Study J-103 November 4, 2004

Memorandum 2004-53

Oral Argument in Civil Procedure (Discussion of Issues)

INTRODUCTION

This study responds to a joint request from the Chair and Vice Chair of the Senate Judiciary Committee that the Law Revision Commission undertake a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument. A copy of their letter is attached at Exhibit p. 1.

The Commission considered the Judiciary Committee letter at its September 2004 meeting and agreed to undertake the requested study. The Commission decided to commence work on the study forthwith, since it appears to fall within the Commission's authority to correct technical and minor substantive statutory defects pursuant to Government Code Section 8298.

To eliminate any doubt about the Commission's authority, the Commission also will seek to have the study included in the next concurrent resolution of the Legislature establishing the Commission's Calendar of Topics. This would eliminate any question of jurisdiction, enable the Commission to recommend substantive changes to the law if the study shows they are needed, and keep the Legislature and interested parties apprised of the Commission's work.

A CASE IN POINT

The matter is cogently illustrated by the opinion of the Court of Appeal in *Gwartz v. Superior Court*, 71 Cal. App. 4th 480, 83 Cal.Rptr.2d 865 (1999):

> Sometime ago, a handful of judges on the local superior court bench began deciding summary judgment motions without, according the parties, the benefit of oral argument. The decision to rule from behind closed doors apparently was based on some loose dicta in *Sweat v. Hollister* (1995) 37 Cal.App.4th 603 [43 Cal.Rptr.2d 399] (disapproved on another point in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 609, fn. 5 [71 Cal.Rptr.2d 830, 951 P.2d 399]) to the

effect that law and motion courts may decide motions without hearing oral argument.

In *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257 [77 Cal.Rptr.2d 781], this court took a long, hard look at the language of Code of Civil Procedure section 437c, and came to the inescapable conclusion that, as now drafted, it requires oral argument on summary judgment motions. This court held that while trial judges "retain extensive discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures," they may not refuse to hear oral argument. (66 Cal.App.4th at p. 265.)

We thought — incorrectly, as it turned out — that the trial courts would simply follow our opinion even if they disagreed with it. Stare decisis and all that stuff. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937] ["Decisions of every division of the District Courts of Appeal are binding upon ... all the superior courts of this state"]; cf. Cal. Code Jud. Conduct, canon 3B.) But sometimes it seems as though we have to remind the lower court there is a judicial pecking order when it comes to the interpretation of statutes.[1]

Here, defendants filed a motion for summary adjudication of issues in a civil action concerning a boundary line dispute. The trial court did not hear oral argument but simply denied the motion. It may well be after hearing oral argument that the trial court will again deny it. But the possible correctness of the court's ruling is not a proper basis on which to ignore the fact that the court was required by Code of Civil Procedure section 437c to hear oral argument and it did not. (*Mediterranean Construction Co. v. State Farm Fire & Casualty Co.*, *supra*, 66 Cal.App.4th at p. 265.)

...

1. The Supreme Court has acknowledged our disagreement with *Sweat*, but has not considered the validity of either decision. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1248, fn. 10 [82 Cal.Rptr.2d 85, 970 P.2d 872].) The trial court should reflect, however, that our holding in *Mediterranean* is clear while the language in *Sweat* is dictum.

BACKGROUND

The Judiciary Committee's request to the Commission was prompted by legislation introduced by Senator Bill Morrow in 2004 — SB 1249 (Morrow). The legislation would have defined the word "hearing" as used in the Code of Civil Procedure and state that the term, when applied to a demurrer, motion, or order to show cause, means oral argument by moving and opposing parties on a

record amenable to written transcription, unless affirmatively waived by the parties. See Exhibit p. 3.

In 2000, in response to ongoing problems of the type illustrated by *Gwartz*, Rule 324 of the California Rules of Court (regarding tentative ruling procedures and hearing after announcement of a tentative ruling) was amended. It was believed that the judges who had been denying oral argument would, in conformance with the new procedures detailed in Rule 324, allow oral argument before making a final ruling and issuing any order.

However, in 2001 and 2002, two judges in San Diego County were denying civil litigants oral hearings on motions. In early 2004, three judges in Orange County were denying civil litigants oral hearings on motions.

The Conference of Delegates of California Bar Association twice passed a resolution recommending that legislation be sponsored to amend Code of Civil Procedure Section 17 to add a definition of "hearing" and was the sponsor of the Morrow bill. The introduction of SB 1249 alerted the Judicial Council of California that some judges in San Diego and Orange Counties continued to deny oral argument after issuing a "tentative" ruling, in violation of Rule 324.

The Judicial Council immediately contacted the presiding judges of these courts and demanded compliance with Rule 324. The presiding judges met with the judges who were not complying with the Rules of Court and corrected their practices, reviewed the judges' websites to eliminate any tentative ruling practices that were inconsistent with Rule 324, and amended local court rules on tentative ruling procedures to conform to Rule 324. The presiding judges of the affected courts have provided written assurance to the Administrative Office of the Courts that the practices of individual judges in denying oral argument have been discontinued.

There is no evidence that noncompliance with Rule 324 remains a problem. However, the Senate Judiciary Committee letter suggests that a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument.

SCOPE OF STUDY

The Judiciary Committee letter requests that the Commission undertake a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument.

The request is not limited to a review of the tentative ruling process, nor to a review of "hearings" under the Code of Civil Procedure. In fact, the Judiciary Committee letter indicates that under the case law, parties may be entitled to oral argument even with respect to a motion or matter for which the statute does not use the word "hearing". That could occur, for example, where a statute requires a court determination on a motion or petition, or provides for argument on a motion or petition, without specific reference to a hearing.

The staff suggests that we adopt a couple of pragmatic parameters for this study, in order to impose manageable bounds on it. Principally, we would take our lead from the Committee's reference to the Code of Civil Procedure. Their concern is with general civil practice in the courts.

Therefore, we would eliminate criminal practice from consideration under this study. Although case law does address the right to oral argument in criminal proceedings, there are special constitutional considerations that may apply in criminal proceedings.

We would also eliminate from consideration administrative hearings. Special rules apply in the quasi-adjudicative process. Our focus here should be on the judicial process.

And we would eliminate from consideration arbitration procedure, at least where the arbitration is contractual. The right to oral argument in that situation is within the control of the parties.

We would not review special court procedures provided for under other state codes. While some 260+ provisions of the Code of Civil Procedure use the term "hearing" (not to mention the several dozen statutes that require the court to "hear" and determine an issue), some 12,000+ provisions of other codes also use that term. We have not tried to categorize those provisions, but undoubtedly the bulk of them deal with administrative hearings. Of those that deal with court proceedings, most will be unique to the procedural context in which they occur. We do not have the resources to review those proceedings; we would stick to general civil procedure as developed in the Code of Civil Procedure.

Appeals, original writ proceedings, and other motions in the Supreme Court, Court of Appeal, or Appellate Division of the Superior Court would fall within the scope of a review of hearings under the Code of Civil Procedure. The law governing oral argument in appellate court proceedings is clearer and somewhat different from the law governing oral argument in trial court proceedings.

The right of counsel to appear and orally argue is generally recognized in an appeal or original proceeding that is decided on the merits by a written opinion in an appellate court. 9 B. Witkin, *California Procedure*, Appeals § 663 (4th ed. 1997). The right is of constitutional dimension in California, due to the requirement that judgment be concurred in by a majority of judges present at the argument. See Cal. Const. art. VI, §§ 2 (Supreme Court) and 3 (Court of Appeal). See also *Metropolitan Water Dist. v. Adams*, 19 Cal.2d 463, 468, 12 P. 2d 25 (1942):

> But from the constitutional provision concerning argument it does not follow that the parties are entitled to oral argument in all matters passed upon by the court in bank. When not conducting an open session, the court is convened in executive sessions at least two times each week. At these sessions numerous matters are ruled upon, such as applications for writs, petitions for transfer from the District Courts of Appeal, and petitions for rehearing of our own decisions. These matters are disposed of by order of at least four members of the court, but no oral argument thereon is provided for by the Constitution or otherwise permitted, and no grounds for the rulings are stated in writing, except in very rare cases in the discretion of the court.

