

## Memorandum 2003-8

**Authority of Court Commissioners  
(Draft of Tentative Recommendation)**

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At the November 2002 meeting the Commission considered a number of problems with Code of Civil Procedure Section 259, relating to the authority of a court commissioner. Among the issues considered was an apparent defect in subdivision (e), relating to the authority of a court commissioner to act as a temporary judge:

**Code Civ. Proc. § 259. Court commissioners**

259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:

...

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, **or by written consent of an appearing party**. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

That statute appears to authorize a court commissioner to act as a temporary judge on consent of a single party, in violation of the constitutional requirement of a stipulation of “the parties litigant”:

**Cal. Const., Art. VI, § 21. Temporary judge**

Sec. 21. On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

The Commission decided that, before circulating a tentative recommendation to clarify the matter, it would seek the input of the Los Angeles Superior Court. The court had once previously expressed concern about deleting the offending language from Code of Civil Procedure Section 259(e).

The Commission posed two alternative approaches to the Los Angeles Superior Court for its reaction. One approach would strike out the language relating to a court commissioner acting as a temporary judge “by written consent

of an appearing party.” The other approach would substitute for that language the constitutional requirement of a “stipulation of the parties litigant”.

We requested comment from the court in November, and again in February, but have had no response. The staff recommends that the Commission proceed to circulate a tentative recommendation on the matter. The court will have a further opportunity to respond during the comment period.

The staff believes the cleaner approach is simply to delete the offending language. However, a more user-friendly approach would import the language of the Constitution into the statute, where one would ordinarily expect to find procedural details of this nature:

**Code Civ. Proc. § 259 (amended). Court commissioners**

259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:

...

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, ~~or by written consent of an appearing party~~ on stipulation of the parties litigant. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

...

**Comment.** Subdivision (e) of Section 259 is amended to replace the provision for appointment of a commissioner as temporary judge on written consent of an appearing party with the constitutional standard for appointment of a temporary judge. See Cal. Const. Art. VI, § 21. Under the Constitution, written consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the Constitution, whether the stipulation of a party is required for designation of a temporary judge is determined by the party’s status as a “litigant”, not by the whether the party is “an appearing party”. See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P. 2d 53, 111 Cal. Rptr. 21 (1974); *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).

The attached draft tentative recommendation employs the user-friendly approach. The Commission should decide whether it wants to circulate this, or another version, for comment. The draft includes cleanup of the remainder of Section 259 previously identified by the Commission. We would circulate the tentative recommendation to the California Court Commissioners Association

and the Los Angeles Superior Court, as well as to our normal mailing list on judiciary and civil procedure matters.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

# CALIFORNIA LAW REVISION COMMISSION

Staff Draft  
TENTATIVE RECOMMENDATION

## Authority of Court Commissioners

March 2003

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN \_\_\_\_\_.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would repeal obsolete provisions of Code of Civil Procedure Section 259 relating to notarial functions of court commissioners. The recommendation would also harmonize the language of Section 259 relating to appointment of a court commissioner as temporary judge with the controlling constitutional provision.

This recommendation was prepared pursuant to Government Code Section 8298.

## AUTHORITY OF COURT COMMISSIONERS

1 Code of Civil Procedure Section 259 prescribes powers of court commissioners.  
2 Various provisions of Section 259 are either obsolete or inconsistent with  
3 governing law. The Commission recommends corrective legislation to modernize  
4 the statute.

### OBSOLETE PROVISIONS

5  
6 Code of Civil Procedure Section 259 has an ancient lineage, dating from 1872. It  
7 still includes provisions that suggest that the position of court commissioner is a  
8 county rather than a court position and is funded out of county rather than court  
9 funds,<sup>1</sup> that a court commissioner maintains an official seal distinct from that of  
10 the court,<sup>2</sup> and that a court commissioner performs notarial acts,<sup>3</sup> despite the fact  
11 that court commissioners no longer perform those functions.<sup>4</sup> A court  
12 commissioner acts as a subordinate judicial officer.<sup>5</sup>

13 The provisions of Code of Civil Procedure Section 259 highlighted below are  
14 obsolete and should be repealed:

#### **Code Civ. Proc. § 259. Court commissioners**

15  
16 259. Subject to the supervision of the court, every court commissioner shall  
17 have power to do all of the following:

18 (a) Hear and determine ex parte motions for orders and alternative writs and  
19 writs of habeas corpus in the superior court for which the court commissioner is  
20 appointed.

