

Memorandum 2003-27

**Civil Discovery: Nonsubstantive Reform
(Comments on Tentative Recommendation)**

The Commission has been exploring the concept of making the civil discovery statute more user-friendly by reorganizing the current cumbersome provisions into short sections that closely track the existing language and sequencing. This is strictly a nonsubstantive proposal. The tentative recommendation was finalized in February, along with a lengthy set of conforming revisions. To ensure adequate response time, the deadline to comment on those documents was June 30, 2003. The Commission received the following comments:

	<i>Exhibit p.</i>
1. Consumer Attorneys of California (June 26, 2003)	1
2. Richard L. Haeussler — general comments (June 24, 2003)	4
3. Richard L. Haeussler — proposed § 2016.040 (March 8, 2003)	5
4. Richard L. Haeussler — proposed § 2017.220(b) (March 10, 2003)	8
5. Richard L. Haeussler — proposed § 2032.510(f) (April 7, 2003)	9
6. State Bar Committee on Administration of Justice (June 27, 2003)	10

It is time for the Commission to consider the comments and decide whether to finalize its proposal for introduction in the Legislature.

(The Commission also received a letter from attorney Robert Andrews regarding the 35-item discovery limit for economic litigation procedures, and a number of other comments from attorney Richard Haeussler relating to specific provisions. Because those comments propose substantive reforms, we will present and analyze them in the Commission's substantive study of civil discovery, instead of in this study.)

COMMENTS ON THE PROPOSAL GENERALLY

The amount of response to the tentative recommendation is disappointing, particularly because we made special efforts to obtain input. As usual, we posted the tentative recommendation and the conforming revisions to the Commission's website, issued a press release to our normal list of recipients, and circulated the tentative recommendation to our mailing lists applicable to this topic. In

addition, we mailed the press release to numerous courts, law libraries, and bar associations, made several phonecalls soliciting comment, and sent personalized letters (including the tentative recommendation) to contacts at organizations such as the California Defense Counsel, California Judges Association, California Association of Collectors, Civil Justice Association of California, Consumers Union, Los Angeles County Superior Court, Nolo.com, Office of State Publishing, and Public Law Center. A notice regarding the tentative recommendation was also published in the April issue of the *California Bar Journal*. Despite those efforts, the Commission did not receive many comments.

The Commission is fortunate, however, to have gotten detailed comments from the Consumer Attorneys of California (“CAOC”), as well as a letter reporting the views of the State Bar Committee on Administration of Justice (“CAJ”). Richard Haeussler has also taken the time to review the tentative recommendation section by section and share his thoughts. We encourage other interested parties to make the effort to submit input at or before the Commission meeting scheduled for September 18-19, 2003, so that the Commission can take their opinions into account.

CAOC is an organization of more than 3,000 attorneys who represent consumers seeking redress for injuries. CAOC’s comments on the tentative recommendation are generally favorable. CAOC supports the objectives of enhancing the readability of the discovery provisions, simplifying the process of amendment, and generally making the law more accessible in the future. Exhibit p. 1. CAOC “believes that the Law Revision Commission should be credited with a fine effort to make the Civil Discovery sections more user friendly.” *Id.* at 3. According to CAOC, the tentative recommendation “makes substantial progress toward this goal.” *Id.*

Richard Haeussler, a Costa Mesa practitioner who is active in the National Lawyers Association, expresses similar views. He “strongly support[s]” the Commission’s proposed reorganization of the civil discovery statute. Exhibit p. 4. He finds it preferable to the current format, which he considers confusing and hard to follow. *Id.*

CAJ is less enthusiastic. CAJ is “a committee of attorneys from diverse practice areas, with expertise in civil procedure, court rules and administration, rules of evidence, and other matters having an impact on the administration of justice in civil cases.” Exhibit p. 10. The committee “appreciates the overall intent of the proposed, nonsubstantive reorganization of the statutes governing civil

discovery, and recognizes the potential advantages of that reorganization, as explained in the Tentative Recommendation.” *Id.* CAJ asserts, however, that there is “no compelling reason” to reorganize the discovery provisions, and cautions that “the status quo should not be changed for the sole purpose of a nonsubstantive reorganization.” *Id.* CAJ explains:

CAJ is concerned that the proposed revisions will result in additional and unnecessary transaction costs — particularly in the short run — to the detriment of litigants, attorneys, and the courts. Attorneys and the courts will be required to retool when dealing with discovery under the revised statutes, and to translate everything from a familiar statutory scheme into a new scheme. In addition, questions might arise concerning the application of existing case law to the construction of the reorganized statutes. CAJ understands that the “intent of the proposal is not to alter existing rights and duties relating to civil discovery.” (Tentative Recommendation, page 3). Notwithstanding the stated intent, and the Comments that would accompany any legislative changes, CAJ believes that attorneys could seize on minor modifications in structure or wording to raise questions or arguments that would not be raised under the existing statutes. The application of existing case law to the revised statutes could be a source of potential confusion. Legal research relating to the discovery statutes could also become more involved, because, at a minimum, there will be a need to cross-reference the revised statutes with the existing statutes.

Id.

CAJ’s concerns regarding the transition to the proposed new scheme are legitimate. Every law reform project, particularly one that involves moving and renumbering statutory material, entails a certain amount of disruption, which must be weighed against the anticipated benefits of the proposed reform. In CAJ’s view, the proposed reorganization would not “provide a commensurate benefit to justify the additional burden and expense that would be imposed.” *Id.* at 11.

The Commission has, however, taken steps to minimize the amount of disruption that would result from the reorganization. In particular, the tentative recommendation closely tracks both the wording and the organization of the current discovery statute. That should help prevent disputes over interpretation of the new provisions, facilitate reference to pertinent material, and forestall arguments over whether existing case law continues to apply. To further

minimize disruption, the new provisions are also numbered to correspond to the existing provisions from which they are drawn.

In addition, the tentative recommendation includes a disposition table, which would be published in the annotated codes. The disposition table, together with the Comments indicating the derivation of each proposed new section, would help to make the transition process manageable. The now ubiquitous usage of word processing would also facilitate the transition to the new numbering scheme. Code of Civil Procedure Section 5 would serve to make clear that the proposed new provisions, “so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.”

There is another step, however, that might further reduce the potential for transitional problems: The Commission could add an uncodified provision to its proposal, stating that the legislation is not intended to have any substantive impact. For example, the Commission could add a provision along the following lines:

Uncodified (added). Effect of act

SEC. _____. Nothing in this act is intended to substantively change the law of civil discovery.

Provisions like this are commonly used and can be very helpful in clarifying the nonsubstantive intent of a proposed reform. **We recommend including such a provision if the Commission decides to proceed with its proposal.**

That brings us back to the question of whether to go forward with the proposed reorganization. In light of the efforts that the Commission has made to minimize disruption, we are optimistic that the transition would not be overly burdensome. There would still be some transition costs, but we are encouraged by the positive reactions of CAOC and Mr. Haeussler. The proposed reform is intended to save attorneys and courts countless hours by enabling them to readily locate and refer to pertinent material in the discovery statute. Based on reactions previously expressed by some of the Commissioners, comments of the student who citechecked the tentative recommendation, and the staff’s own experience using the tentative recommendation in the company of discovery experts, we remain hopeful that it would accomplish that goal (as well as the other objectives of facilitating amendment and sound development of the law).

Consequently, the staff continues to believe that this project is worth pursuing. **Unless the Commission receives additional negative input, we recommend that it proceed with the reform.**

COMMENTS ON SPECIFIC PROVISIONS

If the Commission decides to continue working on this project, it will be necessary to resolve a number of minor issues relating to the drafting of specific sections, which were raised in Notes in the tentative recommendation. The comments on those issues are discussed below. For each issue, we have indicated how we propose to resolve it. We do not plan to discuss any of these issues at the meeting unless someone raises a concern.

(Unless otherwise specified, all statutory references are to the Code of Civil Procedure.)