In a criminal appeal, "The right to oral argument on appeal is recognized in the California Rules of Court, the Penal Code, the state Constitution, and prior decision of this court." *People v. Brigham*, 25 Cal. 3d 283, 285, 157 Cal. Rptr. 905, 599 P.2d 100 (1979).

Justice Newman dissented in *Brigham* on the basis of his belief that traditional boundaries of the right to oral argument are broader than the constitution requires. He expressed concern about serious overload in the appellate courts, and felt that many improvements are essential. "It would be unfortunate if needed experiments and reforms were blocked by archaic assumptions as to how, in fact, oral argument most efficiently helps promote justice." 25 Cal. 3d at 316.

However, the Supreme Court has not taken up Justice Newman's invitation to narrow the circumstances in which oral argument is required on appeal. In fact, the court has made clear that the right to an oral argument on appeal applies in a civil as well as a criminal case. *Moles v. Regents of University of California*, 32 Cal. 3d 687, 187 Cal. Rptr. 557, 654 P. 2d 740 (1982).

In a case decided in February 2004, the Supreme Court reaffirmed the right to oral argument on appeal. *People v. Pena*, 32 Cal. 4th 389, 9 Cal. Rptr. 3d 107, 83 P.3d 506 (2004), involved an appeal in a criminal case. The Court of Appeal in that case had issued a tentative opinion against the defendant, informed him of the right to oral argument, and discouraged him from exercising that right by suggesting that (1) the Court of Appeal had already finally decided the case and would not be affected by oral argument and (2) appellate counsel might face adverse consequences if oral argument were requested. The defendant waived oral argument, and took the case to the Supreme Court.

The Supreme Court in *Pena* reversed the judgment of the Court of Appeal and remanded the case for oral argument. It ordered the Court of Appeal to discontinue using its oral argument waiver form. "By suggesting the Court of Appeal already has decided the case without oral argument and that oral argument, if requested, would have no impact on its decision, the oral argument waiver notice here has the potential to improperly discourage the exercise of the right to present oral argument on appeal." 32 Cal. 4th at 401.

The Supreme Court made clear its intention not to discourage experimentation by the Courts of Appeal through adoption of procedural innovations designed to streamline the appellate process. The tentative opinion process itself, which is intended to maintain the quality and integrity of the judicial process in the face of an increasing caseload, is not improper. Other Courts of Appeal have drafted and used a variety of oral argument waiver notices that do not suffer from the same defects as the notice used in *Pena*.

It should be noted that the right to oral argument on appeal does not extend to every decision on the merits in the appellate courts. California law does not grant a right to present oral argument in a proceeding for issuance of a peremptory writ of mandate or prohibition in the first instance (as opposed to a proceeding for issuance of an alternative writ or an order to show cause, in which there is a right to oral argument). *Lewis v. Superior Court*, 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872 (1999). Nor is there a right to oral argument when the Supreme Court considers an attorney's request for review of a State Bar

Court disbarment recommendation. *In re Rose*, 22 Cal. 4th 430, 93 Cal. Rptr. 2d 298, 993 P.2d 956 (2000).

Because the right to oral argument on appeal is clear, and is of constitutional dimension, the staff believes the Commission should so report to the Legislature, but should not recommend codification of the law on the matter.

OVERVIEW OF TRIAL COURT PROCEEDINGS

A timely MCLE article in *California Lawyer* provides an overview of the right to oral argument in Superior Court. The following discussion is adapted from Thomas, *The Rites and Rights of Oral Arguments*, California Lawyer 40-41 (Sept. 2004):

Introduction

Oral argument is central to our legal tradition. Indeed, it has been opined that "Oral argument may lift up the fallen or cause the tottering to fall." *TJX Cos., Inc. v. Superior Court*, 87 Cal. App. 4th 747, 754, 104 Cal. Rptr.2d 810 (2001). When an attorney appears in a courtroom to advocate a position to the judge, according to one, "the judicial process loses its arid, abstruse, and remote character. A lively interchange between counsel and the bench, not possible by the submission of written briefs, may lead a judge to rethink his or her position and even alter the outcome of the proceeding." *Lewis v. Superior Court*, 19 Cal. 4th at 1266 (Kennard, J., dissenting).

As another judge has poetically noted, "An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!" Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1977). Or, put in more down-to-earth fashion, oral argument can "clear the air" — and "is often as effective as a catalytic converter." *TJX Cos.*, 87 Cal. App. 4th at 755.

Public Policy and Due Process

Despite the burden of heavy caseloads, recent opinions have emphasized the critical need for a party to have its "day in court." *Medix Ambulance Serv., Inc. v. Superior Court*, 97 Cal. App. 4th 109, 112, 118 Cal.Rptr. 2d 249 (2002). One noted cryptically that "Justice unseen is justice undone." *TJX Cos.*, 87 Cal. App. 4th at 755. A court must not only "be fair to all litigants," according to another opinion, but must also "appear to be so." *Solorzano v. Superior Court*, 18 Cal. App. 4th 603,

615, 22 Cal.Rptr. 2d 401 (1993). By allowing for oral argument, public visibility and accountability of the judicial process is significantly enhanced. *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co.*, 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781 (1998). Although oral argument "may not be the sine qua non for accurate judicial decision-making," admitted one court, "the quality and appearance of justice is always improved when a judge listens before he or she decides." *Cal-American Income Prop. Fund VII v. Brown Dev. Corp.*, 138 Cal. App. 3d 268, 273 fn. 3, 187 Cal. Rptr. 703 (1982).

Ultimately, because of basic due process concerns, courts have admitted that they are "on shaky ground where they entirely bar parties from having a say." *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 742, 104 Cal. Rptr. 2d 803 (1993); see also *Monarch Healthcare v. Superior Court*, 78 Cal. App. 4th 1282, 1286 (2000) (criticizing court orders that "issue like a bolt from the blue out of the trial judge's chambers"), *Gwartz v. Superior Court*, 71 Cal. App. 4th 480, 481-2 (1999) (lower court must allow oral argument on summary judgment motion — "Sometimes it seems as though we have to remind the lower court there is a judicial pecking order when it comes to the interpretation of statutes").

In short, one court concluded simply that "It is wise public policy to conduct judicial proceedings in the sunshine, unless there is a very good reason not to do so." *TJX Cos.*, 87 Cal. App. 4th at 754.

A Right to Oral Argument?

All this notwithstanding, California courts have long held that a party does not have an automatic right to present oral argument on every kind of motion brought before a court. *Niles v. Edwards*, 95 Cal. 41, 43, 30 P. 134 (1892). And just because a statute provides for a "hearing" does not necessarily mean a party must be given an opportunity to orally argue the case. *Medix*, 97 Cal. App. 4th at 113.

In the absence of a clear legislative directive in a statute regulating oral argument, a court will consider whether the statutory scheme — read as a whole, in context, and taking into account its nature and purpose — encompasses an oral argument. That may include analyzing whether the judge acts as a fact finder or adjudicates an issue at the hearing, as well as whether any procedural remedy, such as making an evidentiary objection or orally moving to continue, is provided for during the hearing. *Titmas*, 87 Cal. App. 4th at 741; *TJX Cos.*, 87 Cal.

