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Memorandum 99-58

New Topics and Priorities

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BACKGROUND

It is the Commission's practice annually to review the topics on its Calendar of Topics, 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 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 2000.

IMPLEMENTATION OF LAST YEAR'S DECISIONS

At its last annual review of topics and priorities, the Commission decided that it would request the Legislature to add the following topics to the Commission's calendar:

Statutes of Limitation in Legal Malpractice Actions
Common Interest Developments
Public Records Law
Criminal Sentencing

The requested authority has been granted. 1999 Cal. Stat. res. ch. 81.

The Commission also decided to activate study of the following aspects of topics already on its calendar:

Attorney's Fees — Issues involving contractual attorney's fee provisions are currently under consideration by the Commission.

Rules of Construction of Estate Planning Instruments — The Commission has retained Prof. Bill McGovern of UCLA Law School to prepare a background study on this matter.

Miscellaneous Probate Issues — This matter is currently under consideration by the Commission.

Judicial Review of Agency Action — The Commission has circulated a tentative recommendation and will review comments at its October meeting.

TOPICS CURRENTLY AUTHORIZED FOR COMMISSION STUDY

There are now 20 topics on the Commission's Calendar of Topics that have been authorized by the Legislature for study. 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 of Topics. 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 narrower recommendations to the Legislature.

Exemptions. Code of Civil Procedure Section 703.120 requires the Law Revision Commission, decennially, to review the exemptions from execution and recommend any changes in 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 revisited this matter in light of a number of cases illustrating the confusion of the courts and litigants arising from defects in the law. We have circulated a

tentative recommendation on it, and review of comments received is scheduled for the Commission's October 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 recent case, *Dreyfuss v. Union Bank of California*, 87 Cal. Rptr. 2d 580 (1999), deals with an anomaly in California law that enables a lender to avoid the policy of fair value and anti-deficiency legislation by securing a loan with multiple properties and then nonjudicially foreclosing on each property seriatim at less than fair value. "We conclude existing law does not require a lender to credit a borrower with the fair market value of property when it nonjudicially forecloses successively on multiple parcels of real property collateral. Further, we cannot engraft such a requirement on the law. Rather, this is a matter for the Legislature to consider if it deems it appropriate to do so." 87 Cal. Rptr. 2d at 588.

Quateman and Zidell's review of "Recent Developments Concerning California's One Action Rule and Anti-Deficiency Laws" in 17 *California Real Property Journal* 19 (Spring 1999) notes the complexity of this area of law and the ongoing judicial attempts to refine it. "Because: (i) the statutes involved here are diverse and complex, (ii) lenders and borrowers have raised creative arguments over the years regarding the application of these statutes in particular situations and (iii) courts have tended to interpret these statutes broadly to further the legislative intent of protecting borrowers, the law surrounding California's one action rule and the anti-deficiency statues remains an area with traps for unwary lenders and creditors." 17 *California Real Property Journal* at 23 (Spring 1999). The article also quotes Prof. Roger Bernhardt, a respected commentator in this area and author of the CEB book on California mortgage and deed of trust practice — "Because these remedial statutes are not part of any comprehensive plan, the courts have been compelled to fill in the legislative gaps with judicial lawmaking. As a result, confusion is high and predictability is low in this area."

A Commission study of judicial and nonjudicial foreclosures would be appropriate. However, it would be a major project and would be the subject of intense pressure by affected interest groups. **If the Commission is interested, we could retain a consultant to prepare a background study for Commission work a couple of years down the road.** Our platter is somewhat full with major studies in the near future, though.

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 Prof. Frederick Tung of University of San Francisco Law School; his background study is due. Prof. Tung reports he's slightly behind schedule on this project.

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 30, 1999.

Mechanics lien law. The Assembly Judiciary Committee has asked the Commission for a comprehensive study of the California mechanics lien law, on a priority basis. Although the issues involved are typically those of real property and construction practice, we are engaged in this project under our general authority to study lien law. We have retained Gordon Hunt to prepare a background study. The study is due by March 30, 2000, but Mr. Hunt has indicated his intention to deliver the study ahead of schedule. We have informed the Judiciary Committee we will give this matter a priority, but they cannot expect a report from the Commission before January 1, 2001. **There are interest groups that would like to see this process expedited, since legislation they have sponsored is being held up pending the Commission's study.**

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. Commission-recommended legislation on this topic is on the Governor's desk. Followup issues are on the Commission's agenda for the October meeting.

Uniform Principal and Income Act. The Commission's recommendation of the revised Uniform Principal and Income Act was enacted in 1999. It may be necessary to address followup issues on the legislation.

Inheritance from or through foster parent or stepparent. The Commission has decided not to pursue enactment of this recommendation due to resolution of

the conflict in the law by the Supreme Court and the State Bar's withdrawal of its support for the recommendation.

Termination of beneficiary designation by divorce. The Commission's recommendation on this matter has not been enacted. The Commission has asked the staff to discuss issues on it with the chair of the Assembly Judiciary Committee. The study has also been broadened to include Automatic Temporary Restraining Order issues, which are under active consideration by the Commission.

Rules of construction for trusts. The Commission has retained Prof. Bill McGovern of UCLA Law School to prepare a background study on rules of construction for trusts and other nonprobate instruments. The study is due June 30, 2000.

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.

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 Estate Planning, Trust and Probate Law Section for comment.

Miscellaneous probate issues. The Commission has under active consideration a number of miscellaneous probate issues, including issues involved in an accounting by the trustee of a revocable trust. The staff brings these issues to the Commission from time to time on a low priority basis as staff and Commission resources permit.

Uniform Trust Act. In the summer of 2000 the National Conference of Commissioners on Uniform State Laws will promulgate a Uniform Trust Act. A Commission consultant, Prof. David English, is reporter for that act. The

Executive Secretary has served on the drafting committee for that act. The act is derived from the California Trust Law, which the Commission drafted.

It does not appear to make sense to consider replacing the California Trust Law with the uniform act. However, it may be instructive to examine the uniform act to see whether any of the improvements it would make on California law are worth adopting here. **The staff would engage Prof. English to prepare a comparison of the uniform act with California law**; we would circulate the study to interested parties and see if there is a consensus whether any of the changes should be adopted in California. This approach is suggested by the State Bar Estate Planning, Trust and Probate Law Section. Exhibit p. 1.

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 currently 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. Prof. Gideon Kanner is preparing a report for the Commission on this matter. The study is in abeyance pending resolution of several cases currently in the courts.

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 low priority 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 enacted 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; there are recent cases 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, Prof. 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). We have solicited comment from other experts on whether the article appears to present a fruitful approach for a legislative solution to this intractable problem.

Our community property and probate consultant, Prof. Jerry Kasner, thinks that, while Prof. Reppy's proposals are right, they will engender intense opposition from family lawyers, title companies, and financial institutions. See Exhibit pp. 2-3. The State Bar Family Law Section thinks that this matter is better left to continued case law development. See Exhibit pp. 4-6.

Given this feedback, the staff thinks it is advisable to hold off getting involved in this area for the time being.

Enforcement of judgments under the Family Code. The Commission has previously recommended legislation, which did not receive legislative consideration, untangling the interrelation of the general enforcement of judgment statutes with the special statutes on enforcement of judgments issued by courts under the Family Code. We have renewed this project, and comments on the Commission's revised tentative recommendation are scheduled for consideration in October.

Community property in joint tenancy form. Pursuant to the Commission's directive earlier this year, the staff circulated the Commission's unenacted recommendation on joint tenancy and community property to the banks, real

estate brokers, and title insurance companies to see whether there has been enough of a change in attitudes to warrant reintroduction of this recommendation. Although attitudes appear to be changing, negative responses from the title insurance industry indicate to the staff that the Commission's recommendation would still encounter substantial opposition. The staff recommends that we continue to bide our time on this one.

5. Offers of Compromise

This topic was added to the Commission's calendar 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.

