Study J-103 December 20, 2004

Memorandum 2005-5

Oral Argument in Civil Procedure (Discussion of Issues)

BACKGROUND

The Commission commenced the oral argument study in November 2004. The general approach adopted by the Commission is to seek greater certainty and clarity in the determination whether oral argument is required on a particular matter.

The project is limited to hearings on general civil practice matters in superior court.

The Commission directed the staff to identify specific types of hearings in which oral argument is required unless waived by the parties. These would include (1) hearings that the Legislature has expressly stated should be oral, (2) hearings that the courts have identified as requiring oral argument, and (3) additional hearings neither expressly identified by the Legislature nor the subject of a court decision, but in which it is clear that oral argument is appropriate (such as an anti-SLAPP motion).

The failure of the statute to single out a specific type of hearing should not signal legislative intent to disallow oral argument. There should be a straightforward general standard that applies to types of hearings not specifically identified — e.g., the court's determination of the motion would be dispositive of the case. For a court determination that does not fall within that standard, the right to oral argument would depend on legislative intent as determined pursuant to criteria developed by the courts. The criteria for determination of legislative intent would not be codified, but would be identified in the Comment.

The statute would make clear that it does not preclude oral argument in a case where the court in its discretion determines oral argument would be appropriate. The statute would also recognize that it may be necessary to dispense with oral argument in a case where immediate action is necessary (e.g., temporary restraining order).

Other concerns raised at the meeting include whether hearing of argument by a research attorney satisfies a required hearing by the court, whether it is

appropriate to deny oral argument on an ex parte application, and whether it is appropriate to deny oral argument if supporting papers have not been filed, particularly where the hearing is on short notice (e.g., summary judgment hearing in an unlawful detainer action on five days notice). These concerns are addressed in this memorandum.

DRAFTING APPROACH

This memorandum examines the factors the Commission wants to incorporate into the statute governing oral argument and recommends statutory language to implement them. The staff draft takes the form of a general statute that identifies specific hearings in which oral argument must be allowed, and provides general standards to govern oral argument for those hearings that have not been singled out.

A different drafting approach would be to open individual procedural statutes and categorize each one. For example, each statute could contain express language relating to oral argument.

Alternatively, all statutes could be recast in standardized, defined language. For example, if the statute calls for a "hearing" on a motion, that would signal mandatory oral argument unless waived; if the statute provides for an "appearance" on a motion, oral argument is not allowed unless requested; if the statute prescribes a "determination" of a motion, oral argument is only allowed in the court's discretion; etc.

We may ultimately move to the approach of categorizing individual statutes. However, that approach would require a lot of drafting. The approach we are currently pursuing of drafting a general governing statute is far simpler to effectuate. Whether it will yield sufficiently concrete rules remains to be seen.

Regardless of the drafting approach taken, we still need to examine individual statutes to ascertain the appropriate type of hearing for that statute. We do not currently have the resources to examine all hearings under the Code of Civil Procedure. We are actively seeking law student assistance on this project. A more effective alternative might be to circulate a tentative recommendation for comment, including in it a request that commenters identify specific hearings in which they believe oral argument should be allowed as a matter of right.

Civil Practice

The Commission decided to limit the scope of the project to hearings on general civil practice matters in superior court. This would cover civil actions and proceedings under the Code of Civil Procedure.

Specifically excluded from the study by this decision are:

- Criminal proceedings.
- Administrative hearings.
- Contractual arbitration.
- Special court procedures provided for under other codes.
- Appeals, original writ proceedings, and other motions in the Supreme Court and Courts of Appeal.

Special Proceedings

An issue the Commission has not yet confronted is whether to limit the project to civil actions or to extend it to special proceedings. The staff would argue for limiting it to civil actions.

A civil action is generic and is covered by general principles in the Code of Civil Procedure. A special proceeding is sui generis and ordinarily governed by its own special and detailed rules of procedure, even though in some instances located in the Code of Civil Procedure. Examples of special proceedings located in the Code of Civil Procedure include eminent domain, escheat, and judicial enforcement of arbitration. A special proceeding may incorporate by reference general rules of civil practice, and in that case would pick up any general principles on oral argument. See, e.g., Code Civ. Proc. § 1109 (writ practice).