App. 4th at 751; *Marriage of Dunn-Kato & Dunn*, 103 Cal. App. 4th 345, 348, 126 Cal.Rptr. 2d 636 (2002).

Additionally, a court may consider whether the proceeding involves a critical pretrial matter that is of considerable significance to a party, such as summary judgment, and that mandates a hearing. See *Mediterranean*, 66 Cal. App. 4th at 266-7.

Finally, a court may look to whether the motion or other pretrial proceeding involves a real and genuine dispute or whether oral argument would simply amount to an "empty gesture." See *Lewis*, 19 Cal. 4th at 1258-59.

The right to oral argument has been explicitly recognized in the following types of matters:

- **Motion to quash or dismiss for lack of jurisdiction.** *Marriage of Lemen*, 113 Cal. App. 3d 769, 784, 170 Cal. Rptr. 642 (1980).
- **Summary judgment motion.** *Brannon v. Superior Court*, 114 Cal. App. 4th 1203, 1208-13, 8 Cal.Rptr. 3d 491 (2004); *Mediterranean*, 66 Cal. App. 4th at 265; *Gwartz*, 71 Cal. App. 4th 480.
- **Demurrer.** See *Medix*, 97 Cal. App. 4th at 113-15 (sexual harassment complaint against employer); *TJX Cos.*, 87 Cal. App. 4th at 755 (whether suit should proceed as a class action).
- **Discovery motion involving attorney-client privilege.** *Titmas,* 87 Cal. App. 4th at 744-5.
- **Motion to treat party as vexatious litigant.** *Bravo v. Ismaj*, 99 Cal. App. 4th 211, 225, 120 Cal.Rptr. 2d 879 (2002).
- **Motion for pretrial writ of attachment.** *Hobbs v. Weiss*, 73 Cal. App. 4th 76, 86 Cal.Rptr.2d 146 (1999).
- **Motion for appointment of receiver.** See *Cal-American*, 138 Cal. App. 3d at 273, fn. 3.
- **Sanctions motion.** *Marriage of Lemen*, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

As a matter of good practice, a court should allow oral argument whenever it is in doubt about any relevant matter "because that is precisely when oral argument may be most beneficial." *TJX Cos.*, 87 Cal. App. 4th at 755. As Yogi Berra said, "You observe a lot by watching." *The Jurisprudence of Yogi Berra*, 46 Emory L.J. 697, 701 (1997).

Oral argument should also be allowed when a substitute judge is filling in for the judge to whom the matter is regularly assigned. "Hearing oral argument is one of the best ways for substitute judges to demonstrate to the satisfaction of the

parties and the public that judicial responsibility has been exercised rather than abdicated." *TJX Cos.*, 87 Cal. App. 4th at 755.

Although a party has a right to oral argument in connection with certain types of motions, a court retains substantial discretion to impose reasonable limitations, including limiting the time of argument. *Wilburn v. Oakland Hosp.*, 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989); *Sweat v. Hollister*, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995); *Brannon*, 114 Cal. App. 4th at 1211; *Mediterranean*, 66 Cal. App. 4th at 265.

And a court may refuse to allow a party oral argument against a motion or demurrer if the party fails to file timely invoke the procedure or file written opposition to it. *Brannon*, 114 Cal. App. 4th at 1211; Weil & Brown, Cal. Proc. Guide: *Civ. Pro. Before Trial* §9:168 (Rutt. Grp. 2004).

APPROACHES TO CLARIFICATION OF THE LAW

There are two obvious approaches to clarification of the law:

- Codify general standards that a court must apply in determining whether to allow oral argument on a particular matter.
- Review the various hearings under the Code of Civil Procedure and specify on a case by case basis whether oral argument must be allowed for that type of hearing.

A combination of these two approaches is what, in effect, is going on in the courts at present. Courts are seeking to ascertain legislative intent by applying both general standards and specific context. See, e.g., *Titmas*, 104 Cal.Rptr.2d at 807:

> In the absence of a clear legislative directive for or against oral hearings, we examine the applicable statutory language and consider the context. In particular, we look to the following factors: (1) Does the statutory scheme, read as a whole, encompass an oral hearing? (2) Do the proceedings involve critical pretrial matters of considerable significance to the parties? and (3) Does the motion or other pretrial proceeding involve a real and genuine dispute?

While the approach of specifying whether an oral argument is required on a case by case basis would provide greater clarity and certainty, there are a number of drawbacks to it. First, under existing law oral argument may be required for a particular type of motion in some instances but not in others. Factors in determining whether oral argument must be allowed include whether

the motion raises a substantial issue, and the importance of the decision to a party's case.

Moreover, the effort to categorize the various hearings under the Code of Civil Procedure would have only temporal value. It is likely that, as new hearings are added to the Code, the Legislature will neglect to specify whether oral argument is required. This will throw us back on general principles. In addition, the Legislature's silence with respect to a newly created hearing could be read to signal an intent not to require oral argument.

That having been said, it is possible that some types of hearings necessarily mandate oral argument. A motion for summary judgment, for example, which could terminate a party's case, probably would always carry with it the right to oral argument.

It is worth surveying the sources of law on the matter before turning to specifics. Those sources are the Constitution, statutes, and court rules.

Constitution

Due process of law requires that a litigant be afforded notice and an opportunity to be heard. While the courts have danced around the oral argument issue and spoken of issues of fairness, they have not linked oral argument definitively to due process of law.

Many cases have held that an opportunity for a written submission to the decisionmaker as a general rule may satisfy due process. See, e.g., *Muller v. Muller*, 141 Cal. App. 2d 722, 731, 297, P.2d 789 (1956):

> It is, of course, the law, that a trial judge is not required to listen to oral arguments in support of a motion, but may, in his discretion, decide it solely on the basis of supporting affidavits. (*Morel v. Simonian*, 103 Cal.App. 490 [284 P. 694]; *Collins v. Nelson*, 41 Cal.App.2d 107 [106 P.2d 39]; *People v. Carpenter*, 3 Cal.App.2d 746 [40 P.2d 524].)

On the other hand, there are suggestions in the cases that due process may require oral argument where important consequences are at stake. See, e.g., *Mediterranean v. State Farm Fire & Cas.*, 66 Cal. App. 4th 268, 77 Cal. Rptr. 2d 781, 786 fn. 11 (1998):

> This court in the past has expressed its frustration with some law-and-motion judges who rely on shaky precedents like those discussed above to refuse to hold oral hearings on critical pretrial matters of considerable significance to the parties. We repeat these

> concerns here. There is a reason why litigants are afforded their proverbial "day in court" — to speak directly to the decision maker. Cold words on a printed page are not the same as a live presentation. Fair warning: both written and oral argument are complementary parts of good judging and elemental due process.

Whether or not oral argument is constitutionally guaranteed, most attorneys, and judges, believe that it is desirable. See, e.g., Millar, *Friends, Romans and Judges — Lend Us Your Ears: The Tradition of Oral Argument*, 44 Orange County Lawyer 10 (Jan. 2002):

> Technological advances and increasing work loads oft combine to encourage decision quickly made and equally quickly transmitted. There is no question but that oral argument eats into a court officer's time demands but that is not, or at least should not be, the issue. Decisions are best formed in the crucible of open discussion, not in shuttered chambers (and, no, a discussion with a research attorney does not count).

TJX Cos., 4 Cal.Rptr.2d at 815:

> Our own experience with appellate argument confirms its utility. Oral argument may lift up the fallen or cause the tottering to fall. It separates the wheat from the chaff by affording "a direct dialogue between the litigant and the bench ... in ways that cannot be matched by written communication, and for many judges a personal exchange with counsel makes a difference in result." (*Lewis*, *supra*, 19 Cal.4th at p. 1255, 82 Cal.Rptr.2d 85, 970 P.2d 872.)