6. 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. Prof. Gregory Weber is the Commission's consultant; his background study is due September 1, 2000.

7. 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 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.

8. 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.

9. 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 and Uniform Rules of Evidence. Since the 1965 enactment of the Evidence Code, the Federal Rules of Evidence have been adopted and the Uniform Rules of Evidence have been adopted and comprehensively revised in 1999. 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; that study was never considered by the Commission and is now dated. The time may be ripe for a comprehensive comparison of the California Evidence Code with the Federal Rules and the Uniform Rules. This could be combined with a report on experience under the California Evidence Code. **The staff suggests that the Commission identify and contract with an expert consultant for a background study on the matter.** This would be a substantial undertaking, and we could not expect the study to be delivered for a number of years.

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 (ret.) — to prepare a background study on this matter. The study was due June 30, 1999. Judge Harvey has reported that his investigations have not disclosed any major problems in California law. However, with the consent of the Executive Secretary, he is continuing his inquiry into this matter and will make a final report to the Commission in the future.

10. 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.

11. Administrative Law

This topic was authorized for Commission study 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.

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 has circulated parts of this proposal for further comment, and review of comments is scheduled for the October meeting.

The Commission is now actively engaged in a study of state rulemaking procedures. Legislation addressed to two aspects of rulemaking — consent regulations and advisory interpretations — has passed the Legislature and is awaiting action by the Governor. Proposed comprehensive legislation for the 2000 session is under active consideration by the Commission.

12. Payment and Shifting of Attorney's Fees Between Litigants

The Commission requested authority to study this topic 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 further 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. Meanwhile, the Commission has commenced work on one aspect of this topic — award of costs and contractual attorney's fees to prevailing party.

13. Uniform Unincorporated Nonprofit Association Act

This topic was authorized in 1993 on request of the Commission. The Commission retained Prof. Michael Hone of the University of San Francisco Law School to prepare a background study. Despite delays, Prof. 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.

14. 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. Proposition 220, implementing the report, was approved by the voters on the June 1998 ballot.

The Commission submitted its report on statutory revisions to implement unification in July 1998. The proposed legislation was enacted in 1998, and cleanup legislation recommended by the Commission was enacted in 1999.

Government Code Section 70219 directs the Commission to study the additional issues in judicial administration identified in the Commission's report on statutory revisions. The Commission is actively engaged in this endeavor, and has approved a number of tentative recommendations on these issues.

The major project under Section 70219 is a review of basic court procedures under unification to determine what, if any changes should be made. With respect to **criminal procedures**, the Commission has retained Prof. Gerald Uelmen to prepare a background study. The study is due December 31, 2000. With respect to **civil procedures**, the statute contemplates a joint project of the Commission and Judicial Council. The Commission and Judicial Council staffs have met, convened a panel of civil procedure experts to suggest appropriate areas of inquiry, and are in the process of attempting to narrow the focus of this project and initiate background research.

15. Law of Contracts

The Commission's calendar includes 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 has promulgated a Uniform Electronic Transactions Act, which has been adopted in California, effective January 1, 2000. See Civ. Code § 1633.1 *et seq.* The staff has not yet had an opportunity to explore whether this act addresses all the problems

in the area. A recent article in the *San Francisco Daily Journal*, for example, is entitled "Technology Spurs New Contract-Formation Disputes" (September 20, 1999, at p. 4). We do not know whether UETA, as enacted in California, would resolve the issues mentioned in this article.

The staff suggests that the Commission maintain authority in this area for the time being.

16. Consolidation of Environmental Statutes

The Legislature in 1996 added to the Commission's calendar 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." After extensive inquiry into this question, the Commission concluded that it would be inadvisable to attempt the contemplated statutory reorganization. The Commission has approved a report to the Legislature indicating its intent not to proceed with the proposed Environment Code.

The Commission is developing a recommendation on technical corrections for defects in the air resources statutes, discovered in the process of the Commission's exploration of the Environment Code concept. This matter is on the agenda for the October Commission meeting.

The staff suggests that the Commission's authority in this area be maintained until conclusion of the air resources technical revisions project, and then be removed.

17. Common Interest Development Law

This topic was added to the Commission's calendar in 1999 at the request of the Commission.

The Commission's request noted that the main body of law governing common interest developments is the Davis-Stirling Common Interest Development Law, and that 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. In addition, statutes based on separate, rather than common, real property ownership models still control many aspects of the governing law.

The Commission suggested that the statutes affecting common interest developments be reviewed with the goal of setting a clear, consistent, and unified policy with regard to their formation and management and the transaction of real property interests located within them. The objective of the review is to clarify the law and eliminate unnecessary or obsolete provisions, to consolidate existing statutes in one place in the codes, and to determine to what extent common interest housing developments should be subject to regulation.

The staff recommends that, due to the magnitude of this project and the number of different statutes and interest groups that will be involved, it would be helpful to obtain expert guidance on the appropriate scope of this project. An expert familiar with the law and politics in this area could advise the Commission as to whether a comprehensive new statute is achievable, such as the Uniform Common Interest Ownership Act, and what specific areas of law are most amenable to reform or will likely encounter unalterable political opposition. The Commission greatly benefited from a scope study by Prof. Michael Asimow before embarking on its major administrative procedure effort. **The staff will have a specific proposal for the Commission at the October meeting for a scope study of common interest development law.**

18. Statute of Limitations for Legal Malpractice Actions

This topic was added to the Commission's calendar in 1999 at the request of the Commission. There is a law review article on this matter that prompted the Commission's request and can serve as a background study. See Ochoa & Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 Sw. U. L. Rev. 1 (1994). The staff plans to work this matter into the Commission's agenda as staff and Commission resources permit.

19. Public Records Laws

This topic was added to the Commission's calendar in 1999 at the request of the Commission. The objective is to review the public records law in light of electronic communications and data bases to make sure the laws are appropriate in this regard, and to make sure the public records law is adequately coordinated with laws protecting personal privacy.

The staff will work this matter into the Commission's agenda as staff and Commission resources permit.

20. Criminal Sentencing Statutes

This topic was added to the Commission's calendar in 1999 at the request of the Commission. The objective of the study is to propose a reorganization and clarification of the sentencing procedure statutes in order to make them more logical and understandable. This would be a nonsubstantive project.

The staff has been gathering names of experts in this area to serve as possible consultants to the Commission. **Our concept is to identify several consultants from different perspectives within the criminal law field who would work together to develop a suggested outline or roadmap for the law**, much as our Environment Code consultants developed a helpful outline of an Environment Code. Once we have developed an appropriate outline for the sentencing statutes, with an indication of which specifics would go where in the structure, the staff would do the actual work of relocating and integrating statutes, with commentary.

SUGGESTED NEW TOPICS AND PRIORITIES

During the past year the Commission received a few new topic and priority suggestions. The Assembly Judiciary Committee has requested the Commission to study mechanics lien law on a priority basis, and the Commission has indicated that it will. Other matters that have surfaced during the past year are discussed below. **Despite the obvious merits of some of the proposed projects, the staff is hesitant to add new topics to the Commission's Calendar of Topics or to activate new priorities in light of the substantial volume of work currently in the pipeline.**

Claims and Actions Against Government Entities and Employees

The Tort Claims Act was enacted on recommendation of the Law Revision Commission in 1963. It requires as a general matter that a claim must be filed against a public entity within a short period after accrual of a cause of action as a prerequisite to a lawsuit.

An issue that has come into dispute recently is whether a claim must be filed as a prerequisite to an action on a contractual liability. Court of Appeal cases go both ways on the issue. Compare *Baines v. City of Los Angeles,* 85 Cal. Rptr. 2d 74 (1999) (contract claim required), with *Alliance Financial v. City and County of San Francisco,* 75 Cal. Rptr. 2d 341 (1998) (contract claim not required). The opinions delve at length into the Commission's original recommendation and the

background studies on which it was based. The *Baines* court comments, "However, given the ongoing confusion in this area, the broad importance of the question presented and the likelihood this issue will recur, we respectfully invite either the Legislature to declare its intent or the Supreme Court to clarify the matter at the earliest opportunity." 85 Cal. Rptr. 2d at 81.