Evidentiary Hearings

A limitation on the scope of this study that we have assumed but not explicitly stated relates to the nature of the hearing. Many hearings under the Code of Civil Procedure are evidentiary in nature. A statute may specify that evidence may be introduced in a hearing orally or in writing or both. We take that issue to be outside the scope of this study, which is concerned principally with law and motion matters rather than presentation of evidence.

Pre-Trial Motions, Trial Motions, Post-Trial Motions

Pre-trial procedures have been the major recent source of oral argument problems — motions for summary judgment, demurrers, prejudgment remedies such as attachment and receivership, etc.

Once trial has commenced the parties and judge are in the same place at the same time and should be able to deal with trial motions appropriately. A motion may be made orally, and the judge may hear argument in court or in chambers, or on written points and authorities, or both, depending on the issue.

The increased use of in limine motions may introduce a new dynamic that calls for more detailed treatment of oral argument rights.

After presentation of evidence, argument to the court may be submitted on briefs — oral argument is not a matter of right. See, e.g., *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635 (1894) (foreclosure of mechanics lien).

The staff would include trial motions and post-trial motions in this study, and not limit it to pre-trial motions.

Appeals

It is not our intention to cover oral argument on appeal in this study. The standards governing appeals to the Supreme Court and Courts of Appeal are clear; the standards governing appeals to the Appellate Division of the Superior Court are not. We would make clear in the statute that the standards developed for oral argument in the trial court do not apply to oral argument on appeal.

Draft on Scope

Scope language in the statute we are developing might read:

> This section governs the right of a party in a civil action to present oral argument to the superior court on a decision by the court under this code. This section does not govern the right to present oral argument in a special proceeding except to the extent incorporated by reference in the statute governing the special proceeding. This section does not govern the right to present oral argument on appeal.
>
> As used in this section, the term "oral argument" does not include presentation of oral testimony that is evidentiary in nature.
>
> **Comment.** This section clarifies circumstances under which a party to a civil action has the right to oral argument before the court makes a decision under this code. As used in this section, "civil action" means an ordinary court proceeding for the declaration,

enforcement, or protection of a right, or the redress or prevention of a wrong. See Sections 20 (judicial remedies defined), 21 (division of judicial remedies), 22 (action defined), 24 (kinds of actions), 30 (civil action defined). The section does not apply to a special proceeding, a criminal action, a proceeding in a non-judicial tribunal, or an appeal. Although the section is by its terms limited to civil actions, it may be incorporated by reference in a special proceeding. See, e.g., Section 1109 (writ practice).

This section does not govern proceedings in the Supreme Court or Courts of Appeal. Oral argument in proceedings in those courts is governed by 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).

This section is not limited to pre-trial or in limine matters. It applies to trial motions and post-trial motions as well. Cf. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635 (1894) (foreclosure of mechanics lien). However, it does not govern the right to present oral testimony in an evidentiary proceeding.

SPECIFIC TYPES OF HEARINGS IN WHICH ORAL ARGUMENT IS REQUIRED

The Commission directed the staff to identify specific types of hearings in which oral argument must be allowed. These would include (1) hearings that the Legislature has expressly stated should be oral, (2) hearings that the courts have identified as requiring oral argument, and (3) additional hearings not expressly identified by the Legislature or the subject of a court decision but for which it is clear that oral argument is appropriate (such as an anti-SLAPP motion).

Hearings the Legislature Has Expressly Identified

Express Statutes

Although many statutes may be read to imply an oral argument requirement, few if any provide for it in so many words.

The only statute we have been able to find within the scope of this study that even uses the term "oral argument" is Code of Civil Procedure Section 661. That statute deals with oral argument on a motion for new trial. 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." There is perhaps an implication 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 that do not use the term "oral argument," are so strongly suggestive of it that there appears to be no other reasonable interpretation.

For example, Code of Civil Procedure Section 237 provides for a petition to unseal personal juror identifying information. If the petition establishes a prima facie showing of good cause for release of that information, the court must set the matter for hearing. "Any affected former juror may appear in person, in writing, by telephone, or by counsel to protest the granting of the petition. A former juror who wishes to appear at the hearing to oppose the unsealing of the personal juror identifying information may request the court to close the hearing in order to protect the former juror's anonymity." Code. Civ. Proc. § 237(c).

