAFETY
REVENUE AND TAXATION

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ALAMEDA CORRIDOR
GENETICS & PUBLIC POLICY
HIGHER EDUCATION
MARITIME INDUSTRY
PRISON MANAGEMENT
REDEVELOPMENT
TECHNOLOGICAL CRIME AND THE CONSUMER

SUBCOMMITTEES
BUDGET SUBCOMMITTEE NO. 2 ON RESOURCES, ENVIRONMENTAL PROTECTION, JUDICIARY AND TRANSPORTATION CHAIRMAN
FINANCE SUBCOMMITTEE ON CALIFORNIA-EUROPEAN TRADE DEVELOPMENT - CHAIRMAN
SUBCOMMITTEE ON THE AMERICAS

July 15, 1998

Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Common interest developments

Dear Nat:

I write to request that the Commission consider reviewing the current statutory scheme regulating common interest development (CID) housing. As you may recall, the Common Interest Consumer Project requested that I amend SCR 65 to add this as a study area. I concluded, however, that it was not a good year to expand the list of Commission study topics.

I believe the Commission already has sufficient authority to study common interest developments under the real property study area. Accordingly, I hope the Commission will discuss the matter during its annual review of study topics when it sets priorities for the coming year.

Thanks for your attention to the matter.

Sincerely yours,

Quentin

QUENTIN L. KOPP

QLK:df

cc: Mr. Frederick L. Pilot

Date: Tue, 10 Mar 1998 19:31:07 PST
From: fpilot@a1.senate.sen.ca.gov
Subject: SCR 65: Requested amendment

The Honorable Quentin Kopp
California State Senate
State Capitol
Sacramento, CA

Dear Senator Kopp:

The Common Interest Consumer Project, a non profit organization devoted to consumer-oriented education and research concerning California common interest development housing issues, respectfully requests you amend your SCR 65 set for hearing on March 17 in the Senate Judiciary Committee to add as a study topic a comprehensive review of the current statutory scheme regulating common interest development housing.

It is our belief the various statutes affecting CIDs should be reviewed in total by the California Law Revision Commission with the goal of setting a clear, consistent and unified regulatory policy with regard to the formation and management of CIDs and the transaction of real property interests located within CIDs.

The present statutory scheme governing CIDs came into existence at a time when there were far less CIDs in California and should be reviewed to reflect the substantial growth in the number of CIDs over the past decade. According to a recent estimate by the Senate Housing & Land Use Committee, there are approximately 30,000 CIDs in California that are home to an estimated six million Californians. And as new housing starts accelerate, there have been reports that local municipalities are requiring that nearly all new housing developments be formed as CIDs as opposed to traditional single family housing not governed by restrictive covenants and homeowner associations.

In fact, the growth of CIDs in California and elsewhere in the nation has been so robust in recent years that researchers such as Evan McKenzie have described the trend as no less than a profound transformation of local government as we have known it into what are essentially "private residential governments" not subject to laws governing municipalities. But despite the rapid growth in CIDs, the public's understanding of them remains cloudy, and questions have arisen as to whether existing law allows housing consumers to clearly

and readily understand and exercise their rights and obligations within CID regimes.

The objectives of this review should be to assist the Legislature in determining to what extent CIDs should be regulated in the future; to clarify and eliminate unnecessary or obsolete provisions in the law; and to consolidate existing statutes pertaining to CIDs under a single code section.

As you know, the main body of statutory law governing CIDs is contained in Civil Code section 1350 et. seq., known as the Davis-Stirling Common Interest Development Act. But other statutes affecting CIDs are drafted with the traditional detached single family home in mind rather than CID housing, and in particular attached units in condominiums which comprise of majority of CID housing in California. These "separate interests" as they are referred to under existing law are typically nothing more than an exclusive easement and an undivided share in common area buildings and property that in many respects more resemble a share in a publicly traded real estate holding corporation than the discrete, free standing, sticks and mortar dwelling unit that is the traditional single family home.