Statutes

While the Constitution may not require oral argument, a statute may provide for a "hearing", or refer to an "argument" before the court, or set a specific date for an appearance before the court on the matter, or provide for the presence of a shorthand reporter. All of this type of statutory language has been used by the courts to discern legislative intent to require oral argument.

Hearing

A statute may provide for a "hearing" or for the court to "hear" a matter, or that the matter be "heard". The term itself seems to suggest an oral argument, but the courts have rejected this reading. See, e.g., *Lewis*, 19 Cal. 4th at 1247-1248:

> The question is whether the foregoing references to a requirement that the case "must be heard" or to a "hearing [of] the argument" were intended to encompass an oral presentation in

addition to written argument. The terms "hear" and "hearing" are not defined in the Code of Civil Procedure. The usual and ordinary meaning of these words most commonly includes an auditory component,[9] but when used in a legal sense they do not necessarily encompass oral presentations. One legal dictionary defines the word "hearing," first, as a "proceeding ... in which witnesses are heard and evidence is presented." (Black's Law Dict. (6th ed. 1990) p. 721, col. 1; accord, *People v. Pennington* (1967) 66 Cal.2d 508, 521, 58 Cal.Rptr. 374, 426 P.2d 942 ["A 'hearing' is generally understood to be a proceeding where evidence is taken to the end of determining an issue of fact and a decision made on the basis of that evidence. [Citation.]"].) This dictionary also observes, however: "[The word 'hearing'] is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without [a] jury at any stage of the proceedings subsequent to its inception.... [An administrative hearing] consists of any confrontation, *oral or otherwise*, between an affected individual and an agency decision-maker sufficient to allow [an] individual to present his [or her] case in a meaningful manner." (Black's Law Dict., *supra*, p. 721, cols. 1-2, italics added; see also Webster's New Internat. Dict., *supra*, p. 1044, col. 2 [defining "hearing" as an "opportunity to be heard *or to present one's side of a case* " (italics added)]; but cf. *McCullough v. Terzian* (1970) 2 Cal.3d 647, 656, 87 Cal.Rptr. 195, 470 P.2d 4 [due process requires that welfare recipient be offered the opportunity to "present his case [orally] before the person who will make the decision regarding his eligibility for future benefits"].)

...

In *Mediterranean Const. Co. v. State Farm Fire & Cas. Co.* (1998) 66 Cal.App.4th 257, 77 Cal.Rptr.2d 781 (*Mediterranean*), on the other hand, the Court of Appeal concluded that the statute governing summary judgment motions, when considered in context, requires an oral hearing. The court relied upon references in that statute to the "time appointed for hearing," and a requirement that objections not made "at the hearing" be deemed waived. (437c, subds. (a), (d).) It also observed that rules 343 and 345, providing that litigants who raise evidentiary objections at the hearing must arrange for a court reporter, similarly reflect an intention to provide for oral argument. (66 Cal.App.4th at pp. 262-264, 77 Cal.Rptr.2d 781.)[10]

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9. The word "hear" is defined as follows: "to be made aware of by the ear [or] apprehend by the ear," "to be informed or gain knowledge of by hearing," "to listen to with favor or compliance," "to listen to with care or attention," "to attend and listen to," "to listen to the recitation of," "to give a legal hearing to," or "to take

testimony from." (Webster's New Internat. Dict. (3d ed. 1981) p. 1044, col. 2.) The term "hearing" includes the following definitions: "the act or power of apprehending sound," "the act or instance of actively or carefully listening (as to a speaker or performer)," "opportunity to be heard or to present one's side of a case," "a trial in equity practice," or "a listening to arguments or proofs and arguments in interlocutory proceedings." (*Ibid*.)

10. The court in *Mediterranean* disagreed with *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 613-614, 43 Cal.Rptr.2d 399, disapproved on other grounds in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 609, footnote 5, 71 Cal.Rptr.2d 830, 951 P.2d 399, to the extent *Sweat* determined that references to a hearing in section 437c do not require an opportunity for oral argument before a final ruling on such a motion. (*Mediterranean*, *supra*, 66 Cal.App.4th at pp. 265-266, 77 Cal.Rptr.2d 781.) We have no occasion in this case to consider the validity of either the *Sweat* or *Mediterranean* decisions; nor do we express any view regarding the conclusion reached in *Schlessinger v. Rosenfeld, Meyer & Susman*, *supra*, 40 Cal.App.4th 1096, 47 Cal.Rptr.2d 650.

Date for Hearing

Although use of the term "hearing" alone does not suggest an oral argument requirement, a provision requiring that the court set a date for hearing may be read to infer it. Again, *Lewis*, 19 Cal. 4th at 1249-1250:

> Thus, in determining whether the Legislature intended that the words "heard" or "hearing" as used in the statutes regarding prerogative writs must include a consideration of oral argument, we examine the context in which those terms appear. Other words used in these provisions suggest that, at least in some circumstances, the Legislature did contemplate that the hearing of the matter would include an appearance and oral argument by the parties. Section 1094's statement that "the court must proceed to hear or fix a day for hearing the argument of the case," and section 1090's provision allowing the court to "postpone the argument" until after a trial of factual issues, both suggest that the hearing of the argument will occur at a specific time.[12] Similarly, rule 56(e) specifies that "the return shall be made at least five days before the date set for hearing." If "hearing" simply meant "consideration" of written arguments, there would be no need to select a particular date for considering the arguments. (See *Gulf Coast Investment Corp. v. Nasa 1 Business Center*, *supra*, 754 S.W.2d at p. 153 [where a rule required the court to notify the parties of the "date, time and place of the hearing," the trial court abused its discretion in refusing to hold an oral hearing].)

12. Because it is written in the disjunctive, section 1094's requirement that "the court must proceed to hear *or* fix a day for hearing the argument of the case" (italics added) arguably contemplates that, under some circumstances, a court may consider written arguments alone, without setting a particular day for the hearing.

Argument

In the appellate context, the constitutional requirement that the deciding judges have to be "present at the argument" has been used to help reach the conclusion that oral argument is required on appeal. See discussion of "Appellate Court Proceedings" above. Does the same reasoning apply to a statute providing for argument on a motion?

Two provisions of the Code of Civil Procedure make specific reference to oral argument. (One statute provides the right to oral argument in arbitration of international commercial disputes on request of a party. We do not propose to deal with arbitration in this study.)

Section 661 deals with oral argument on a motion for new trial. It is ambiguous. If the motion is heard by a judge *other than* the trial judge, it "shall be argued orally or shall be submitted without oral argument, as the judge may direct." The implication is that, if heard by the *trial judge*, there is a right to oral argument. However, the cases have consistently held that the right to oral argument on a motion for new trial is within the discretion of the judge. See, e.g., *Kimmel v. Keefe*, 9 Cal. App. 3d 402, 88 Cal.Rptr. 47 (1970).

Other statutes within the Code of Civil Procedure refer simply to "argument" on a matter. Some are ambiguous as to their implications for oral argument; others appear to be reasonably clear.

For example, Section 170.3(c) provides for a proceeding to disqualify a judge. The judge deciding the question of disqualification may do so on the basis of written arguments, or may set the matter for hearing. If a hearing is ordered, the judge "shall permit the parties and the judge alleged to be disqualified to argue the question." Code Civ. Proc. § 170.3(c)(6). Cf. *Urias v. Harris Farms, Inc.*, 234 Cal. App. 3d 415, 285 Cal.Rptr. 659 (1991).

Section 259 prescribes the authority of a court commissioner. A party to a contested proceeding may object to a court commissioner's report of findings of fact and the court's order based on it. "The party may argue any exceptions

before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order." Code Civ. Proc. § 259(b). This provision appears to contemplate oral argument; there is no case determining the issue.