The staff believes that *Baines* is incorrect — the statute does not intend that a contract claim be required, and to require one is wrong as a matter of public policy. However, this subject is no longer on the Commission's Calendar of Topics. Moreover, a simple clarification of the law at this point would likely encounter substantial resistance from governmental interests.

Grand Jury Selection

As a result of its work on trial court unification, the Commission uncovered a number of technical defects and other problems in the statutory provisions relating to selection of a grand jury. Because the Commission's Calendar of Topics does not include grand jury selection, the Commission decided to consider this matter in connection with its annual review of topics and priorities. The Commission directed the staff to investigate whether another entity would be better-suited to address the problems in this area.

We have since received a letter from the Attorney General's office commenting on the issues identified by the Commission. Exhibit pp. 7-9. The Attorney General's office downplays the importance of certain proposed technical revisions, but supports the concept of an in-depth study of grand jury selection. "Clearly, there would be value in a complete study of the grand jury selection process, with the objective of modernizing Penal Code provisions to reflect current practice or to embody changes to enhance ethnic and geographic balance." The Attorney General's office suggests that the Commission undertake such a study pursuant to its general statutory function to modernize and improve California law (Gov't Code § 8289).

The Commission's authority to modernize and improve California law is limited, however, to topics approved by concurrent resolution of the Legislature. Although the Commission could seek authority from the Legislature to study grand jury selection, we may not be able to give this area prompt attention, because we have an abundance of major studies in progress. Professor J. Clark Kelso is investigating whether the Institute for Legislative Practice is interested in

pursuing this topic. We will update the Commission on this matter at its upcoming meeting.

Motion to Compel Further Response to Discovery

We have received a suggestion from Scott Bonagofsky of Berkeley (Exhibit p. 10) that the deadlines for a motion to compel further response to discovery be liberalized along the lines of the Federal Rules of Civil Procedure. He argues that this would avoid constant phone calls and letters seeking extensions of deadlines, and would lower fees to litigants. **The staff would refer this recommendation to our consultant, Prof. Weber, for analysis as part of his background study.**

Enforcement of Judgments Technical Corrections

The Civil Procedures Committee of the California State Sheriffs' Association has provided us with a memorandum indicating a number of problems in the statutes governing enforcement of judgments that the levying officers have come across. Exhibit pp. 11-17. The enforcement of judgments statutes were enacted on recommendation of the Commission, and the Commission maintains continuing authority and review of them. **The staff would analyze and bring these matters to the Commission as staff and Commission time allows.**

Mediation Confidentiality

In 1997 the Commission obtained enactment of a new chapter of the Evidence Code on mediation confidentiality. Albert Balingit (Statewide Coordinator for the Dispute Resolution Programs Act) suggests modifying the mediation confidentiality provisions to clarify that they would not preclude a county from inspecting and ensuring that statistics from a program funded pursuant to the Dispute Resolution Programs Act are accurate. Exhibit p. 18. He explains:

> Counties need access to program records to verify that moneys given to these programs were appropriately spent. Counties also must compile and report statistics … on the success of the programs which they oversee. Without access to program files, counties cannot ensure that statistics are accurate.

Ron Kelly (expert advisor for the Commission's recent study on mediation confidentiality) believes that the current statute provides adequate opportunities for oversight and no revision is necessary. According to Nancy Rogers (Reporter for Drafting Committee on Uniform Mediation Act), the drafters of the Uniform

Mediation Act have similarly concluded that funders of mediation programs do not need access to mediator files, only an opportunity to conduct exit surveys and obtain certain statistical information (e.g., number of mediations conducted, number of mediation sessions, number of agreements reached).

Because of the Commission's previous involvement in mediation confidentiality, this would be an appropriate area for Commission review. However, the matter is controversial. **The staff would address it on a low-priority basis — the affected parties may be able to work out an appropriate protocol meanwhile.**

Other Suggested Topics

If Commission members have other suggested topics for Commission study, you should plan to elaborate on them at the meeting. In the past Commissioner Skaggs has suggested that it would be worthwhile overhauling the Subdivision Map Act and Government Code provisions relating to development fees. He has also pointed out the problematic nature of some aspects of Government Code Section 1090 *et seq.*, relating to contracts made by a public body where a member of the body has a conflict of interest.

CONCLUSION

Legislative Program for Year 2000

The Commission's first priority should be to complete projects in progress for the next legislative session. The staff anticipates the Commission will complete work on the following matters for the year 2000.

Goodwill Issues in Eminent Domain. The Commission has approved a final recommendation on these technical issues.

Administrative Rulemaking. Comments on the tentative recommendation have been considered. The Commission has before it a draft final recommendation for approval on this omnibus legislative proposal.

Administrative Mandamus. The Commission has circulated a tentative recommendation to make consensus revisions drawn from its unenacted judicial review proposal. Comments on the tentative recommendation have yet to be considered.

Family Consent in Health Care Decisionmaking. The Commission previously adopted a recommendation on this matter, but it was removed from

1999 legislation for further consideration. The Commission has indicated its intent to pursue this matter in the 2000 legislative session.

Surrogate Committee in Health Care Decisionmaking. This was also part of the recommended legislation this year, but was removed for further study. The Commission has indicated its interest in pursuing this subject, but the political climate doesn't look favorable.

Miscellaneous Probate Issues. Comments on this tentative recommendation for minor changes in probate procedure are due in November.

Air Resources Technical Revisions. This is cleanup legislation to correct statutory defects uncovered during the Commission's exploration of the feasibility of an Environment Code.

Enforcement of Judgments Under the Family Code. This proposal is designed to untangle the statutory confusion between Code of Civil Procedure and Family Code enforcement of judgments provisions. Comments on the tentative recommendation will be reviewed in October.

Homestead Issues. Comments on the tentative recommendation will be reviewed in October. The question is whether the Commission is interested in pursuing this matter in light of the politics of it.

Settlement Negotiations. The Commission should complete work on this subject this fall.

Trial Court Unification Followup. The Commission has approved tentative recommendations on a number of miscellaneous minor issues uncovered during the trial court unification work. One or more of these (e.g., jurisdictional classification of good faith improver claim, repeal of expired pilot project statutes, etc.) may be ready to go for 2000.

Active Topics

Apart from matters to be wrapped up for the 2000 legislative session, the Commission has commenced work on the following topics, many of which we should be able to complete during the coming year. The staff would give a reasonably high priority to these matters, so that, once activated, they do not become stale.

Eminent domain law. Topics under consideration include public utility condemnation, litigation expenses, and withdrawal of prejudgment deposit. We would continue to work these and other eminent domain issues into the agenda on a regular basis.

Trial court unification. We should complete work on miscellaneous issues identified in the trial court unification project during 2000. There will also be a continuing need to consider issues arising out of trial court unification as experience in the unified counties discloses problems.

Miscellaneous probate issues. Active probate issues include Uniform Principal and Income Act follow-up, revocable trust accounting, and the impact of the family law Automatic Temporary Restraining Order on estate planning.

Attorney's fees. This is a complex and difficult project concerning the interrelation of the general attorney's fee statutes with those governing contractual attorney's fee provisions.

Recommended Priorities

1. Mechanics lien law. The staff would give highest priority to the study of mechanics lien law. The Assembly Judiciary Committee has requested the Commission to give this matter a priority, and the Commission has indicated that it will. There is pending legislation that is on hold awaiting the results of this study. The deadline for our consultant Gordon Hunt's background study is March 30, 2000, but it is our expectation that he will deliver the study well before that date.

2. Active topics. Next priority would go to matters described above as "active topics". These are matters currently under consideration by the Commission. Once activated, they should be pursued to completion within a reasonable time.