Proposed Section 2016.030. Written stipulations regarding depositions and other discovery

CAOC prefers the proposed language in the Note (p. 2, lines 4-7) to the language in the draft (p. 1, lines 26-33). Exhibit p. 1. We propose to use the language in the Note, which is simpler than the alternative language.

Proposed Section 2016.040. Meet and confer declaration

Proposed Section 2016.040 provides: “A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.” The section is intended to help streamline the drafting of the many provisions in the Civil Discovery Act that require a meet and confer declaration. The Commission solicited input on whether that is a good approach.

CAOC “prefers the clear, straightforward, streamlined approach.” Exhibit p. 1. Mr. Haeussler is also “in favor of consolidation of the numerous provisions of the existing statutes into one section.” Exhibit p. 5. Based on those comments, we would stick with proposed Section 2016.040.

(Mr. Haeussler also makes some substantive suggestions regarding meet and confer declarations. Exhibit pp. 507. We plan to present and analyze those suggestions in the Commission’s substantive study of civil discovery.)

Proposed Section 2016.050. Service by mail

CAOC prefers the proposed language in the Note (p. 2, lines 35-38) to the language in the draft (p. 2, lines 27-31). Exhibit p. 1. We propose to use the language in the Note, which makes clear that the service rules of Section 1013 apply to a motion for a protective order, as well as a motion for discovery.

Proposed Section 2017.220. Discovery concerning plaintiff's sexual conduct

CAOC prefers the proposed language of subdivision (b) in the Note (p. 4, lines 41, to p. 5, line 5) to the language of subdivision (b) in the draft (p. 4, lines 23-27, 30-31). Exhibit p. 2. Mr. Haeussler does too. Exhibit p. 8. We propose to use the language in the Note, which is more clear and precise than the language in the draft.

Proposed Section 2025.340. Deposition recorded by audio or video technology

AB 2842 (Harman), 2002 Cal. Stat. ch. 1068, revised the Civil Discovery Act to encompass audio and video technology other than audiotape and videotape. Two references to audiotape and videotape technology in Section 2025 appear to have been overlooked. See Section 2025 (1)(2)(H), (1)(2)(I). Proposed Section 2025.340 would correct those apparent oversights. The Commission solicited comment on that approach.

CAOC supports the proposed approach. Exhibit p. 2. We propose to go forward with Section 2025.340 as drafted.

Proposed Section 2025.450. Sanctions where party deponent fails to appear

CAOC prefers the proposed language of subdivision (c) in the Note (p. 36, lines 9-20) to the proposed language of subdivision (c) in the draft (p. 34, line 41, to p. 35, line 11). Exhibit p. 2. We propose to use the language of subdivision (c) in the Note, which clarifies the distinction between the two types of sanctions available (one in favor of the party who noticed the deposition and the other in favor of any other party who attended the deposition).

Proposed Sections 2025.520, 2025.530, and 2030.090

With regard to each of these sections, the Commission solicited comment on whether the phrase "under this section" should be included as shown in brackets in the draft (p. 40, line 32; p. 41, line 41; p. 56, line 15). In each case, CAOC says that the phrase should be included. Exhibit pp. 2. We propose to include the phrase in each of these sections in the next draft, because it improves clarity.

Proposed Section 2032.030. Alternative procedures and restrictions

Proposed Section 2032.030 (based on existing Section 2032(e)) would provide: “In lieu of the procedures and restrictions specified in Article 2 (commencing with Section 2032.210) and Article 3 (commencing with Section 2032.310), any physical or mental examination may be arranged by, and carried out under, a written agreement of the parties.” The Commission solicited comment on whether the provision should be deleted as redundant because proposed Section 2016.030 (based on existing Section 2021) permits parties to modify discovery procedures by stipulation unless the court orders otherwise.

CAOC states that “§ 2032.030 should be deleted as redundant.” Exhibit p. 2. We propose to eliminate the provision from the next draft and make corresponding revisions in proposed Sections 2032.410, 2032.610, and the Disposition Table.