Motion Procedure

Section 1005.5 of the Code of Civil Procedure provides: "A motion upon all the grounds stated in the written notice thereof is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion, but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled ..."

Brannon v. Superior Court, 114 Cal. App. 4th 1203, 1209, 8 Cal.Rptr.3d 491 (2004), states that:

> Although the phrase "hearing of the motion," on its face, does not necessarily mean an oral hearing, this meaning becomes clear when viewing the Legislature's original purpose for enacting the code section. As explained by Professor Witkin, the Legislature enacted section 1005.5 to abolish the former requirement that a motion required an "*oral application*" to the court, but at the same time to "protect[ ] the *right* of either party to appear and be heard." (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 36, p. 431, original italics; see *Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal.App.2d 318, 325, 37 Cal.Rptr. 327.)

Brannon concludes that, "Because the Legislature intentionally retained the concept of a party's right to appear and to orally argue a motion when it eliminated the requirement that a notice of motion be presented orally, we conclude the Legislature intended to provide parties to a summary judgment motion with this right because there is no language to the contrary in the summary judgment statute." 114 Cal. App. 4th at 1209.

The classical rule was that oral argument on a motion was optional. See, e.g., *Muller*, 141 Cal. App. 2d at 731. What other motions will be read with 1005.5 now to require oral argument? *Brannon* cautions that its reasoning with respect to a summary judgment motion cannot necessarily be applied to other prejudgment motions. "The extent to which oral argument may be required on another type of motion depends on the relevant statutory language and other factors unique to the governing statutory scheme. (See *TJX Companies, Inc. v. Superior Court* (2001)

87 Cal.App.4th 747, 750-751, 104 Cal.Rptr.2d 810 [setting forth factors relevant in determining whether a statute requires the opportunity for oral argument]; *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 742, 104 Cal.Rptr.2d 803.)" *Brannon*, 114 Cal.App.4th at 1211.

Court Rules

There may be cases where neither the constitution nor a statute mandates oral argument, but court rules provide for it. If a court uses a tentative ruling procedure, Rule 324 specifies oral argument requirements:

> **Rule 324. Tentative rulings**
>
> (a) **[Tentative ruling procedures]** A trial court that offers a tentative ruling procedure in civil law and motion matters shall follow one of the following procedures:
>
> (1) **[Notice of intent to appear required]** The court shall make its tentative ruling available by telephone and also, at the option of the court, by any other method designated by the court, by no later than 3:00 p.m. the court day before the scheduled hearing. If the court desires oral argument, the tentative ruling shall so direct. The tentative ruling may also note any issues on which the court wishes the parties to provide further argument. If the court has not directed argument, oral argument shall be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day prior to the hearing of the party's intention to appear. A party shall notify all other parties by telephone or in person. The court shall accept notice by telephone and, at its discretion, may also designate alternative methods by which a party may notify the court of the party's intention to appear. The tentative ruling shall become the ruling of the court if the court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given.
>
> (2) **[No notice of intent to appear required]** The court shall make its tentative ruling available by telephone and also, at the option of the court, by any other method designated by the court, by a specified time prior to the hearing. The tentative ruling may note any issues on which the court wishes the parties to provide further argument at the hearing. This procedure shall not require the parties to give notice of intent to appear, and the tentative ruling shall not automatically become the ruling of the court if such notice is not given. The tentative ruling, or such other ruling as the court may render, shall not become the final ruling of the court until the hearing.
>
> (b) **[No other procedures permitted]** Other than following one of the tentative ruling procedures authorized in subdivision (a),

> courts shall not issue tentative rulings except (1) by posting a calendar note containing tentative rulings on the day of the hearing, or (2) by announcing the tentative ruling at the time of oral argument.
>
> (c) **[Notice of procedure]** A court that follows one of the procedures described in subdivision (a) shall so state in its local rules. The local rule shall specify the telephone number for obtaining the tentative rulings and the time by which the rulings will be available. If a court or a branch of a court adopts a tentative ruling procedure, that procedure shall be used by all judges in the court or branch who issue tentative rulings. This rule does not require any judge to issue tentative rulings.

This rule makes clear the right to oral argument if a court uses the tentative ruling procedure. The court rules are silent concerning the right to oral argument if a court does not use the tentative ruling procedure. However, the rules seem to assume that oral argument will be allowed in law and motion hearings where the tentative ruling process is not use. See, e.g., Rules 321 (time of hearing), 324.5 (reporting of proceedings). That is also the conclusion of the court in *Brannon*, 8 Cal. Rptr.3d at 495:

> Consistent with sections 437c and 1005.5, the California Rules of Court frequently refer to a "hearing" in the narrow sense of an "oral" proceeding. For example, Rule 321 sets forth rules regarding dates and times for law and motion "hearings," and provides that a party may waive his or her appearance unless the court orders otherwise. Rules 343 and 345 provide that litigants who wish to raise evidentiary objections at a summary judgment "hearing" must arrange for a court reporter, or the objections must be submitted in writing three days before the "hearing." Rule 317(c) refers to the "time appointed for the hearing." Rule 323 governs the presentation of oral evidence at a "hearing."
>
> The California Rules of Court and implementing local rules applicable to tentative rulings similarly show that the drafters of the rules intended to provide the opportunity for an oral hearing in a pretrial proceeding such as a summary judgment motion. (See *Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 115, 118 Cal.Rptr.2d 249.) Rule 324 provides two ways in which superior courts may elect to issue tentative rulings on motions. (Rule 324(a).) First, a trial court may offer a tentative ruling and *require* a notice of intent to appear at an oral hearing. (Rule 324(a)(1).) Under this procedure, a court issuing a tentative ruling may require ("direct") oral argument *or* "[i]f the court has not directed argument, oral argument shall be permitted only if a

party notifies all other parties and the court by 4:00 p.m. on the court day prior to the hearing of the party's intention to appear." (Rule 324(a)(1).) This procedure contemplates that a party be given the opportunity to request oral argument because a tentative ruling becomes final only if the court has "not directed oral argument and notice of intent to appear has not been given." (Rule 324(a) (1).)

Under the second method for issuing tentative rulings, the superior court may issue a tentative ruling without requiring a notice of intent to appear. (Rule 324(b)(2).) Rule 324(a)(2) provides that under this procedure, "[t]he tentative ruling ... shall not become the final ruling of the court until the hearing." (Rule 324(a)(2).) The right to an oral hearing is thus necessarily assumed under this procedure. Because the tentative ruling does not become the final ruling "until the hearing," this rule makes sense only if the word "hearing" is interpreted to be an oral proceeding. (Rule 324(a)(1).)

EXERCISE OF ORAL ARGUMENT RIGHT

The Court Rules seem to assume a right to oral argument in all civil law and motion matters. That being the case, why would the Judicial Council oppose SB 1249 (Morrow)?

The Judicial Council's primary objection, according to the Senate Judiciary Committee analysis, was that the bill provided for oral argument unless affirmatively waived by the parties. The affirmative waiver requirement undermines the efficacy of the tentative ruling process because a hearing would be required even in a case where all the parties agreed with the court's tentative ruling, but one party failed, for whatever reason, to notify the court in advance of the scheduled hearing. The Judicial Council offered the following example of how an affirmative waiver requirement would impose an undue burden on the courts and litigants:

> A motion is filed in a complex, construction defect case in the Shasta Superior Court that involves 15 separate parties, each of which is represented by their own counsel, many of whose offices are located in Sacramento or San Francisco. The court issues its tentative ruling on the motion by 3:00 p.m. on the afternoon before the scheduled hearing on the motion. Counsel for 14 of the parties notifies the court of their intent to waive the hearing on the motion, but the attorney for the remaining party is out of the office and fails to contact the court or the other parties. Under the bill, all of the counsel would be required to travel to the Shasta court, wait for the matter to be called, only to find out that no hearing was necessary.