3. Topics on which background study is due. There are a number of topics on which the Commission has contracted for a background study and on which the study is due during the coming year. So as not to let the study become stale and while the consultant is still available, the staff would commence active consideration of these topics on receipt of the background study. These are:

- **Evidence Code.** The background study on Evidence Code changes required by electronic communications was due June 30, 1999, from the Commission's consultant, Judge Joe Harvey. We have extended the due date for this study; Judge Harvey's preliminary inquiries in the area have not revealed major problems. We therefore do not expect this will consume much staff or Commission time when the report is delivered.
- **Bankruptcy Code Chapter 9.** The study relating to adjustment of debts of governmental entities is being prepared by Prof. Fred Tung

of USF Law School. It is due September 30, 1999, but will be somewhat late.

- **General Assignment for Benefit of Creditors.** The comprehensive study of assignments for benefit of creditors is being prepared for the Commission by David Gould. It is due December 30, 1999.
- **Rules of Construction for Trusts.** Prof. Bill McGovern of UCLA Law School is preparing this study for the Commission. It is due June 30, 2000.
- **Discovery in Civil Cases.** Prof. Gregory Weber of McGeorge Law School is preparing a background study reviewing possible discovery improvements from other jurisdictions. The study is due September 1, 2000.

4. Lower priority topics. The staff would work the following topics into the Commission's agenda from time to time as staff and Commission resources permit:

- **Enforcement of judgments technical issues** identified by the sheriffs.
- **Statutes of limitation in legal malpractice actions.** There is a good recent law review article on this matter which can be used as a background study.
- **Public records law.** This is a question of harmonizing the public records statutes with the privacy protection statutes, and making sure that both of them work appropriately in an environment of electronic communications.
- **Mediation confidentiality.** The staff would bring the question of an exception for audit of publicly funded programs to the Commission on a low priority basis.

New Topics

Despite a couple of worthy topics suggested this year, the staff recommends against any new additions to the Commission's Calendar of Topics. We have a substantial amount of work currently underway or to be activated in the near future, as well as a large number of topics to take up in the more distant future.

Consultant Contracts

This memorandum suggests consultant contracts on a number of topics. These are collected here for convenience of reference. Although the Commission's agenda is full, these could be scheduled in a way that they will be

ready for Commission consideration several years from now, after the Commission has completed work on current priority topics.

Judicial and nonjudicial foreclosure of real property liens. The problems in this area of law continue unabated. This would be a major project. We may wish to retain a consultant to prepare a background study for future consideration, however.

Uniform Trust Act. The Uniform Trust Act will be promulgated in summer 2000. The staff would engage Prof. English, reporter for the Uniform Act, to prepare a comparison of the Uniform Act with California law. We would circulate the study to interested parties and see if there is a consensus whether any of the changes should be adopted in California.

Federal Rules of Evidence and Uniform Rules of Evidence. The time may be right for a comprehensive comparison of the California Evidence Code with the Federal Rules and the newly revised Uniform Rules. This could be combined with a report on experience under the California Evidence Code. The staff suggests that the Commission identify and contract with an expert consultant for a background study on the matter. This would be a substantial undertaking, and we could not expect the study to be delivered for a number of years.

Common interest development law. Due to the magnitude of this project and the number of different statutes and interest groups that will be involved, it would be helpful to obtain expert guidance on the scope of this project. An expert familiar with the law and politics in this area could advise the Commission as to whether a comprehensive new statute is achievable, such as the Uniform Common Interest Ownership Act, and what specific areas of law are most amenable to reform or will likely encounter unalterable political opposition.

Criminal sentencing statutes. The staff has been gathering names of experts in this area to serve as possible consultants to the Commission. Our concept is to identify several consultants from different perspectives within the criminal law field who would work together to develop a suggested outline or roadmap for the law. The staff would consult with the Chairperson in selecting appropriate persons to serve as consultants.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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

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August 6, 1999

Nat Sterling
California Law Revision Commission
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REPLY TO:
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Re: Uniform Trust Act

Dear Nat:

We discussed informally at the last Drafting Committee Meeting of the Uniform Trust Act a possible approach to implementing portions of the Act in California.

Depending upon the final version of the Act, it was my suggestion that after the Act is adopted by the Commission on Uniform State Laws, that the CLRC engage Professor English to prepare a background study on the differences between the Uniform Act as finally promulgated and current California trust law. The background study would then allow practitioners an opportunity to comment on the proposed changes to existing California trust law as set forth in the statutes and as interpreted by California cases. I believe this approach has significant merit. In talking with Professor English, I believe that he would be delighted to be engaged as a consultant for the background study.

Kindly let me know your views on the suggested approach.

Sincerely,

Robert E. Temmerman, Jr.
RET/gmd
cc: Susan House, Chair
James Ellis, Vice-Chair
Professor David English

1

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April 19, 1999

Nat Sterling
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Re: The Reppy Article

Dear Nat:

Thanks for sending me the Reppy article. As usual, it is thorough and in my opinion, his conclusions are correct. However, what is academically correct and politically possible are two different things.

As Professor Reppy indicates, the inception of title theory and the *George v. Ransom* rule that income from separate property is separate, which are the law of California, make our system much more complex, and in my opinion, better, than the basic Spanish-Mexican-Texas rule. Most of the other issues stem from these rules – *Periera*, CFC § 2640, and in particular, the gift presumption. Not only do I agree the presumption of gift rule should be abolished, I suggest that the way the courts are interpretation the written transmutation rule, it may already be gone. Does signing a check on a community bank account to pay for improvements to a home owned by one spouse before marriage meet the "express declaration in writing" requirement? Is title an express declaration in writing? Also, much of the authority for the gift presumption predates the equal management statutes. I even question whether or not *See* would be decided the same way today – it involved both a presumption of gift (use of separate funds to pay living expenses) and the imposition of a presumption against the husband as manager of the community.

My point is that the presumption of gift rule was largely created by case decision, and it is probably necessary that major changes to the rule come from the courts. If you were to attempt to propose legislation which would totally eliminate this presumption and impose the buy-in rule, which I agree is much better, I believe you would have all of the family lawyers, title companies, and financial institutions in an uproar almost immediately.

As Professor Reppy indicates, the true application of the buy-in or mixed source acquisition rule requires allocation of the growth or decrease in the value of the asset from the date of the buy-in to the date of valuation. Years ago, I analyzed the application of the buy-in rule to spousal joint tenancies under IRC § 2040. The regulations at that time, which have since been mercifully deleted, went on at length on how to allocate spousal contributions to the purchase of the property. Just let me say you really do not want to go down that road, and neither do any of the groups mentioned above.

The one piece of legislation that should be abolished, according to Professor Reppy, is CFC § 2640. I agree. However, that legislation was in response to one of what I believe are the two worst modern community property decisions in California (the other being *Marriage of Mix*), *Marriage of Lucas* . The court applied the gift presumption where the evidence was clear there was no intent to make a gift. The rationale? Protection of titles. This never made any sense – third parties should be able to rely on title, but not the spouses. There is an obvious clash between CFC § 2640 and the written transmutation rule.

CFC § 2640 was adopted to overturn that awful decision, but if memory serves, the reason for adoption of reimbursement was pressure from the family law bar. It also made title companies and financial institutions happy, since their precious titles were protected. If you were to now seek to replace that rule with the more accurate buy-in approach, I think it might cause a riot.

Is there anything you could consider? How about elimination of the gift presumption with a strict reimbursement remedy, **but with interest.** While this is not a prefect answer, it would be fairer, get us somewhat closer to inception of title, and might not unduly offend the groups mentions above.

If you do look at such a change, it probably should be separated form any solution to the joint tenancy problem.

I hope this helps.