Proposed Sections 2032.510, 2032.620, 2032.650, 2033.080, and 2034.250

With regard to each of these sections, the Commission solicited comment on whether the phrase “under this section” should be included as shown in brackets in the draft (p. 77, line 24; p. 79, line 79; p. 80, lines 30-31; p. 85, line 8; p. 94, line 28). In each case, CAOC says that the phrase should be included. Exhibit pp. 2-3. Mr. Haeussler agrees with regard to Section 2032.510. Exhibit p. 9. He has not commented on the other sections. We propose to include the phrase “under this section” in each of the five provisions (Sections 2032.510, 2032.620, 2032.650, 2033.080, and 2034.250) in the next draft, because it improves clarity.

Proposed Government Code Section 12963.3. Depositions

The Commission solicited comment on the proposed conforming revision of Government Code Section 12963.3, because the existing cross-reference to Code of Civil Procedure Section 2018(a) appears erroneous. CAOC supports the treatment proposed in the tentative recommendation. Exhibit p. 3. We propose to proceed with that approach.

Proposed Insurance Code Section 11580.2. Uninsured and underinsured motorist coverage

The Commission solicited comment on the proposed conforming revision of Insurance Code Section 11580.2(f)(5), because the existing language of that provision does not make sense (it refers to language in Code of Civil Procedure Section 2019(b)(2) that does not appear in that provision). CAOC states that the

confusing material in Insurance Code Section 11580.2(f)(5) should be eliminated. Exhibit p. 3. We propose to delete Section 11580.2(f)(5) from the next draft, renumber the remainder of subdivision (f) accordingly, and check whether any additional revisions are necessary to reflect these changes.

NEW LEGISLATION

If the Commission decides to proceed with this proposal, we will have to revise the draft to incorporate legislation enacted in 2003. As best we can tell so far, that would not be too difficult, because only a few bills would affect the part of the code that the Commission is proposing to reorganize.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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

RE: Comments on Civil Discovery Recommendations

June 26, 2003

Dear Ms. Gaal:

The Consumer Attorneys of California is pleased to have this opportunity to comment upon the California Law Revision Commission's Tentative Recommendations on Civil Discovery. Consumer Attorneys supports the stated intents to "enhance the readability, simplify the process of amendment and to generally make the law more accessible in the future.

Our comments refer to Document #J-504, February 2003: Civil Discovery: Nonsubstantive Reform.

Proposed Statute §	Pg. No. of J-504:	Comment:
2016.030	1-2	The alternative phrasing "any method of discovery permitted under § 2019.010" is more concise and provides adequate reference to the types of discovery covered.
2016.040	2	Consumer Attorneys prefers the clear, straightforward, streamlined approach.
2016.050	2	It would be preferable to "broaden the language to include protective orders."

2017.220	4-5	The proposed revision that specifies <i>under subdivision (a)</i> is more clear.
2025.340	29-31	The changes that encompass audio and video technology, succinctly reflect the range of technology. It is best to remove the more limiting “audiotape & videotape.”
2025.450	34-36	The proposed revision is preferable. It clarifies the two sanctions: one in favor of party who noticed the deposition and the other in favor of “any other party.”
2025.520	39-41	The language should be changed to state “motion to suppress a deposition under this section.”
2025.530	41-42	The language should be changed to state “motion to suppress a deposition under this section.”
2030.080	55-56	Language should clearly state “protective order under this section.”
2032.030	72	§ 2032.030 should be deleted as redundant.
2032.510	77-78	The reference should be to “protective order under this section.”
2032.620	79	There should be a change in the language to: “motion to compel delivery of medical reports under this section.” This adds more specificity.
2032.650	80-81	The language should read “motion to compel delivery of medical reports under this section.”

2033.080	84-85	Consumer Attorneys supports the change. The language should read: “protective order under this section.”
2034.240	93-95	The language should read: “protective order under this section.”
Conforming Revision Cal Gov Code § 12963.3	123-124	The proposed change makes a logical correction and updates language to refer to the appropriate section.
Conforming Revision Cal Ins Code § 11580.2	124-126	The “confusing reference” should be eliminated.