> This would not only waste judicial resources, but also would result in many wasted hours by counsel, all of which will be billing their clients for the time involved in the unnecessary court appearance. The affirmative waiver requirement would also be subject to gamesmanship, since counsel could force an opposing party to make such appearances by deliberately failing to properly notify the court of their waiver of the hearing.

This appears to the staff to be a real concern. Depending on the direction the Commission ultimately decides to take on this study, we may want to include in any proposals a recommendation that deals with the extent to which the right to oral argument should be exercisable on an opt-in or opt-out basis. This is not a simple question, due to the pressure that an attorney can be exposed to if the attorney must act affirmatively in order to exercise the oral argument right. This is particularly a concern where the attorney will have to deal with the judge on an ongoing basis for the duration of the judicial proceeding.

SCOPE OF ORAL ARGUMENT RIGHT

The Judicial Council was also concerned that the oral argument right that would be established by SB 1249 (Morrow) was overbroad. The bill would have provided for oral argument in a "demurrer, motion, or order to show cause" under the Code of Civil Procedure.

Although neither the Constitution nor existing statutes require oral argument in every motion or matter, the Court Rules seem broadly to require just that, at least with respect to civil law and motion matters. The Court Rules apply to a proceeding on (1) a demurrer, (2) an application before trial for an order, and (3) an application for an order to enforce a judgment, attach property, appoint a receiver, obtain or set aside a judgment by default, for a writ of review, mandate, or prohibition, compel arbitration, or enforce an award by arbitration. Rule 303.

The coverage of the Rules of Court on civil law and motion matters includes, among other matters, the following particular motions:

> PLEADING MOTIONS
> Demurrer
> Motion for change of venue
> Amended pleading and amendment to pleading
> Motion to strike
> Good faith settlement and dismissal

DISCOVERY AND DISCOVERY MOTIONS
Discovery motions
Supplemental and further discovery
Oral deposition by telephone, videoconference, etc.
Sanction for failure to provide discovery

SUMMARY JUDGMENT MOTIONS
Summary judgment or summary adjudication
Objection to evidence

WRITS AND RECEIVERS
Administrative Mandamus
Receivership
Stay of driving license suspension

INJUNCTIONS
Preliminary injunction and bond
Civil harassment and workplace violence
Minor seeking restraining orders

MULTIPLE PARTY CASES
Consolidation of cases

MISCELLANEOUS MOTIONS
Motion to grant lien on cause of action
Motion concerning arbitration
Motion for discretionary dismissal for delay in prosecution
Motion to dismiss for delay in prosecution
Motion or application for continuance of trial
Motion or application to advance, special set, or reset trial date
Motion to be relieved as counsel
Petition for approval of compromise of claim of minor or incompetent person; order for deposit of funds; petition for withdrawal

See Rules of Court 325-378.

Court rules may not be inconsistent with statute. Cal. Const. art. VI, § 6. However, there is nothing to preclude court rules from offering an oral argument opportunity even though not required by statute, so long as not prohibited by statute.

TO CODIFY OR NOT TO CODIFY

The Senate Judiciary Committee's referral of this matter to the Commission concludes that, "a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument." Exhibit p. 2.

Even though there seems not to be a problem at present, the history of this issue demonstrates that problems will recur. The pressure of business in the trial courts will continue to fuel efforts to limit oral argument, as illustrated by *Gwartz*, cited above under "A Case in Point".

The *Medix* court highlights the problem, 118 Cal.Rptr.2d at 250-251:

> We realize that the demands made on busy trial judges approach, if they do not already exceed, the unrealistic. This is particularly true in counties such as Orange County where all civil cases are immediately assigned to direct calendar courts. Judges with heavy case loads are expected to preside over trials, hear law and motion, rule on ex parte applications, conduct settlement and status conferences, and perform additional administrative duties. All this under the requirements of the Trial Court Delay Reduction Act (Gov. Code, 68600 et seq.) and the Standards of Judicial Administration (Cal. Stds. Jud. Admin., 2.3) which include a directive that 90 percent of all civil cases be "disposed of within 12 months after filing ...." (Cal. Stds. Jud. Admin., 2.3(b).)
>
> It is thus no surprise that, in their need for efficiency, trial judges have adopted procedures to streamline litigation. Most of these procedures have beneficial effects, causing disputes to be resolved more quickly and more efficiently without sacrificing the ultimate goal of the judicial process: the delivery of just results. But, in adopting these new, efficient procedures, judges must remember another, equally important goal: preserving a process that not only is just, but also appears to be just. In spite of the need for efficiency, courts should not lose sight of the need that parties be given their "day in court."
>
> The concept of parties being given their day in court has real as well as symbolic meanings. It is much preferred that parties, or more likely their lawyers, be given an opportunity to address the court in person so as to assure themselves that the facts and ideas sought to be communicated have, in fact, been communicated. In this case the parties were not given such an assurance; the ruling on their demurrer was delivered to them very cryptically on the Internet the day before they expected to appear in court. The Internet is a useful tool and serves many purposes; but it is no substitute for judge and lawyer being able to interact in person.

Codification of the circumstances under which oral argument must be allowed would provide guidance to trial courts struggling to find efficiencies. This may help avoid situations in the future of the type illustrated by *Gwartz* and *Medix*.

Codification of the circumstances under which oral argument must be allowed would also provide guidance to attorneys who currently must cope with an ever-expanding body of case law in order to figure our the rule. Laying down the black letter law will help bring certainty to this contentious area.

STAFF RECOMMENDATION

General Standards

Under the heading "Approaches to Clarification of the Law" above, the staff raised the question whether codification should stick to general principles or should categorize hearings on a case by case basis. Having reviewed the sources of law on the matter, and the large and ever-changing body of law relating to hearings under the Code of Civil Procedure, the staff believes that establishing general principles for guidance of courts and practitioners is the most feasible approach.

We would combine a general statement of principles with a review of individual hearings under the code to determine whether a right to oral argument should be mandated in any of them. For example, it may be appropriate to permit oral argument on all motions for summary judgment. In a case where oral argument is not automatically allowed, the court would need to apply the general statutory standards.

The general principles currently in effect are delineated in *TJX Cos.*, 104 Cal.Rptr.2d at 812:

> We glean from *Lewis*, *Mediterranean*, and *Hobbs* the following principles: The court should look to the words of the statute and apply their plain meaning, if there is one. (*Lewis*, *supra*, 19 Cal.4th at p. 1245, 82 Cal.Rptr.2d 85, 970 P.2d 872.) But where the statutes employ imprecise terms such as "heard" and "hearing," then we further analyze whether "the context or other language indicates a contrary intent." (*Lewis*, *supra*, 19 Cal.4th at p. 1247, 82 Cal.Rptr.2d 85, 970 P.2d 872.) In so doing we study the entire statutory scheme, reading the provisions in context and considering their nature and purpose. (*Id.* at pp. 1245, 1249- 1250, 82 Cal.Rptr.2d 85, 970 P.2d 872.) Does the trial judge act as a fact finder or adjudicate any

> issues at the hearing? Are any procedural remedies (making evidentiary objections, orally moving for a continuance) provided for any of the litigants at the time of the hearing? Do the proceedings involve "critical pretrial matters of considerable significance to the parties...." (*Mediterranean*, *supra*, 66 Cal.App.4th at pp. 266-267, 77 Cal.Rptr.2d 781.)
>
> Last, we consider the bona fides of the pending motion: Is there an authentic dispute, or are the issues so obvious or well-settled that oral argument "would amount to an empty gesture"? (*Lewis*, *supra*, 19 Cal.4th at pp. 1258-1259, 82 Cal.Rptr.2d 85, 970 P.2d 872.)