21 (b) Take proof and make and report findings thereon as to any matter of fact  
22 upon which information is required by the court. Any party to any contested  
23 proceeding may except to the report and the subsequent order of the court made  
24 thereon within five days after written notice of the court's action. A copy of the  
25 exceptions shall be filed and served upon opposing party or counsel within the  
26 five days. The party may argue any exceptions before the court on giving notice  
27 of motion for that purpose within 10 days from entry thereof. After a hearing  
28 before the court on the exceptions, the court may sustain, or set aside, or modify  
29 its order.

30 (c) Take and approve any bonds and undertakings in actions or proceedings, and  
31 determine objections to the bonds and undertakings.

32 (d) **Administer oaths and affirmations, and take affidavits and depositions**  
33 **in any action or proceeding in any of the courts of this state, or in any matter**

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1. See Code Civ. Proc. § 259(i) (deposit of fees in general fund of county).

2. The statute also refers to the seal as "engraved" and requires that the seal list the county where the commissioner resides rather than the county where the commissioner performs duties. Cf. Code Civ. Proc. § 259(j).

3. See Code Civ. Proc. § 259(d), (i), (k).

4. But see Civ. Code § 1181 (listing various officers authorized to take proof or acknowledgment of an instrument, including court clerks, court commissioners, judges, district attorneys, county counsels, etc.).

5. See Cal. Const. art. VI, § 22 (subordinate judicial functions).

1 **or proceeding whatever, and take acknowledgments and proof of deeds,**  
2 **mortgages, and other instruments requiring proof or acknowledgment for**  
3 **any purpose under the laws of this or any other state or country.**

4 (e) Act as temporary judge when otherwise qualified so to act and when  
5 appointed for that purpose, or by written consent of an appearing party. While  
6 acting as temporary judge the commissioner shall receive no compensation  
7 therefor other than compensation as commissioner.

8 (f) Hear and report findings and conclusions to the court for approval, rejection,  
9 or change, all preliminary matters including motions or petitions for the custody  
10 and support of children, the allowance of temporary spousal support, costs and  
11 attorneys' fees, and issues of fact in contempt proceedings in proceedings for  
12 support, dissolution of marriage, nullity of marriage, or legal separation.

13 (g) Hear actions to establish paternity and to establish or enforce child and  
14 spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

15 (h) Hear, report on, and determine all uncontested actions and proceedings  
16 subject to the requirements of subdivision (e).

17 **(i) Charge and collect the same fees for the performance of official acts as**  
18 **are allowed by law to notaries public in this state for like services. This**  
19 **subdivision does not apply to any services of the commissioner, the**  
20 **compensation for which is expressly fixed by law. The fees so collected shall**  
21 **be paid to the treasurer of the county, for deposit in the general fund of the**  
22 **county.**

23 **(j) Provide an official seal, upon which must be engraved the words "Court**  
24 **Commissioner" and the name of the county, or city and county, in which the**  
25 **commissioner resides.**

26 **(k) Authenticate with the official seal the commissioner's official acts.**

27 COURT COMMISSIONER AS TEMPORARY JUDGE

28 Subdivision (e) of Code of Civil Procedure Section 259 appears to authorize a  
29 court commissioner to act as a temporary judge on consent of a single party, in  
30 violation of the constitutional requirement of a stipulation of "the parties litigant."<sup>6</sup>

31 **California Constitution, Article VI, Section 21**

32 Article VI, Section 21 of the California Constitution provides for appointment of  
33 a temporary judge "on stipulation of the parties litigant." Cases under the  
34 constitutional provision have approved appointment of a temporary judge without  
35 stipulation of any party. This has occurred where both parties are present in court,  
36 a temporary judge acts, and no one objects. In that circumstance there is an  
37 "implied" or "tantamount" stipulation.<sup>7</sup>

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6. See Cal. Const. art. VI, § 21 ("On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.").

7. See, e.g., *Walker v. San Francisco Housing Authority*, 100 Cal. App. 4th 685, 122 Cal. Rptr. 2d 758 (July 30, 2002), *In re Brittany K.*, 96 Cal. App. 4th 805, 117 Cal. Rptr. 2d 813 (2002). A discussion of the implied stipulation doctrine appears in *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995).

1 If only one party is before the court, the absent party may in some circumstances  
2 be presumed to have impliedly stipulated to a temporary judge,<sup>8</sup> This doctrine has  
3 its limits, however, and there are situations in which a temporary judge is not  
4 authorized to act without the stipulation of the absent party.<sup>9</sup>

5 **Code of Civil Procedure Section 259(e)**

6 Code of Civil Procedure Section 259(e) states that a court commissioner may act  
7 as a temporary judge “by written consent of an appearing party.” This provision  
8 appears to be consistent with the constitutional requirement that a temporary judge  
9 may be appointed “on stipulation of the parties litigant” — provided there is only  
10 one appearing party. If there is more than one appearing party, then the language  
11 of Section 259(e) allowing a temporary judge on consent of “an” appearing party  
12 appears to be inconsistent with the Constitution.