The Consumer Attorneys believes that the Law Revision Commission should be credited with a fine effort to make the Civil Discovery sections more user friendly. The Tentative Recommendation makes substantial progress toward this goal. If you have any questions please feel free to contact me at our Sacramento Office.

Sincerely,

Bruce M. Brusavich
 President, Consumer Attorneys of California
 770 L Street, Suite 1200
 Sacramento, CA 95814

DATE: June 24, 2003

FROM: Richard L. Haeussler
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Newport Beach, CA 92585-5007
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haeu@ix.netcom.com

Law Revision Commission
RECEIVED

JUN 27 2003

File: J504

TO: Barbara Gaal, Staff Counsel
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Rm D-1
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E-Mail: bgaal@clrc.ca.gov

FAX 650-494-1827
ph: 650-494-1335

RE Comments on General Format of Reorganization of
Civil Discovery Statutes: Studies J-503 & J-504

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Dear Ms. Gaal:

I STRONGLY SUPPORT the Commissions General Reorganization of the
Civil Discovery Statute and its new self contained format.

I believe that the current format is confusing, and hard to follow in that
it requires the reader/user to go back and forth the several sections to
find the applicable provision.

FROM: Richard L. Haeussler
P. O. Box 10757
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714-641-9110; FAX 714-641-5016
haeu@ix.netcom.com

March 8, 2003

Law Revision Commission
RECEIVED

MAR 12 2003

TO: Barbara Gaal, Staff Counsel
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Rm D-1
Palo Alto CA 94303-4739
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File: J-503

FAX 650-494-1827
ph: 650-494-1335

RE Comments on Section 2016.040 Meet and Confer
Declaration
Civil Discovery Recommendations Studies J-503 & J-504

-
- 1. I am in favor of consolidation of the numerous provisions of the existing statutes into one section.**
 - 2. I would suggest that either of the two following provisions be used.**
 - 3. I believe that the Option # two, based upon the old Orange County Superior Court Rule 504, clearly sets forth the obligation to participate in a Meet and Confer meeting. Further it places the burden on the parties to have two meetings, one before the filing of the motion and one prior to the hearing date of the motion in an effort to resolve the issues prior to having court intervention. Because of limited budgets, and limited judicial resources, I believe that the burden should be placed on the parties to resolve the matter, prior to having court intervention.**

OPTION # 1

2016.040. A *separate* meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt *prior to the filing of the motion* at an informal resolution of each issue presented by the motion.

3. The following procedure is drawn by the "old" Orange County Superior Court Rule 504, which had a Meet and Confer requirement. The requirements of the rule CLEARLY set forth the obligation to prepare and file meet and confer declarations.

OPTION # 2

2016.040. Meet and Confer Declaration

a. For the purpose of this rule, the term "counsel" shall include parties appearing in propria persona.

b. Prior to the filing of any motion governed by this Title [or "by Title 4"], counsel for the parties shall meet, either in person or telephonically, in a good faith effort to eliminate the necessity of the filing of the motion or to eliminate as many of the disputes between the parties as possible.

[1]. It shall be the responsibility of the counsel for the moving party to arrange the time and place of the conference. Counsel for the opposing party shall meet with counsel for the moving party within ten [10] days from the moving parties' counsel's request to so meet, unless both counsel agree, in writing, to a later or earlier date.

c. Counsel for the moving party shall accompany the motion with a separate declaration summarizing the efforts to resolve the remaining issues in dispute to be presented by the motion.

d. Prior to the hearing of any motion governed by this Title [or "by Title 4"], and not less than ten [10] calendar days before the hearing of the motion, Counsel for moving and responding parties, shall meet and confer in person or telephonically, in an effort to resolve the remaining issues and differences at a time and place set by counsel for the moving party.