Sincerely,

Jerry A. Kasner

FAMILY LAW SECTION
THE STATE BAR OF CALIFORNIA

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May 14, 1999

Nathaniel Sterling, Executive Secretary
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Re: **Mixed Community and Separate Assets**

Dear Mr. Sterling:

This letter is in response to your letter dated February 19, 1999 to Robert C. Wood in his capacity as Chair of the State Bar Family Law Section, requesting the State Bar Family Law Section's Executive Committee ("Flexcom") to read, consider and comment upon an article written by Professor William A. Reppy, Jr. entitled "Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement." Mr. Wood has asked that I reply, on behalf of Flexcom.

Flexcom referred Professor Reppy's article to its two Standing Committees on Property, one in Southern California and one in Northern California. The members of both of these two interested standing committees read and considered the article and returned their comments on it to Flexcom. A summary of their comments follows, and generally represents the views of Flexcom to the effect that the matter would be better left to continued case law development.

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Summary of Comments by Property North and Property South:

The issue identified by Professor Reppy needs no legislative intervention at this time. The issue of mixed assets is properly treated on a case-by-case issue in each dissolution proceeding where the issue arises. Each marital estate containing a mixed asset is capable of presenting a different fact pattern. The fair resolution of such infinitely diverse situations is best left to judicial interpretation and management, even if there might be an occasional misinterpretation and inequity by a court.

The overriding concern of Professor Reppy's article appears to be that a spouse who has contributed separate property to the payment of a mortgage or improves the other spouse's separate property is unfairly treated when those funds are not recoverable with interest at the time of dissolution of the marriage or at the termination of the marriage by death. Professor Reppy's unspoken premise is that the marriage should be treated as a business relationship.

This result, however, does not strike Flexcom as unfair since it is not counter to most participants' reasonable expectations in a marriage in the current social setting. For example, does a spouse who pays the mortgage with separate property on the other's home, in which both are living, really expect to be repaid? A business partner may, but a spouse most likely believes this is part of the "marriage bargain" and does not expect to be reimbursed.

Professor Reppy's article tells us that early California law developed at a time when the model was a single marriage. That is clearly no longer a reasonable assumption. As multiple marriages are a fact of life in California, as elsewhere, it is also reasonable to assume that the parties will be aware of the rules and, in many instances, limit reimbursements and "return" on investment t dissolution or death. For example, separate property inheritance distributions require strict tracing of funds in order to preserve their separate character. Is this rule any more or less fair than the rule Professor Reppy seeks to change? Probably not.

Clearly, the parties to a marriage have an opportunity to structure their financial affairs to their liking, if they so choose, by written agreements which provide deviation from the legislative scheme for division of property upon dissolution. Consumer education as to rights *inter se*

between spouses, together with knowledge of the rules and knowledge that the rules can be modified by them in a writing they both sign, will help ameliorate any perceived unfairness of the current system. The fact that many married parties are still unaware of these rules is a failure of California's secondary education system to prepare persons for perhaps their most significant contractual relationship. The fact that it takes more education to obtain a driver's license than a marriage license is indicative of this glaring inadequacy.

Whereas Flexcom would like to see a simple rule which could easily be applied, the issues often require the case-by-case assessment only available through judicial interpretation. The alternative could be a running marital "ledger" accounting approach which would not only require a legislative determination of all reimbursable claims, but a redefinition of the duties of mutual support during marriage. This would undoubtedly still involve the judiciary in the determination of issues likely to arise under this new concept of marital accounting and marital "investment" expectation identified by Professor Reppy. Therefore, Flexcom sees no need at this time for the California Law Revision Commission to take action in this area.

Thank you for giving the State Bar Family Law Section the opportunity to review and comment upon this interesting article. Please be assured that the members of the Executive Committee and the standing committees of the Section are always enthusiastic about lending their voices and opinions to the Commission on issues of family law.

Yours very truly,

Suzanne Harris

SH:cwc
cc: Robert C. Wood
Laurel T. Amaya
LeRoy Humpal

BILL LOCKYER
Attorney General

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DEPARTMENT OF JUSTICE

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VIA FACSIMILE TRANSMISSION TO 650-494-1827 AND FIRST CLASS MAIL

September 24, 1999

Ms. Barbara Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

RE: Memorandum 99-46: Trial Court Unification: Grand Jury Issues

Dear Ms. Gaal:

We appreciate the opportunity to comment on the suggestions contained in Staff Memorandum 99-46, presented to the California Law Review Commission at its August meeting and which we understand the Commission intends to study further. Memorandum 99-46 addresses issues pertaining to grand juries in light of trial court unification.

As you are aware, grand jury selection is a local governmental process, and the Attorney General's principal interface with grand juries and grand jury proceedings is through this office's Criminal Law Division. The comments which follow reflect that orientation, and are provided following consultation with Criminal Law Division members appropriately knowledgeable in the area of grand jury proceedings and procedures.

The memorandum cautions against proposal of a revision to Penal Code section 899, insofar as the section specifies selection from among particular districts, reference to some of which may be inappropriate or obsolete. To the extent the recommendation is based upon staff's view of Commission authority, please refer to our final comment below. With respect to the substantive issue, our Criminal Law Division observes that while the current text contains references which may now be obsolete, the choice is between (a) amending the statute and awaiting validation of the changes through litigation, on the one hand, and (b) leaving the unamended statute to await possible litigation seeking interpretation in the context of the post-consolidation environment. Because virtually all criminal prosecutors now utilize the additional

grand jury provided for in Penal Code section 904.6, selected "at random, from the list of trial jurors in civil and criminal cases...", whether section 899 is amended for the specific purpose indicated is of only incidental significance to the criminal justice process.

Memorandum 99-46 also recommends against proposal of an amendment to Penal Code sections 908 and 908.1, to eliminate a clearly obsolete references to Code of Civil Procedure section 226, which earlier pertained to the choosing of jurors for unfilled panels but now pertains to timing of challenges. With respect to the Commission's authority to act on the proposal reviewed by staff, please refer to our final comment below. With respect to the substantive issue presented by the proposal, Penal Code section 904.6, referred to above, contains the revising language proposed for sections 908 and 908.1; thus for the same reason indicated with respect to amendment of section 899, amendment of sections 908 and 908.1 in this regard is not seen as a matter of urgency for purposes of the criminal justice process.

Finally, Memorandum 99-46 generally supports a study of grand jury selection as a whole, in view of, *inter alia*, the condition of Penal Code sections 899, 908 and 908.1, the possible obsolescence of provisions pertaining specially to counties having a jury commissioner (inasmuch as the duties of that office are now apparently performed by specified individuals in all counties) and the possible need for reforms to fulfill legislative intent that all qualified persons have an equal opportunity to be considered for service as criminal grand jurors, and to extend fulfillment of that intent to grand juries generally. It is our understanding that the Commission has determined to consider this question in connection with its annual review of topics and priorities. Clearly, there would be value in a complete study of the grand jury selection process, with the objective of modernizing Penal Code provisions to reflect current practice or to embody changes to enhance ethnic and geographic balance. As grand jury selection is a governmental process which operates at the local level, it would appear that the participation of district attorneys, county counsels, and county court administrators would be valuable and necessary.

On the particular subject of a study of the grand jury selection process, Memorandum 99-46 indicates the view that the subject is outside the purview of the Commission's authority. Likewise, with respect to the proposals addressed in connection with Penal Code sections 899, 908 and 908.1, Memorandum 99-46 expresses doubt concerning the Commission's authority to proceed. *Prima facie*, to propose amendments to the code sections in question and to study the subject of grand jury selection with which those sections treat would appear to be well within the general authority of the Commission to "[e]xamine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and

recommending needed reforms (Gov. Code §8289, subd. (a)), and to "[r]ecommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions." (Gov. Code §8289, subd. (d).) We recognize, of course, that the Memorandum's observations concerning Commission authority may appropriately rest upon considerations other than the text of the Commission's enabling statute, and we do not here presume to second-guess the internal expertise available to the Commission on the scope of its authority.