However, once we depart from the bright line standard of express statutory provision for "oral argument" and enter the realm of statutory implication, things get very fuzzy very fast.

For example, a statute that requires the court to set a date for hearing seems to imply that there will be an actual event at which arguments may be made. See, e.g., *Lewis v. Superior Court*, 19 Cal. 4th 1232, 1249-1250, 82 Cal. Rptr. 2d 85, 970 P.2d 872 (1999):

> 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.
>
> ---
>
> 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.

But what about a statute that provides a procedure for a party to "appear and be heard"? The legislative intent may depend on the sense in which the term

"appear" is used — whether as an appearance for jurisdictional purposes or as presence before the court.

These are all nuances of statutory construction. They go beyond the immediate question here — whether the statute **expressly** provides for oral argument. The staff's conclusion is that no California statute within the scope of this study expressly provides for oral argument, but it seems reasonably clear that in many instances the Legislature assumed there would be an oral hearing.

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 ..." (Emphasis added.)

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 same analysis could be applied to conclude that there is an oral argument right on every motion under the Code of Civil Procedure.

Telephone Appearance

An argument on legislative intent can also be derived from statutes governing telephonic court appearances. Code of Civil Procedure Section 1006.5 provides:

> 1006.5. (a) The Judicial Council shall adopt a standard of judicial administration governing the appearance of counsel by telephone at any hearing of a demurrer, an order to show cause, or a motion heard before the action is called for trial.
>
> (b) The standard of judicial administration shall provide that counsel for a party to a civil action may appear by telephone at any of those hearings unless (1) the action or proceeding is one filed pursuant to the Family Code, (2) any party notices an intent to present oral testimony, or (3) the court orders the personal appearance of counsel.
>
> (c) Within six months after the Judicial Council has adopted that standard of judicial administration, the superior court of each county shall advise the Judicial Council whether it will incorporate the standard, a modified version thereof, or not provide for the appearance of counsel by telephone in its local rules.

The implication of this statute is that it is legislative policy to allow oral argument — either telephonic or in person — at a hearing on a demurrer, order to show cause, or pretrial motion. However, it appears that the matter is ultimately left to court discretion and is not mandated by statute.

On the other hand, Government Code Section 68070.1 provides:

> 68070.1. (a) Except as otherwise provided in this section, counsel shall have the option of appearing by telephone in any nonevidentiary law and motion and probate hearings and conferences, and every superior court shall provide for appearances of counsel in those hearings and conferences by telephone.
>
> Counsel shall have the option of appearing by telephone in nonevidentiary trial setting conferences in superior courts in counties subject to the Trial Court Delay Reduction Act of 1986 (Article 5 (commencing with Section 68600) of Chapter 2 of Title 8) if the superior court has provided that option by local rule or written local policy.
>
> The Judicial Council may provide, by rule, for the exclusion of specified types of hearings or conferences from this subdivision.
>
> (b) On or before March 1, 1988, the Judicial Council shall establish a pilot project for teleconferencing in nonevidentiary law and motion and probate hearings and conferences in the superior courts in at least 10 counties selected by the Judicial Council. If a pilot project court is not subject to the Trial Court Delay Reduction Act of 1986, it shall also provide teleconferencing in nonevidentiary trial setting conferences; and all other pilot project courts may provide for teleconferencing in nonevidentiary trial setting conferences by local rule.

(c) The Judicial Council shall adopt model procedures to guide superior courts in the development of teleconferencing procedures.

This statute suggests there is an oral argument right by telephone in every law and motion hearing, arguably subject to Judicial Council rules limiting that right.

The Judicial Council has not acted to limit the right. The Rules of Court currently provide that a party "may appear by telephone in any conference or hearing at which witnesses are not expected to be called to testify," except that a personal appearance is **required** at a settlement or case management conference and any other conference or hearing in which the court determines that "a personal appearance would materially assist in a determination of the proceeding or in resolution of the case." Rule 298. Again, the implication is that oral argument must be allowed, either by telephone or in person.