This is a pretty good start, although there are other factors that have influenced the courts as well. For example, if the determination is likely to be the focus of judicial review, a more formal hearing may be appropriate. "Unreported informal chambers proceedings hamper the opportunity for meaningful appellate review." *Marriage of Dunn-Kato & Dunn*, 103 Cal. App. 4th at 348.

One of the factors to be considered by the court is whether the hearing involves a pretrial matter that is of considerable significance to the parties. But it appears to the staff that if the ruling of the court will be dispositive of the case, oral argument should be allowed on the matter as of right; this should not be merely one of several factors for the court to take into account.

Assuming there is a right to oral argument, should oral argument be required unless waived, or should oral argument be scheduled only on request of a party? One of the problems identified in SB 1249 (Morrow) was that oral argument was required unless waived, creating possible complications. This is a difficult issue. Putting the onus on a party to request an oral hearing may unduly discourage oral argument in circumstances where oral argument would be quite appropriate.

The staff doesn't have any quick solutions at this point. The matter will have to be addressed with some sensitivity. Generally the court has discretion to control the manner of exercise of matters such as oral argument. But we may want to limit the discretion in some way.

Draft Statute

A draft statute to implement statutory standards for oral hearing might look something like this.

Code Civ. Proc. § 130 (added). Oral argument in judicial proceeding

130. (a) The parties to a judicial proceeding in Superior Court under this code have a right to oral argument on a court decision that adversely affects a substantial interest of a party. The court shall provide the parties reasonable notice of the right to oral argument and a reasonable opportunity to exercise that right.

(b) A court is subject to the following standards in its determination whether a decision adversely affects a substantial interest of a party:

(1) If the court's decision will be dispositive of the judicial proceeding or of a substantial cause of action in the judicial proceeding, oral argument shall be permitted as a matter of right.

(2) Unless a statute expressly provides a right to oral argument, a reference in the statute to a "hearing", "argument", or "appearance" shall not be construed to provide a right to oral argument. In making the determination whether oral argument must be allowed the court shall take into consideration the following factors, to the extent the factors are relevant to the judicial proceeding before the court:

(A) Whether the judge acts as a fact finder or adjudicates an issue at the hearing.

(B) Whether the statute provides the parties procedural remedies at the time of the hearing, such as an evidentiary objection or an oral motion for a continuance.

(C) Whether the decision involves a critical pretrial matter of considerable significance to the parties.

(D) Whether the issues are so obvious or well-settled that oral argument would amount to an empty gesture.

(E) The need for a record of the proceedings due to the likelihood of judicial review of the decision.

(F) Whether the judge is substituting for a judge to whom the judicial proceeding is regularly assigned.

(G) Whether the judge is in doubt about the proper resolution of an issue in the proceeding.

(H) Whether oral argument would contribute materially to the quality and appearance of justice in the proceeding.

(I) Any other matter that is germane to the determination.

(c) Nothing in this section affects the discretion of the court to impose reasonable limitations on the right to oral argument, including but not limited to conditions for exercising the right and restrictions on the time of argument.

(d) Nothing in this section limits the right to oral argument in a judicial proceeding to the extent a statute expressly provides the right in the proceeding.

Comment. Section 130 codifies the existing right to oral argument as expressed in case law. Under existing law the right to oral argument is determined by the courts on a case by case basis. See, e.g., *TJX Cos., Inc. v. Superior Court*, 87 Cal. App. 4th 747, 104 Cal. Rptr.2d 810 (2001).

This section does not govern proceedings in the Supreme Court and Courts of Appeal. Oral argument in those proceedings is subject to different standards. See Cal. Const. art. VI, §§ 2 (Supreme Court), 3 (Court of Appeal); *Moles v. Regents of University of California*, 32 Cal. 3d 687, 187 Cal. Rptr. 557, 654 P. 2d 740 (1982).

Subdivision (a) is subject to the authority of the court to control the manner of exercise of the right to oral argument. See subdivision (c).

Under subdivision (b)(1) a court must allow for oral argument in a proceeding in which the court's decision may result directly in dismissal of the case or of a substantial cause of action in the case. This codifies the existing rule relating to a motion to quash or dismiss for lack of jurisdiction (*Marriage of Lemen*, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980)), a motion for summary judgment (*Brannon v. Superior Court*, 114 Cal. App. 4th 1203, 8 Cal.Rptr. 3d 491 (2004)), or a demurrer (*Medix Ambulance Serv., Inc. v. Superior Court*, 97 Cal. App. 4th 109, 118 Cal.Rptr. 2d 249 (2002) (sexual harassment complaint against employer); *TJX Cos.*, 87 Cal. App. 4th at 755 (whether suit should proceed as a class action)).

Subdivision (b)(2) codifies factors used in existing law to determine whether a right to oral argument exists in the context of a particular proceeding. See, e.g., *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (1993); *TJX Cos.*, 87 Cal. App. 4th at 751, 755; *Marriage of Dunn-Kato & Dunn*, 103 Cal. App. 4th 345, 126 Cal.Rptr. 2d 636 (2002); *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.*, 66 Cal.App.4th 257, 77 Cal.Rptr.2d 781 (1998); *Lewis v. Superior Court*, 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872 (1999); *Cal-American Income Prop. Fund VII v. Brown Dev. Corp.*, 138 Cal. App. 3d 268, 273 fn. 3, 187 Cal. Rptr. 703 (1982).

Under existing law, application of these factors to determine whether the nature of a particular decision is such that oral argument must be allowed has resulted in a determination that oral argument must be allowed in a discovery motion involving attorney-client privilege (*Titmas*, 87 Cal. App. 4th at 744-5), a motion to treat a party as a vexatious litigant (*Bravo v. Ismaj*, 99 Cal. App. 4th 211, 225, 120 Cal.Rptr. 2d 879 (2002)), a motion for a pretrial writ of attachment (*Hobbs v. Weiss*, 73 Cal. App. 4th 76, 86 Cal.Rptr.2d 146 (1999)), a motion for appointment of a receiver, (*Cal-American Income Prop. Fund VII v. Brown Dev. Corp.*, 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982)), and a sanctions motion (*Marriage of Lemen*, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980)).

The listing of factors in subdivision (b)(2) is illustrative and not exclusive. See subdivision (b)(2)(F) (other relevant matters).

Subdivision (c) codifies existing case law providing for court discretion. See, e.g., *Wilburn v. Oakland Hosp.*, 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989); *Sweat v. Hollister*, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995); *Brannon*, 114 Cal. App. 4th at 1211; *Mediterranean*, 66 Cal. App. 4th at 265. [Limitations on the court's discretion to be determined.]

Under subdivision (d), the court must allow oral argument to the extent a specific statute expressly provides for oral argument in a particular proceeding. See, e.g., Sections [to be provided].

Court Rule?

We could probably do a pretty good job prescribing general standards by statute, along the lines illustrated above. But does it make sense for the statutes to get into that level of detail about court proceedings? The Legislature shouldn't have to micromanage court processes, as long as the general parameters are set. Past experience with renegade judges is not favorable, but this may really be the realm of court rules.

An alternative approach would be to direct the Judicial Council to formulate court rules governing oral argument subject to statutory standards. We would set the general parameters for the rules by statute, guaranteeing the fundamental right to oral argument, but leave it to the court system to work out the details. The courts are well positioned to take into account the nuances of various types of proceedings and to balance the various considerations that may come into play in a particular proceeding.