Thank you again for the opportunity to comment of Memorandum 99-46.

Sincerely,

ROBERT L. MUKAI
Counsellor to the Attorney General

For BILL LOCKYER
Attorney General

From: SBonagof@aol.com
Date: Fri, 14 May 1999 03:13:22 EDT
Subject: Discovery -- deadlines for motions to compel further responses
To: comment@clrc.ca.gov
X-Rcpt-To: comment@clrc.ca.gov

To whom it may concern:

One proposal I would like the Commission to consider is removing the deadlines as they presently exist for motions to compel further responses to discovery, and adding new deadlines in line with the local rules of the U.S. District Court, Northern District of California (the FRCP does not appear to have any deadline at all for motions to compel further responses). Under federal law, a party is not limited to 45 days after the response to move to compel a further response.

Under the state rule, a party may make a determination at the beginning of a case not to file a motion to obtain a further response on a discovery request that seems only marginally important at the time. Later, when facts are fleshed out and the need for the particular information becomes more apparent to the propounding party, it is usually too late to ask for more information on the same topic, using the same discovery device. Professional Career Colleges, Magna Institute (1989) holds that a party cannot simply re-issue substantially the same interrogatory or discovery request seeking the same information at a later date, once the motion to compel date has passed.

Under the N.D. Cal. local rules, which provide a much longer deadline for moving to compel information, this problem almost never arises (unless a litigant truly waits until the last minute to compel further discovery), and even then, I do not believe that the deadline is "quasi-jurisdictional," as it is under the state rule. The federal rule is the much better rule, since it prevents parties from hiding behind an arbitrary deadline in the hope that an unwary opponent will not realize that they really do need a better answer than they were given.

The federal rule also avoids the constant barrage of telephone calls and letters seeking extensions of deadlines for motions to compel, which results in lower fees for the litigants. The federal rule also results in smaller motions, since the moving party does not need to attach the writing extending the deadline to a declaration to prove to the Court that he hasn't blown the deadline.

Thanks for your time,

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COUNTY OF LOS ANGELES

SHERIFF'S DEPARTMENT

DATE: SEPTEMBER 28, 1999

OFFICE CORRESPONDENCE FILE NO:

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ATTN: NATANIEL STIRLING,
EXECUTIVE SECRETARY
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SUBJECT: PROPOSED LAW REVISIONS
RELATING TO LEVYING OFFICERS

On behalf of the Civil Procedures Committee of the California State Sheriffs' Association, please consider for revision the following items which are of concern to the various levying officers (sheriffs and marshals) throughout the state.

1. WRIT OF POSSESSION (CLAIM AND DELIVERY)

EXISTING LAW

Existing law (CCP 512.060, 514.020, 515.010 and 515.020) requires a plaintiff to post an undertaking prior to the court issuing a writ of possession (claim and delivery). The Judicial Council form Writ of Possession (Claim and Delivery) (CD-130) states, "A copy of the plaintiff's undertaking must be attached to the original writ and all copies served." The defendant may obtain redelivery of seized property by posting an undertaking indemnifying the plaintiff in the amount of the plaintiff's undertaking.

LEVYING OFFICER'S CONCERN

Courts frequently issue writs of possession (claim and delivery) without requiring the plaintiff to post an undertaking if the court finds that the defendant has no interest in the property as determined by CCP 515.010. Consequently, the levying officer is faced with two problems: (1) the plaintiff's undertaking is not served on the defendant as required by statute; and, (2) the amount of the defendant's undertaking for redelivery is problematic. Since CCP 515.020 allows the defendant to post a redelivery bond "equal" to the amount the plaintiff's undertaking (which is non-existent), the levying officer faces a dilemma.

SUGGESTED LAW REVISION

To amend Sections 512.060, 514.020, 515.010 and 515.020 of the Code of Civil Procedure.

CCP 512.060. Issuance of writ; requirements; probable cause for entry of private place

(a) At the hearing, a writ of possession shall issue if both of the following are found:

(1) The plaintiff has established the probable validity of his claim to possession of the property.

(2) The ~~plaintiff has provided an undertaking as required by~~ *requirements of* Section 515.010 *are met*..

(b) No writ directing the levying officer to enter a private place to take possession of any property shall be issued unless the plaintiff has established that there is probable cause to believe that such property is located there.

CCP 514.020. Delivery of copy of writ and plaintiff's undertaking by officer to defendant

(a) At the time of levy, the levying officer shall deliver to the person in possession of the property a copy of the writ of possession with a *any* copy of the plaintiff's undertaking attached *and a copy of the order for issuance of the writ*.

(b) If no one is in possession of the property at the time of levy, the levying officer shall subsequently serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part. If the defendant has not appeared in the action, service shall be accomplished in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part.

CCP 515.010. Plaintiff; necessity prior to issuance of temporary restraining order or writ of possession; requirements

(a) The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking. The undertaking shall provide that the sureties are bound to the defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against plaintiff. The undertaking shall be in an amount not less than twice the value of defendant's interest in the property or in a greater amount. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and such other factors as may be necessary to determine the defendant's interest in the property.

(b) Notwithstanding subdivision (a), upon a finding that the defendant has no interest in the property, the court may set the amount of the plaintiff's undertaking to be filed with the court or, in its discretion, order the undertaking waived. If the plaintiff's undertaking is ordered waived, the court shall set forth in the order for issuance of the writ the amount of an undertaking which may be posted with the court by the defendant to prevent the delivery of the property to the plaintiff as provided in Section 515.020.

CCP 515.020. Defendant; purpose; requirements

(a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought an undertaking in an amount equal to the amount of the plaintiff's undertaking required by Section 515.010*(a) or in the amount determined by the court pursuant to Section 515.010(b)*. The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

(b) The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer.

(c) If an undertaking for redelivery is filed and defendant's undertaking is not objected to, the levying officer shall deliver the property to the defendant, or, if the plaintiff has previously been given possession of the property, the plaintiff shall deliver such property to the defendant. If an undertaking for redelivery is filed and defendant's undertaking is objected to, the provisions of Section 515.030 apply.

2. STAY PENDING FINAL DETERMINATION OF CLAIM OF EXEMPTION

EXISTING LAW

In the case of a claim of exemption, the levying officer is stayed until the time to appeal has expired pursuant to CCP 703.610(a).

LEVYING OFFICER'S CONCERN

Many levying officers are unaware of the Legislative Committee's Comment concerning CCP 703.610(a) concerning the automatic stay. Also, courts occasionally order the levying officer to immediately apply or release levied property notwithstanding CCP 703.610(a).

Subdivision (a) of Section 703.610 continues the substance of subdivision (h) and the second sentence of subdivision (j) of former Section 690.50. Although the language in subdivision (j) of former Section 690.50 pertaining to waiver of an appeal has not been specifically continued, subdivision (a) of Section 703.610 continues its substance since an exemption is finally determined if an appeal is waived. Subdivision (a) requires, as did former Section 690.50(h), that the levying officer preserve the status quo by maintaining the levy on the property. For exceptions to the general rule provided in subdivision (a), see Sections 685.100 (release for failure to pay levying officer's costs), 699.060 (release in general), 699.070 (sale to preserve value of property), 720.660 (release pursuant to third person's undertaking). Subdivision (b) continues the substance of subdivision (g) of former Section 690.50, except that orders for the disposition of perishable property are governed by Section 699.70. Subdivision (c) is new. For provisions governing enforcement and stays pending appeal, see Sections 916-923. [16 Cal.L.Rev.Comm. Reports 1397 (1982)].

SUGGESTED LAW REVISION

To amend Section 703.610 of the Code of Civil Procedure.

CCP 703.610. Disposition of property pending final determination and appeal

(a) Except as otherwise provided by statute *or the right to appeal is waived in open court,* the levying officer shall not release, sell, or otherwise dispose of the property for which an exemption is claimed until *the time to file an appeal has expired or until* final determination of the exemption.