A side question that appears not to be adequately dealt with in the statutes is the definition of a telephonic appearance — does that include video conferencing? Webcasting? The staff would leave this to the Judicial Council to straighten out; we have our hands full with the oral argument issue as it is.

Bottom Line

The staff is unable to conclude that the Legislature has expressly mandated oral argument in any instance, so we have not identified any specific motions as such in the staff draft. Nonetheless, an argument can be made that the entire scheme of the Code of Civil Procedure points towards oral argument on motions generally. This position is based not just on terminology such as "hearing on the motion" and "appearance at the hearing," but on the legislative intent of such statutes as Code of Civil Procedure Sections 1005.5 (party shall not be deprived of right to hearing on a motion), 1006.5 (mandating the Judicial Council to adopt standard of judicial administration for telephone appearance on demurrer, order to show cause, or pretrial motion), and Government Code Section 68070.1 (providing for telephone appearance in any nonevidentiary law and motion hearing, subject to limitation in Judicial Council rules).

The Commission may want to take the lead from provisions such as these and propose a general oral argument right. It is instructive to the staff, however, that the existing general provisions all stop short of mandating oral argument and ultimately leave the matter in the hands of the courts. We suspect that concern about the press of business in the trial courts, the need for flexibility in processing litigation, and the feeling that the courts may be in the best position to

ascertain the need for and value of oral argument in various types of proceedings, have ultimately prevailed in the Legislature.

Specific Hearings the Courts Have Addressed

Motions on Which Oral Argument May Be Denied

The courts have generally held that oral argument at a hearing on a motion is **not** a matter of right, but may be allowed in the court's discretion. See, e.g., 6 B. Witkin, California Procedure, *Proceedings Without Trial* § 34(b) (4th ed. 1997).

Specific motions that have been held not to require oral argument include:

- **Motion for dismissal for failure to timely amend.** *Wilburn v. Oakland Hospital*, 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989).
- **Motion to compel discovery.** *Marriage of Lemen*, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).
- **Motion to withdraw motion to vacate default.** *Muller v. Muller*, 141 Cal. App. 2d 722, 297 P.2d 789 (1956).
- **Motion to reopen for additional evidence.** *Ensher, Alexander & Barsoom v. Ensher*, 225 Cal. App. 2d 318, 37 Cal. Rptr. 327 (1964).
- **Motion for new trial.** *Kimmel v. Keefe*, 9 Cal. App. 3d 402, 88 Cal. Rptr. 47 (1970); *People v. Sarazzawski*, 27 Cal. 2d 7, 161 P.2d 934 (1945); *Morel v. Simonian*, 103 Cal. App. 490, 284 P. 694 (1930).

Motions on Which Oral Argument Must Be Allowed

The courts have explicitly recognized the **right** to oral argument in the following matters:

- **Motion to quash or dismiss for lack of jurisdiction.** *Marriage of Lemen*, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).
- **Summary judgment motion.** *Brannon v. Superior Court*, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004); *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co.*, 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); *Gwartz v. Superior Court*, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).
- **Demurrer.** *Medix Ambulance Serv., Inc. v. Superior Court*, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); *TJX Cos., Inc. v. Superior Court*, 87 Cal. App. 4th 747, 104 Cal. Rptr. 2d 810 (2001) (qualification as class action).
- **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.** *Cal-American Income Prop. Fund VII v. Brown Dev. Corp.*, 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982).
- **Discovery motion involving attorney-client privilege.** *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (1993).
- **Motion to treat party as vexatious litigant.** *Bravo v. Ismaj*, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (2002).

These right to oral argument cases are an interesting melange. The basis for the first three items is reasonably clear — each of those motions has the potential to terminate a party's access to court. The basis for the next two items is equally clear — the provisional remedies can have a dramatic practical impact on the circumstances of the defendant and effectively end the dispute.

The last two hearings — attorney-client privilege and vexations litigant determinations — are intriguing. Neither of these would seem likely candidates for mandatory oral argument — they do not preclude a party from pursuing judicial remedies, nor do they so fundamentally affect the ability of the parties to act that they might be considered to effectively end the litigation.