Existing law governing transactions of separate interests in CIDs such as Civil Code section 1102 et. seq. pertaining to disclosures in residential property transactions involving four or fewer dwelling units, and Civil Code section 2079 et. seq. pertaining to the disclosure duties of real estate licensees in residential property transactions were drafted not with CID separate interests in mind, but instead the traditional, non-CID detached single family home that is becoming increasingly rare among recently constructed housing in California.

As an illustration of how existing law has encountered difficulty in application to attached CID housing such as condominiums, note that Civil Code section 2079 was amended not long ago to carve out from a real estate licensee's disclosure duty areas of the CID outside the dwelling unit offered for sale and CID legal and financial matters that could have a material impact on the value of the separate interest being transacted. This was apparently done to make the law conform more to the traditional detached single family home transaction for which the section 2079 was primarily intended and as a consequence, to reduce the potential liability of real estate licensees in CID transactions. The commission should examine how such piecemeal efforts to adjust the law to CIDs impact on the overall statutory scheme and whether they serve a beneficial public policy purpose relative to the needs of CID housing consumers and determine

if a new and unified CID statute would better address the unique aspects of CID transactions and their distinct differences from transactions involving traditional detached single family homes.

Finally, there is another disparate body of law governing the corporate activities of CIDs, Corporations Code sections 7110-8338 pertaining to non profit mutual benefit corporations. CICP has received anecdotal accounts that enforcement of the Corporations Code relative to CIDs is spotty due to inadequate resources at the Attorney General's office and competing higher priorities. And while the Attorney General's Office is the regulatory agency charged with the enforcement of the Corporations Code, there is no authorization within current law authorizing a regulatory agency to promulgate and enforce regulations under Civil Code section 1350 et. seq., the main body of statutory law governing CIDs.

In testimony before the Senate Housing & Land Use Committee at a special hearing on CIDS conducted in November of 1996, various witnesses testified the current statutory scheme is too complex for the lay volunteers that administer CIDs though elected boards of directors made up of CID unit owners and has no practical enforcement provisions to deter violations. The Commission should develop recommendations for the Legislature with regard to the creation of a regulatory agency authority to oversee the law under a unified statutory scheme.

The Common Interest Consumer Project appreciates this opportunity to share this proposed amendment to SCR 65 and is prepared to testify in support of the proposed amendment when the resolution is before the Senate Judiciary Committee on the 17th. We look forward to your response.

/s/

FREDERICK L. PILOT
President
Common Interest Consumer Project, Inc.
915 L. Street, C-281
Sacramento, CA 95814

(530) 295-1176

Charles L. Smith
61 San Mateo Road, Berkeley, CA 94707-2015
(510) 525-4434; FAX: (510) 525-4708

May 28, 1998

Mr. Nathaniel Sterling, Exec. Sec.
Calif. Law Review Commission
4000 Middlefield Road, Rm. D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling and Members of the Commission:

There are several legal problems with parking enforcement which need attention of your Commission:

1. Incorrect time on parking meters

A ruling by the former Attorney General Evelle Younger that cities are not "persons" has kept the County Weights and Measures Departments from examination to assure that the proper time is given on parking meters. i.e., wts & measures only pertains to 'persons' who use commercial measuring devices.

Thus the cities have permission and exemption to commit fraud by giving incorrect time on parking meters. The city of Berkeley does not have enough repair persons to fix disabled parking meters. (Recently there has been widespread vandalism of the meters.)

Here in Berkeley, using a stop watch, I have tested and retested a representative sample of parking meters and have found that up to 60% do not give proper time.

2. Illegal directives issued by police department

On Dec. 20, 1993, Lt. Wm. Pittman of the Berkeley Police Dept. issued a directive ordering parking enforcement personnel to increase their monthly issuance of parking citations from 1000 to 1500 valid citations each month. This directive was discussed in a newspaper article by Will Harper in the Berkeley Voice in May 1994, with a police officer quoted verbatim about the 'performance levels'.