(b) ~~At any time while the exemption proceedings are pending,~~ *Notwithstanding (a) and prior to receipt of notice of appeal by the levying officer,* upon motion of the judgment creditor or a claimant, or upon its own motion, the court may make such orders for disposition of the property as may be proper under the circumstances of the case. Such an order may be modified or vacated by the court at any time ~~during the pendency of the exemption proceedings~~ upon such terms as are just.

(c) *Notwithstanding (a) and (b),* ~~If~~ appeal of the determination of a claim of exemption is taken, notice of the appeal shall be given to the levying officer and the levying officer shall hold, release, or dispose of the property in accordance with the provisions governing enforcement and stay of enforcement of money judgments pending appeal.

3. CLAIM OF EXEMPTION HEARING OFF CALENDAR

EXISTING LAW

CCP 703.580 requires the court to issue an order determining a claim of exemption following a claim of exemption hearing.

LEVYING OFFICER'S CONCERN

There is no statutory provision regarding an exemption hearing that has been taken "off calendar" and not adjudicated by the court.

SUGGESTED LAW REVISION

To amend Section 703.610 of the Code of Civil Procedure.

CCP 703.580. Pleadings; burden of proof; evidence; order; release or satisfaction

(a) The claim of exemption and notice of opposition to the claim of exemption constitute the pleadings, subject to the power of the court to permit amendments in the interest of justice.

(b) At a hearing under this section, the exemption claimant has the burden of proof.

(c) The claim of exemption is deemed controverted by the notice of opposition to the claim of exemption and both shall be received in evidence. If no other evidence is offered, the court, if satisfied that sufficient facts are shown by the claim of exemption (including the financial statement if one is required) and the notice of opposition, may make its determination thereon. If not satisfied, the court shall order the hearing continued for the production of other evidence, oral or documentary.

(d) At the conclusion of the hearing, the court shall determine by order whether or not the property is exempt in whole or in part. Subject to Section 703.600, the order is determinative of the right of the judgment creditor to apply the property to the satisfaction of the judgment. No findings are required in a proceeding under this section.

(e) The court clerk shall promptly transmit a certified copy of the order to the levying officer. Subject to Section 703.610, the levying officer shall, in compliance with the order, release the property or apply the property to the satisfaction of the money judgment.

(f) The levying officer shall release the property to the extent it was claimed as exempt at the expiration of twenty days from the date the exemption hearing was ordered off calendar and not rescheduled for hearing.

4. ELECTRONIC FILING

EXISTING LAW

The are various statutory schemes concerning electronic filing. For example, SB 367 added CCP 1010.6 to permit the electronic filing of a complaint and the issuance of a summons in electronic form.

LEVYING OFFICER'S CONCERNS

E-commerce promises to significantly impact levying officers in the very near future. Legislation is required to authorize the courts to issue electronic files in lieu of hard copy writs, subpoenas and other process. Similarly, legislative change is needed to permit levying officers to accept and execute electronic process. Supplemental proceedings such as claims of exemption and third party claims should permit the electronic

transmission of claims, forms and orders between the courts and levying officers.

SUGGESTED LAW REVISION

To amend Section 1010.6 of the Code of Civil Procedure. (SB 367)

CCP 1010.6. (a) A trial court may adopt local rules permitting electronic filing and service of documents, subject to rules adopted pursuant to subdivision (b) and the following conditions:

(1) A document that is filed electronically shall have the same legal effect as an original paper document.

(2) (A) When a document to be filed requires the signature, not under penalty of perjury, of an attorney or a person filing in propia persona, the document shall be deemed to have been signed by that attorney or person if filed electronically.

(B) When a document to be filed requires the signature, under penalty of perjury, of any person, the document shall be deemed to have been signed by that person if filed electronically and if, prior to filing, a printed form of the document has been signed by that person. The attorney or person filing the document represents, by the act of filing, that the declarant has signed the document. The attorney or person filing the document shall maintain the printed form of the document bearing the original signature and make it available for review and copying upon the request of the court or any party to the action or proceeding in which it is filed.

(3) Any document that is electronically filed with the court after the close of business on any day shall be deemed to have been filed on the next court day. "Close of business," as used in this paragraph, shall mean 5 p.m. or the time at which the court would not accept filing at the court's filing counter, whichever is earlier.

(4) The court receiving a document filed electronically shall issue a confirmation that the document has been received and filed. The confirmation shall serve as proof that the document has been filed.

(5) Upon electronic filing of a complaint, petition, or other document ~~that must be served with a summons~~, a trial court may electronically transmit a summons *or other process* with the court seal and the case number to the party *requesting the process* ~~filing the complaint~~. Personal service of a printed form of the electronic summons *or other process* shall have the same legal effect as personal service of ~~an original summons~~ *a summons or other process*. If a trial court plans to electronically transmit a summons *or other process* to the party ~~filing a complaint~~ *requesting the process*, the court shall immediately upon receipt of the complaint *petition, or other document* notify the attorney or party that a summons *or other process* will be electronically transmitted to the electronic address given by the person filing the complaint, *petition, or other document*.

(6) Where notice may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the notice and any accompanying documents may be authorized when a party has agreed to accept service electronically in that action. Electronic service is complete at the time of transmission, but any period of notice or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic transmission by two court days, but the extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a specific exception provided for by any other statute or rule of court.

(7) The court shall permit a party or attorney to file an application for waiver of court fees and costs, in lieu of requiring the payment of the filing fee, as part of the process involving the electronic filing of a document. The court shall consider and determine the application in accordance with Section 68511.3 of the Government Code and shall not require the party or attorney to submit any documentation other than that set forth in Section 68511.3 of the Government Code. Nothing in this section shall require the court to waive a filing fee that is not otherwise waivable.

(8) If a trial court adopts rules conforming to paragraphs (1) to (7), inclusive, it may provide by order that all parties to an action file documents electronically in a class action, a consolidated action, or a group of actions, a coordinated action, or an action that is deemed complex under Judicial Council rules, provided that the trial court's order does not cause undue hardship or significant prejudice to any party in the action.

(b) By January 1, 2003, the Judicial Council shall adopt uniform rules for the electronic filing and service of documents in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, and access to public records. These rules shall conform to the conditions set forth in this section, as amended from time to time.

(c) Any printed summons, writ or other process electronically issued by the court pursuant to this Section shall have the same legal effect as an original paper document and may served by the sheriff, marshal or constable in the same manner as a paper document.

5. NOT FOUND FEE

EXISTING LAW

Existing law provides that the sheriff, marshal or constable may change a "not found" fee if the process cannot served within a "judicial district."

LEVYING OFFICER'S CONCERN

Trial court unification has obfuscated the notion of a "judicial district." Also, some judicial districts encompass large geographical areas serviced by several sheriff or marshal offices. For example, the Los Angeles Judicial District is serviced by the six Branches of the Los Angeles Sheriff's Department (San Pedro Branch, West Los Angeles Branch, Beverly Hills Branch, Van Nuys Branch, Los Angeles Branch and San Fernando Branch.)

SUGGESTED LAW REVISION

To amend Section 26738 of the Government Code.

GC 26738. Not-found return

The fee for making a not found return on a summons, affidavit and order, order for appearance, subpoena, writ of attachment, writ of execution, writ of possession, order for delivery of personal property, or other process or notice required to be served, certifying that the person or property cannot be found ~~within the judicial district in which~~ *at* the address specified ~~is situated~~, is twenty-four dollars ($24).

6. 5-DAY NOTICE TO VACATE

EXISTING LAW

CCP 705.020 provides that a debtor must vacate the premises no later than 5 days after service of a writ of possession of real property. There is no requirement to insert the date of service and the last day to vacate the premises on the writ. Consequently, levying officers utilize an in-house 5-day notice to vacate forms which are served with the writ indicating the date of service and the last day to vacate.