In the attorney-client privilege case the court makes the argument that loss of the privilege would be a critical pretrial matter of considerable significance to the parties. Breach of attorney-client confidentiality would not only expose the litigation strategy of the parties, it would put at risk the ability of parties generally to consult openly with their attorneys. The privilege has been a hallmark of Anglo-American jurisprudence for nearly 400 years, fostering free and open exchanges of information and advice. "Without the privilege, it is theoried, the client would not freely speak, thereby limiting the attorney's ability to provide sound legal advice." *Titmas*, 87 Cal. App. 4th at 744. Because of the importance of the public policies at stake, oral argument must be allowed on a motion to breach the privilege.

The vexatious litigant case is not based on fundamental principles, but on statutory construction. The statutory scheme calls for a hearing on a vexatious litigant determination — the court "shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion." Code Civ. Proc. § 391.2. The *Bravo* court construes the statutory language to mean that there is a right to oral argument. "Because the imposition of this requirement limits access to the courts, the Legislature has provided that, before a plaintiff may be declared vexatious, he or she is entitled to a noticed motion, and a

hearing which includes the right to oral argument and the presentation of evidence." 99 Cal. App. 4th at 223.

Staff Draft

A draft to codify matters the courts have determined require oral argument would read:

> A party has a right to present oral argument on the following matters:
>
> (1) Motion to quash or dismiss for lack of jurisdiction.
>
> (2) Motion for summary judgment.
>
> (3) Demurrer.
>
> (4) Motion for pretrial writ of attachment.
>
> (5) Motion for appointment of receiver.
>
> (6) Motion for discovery involving attorney-client privilege.
>
> (7) Motion to treat party as vexatious litigant.
>
> **Comment.** This provision codifies the right to oral argument expressed in case law for the following matters:
>
> (1) Motion to quash or dismiss for lack of jurisdiction. See Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).
>
> (2) Summary judgment motion. See Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); Gwartz v. Superior Court, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).
>
> (3) Demurrer. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); TJX Cos., Inc. v. Superior Court, 87 Cal. App. 4th 747, 104 Cal. Rptr. 2d 810 (2001) (qualification as class action).
>
> (4) Motion for pretrial writ of attachment. See Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).
>
> (5) Motion for appointment of receiver. See Cal-American Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982).
>
> (6) Discovery motion involving attorney-client privilege. See Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (1993).
>
> (7) Motion to treat party as vexatious litigant. See Bravo v. Ismaj, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (2002).

Caveat

Existing court determinations of the right to oral argument are not as absolute as the draft above seems to imply. The draft overstates the case and runs the risk of running roughshod over important distinctions and limitations.

For example, paragraph (3) of the draft does not distinguish between a general demurrer and a special demurrer. Nor do the cases. But the cases dealt only with the particular pleadings before the court, which involved exhaustion of administrative remedies and qualification for class action status. Would an appellate court require oral argument on a special demurrer for a curable defect, such as uncertainty in a pleading or failure to allege whether a contract is written or oral? See Code Civ. Proc. § 430.10 (grounds for demurrer). A flat statutory statement that oral argument must be allowed on a demurrer does codify existing case law, but it is a very blunt instrument.

Paragraph (5) deals with appointment of a receiver. But a key case on appointment of a receiver states that, "So serious a matter as appointment of a receiver should not be made without a full and complete hearing **unless the due administration of justice clearly requires it**." *Cohen v. Herbert*, 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922 (1960) (emphasis added). Presumably the invocation of due administration of justice suggests a situation where time is critical and, in balancing the equities, it appears important to act quickly to grant a provisional remedy, sorting out the rights of the parties later.

What about paragraph (6), discovery motion involving attorney-client privilege? This is a pretty narrow provision. It does not address other important privileges, including the attorney's work product privilege and the mediation communications privilege, that a court would undoubtedly conclude are so fundamental that oral argument must be allowed when an effort is made to breach them. We need to make clear in the statute, of course, that the specific listing of attorney-client privilege is not intended to preclude the right to oral argument on other privileges. But does it really make sense to codify that one privilege based on the happenstance of a court of appeal opinion on it?