"Quotas" are prohibited by Section 41600 et seq of the California Vehicle Code, specifically mentioning parking citations.

That Dec. 20th memo was requested by a duces tecum subpoena in a Small Claims Court suit. A sworn statement was submitted by the Berkeley City Attorney which stated that "No record of it could be found".

Later on, in an answer to a civil rights suit in Federal Court, the City Attorney admitted the existence of the memo, but claimed it didn't apply to a violation of the Vehicle Code because parking enforcement personnel are not 'peace officers'.

3. Disregard of City Council Resolutions by City Staff

On Sept. 27, 1994, the Berkeley City Council passed an Official Resolution "prohibiting and rescinding the use of any quota system by the Berkeley Police Dept".

A request submitted to the Berkeley City Clerk for any memos, directives, or other statements issued by City Staff after that Resolution brought no statements whatever.

The City Clerk did produce a copy of the Dec. 20, 1993 'non-existent' memo.

4. Use of parking enforcement to raise funds for a city's general fund.

In Hendrick vs. Maryland 235 U.S. 610 (1915), is the lead case in this area, a federal judge ruled that it is permissible to charge for parking and to have penalties for parking overtime. He also specifically ruled that "parking enforcement may not be used for revenue enhancement beyond raising the costs of parking enforcement".

Adding to the cost of enforcement to get funds for the General Fund makes this a tax which is not collected in a uniform, equitable manner. In fact, it falls most heavily on the poor who are least able to defend themselves or to take time off from work to fight illegal citations.

Various newspaper articles and City reports have detailed the transfer of funds from parking enforcement to the Berkeley City General Fund.

6. Denial of due process and constitutional rights of citizens

The first-step Administrative "Review" is held in secret with the cited person not allowed to be present to defend him/herself. The existence of a citation is taken as proof of guilt.

The second-step Hearing takes for granted that the first step has been correct. The issuing officer cannot be called for cross examination. (all this is described in a Manual compiled by the City of Los Angeles)

The final appeal to a Municipal Court is supposed to be based only on the material from the lower review and hearing. Discovery is not allowed and there is no appeal possible.

I hope The Commission will take this under consideration and recommend any needed changes.

Yours truly,
Charles L Smith
Charles L. Smith
retired traffic engr., planner, researcher

Attachments:
Copy of Weights and Measures memo, 3 pp.
Copy of Calif. Veh. Code, section 41600 et seq.

(In addition, I have extensive newspaper clippings, copies of Staff Reports on Parking Enforcement to the City Council, etc. all of which are available if needed.)

540 Churchill Downs Court
Walnut Creek, CA 94596
August 12, 1998

The Honorable Quentin Kopp
California State Senator
State Capitol, Room 2057
Sacramento, CA 95814

Dear Senator Kopp:

I am writing to you because it appears to me that, aside from being an expert in local government, you have also a keen sense of justice which may motivate you to do something about the situation mentioned in this letter and enclosures.

Enclosed herewith is a copy of an "Appeal" document I sent to an administrative hearing examiner respecting a parking citation issued in Capitola, CA. I think it is obvious that there was an inadequate and confusing parking restriction sign that enabled Capitola to cite me. However, I realized that under the new legislative scheme for handling parking citations, there is no way I would get an impartial hearing until I reached the municipal court. Accordingly, after being turned down in a perfunctory manner by both the Capitola Police Department and the hearing examiner, I called to ask about a further appeal to the municipal court. I was told that I could appeal by paying a $25.00 nonrefundable fee for the appeal. The parking ticket fine is $33.00.

In other words, I pay $25.00, and, if I win, I get $33.00. This isn't due process. This is a sick joke.

It is common knowledge that the cities are strapped for cash. Accordingly, they may not be incented to do things which reduce revenues. In this case, they put up only one confusing parking sign for an entire long block – a sign not designed to give adequate notice but to entrap the unwary. If the sign had said that the restriction applied "to this block" or "this street," or had they put up a second sign at the other end of the street and then stated that the restriction was "between signs," the problem would go away. Will they do that?