13 Until 1989, Section 259(e) was silent concerning the need for a stipulation to  
14 enable a court commissioner to act as a temporary judge. The matter was governed  
15 by the Constitution. In 1989 the provision was amended to provide explicitly that a  
16 court commissioner might:<sup>10</sup>

17 (5) Act as a temporary judge when otherwise qualified so to act and when  
18 appointed for that purpose, or by written consent of the party appearing at the  
19 hearing where the action is either uncontested or the other party or parties are in  
20 default. While acting as temporary judge the commissioner shall receive no  
21 compensation therefor other than compensation as commissioner.

22 The 1989 language appears to have precisely captured the state of the law at the  
23 time. However, that language was believed to be defective because it was too  
24 narrowly drawn. Under it, a temporary judge could only be authorized where there  
25 was a hearing in open court at which a party gave written consent. This failed to  
26 cover the case where there is written consent but no open court hearing because  
27 the matter is submitted by the parties in writing. By implication, a temporary judge  
28 could not act in that case.

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8. See, e.g., *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 31 Cal. Rptr. 30 (1963) (defaulting party not a “litigant” within meaning of Constitution and therefore stipulation unnecessary); *Bill Benson Motors v. Macmorris Sales Corp.*, 238 Cal. App. 2d Supp. 937, 48 Cal. Rptr. 123 (1965) (party who had appeared in case but failed to appear for trial not a “litigant” within meaning of Constitution and therefore stipulation unnecessary).

9. See, e.g., *Yetenekian v. Superior Court*, 140 Cal. App. 3d 361, 189 Cal. Rptr. 458 (1983) (party who had appeared but refused to participate in trial for fear that participation would be construed as stipulation to temporary judge held to be a “party litigant” notwithstanding absence from courtroom); *Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194 (1984) (defaulting, nonappearing defendant who appears in post judgment proceeding may revoke implied stipulation to temporary judge for purpose of post judgment proceeding).

10. 1998 Cal. Stat. ch. 1105, § 5.

1 The provision was further amended in 1990 to eliminate the court hearing  
2 requirement.<sup>11</sup> However, that amendment appears to state an overly broad  
3 standard:

4 (e) Act as a temporary judge when otherwise qualified so to act and when  
5 appointed for that purpose, or by written consent of ~~the party appearing at the~~  
6 ~~hearing where the action is either uncontested or the other party or parties are in~~  
7 ~~default~~ an appearing party. While acting as temporary judge the commissioner  
8 shall receive no compensation therefor other than compensation as commissioner.

9 In one sense, the overly broad statutory language is immaterial because it is the  
10 Constitution that controls. If two parties appear before the court and one does not  
11 give written consent to a temporary judge, the Constitution will preclude use of a  
12 temporary judge regardless of the language of Section 259(e) (purporting to  
13 authorize a temporary judge on consent of “an” appearing party).

14 However, the statute on its face appears to restrict the traditional “implied  
15 consent” or “tantamount stipulation” doctrine of earlier cases. Moreover, the  
16 statute relies on a nebulous “appearing party” standard — it is not clear whether  
17 that language picks up prior case law giving a more expansive meaning to the term  
18 “party litigant.” Finally, the statute improperly suggests that the prescribed  
19 conditions under which a commissioner may act as a temporary judge are  
20 alternative rather than cumulative.

21 **Revision of Code of Civil Procedure Section 259(e)**

22 The Law Revision Commission recommends that the constitutional standard be  
23 substituted for the existing language of Code of Civil Procedure Section 259(e).  
24 The constitutional standard controls in any event, but a litigator should be able to  
25 find relevant controlling procedural detail in a logical place in the codes.

26 Section 259(e) would be amended to read:

27 **Code Civ. Proc. § 259 (amended). Court commissioners**

28 259. Subject to the supervision of the court, every court commissioner shall  
29 have power to do all of the following:

30 ...

31 (e) Act as a temporary judge when otherwise qualified so to act and when  
32 appointed for that purpose, ~~or by written consent of an appearing party o n~~  
33 ~~stipulation of the parties litigant~~. While acting as temporary judge the  
34 commissioner shall receive no compensation therefor other than compensation as  
35 commissioner.

36 ...