Similarly, the draft statutory listing does not address the possibility of an ex parte hearing on any of those matters, conducted without prior notice to the respondent, and without opportunity to be heard, oral or otherwise. A motion provided for by statute is presumed to require notice and an opportunity for hearing unless the statute expressly provides that the matter is to be heard ex parte. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Superior Court*, 156 Cal. App. 3d

82, 202 Cal. Rptr. 571 (1984). The draft statute appears by its terms to be absolute; but it should not override an express statutory provision for an ex parte hearing.

Can we think of every exception that could be relevant, and codify it?

The Commission's decision to codify cases determining which specific motions require oral argument is problematic. We can state an absolute rule at the risk of overriding important exceptions and nuances that have been expressed in the cases, or that would be expressed in the cases if the issue were to come up. We can seek to codify the exceptions and nuances, to the extent we can ferret them out, but that would necessarily result in a balancing test of the type the Commission seeks to avoid.

Codification of the urgent and compelling need and ex parte exceptions would read:

> Notwithstanding any other provision of this section, the court may make a decision without oral argument if there is an urgent and compelling need to do so, including but not limited to a decision on a matter in which ex parte action is authorized.
>
> **Comment**. This provision codifies the court's authority to abrogate an oral argument requirement in an extraordinary situation. See, e.g., Cohen v. Herbert, 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922 (1960) ("So serious a matter as appointment of a receiver should not be made without a full and complete hearing unless the due administration of justice clearly requires it.") An urgent and compelling need could arise, for example, in a situation where speed or secrecy is required to protect against imminent loss or injury or because of the likelihood that a party will abscond or assets will otherwise be dissipated. A matter in which ex parte action is authorized would typify this type of decision. It should be noted, however, that the party seeking a decision ex parte must ordinarily make a personal appearance. See Cal. R. Ct. 379(i).

We will incorporate this provision in the draft statute, but the staff is concerned that it is not enough. We think that ultimately a general provision on court discretion will be necessary.

Hearings Where It Is Clear Oral Argument is Appropriate

The Commission thought it would be helpful to identify specific types of hearings where oral argument is appropriate, even though there may be neither an express statutory provision for, nor a case law determination of, the right.

In order to make that identification, it is necessary to apply some standard. For lack of a better standard, the staff will use the test that resolution of the

motion either (1) would be dispositive of the case or (2) could have such a substantial effect on the rights of the parties as to effectively resolve the dispute.

We do not have the resources at present to examine all motions, hearings, and court decisions under the Code of Civil Procedure. We hope to have law student assistance during the spring to enable us to do this. A better approach, perhaps, would be to solicit attorney input via the tentative recommendation.

Meanwhile, a once-over lightly of the Code would suggest oral argument might be critical on at least the following motions:

> A party has a right to present oral argument on the following matters:
>
> (8) Motion to dismiss for forum nonconveniens.
> (9) Motion to quash service of summons.
> (10) Special motion to strike (anti-SLAPP).
> (11) Motion for judgment on the pleadings.
> (12) Application for claim and delivery.
> (13) Action for injunctive relief.
> (14) Motion to dismiss for delay in prosecution.
> (15) Motion for judgment notwithstanding verdict.
>
> **Comment**. This provision identifies the following matters in which oral argument must be allowed because the court's decision may be dispositive of the case, either de jure or de facto:
>
> (8) Forum nonconveniens. See Section 410.30.
> (9) Quash service of summons. See Section 418.10.
> (10) Special motion to strike (anti-SLAPP). See Section 425.16.
> (11) Judgment on the pleadings. See Section 438.
> (13) Injunctive relief. See Section 526.
> (14) Delay in prosecution. See Section 583.110.
> (15) Judgment notwithstanding verdict. See Section 629.

GENERAL STANDARDS FOR ORAL ARGUMENT

The failure of our statute to identify a specific type of hearing for oral argument should not signal legislative intent to disallow oral argument. Our statute should also include a straightforward general standard that applies to types of hearings not specifically identified — e.g., the court's determination would be dispositive of the case. For a court determination that does not fall within that standard, the right to oral argument would depend on legislative intent as determined pursuant to criteria developed by the courts. The criteria for determination of legislative intent would not be codified, but would be identified in the Comment.