Next, our Legislature weighs in with a money-saving scheme to deal with parking citations using private collection companies and administrative hearings, when the only real chance of getting the appearance of an impartial hearing costs almost as much as the price of the fine! Is this justice?

Remember that due process requires not only justice but also the appearance of justice. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). Even in the absence of proof of actual bias, judges may still be disqualified in a system that tempts them not to rule fairly. (Ibid.) The U.S. Supreme Court also stated that a litigant is entitled to "a neutral and detached judge in the first instance." It isn't enough that the litigant may get a due process hearing some day later on. Ward v. Village of Monroeville, 409 U.S. 57, 59 (1972).

In this instance, we have a system that gives the appearance of not being neutral, and the cost of obtaining at least the appearance of a neutral tribunal is prohibitive when compared to the cost of the fine. As the California Supreme Court stated, government neutrality is essential for due process. Without a belief by the people that our system is just and impartial, the concept of the rule of law cannot survive. People ex Rel. Clancy v. Superior Court, 39 Cal.3d 740, 745 (1985).

The problem should not be ignored because the fines are small. They still amount to a large contribution to local budgets, and due process has always been required, notwithstanding that the accused can afford to be mulcted. (See the cases I cited in the attachment.)

The following legislative possibilities are suggested here:

1. Parking Signs – Enact legislation requiring Caltrans to promulgate uniform standards for parking restriction signs, just as they do for other traffic signs, and amend the Streets and Highways Code to require cities to follow the standards. Require that the standards assure due process notice and, at a minimum, clearly set forth the locations where the restrictions apply and require a minimum number of signs (more than one) at reasonable intervals (not less than one per ¼ block) along the restricted area, so that the cities cannot mulct innocent persons who want to obey the law but are misled. Provide that any failure to follow uniform State standards renders any local sign or traffic control device unlawful and requires exclusion of evidence of violation.

2. Appeal Rights – Amend the current law to do away with the appeal process which involves administrative review by the agency that issued the citation and by a hearing examiner. This system does not give the appearance of impartial justice and probably is not impartial.

3. Allow a hearing before an impartial examiner, appointed by and acting under the supervision of the municipal court.

4. Allow one additional appeal to the appellate department of the superior court.

5. No fee or charge should be imposed for the hearings or appeals.

Very truly yours,

Gerald H. Genard

Gerald H. Genard

GHG:tln
Encls.
cc: California Law Revision Commission (w/encls.)
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

California Judicial Council (w/o encls.)
Traffic Committee
303 Second Street, South Tower
San Francisco, CA 94107

Presiding Judge (w/o encls.)
Santa Cruz Municipal Court
701 Ocean Street
Santa Cruz, CA 95060

City Council (w/o encls.)
City of Capitola
420 Capitola Avenue
Capitola, CA 95010

540 Churchill Downs Court
Walnut Creek, CA 94596
August 24, 1998

The Honorable Pete Wilson
Governor
State of California
Capitol Building
Sacramento, CA 95814

Dear Governor Wilson:

Re: Computation of Traffic Fines

In light of your demonstrated opposition to waste and inefficiency in government, I thought you might like to do something about the situation described herein.

Recently, I asked a court to explain why a "courtesy notice" on a traffic citation asked for payment of $281, when the Vehicle Code set the fine at $100. I quote below the answer received from the court clerk:

> **"In response to your request for bail information we provide the following:**
>
> **The bail in this matter is $281.00 due on or before 10/29/98.**
>
> **The base fine is $100 per CVC 42001.15 as noted; an additional penalty assessment of $17 ($10 State penalty required by Penal Code 1464 and $7 County penalty required by Government Code 76000) levied upon every $10 or fraction thereof, on every fine, penalty or forfeiture imposed and collected by the courts.**

In addition, there is a $10 court administration fee per CVC 40508.6 and a $1 night court fee per CVC 42006. Therefore, your total bail breaks down as follows: $100 + $170 + $10 + $1 = $281."