We could use the basic statutory format set out above, but leave it to the Judicial Council to fill in the details. This could be done by general standards, by rules applicable to specific types of proceedings, or by both. Such a statute might look something like this:

Code Civ. Proc. § 130 (added). Oral argument in judicial proceeding

130. (a) The Judicial Council shall adopt rules, not inconsistent with statute, that guarantee the right to oral argument on a court decision that adversely affects a substantial interest of a party in a judicial proceeding in Superior Court under this code.

(b) Rules adopted pursuant to this section are subject to the following standards:

(1) If the court's decision will be dispositive of the judicial proceeding or of a substantial cause of action in the judicial proceeding, oral argument shall be permitted as a matter of right.

(2) The parties shall have reasonable notice of the right to oral argument and a reasonable opportunity to exercise that right.

(3) Unless a statute expressly provides a right to oral argument, a reference in the statute to a "hearing", "argument", or "appearance" shall not be construed to provide a right to oral argument. The rules shall determine whether oral argument must be allowed, taking into consideration such factors as:

(A) Whether the judge acts as a fact finder or adjudicates an issue at the hearing.

(B) Whether the statute provides the parties procedural remedies at the time of the hearing, such as an evidentiary objection or an oral motion for a continuance.

(C) Whether the decision involves a critical pretrial matter of considerable significance to the parties.

(D) Whether the issues are so obvious or well-settled that oral argument would amount to an empty gesture.

(E) The need for a record of the proceedings due to the likelihood of judicial review of the decision.

(F) Whether the judge is substituting for a judge to whom the judicial proceeding is regularly assigned.

(G) Whether the judge is in doubt about the proper resolution of an issue in the proceeding.

(H) Whether oral argument would contribute materially to the quality and appearance of justice in the proceeding.

(I) Any other matter the Judicial Council determines is relevant.

(c) Nothing in this section affects the discretion of the court or the authority for the Judicial Council to provide by rule for reasonable limitations on the right to oral argument, including but not limited to procedures for exercising the right and restrictions on the time of argument.

This alternative would of course be dependent on the Judicial Council's willingness to engage in this type of rulemaking. It also might be somewhat of a harder sell to the practicing bar in light of the adverse experience with court rules governing the tentative decision process in Orange and San Diego Counties. Dealing with this matter directly by statute, rather than by court rule, could help to convey the seriousness of the matter to a judge who may be more deferential to a statute than to a Judicial Council rule.

In any event, the Commission should keep Judicial Council rules in mind as an option. Perhaps when we reach the stage of a tentative recommendation, we can offer both alternatives for public comment.

Specific Statutes

If we take the approach of prescribing general standards by statute or by court rule, we would also review the various proceedings under the Code of Civil Procedure to see (1) whether the parameters we have set appear to be generally appropriate, (2) whether oral argument should be provided for in a particular proceeding as a matter of law (e.g., summary judgment motion), and (3) whether any existing statute expressly providing for oral argument requires revision in light of the general standards.

We hope to have some law students working for us during the next semester, who can perhaps help us in this task.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

California Legislature

Senate Committee on Judiciary

Martha M. Escutia
Chair

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August 27, 2004

California Law Revision Commission
Mr. Frank Kaplan, Chair
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Kaplan:

We are writing to request that the California Law Revision Commission undertake a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument.

SB 1249 (Morrow) was introduced this session in response to concerns about several superior court judges in two Southern California counties who refused to allow for oral argument as part of the tentative ruling process prescribed by Rule 324 of the California Rules of Court. The bill would have amended Code of Civil Procedure section 17 to add a definition of "hearing" as follows: "The word 'hearing,' when applied to any demurrer, motion, or order to show cause, signifies oral argument by moving and opposing parties on a record amenable to written transcription which shall be had unless affirmatively waived by the parties."

The Judicial Council of California opposed SB 1249, asserting that the judges who were not complying with Rule 324 have corrected their practices, and that current case law adequately protects the right to oral argument in connection with the tentative ruling process.

The Senate Judiciary Committee's analysis of SB 1249 noted that current case law does not support an entitlement to oral argument for every type of motion or matter:

> Where a statute provides for a "hearing," it does not necessarily demand the parties be given an opportunity to orally argue the case. As our Supreme Court recently noted, the terms "hear" and "hearing" "when used in a legal sense . . . do not necessarily encompass oral presentations." (Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1247.) A statute referring to a "'hearing' does not require an opportunity for an oral presentation, unless the context or other language indicates a contrary intent." (Id., at p. 1247.) Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal.App.4th 109, 113-114.

The analysis also noted that other cases have held that parties may be entitled to oral argument even with respect to motions or matters for which the statute does not contain the word "hearing":

> In the absence of a clear legislative directive for or against oral hearings, we examine the applicable statutory language and consider the context. In particular, we look to the following factors: (1) Does the statutory scheme, read as a whole, encompass an oral hearing? (2) Do the proceedings involve critical pretrial matters of considerable significance to the parties? and (3) Does the motion or other pretrial proceeding involve a real and genuine dispute? (See discussion in TJX, [ ] 87 Cal.App.4th at pp. 750-751.) Titmas v. Superior Court (2001) 87 Cal.App.4th 738, 742.

An electronic search of the Code of Civil Procedure indicates that there are approximately 263 sections of the Code of Civil Procedure that contain the word "hearing." Given time and resource constraints, it was not possible for the committee staff analyzing SB 1249 to conduct an occurrence-by-occurrence review of each section of the code containing the word "hearing" to ensure that the bill's proposed definition was neither overbroad, resulting in the extension of the right to oral argument in a matter to which it currently is not applicable, nor underinclusive, unintentionally eliminating the right to oral argument in matters concerning which the applicable statute does not contain the word "hearing."

In light of the above concerns, Senator Morrow decided not to pursue SB 1249 this session, and instead we jointly agreed that a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument.

Thank you for your consideration of this request.

Very truly yours,

Martha Escutia
Chair, Senate Judiciary Committee

Bill Morrow
Vice Chair, Senate Judiciary Committee

SENATE BILL No. 1249

Introduced by Senator Morrow

February 12, 2004

An act to amend Section 17 of the Code of Civil Procedure, relating to hearings.

LEGISLATIVE COUNSEL'S DIGEST

SB 1249, as introduced, Morrow. Civil procedure: hearings.

Existing law sets forth various definitions of words used in the Code of Civil Procedure.

This bill would define the word ''hearing,'' when applied to any demurrer, motion, or order to show cause for purposes of that code.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 17 of the Code of Civil Procedure is amended to read:

17. (a) Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word ''person'' includes a corporation as well as a natural person; the word ''county'' includes ''city and county''; writing includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term ''testify,'' and every written one in the term ''depose''; signature or subscription includes mark, when the person cannot write, his or her name being written near it by a

person who writes his or her own name as a witness; provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witness thereto.

(b) The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

(1) The word ''property'' includes both real and personal property.

(2) The words ''real property'' are coextensive with lands, tenements, and hereditaments.

(3) The words ''personal property'' include money, goods, chattels, things in action, and evidences of debt.

(4) The word ''month'' means a calendar month, unless otherwise expressed.

(5) The word ''will'' includes codicil.

(6) The word ''writ'' signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word ''process'' signifies a writ or summons issued in the course of judicial proceedings.

(7) The word ''state,'' when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words ''United States'' may include the district and territories.

(8) The word ''section,'' whenever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned.

(9) The word ''affinity,'' when applied to the marriage relation, signifies the connection existing in consequence of marriage, between each of the married persons and the blood relatives of the other.

(10) The word ''sheriff'' shall include ''marshal.''

(11) The word "hearing," when applied to any demurrer, motion, or order to show cause, signifies oral argument by moving and opposing parties on a record amenable to written transcription which shall be had unless affirmatively waived by the parties.

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