37 **Comment.** Subdivision (e) of Section 259 is amended to replace the provision  
38 for appointment of a commissioner as temporary judge on written consent of an  
39 appearing party with the constitutional standard for appointment of a temporary  
40 judge. See Cal. Const. Art. VI, § 21. Under the Constitution, written consent is not  
41 required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re*

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11. 1990 Cal. Stat. ch. 411, § 5.

1 Courtney H., 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995).  
2 Under the Constitution, whether the stipulation of a party is required for  
3 designation of a temporary judge is determined by the party's status as a  
4 "litigant", not by the whether the party is "an appearing party". See, e.g.,  
5 Sarracino v. Superior Court, 13 Cal. 3d 1, 529 P. 2d 53, 111 Cal. Rptr. 21 (1974);  
6 Barfield v. Superior Court, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).



## PROPOSED LEGISLATION

1 **Code Civ. Proc. § 259 (amended). Court commissioners**

2 259. Subject to the supervision of the court, every court commissioner shall have  
3 power to do all of the following:

4 (a) Hear and determine ex parte motions for orders and alternative writs and  
5 writs of habeas corpus in the superior court for which the court commissioner is  
6 appointed.

7 (b) Take proof and make and report findings thereon as to any matter of fact  
8 upon which information is required by the court. Any party to any contested  
9 proceeding may except to the report and the subsequent order of the court made  
10 thereon within five days after written notice of the court's action. A copy of the  
11 exceptions shall be filed and served upon opposing party or counsel within the five  
12 days. The party may argue any exceptions before the court on giving notice of  
13 motion for that purpose within 10 days from entry thereof. After a hearing before  
14 the court on the exceptions, the court may sustain, or set aside, or modify its order.

15 (c) Take and approve any bonds and undertakings in actions or proceedings, and  
16 determine objections to the bonds and undertakings.

17 ~~(d) Administer oaths and affirmations, and take affidavits and depositions in any~~  
18 ~~action or proceeding in any of the courts of this state, or in any matter or~~  
19 ~~proceeding whatever, and take acknowledgments and proof of deeds, mortgages,~~  
20 ~~and other instruments requiring proof or acknowledgment for any purpose under~~  
21 ~~the laws of this or any other state or country.~~

22 (e) Act as a temporary judge when otherwise qualified so to act and when  
23 appointed for that purpose, ~~or by written consent of an appearing party o n~~  
24 stipulation of the parties litigant. While acting as temporary judge the  
25 commissioner shall receive no compensation therefor other than compensation as  
26 commissioner.

27 ~~(f)~~ (e) Hear and report findings and conclusions to the court for approval,  
28 rejection, or change, all preliminary matters including motions or petitions for the  
29 custody and support of children, the allowance of temporary spousal support, costs  
30 and attorneys' fees, and issues of fact in contempt proceedings in proceedings for  
31 support, dissolution of marriage, nullity of marriage, or legal separation.

32 (g) (f) Hear actions to establish paternity and to establish or enforce child and  
33 spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

34 (h) (g) Hear, report on, and determine all uncontested actions and proceedings  
35 subject to the requirements of subdivision (e).

36 ~~(i) Charge and collect the same fees for the performance of official acts as are~~  
37 ~~allowed by law to notaries public in this state for like services. This subdivision~~  
38 ~~does not apply to any services of the commissioner, the compensation for which is~~

1 expressly fixed by law. The fees so collected shall be paid to the treasurer of the  
2 county, for deposit in the general fund of the county.

3 (j) Provide an official seal, upon which must be engraved the words “Court  
4 Commissioner” and the name of the county, or city and county, in which the  
5 commissioner resides.

6 (k) Authenticate with the official seal the commissioner’s official acts.

7 **Comment.** Former subdivisions (d), (i), (j), and (k) of Section 259 are repealed as obsolete. It  
8 should be noted that repeal of these provisions does not preclude a court commissioner from  
9 taking proof or acknowledgment of an instrument. See Civ. Code § 1181 (listing various officers  
10 authorized to take proof or acknowledgment of an instrument, including court commissioners.).

11 Former subdivision (e) is amended to replace the provision for appointment of a commissioner  
12 as temporary judge on written consent of an appearing party with the constitutional standard for  
13 appointment of a temporary judge. See Cal. Const. Art. VI, § 21. Under the Constitution, written  
14 consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re*  
15 *Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the  
16 Constitution, whether the stipulation of a party is required for designation of a temporary judge is  
17 determined by the party’s status as a “litigant”, not by the whether the party is “an appearing  
18 party”. See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P. 2d 53, 111 Cal. Rptr. 21  
19 (1974); *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).