e. If the parties shall resolve all of the remaining issues, it shall be the duty of the counsel for the moving party to summarize in writing the issues resolved, to obtain from the opposing counsel a confirmation of the agreement and to notify the court of the issues resolved at least five [5] court days prior to the hearing.

f. If counsel are unable to resolve all of their differences, each counsel shall at least five [5] court days prior to the hearing, file and serve a statement summarizing the issues resolved, and the issues remaining in dispute as well as the respective positions taken by each.

g. Each statement shall be signed under penalty of perjury by each counsel.

h. If the court finds that there was no good reason for the refusal or failure to participate in, or the refusal or failure to resolve the dispute, it may order any persons at fault to pay to any party the amount of that party's reasonable expenses, including attorneys fees, incurred in attending the good faith meeting and / or in making or resisting the motion.

i. A failure to comply with this section may result in the motion being denied, taken off calendar or continued in the discretion of the court.

**MESSAGE FROM RICHARD HAEUSSLER
REGARDING PROPOSED SECTION 2017.220(b)**

Date: March 10, 2003
To: bgaal@clrc.ca.gov
From: haeu@ix.netcom.com
Subject: Study J-504 Section 2017.220(b)

Message: I agree with the Commission Staff that the proposed revision in the Note to Section 2017.220(b) would make it clear that the provisions of the section are directed to the making of a motion under Sec 2017.220(a)

I do not consider this a substantial change, but a change which corrects what appears to be a piecemeal drafting error.

DATE: April 7, 2003

**FROM: Richard L. Haeussler
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714-641-9110; FAX 714-641-5016
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Law Revision Commission
RECEIVED

APR 9 2003

**TO: Barbara Gaal, Staff Counsel
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**RE Comments on Section 2032.510(f)
Civil Discovery Recommendations Studies J-503 & J-504**

- I agree with the Commission's suggested addition of "under this section".

It makes it clear as to when it applies.

MEMORANDUM

TO: The California Law Revision Commission

FROM: The State Bar of California's Committee on Administration of Justice

DATE: June 27, 2003

SUBJECT: Civil Discovery: Nonsubstantive Reform [Study J-504]

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the February 2003 Tentative Recommendation of the California Law Revision Commission ("CLRC"), *Civil Discovery: Nonsubstantive Reform*, and the related Tentative Recommendation dealing with conforming statutory revisions. CAJ welcomes the opportunity to submit these comments.

CAJ appreciates the overall intent of the proposed, nonsubstantive reorganization of the statutes governing civil discovery, and recognizes the potential advantages of that reorganization, as explained in the Tentative Recommendation. CAJ believes, however, that there is no compelling reason to reorganize and modify the discovery statutes as proposed. CAJ does not perceive a problem with the existing structure, and believes the status quo should not be changed for the sole purpose of a nonsubstantive reorganization.

More significantly, CAJ is concerned that the proposed revisions will result in additional and unnecessary transaction costs – particularly in the short run – to the detriment of litigants, attorneys, and the courts. Attorneys and the courts will be required to retool when dealing with discovery under the revised statutes, and to translate everything from a familiar statutory scheme into a new scheme. In addition, questions might arise concerning the application of existing case law to the construction of the reorganized statutes. CAJ understands that the "intent of the proposal is not to alter existing rights and duties relating to civil discovery." (Tentative Recommendation, page 3). Notwithstanding the stated intent, and the Comments that would accompany any legislative changes, CAJ believes that attorneys could seize on minor modifications in structure or wording to raise questions or arguments that would not be raised under the existing statutes. The application of existing case law to the revised statutes could be a source of potential confusion. Legal research relating to the discovery statutes could also become more involved, because, at a minimum, there will be a need to cross-reference the revised statutes with the existing statutes.

By way of background, CAJ is a committee of attorneys from diverse practice areas, with expertise in civil procedure, court rules and administration, rules of evidence, and other matters having an impact on the administration of justice in civil cases.

In sum, even if the proposed reorganization would provide some, ultimate benefit, CAJ does not believe the reorganization would provide a commensurate benefit to justify the additional burden and expense that would be imposed.

DISCLAIMER:

This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.