LEVYING OFFICER'S CONCERN

The 5-day notice to vacate forms utilized by the various levying officers are not uniform. Also, the practice places a burden on levying officers to print and complete a form not mandated by law.

SUGGESTED LAW REVISION

To amend Section 715.010 of the Code of Civil Procedure.

CCP 715.010. Writ of possession of real property; application; contents; service

(a) A judgment for possession of real property may be enforced by a writ of possession of real property issued pursuant to Section 712.010. The application for the writ shall provide a place to indicate that the writ applies to all tenants, subtenants, if any, name > [FN1] claimants, if any, and any other occupants of the premises.

(b) In addition to the information required by Section 712.020, the writ of possession of real property shall contain the following:

(1) A description of the real property, possession of which is to be delivered to the judgment creditor in satisfaction of the judgment.

(2) A statement that if the real property is not vacated within five days from the date of service of a copy of the writ on the occupant or, if the copy of the writ is posted, within five days from the date a copy of the writ is served on the judgment debtor, the levying officer will remove the occupants from the real property and place the judgment creditor in possession. *At the time of service, the levying officer shall indicate the date and manner of service (personal, leaving with occupant or mailing) and the last date to vacate the premises on the copy of writ, the form of which shall be prescribed by the Judicial Council.*

(3) A statement that any personal property, except a mobilehome, remaining on the real property after the judgment creditor has been placed in possession will be sold or otherwise disposed of in accordance with > Section 1174 of the Code of Civil Procedure unless the judgment debtor or other owner pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the real property.

(4) The date the complaint was filed in the action which resulted in the judgment of possession.

(5) The date or dates on which the court will hear objections to enforcement of a judgment of possession that are filed pursuant to Section 1174.3, unless a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46.

(6) The daily rental value of the property as of the date the complaint for unlawful detainer was filed unless a summons, complaint, and prejudgment claim of right of possession were served upon the occupants in accordance with Section 415.46.

(7) If a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46, a statement that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises.

(c) At the time the writ of possession is served or posted, the levying officer shall also serve or post a copy of the form for a claim of right to possession, unless a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46.

7. "LOCK OUT DATE"

EXISTING LAW

The contents of a writ of possession of real property are prescribed by CCP 712.010, 715.010 and 715.020. However, many courts have adopted the practice of inserting on the writ a statement indicating that "no lock out shall occur prior to [insert date]".

LEVYING OFFICER'S CONCERN

Levying officers have been compelled by local courts to execute writ of possession forms which include a "no lockout prior [date]" statement that does not comport with the Code of Civil Procedure. Additionally, the "no lockout prior to" date frequently conflicts with the statutory 5-day notice on the writ itself. For example, if the writ has been marked "no lockout prior to June 15" and the writ is served on June 5, the levying officer has been instructing the debtor to vacate the premises no later June 14 rather than 5 days after service of the writ. Some debtors vacate the premises within 5 days after service of the writ, while others wait until the expiration of the "no lockout prior to" date.

SUGGESTED LAW REVISION

To amend Section 712.010 of the Code of Civil Procedure.

CCP 712.010. Issuance of writ of possession or sale

After entry of a judgment for possession or sale of property, a writ of possession or sale shall be issued by the clerk of the court upon application of the judgment creditor and shall be directed to the levying officer in the county where the judgment is to be enforced. The application shall include a declaration under penalty of perjury stating the daily rental value of the property as of the date the complaint for unlawful detainer was filed. *However, the clerk of the court shall not issue a writ of possession of real property more than five days prior to a stipulated or court ordered lockout date.* A separate writ shall be issued for each county where the judgment is to be enforced. Writs may be issued successively until the judgment is satisfied, except that a new writ may not be issued for a county until the expiration of 180 days after the issuance of a prior writ for that county unless the prior writ is first returned.

8. RESTORING DEBTOR TO POSSESSION OF PREMISES

EXISTING LAW

Case law (Cardenas v Noren, 235 CA3d 1344) provides that a levying officer lacks the ministerial duty to restore a debtor possession following an improper eviction.

LEVYING OFFICER'S CONCERN

On occasion, a levying officer, through inadvertence or without knowledge of a valid court ordered stay or bankruptcy automatic stay (11 USC 362(a)) may improperly evict a debtor. The efforts of the levying officer to restore the debtor to possession are problematic and usually futile. Codification of Cardenas v Noren would clearly relieve the levying officer of the duty to restore the debtor to possession and provide the debtor a remedy to seek "extraordinary relief from the court which issued the writ of possession."

SUGGESTED LAW REVISION

To amend Section 715.020 of the Code of Civil Procedure.

CCP 715.020. Execution of writ

To execute the writ of possession of real property:

(a) The levying officer shall serve a copy of the writ of possession on one occupant of the property. Service on the occupant shall be made by leaving the copy of the writ with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found upon the property when service

is attempted who is either an employee or agent of the occupant or a member of the occupant's household.

(b) If unable to serve an occupant described in subdivision (a) at the time service is attempted, the levying officer shall execute the writ of possession by posting a copy of the writ in a conspicuous place on the property and serving a copy of the writ of possession on the judgment debtor. Service shall be made personally or by mail. If the judgment debtor's address is not known, the copy of the writ may be served by mailing it to the address of the property.

(c) If the judgment debtor, members of the judgment debtor's household, and any other occupants holding under the judgment debtor do not vacate the property within five days from the date of service on an occupant pursuant to subdivision (a) or on the judgment debtor pursuant to subdivision (b), the levying officer shall remove the occupants from the property and place the judgment creditor in possession. The provisions of Section 684.120 extending time do not apply to the five-day period specified in this subdivision.

(d) Notwithstanding subdivision (c), unless the person is named in the writ, the levying officer may not remove any person from the property who claims a right to possession of the property accruing prior to the commencement of the unlawful detainer action or who claims to have been in possession of the property on the date of the filing of the unlawful detainer action. However, if the summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46, no occupant of the premises, whether or not the occupant is named in the judgment for possession, may object to the enforcement of the judgment as prescribed in Section 1174.3.

(e) Notwithstanding the eviction of a debtor by a levying officer due to inadvertence or lack of notice of a bankruptcy stay under 11 USC 362(a) or other court ordered stay, the levying officer lacks the duty and authority to restore the debtor to possession of the property. The debtor make seek extraordinary relief from the court that issued to writ to compel the landlord/creditor to restore the debtor to possession.

From: Albert_Balingit@dca.ca.gov
X-Lotus-FromDomain: DCANOTES
To: bgall@clrc.ca.gov
Date: Mon, 2 Aug 1999 10:59:27 -0700
Subject: County Access to Program Records
Mime-Version: 1.0
X-Rcpt-To: bgall@clrc.ca.gov

---------- Forwarded by Albert Balingit/EXEC/DCANotes on 08/02/99 10:49 AM ----------

Albert Balingit
07/27/99 04:00 PM

To: bgall@clrc.ca.gov
cc: esoriano@co.la.ca.us, ronkelly@igc.org, Heather.Anderson@jud.ca.gov., Rbarrett@igc.apc.org, normbrand@igc.org
Subject: County Access to Program Records

I request you consider a proposal amending the Evidence Code sections on Mediation to clarify that the confidentiality provisions of Evidence Code section 1119 would not preclude a county from inspecting and ensuring- that statistics provided from a program funded pursuant to the Dispute Resolution Programs Act--are accurate. Evidence Code section 1119 at this time does not expressly provide for a county which funds a dispute resolution program to gain access to program records, and I am fairly sure in reviewing the staff memorandum on the adoption of Chapter 2 that such an Commission was inadvertent.

Counties need access to program records to verify that moneys given to these programs were appropriately spent. Counties also must also compile and report statistics which reports on the success of the programs which they oversee. Without access to program files, counties cannot ensure that statistics are accurate.

In drafting such an amendment, I suggest the Commission review Senate Bill 160 adopted by the Oregon Legislature in 1997.

Thank you.

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