In a recent Dilbert cartoon, one of the characters, Dogbert, stated that "**Reality is always controlled by the people who are the most insane.**" Now, I understand what he meant. Who, other than some insane bureaucratic type, could have conjured up a scheme whereby it is necessary to look at five different code sections in three different codes to determine one lump sum payment for a traffic violation? Or is there simply some hidden agenda, concealed by legislative legerdemain, designed to hide from public view the fact that the actual fines for minor infractions are extremely excessive, and that the fines are a secret means of raising tax money without public knowledge?

What other reason (except insanity) can explain why a "penalty assessment" for each $10 of a fine is $17 -- an "add-on" much greater than the original amount? This really is the tail wagging the dog. Bill Clinton can take lessons from California State government.

Is it possible for the government to ever be forthright in dealing with the citizenry, or am I expecting too much? There isn't even a reference in the Vehicle Code section imposing the fine to any other code section that would increase the amount of the fine. Not even a road map? Why? If it cannot be accomplished on the basis of simple truth and fairness, how about efficiency? Just think how much extra computer programming is needed simply to keep up with all of the statutory changes involved so that the computers can spit out the right amounts and make some payments go into the right earmarked funds.

I suggest that by simplifying the legislation, putting the total fine in one statute and one code, you not only satisfy the public's right to know, but you reduce government inefficiency and expense.

If government wants respect from the governed, it ought to give some respect in return.

> "**It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government," it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'**" (Lentz v. McMahon, 49 Cal.3d 393, 399 (1989), fn. 3.)

The government isn't turning square corners here.

This situation, in the words of 9th Circuit Judge Alex Kozinski, "**gives fresh meaning to the phrase 'I'm from the government and I'm here to help you.'**" (United States v. Gomez, 92 F.3d 770, 772 (9th Cir. 1996).)

No one can seriously oppose fixing this one. Why not do it just because it's the right thing to do?

Who knows, such altruism might even generate some respect for government.

Very truly yours,

Gerald H. Genard

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

California Judicial Council
Traffic Committee
303 Second Street – South Tower
San Francisco, CA 94107

Date: Wed, 22 Jul 1998 15:18:56 -0700 (PDT)
From: Unprivileged user <nobody@best.com>
Reply-to: protravel@earthlink.net
Subject: Feedback Form
X-Rcpt-To: feedback@clrc.ca.gov
Status: U

name = Ron Balchan
email = protravel@earthlink.net
Message = California Vehicle Code section #9990

Who do I contact regarding a revision to California Vehicle Code section #9990. I was sold a new vehicle with aprox. 42% damage to the rear quarter panel, which is now bleeding through. Leaving me with a 36"x8" scar which is yellowing on a white vehicle.

I was told by the dealer that unless the damage,which they admit to, is over $500.00, or 3 percent of the vehicle, they are not obligated to disclose the information. Although I did ask prior to the purchase if the vehicle was ever repaired and was told no, that's a different issue.

I feel customers should be told up front about ALL work done on a new vehicle so a consumer is informed prior to purchasing a vehicle who then, having to fight with a dealership for months afterward.

If the consumers were well informed and all repairs were disclosed prior to a sale then the consumer has the informed decision to buy or not buy the product. At the very least we the consumer would be informed. How can a buyer beware if important information is legally withheld form us.

Why, as a consumer do I have to suffer the damage to my vehicle when the dealership legally can do shotty repairs,sell the car as new,then fail to replace my vehicle per the law ?

I bought a new vehicle not a repaired and repainted vehicle. I should have been told up front and given the opportunity to walk away from the deal.

The dealers do not suffer any penalties with this law only the consumer suffers. They are allowed to sell a repaired vehicle as new without discounting the repaired vehicle or even disclosing what repairs they made. Then for years after, the consumer suffers.

Thank you
Ron Balchan
P.O. Box 3166
Palm Desert Ca. 92261
760 398-2000 x 25