Type of Hearing in Which Oral Argument is Appropriate

What should be the general standard for a determination whether oral argument must be allowed? The standard used by the courts in the cases in which they have held that oral argument is required is basically whether the decision is of a type that can have the effect de jure or de facto of resolving the case. This appears to the staff to be a pretty good general standard, and we would attempt to codify it:

> Nothing in this section limits the right to present oral argument on a matter if either of the following conditions is satisfied:
>
> (1) The court's decision would be dispositive of the case.
>
> (2) The court's decision would as a practical matter irreparably affect the circumstances of the parties.
>
> **Comment**. Under paragraph (1) the court must allow oral argument in a proceeding in which the court's decision could result directly in dismissal of the case. This generalizes existing rules relating to:
>
> • Motion to quash or dismiss for lack of jurisdiction. See Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).
>
> • Motion for summary judgment. See Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004).
>
> • Demurrer. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); *TJX Cos.*, 87 Cal. App. 4th at 755 (qualification as class action).
>
> Under paragraph (2) the court must allow oral argument in a proceeding in which the court's decision could so fundamentally affect the circumstances of the parties that as a practical matter it will resolve the case. This generalizes existing rules relating to prejudgment remedies such as pretrial writ of attachment and appointment of a receiver. See Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999) (pretrial writ of attachment); (Cal-American Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982) (appointment of receiver).

To this we might want to add language recognizing and generalizing the privileged communications case:

> (3) The court's decision would determine whether confidential information is protected by a legal privilege.
>
> **Comment**. Paragraph (3) codifies the holding in *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (1993) (attorney-client privilege), and extends it to other privileges such as

the attorney's work product privilege and the mediation communications privilege.

This formulation does not distinguish among types of privileges on the assumption that they all effectuate important public policies. It also raises the question of what other public policies are so fundamental that a decision concerning them ought to be safeguarded by oral argument?

Legislative Intent

The courts in recent years have developed an extensive body of criteria for determining whether the Legislature intended that oral argument be allowed on a particular motion. A draft to set out the general standard, and elaborate the detailed criteria in the Comment, would read:

> Nothing in this section limits the right to present oral argument on a matter if the applicable statute provides for oral argument.
>
> **Comment**. This provision codifies the case law rule that the court must ascertain legislative intent to determine whether a particular statute provides for oral argument.
>
> Unless a statute expressly provides for oral argument, a reference in the statute to a "hearing," "argument," or "appearance" is not necessarily construed to require oral argument but should be considered by the court in its determination of legislative intent. Courts have determined legislative intent based on the context of the particular statute, 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.

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 n. 3, 187 Cal. Rptr. 703 (1982).

OTHER ISSUES

Court Discretion

The statute specifying when oral argument must be allowed should not constrain the court in its discretion from permitting oral argument in other cases. The staff suggests the following language to accomplish this result:

> The court may permit the parties to present oral argument on a matter for which the right to present oral argument is not otherwise provided by this section if the court in its discretion determines that oral argument would be appropriate.
>
> **Comment**. This provision codifies existing case law providing for court discretion to allow oral argument. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956). Some of the same factors used to determine legislative intent may also be relevant to exercise of the court's discretion, such as the possible need for a record due to the likelihood of judicial review, whether the judge is in doubt about the proper resolution of the matter, and whether oral argument would contribute materially to the quality and appearance of justice.

Research Attorney

There was discussion at the Commission meeting about whether an oral argument requirement is satisfied if the judge delegates a research attorney to hear argument and report back. The Commission is not alone in its concern. See Millar, *Friends, Romans and Judges — Lend Us Your Ears: The Tradition of Oral Argument*, 44 Orange County Lawyer 10 (Jan. 2002) ("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.")

The purpose of oral argument is to enable direct interaction with the decisionmaker; argument to a research attorney would not satisfy that objective.

The basic staff draft would provide, "This section governs the right of a party in a civil action to present oral argument to the superior court on a decision by the court under this code." Argument "to the superior court" within the meaning of that language would include argument to a judge, temporary judge, or commissioner presiding in the case. The Comment would make this clear:

> This provision makes clear that the section governs oral argument "to the superior court." That includes argument before a judge, temporary judge, or subordinate judicial officer presiding and making the decision on the matter. It does not include another court officer or employee such as a clerk or research attorney.

Court Control

The court may impose reasonable limitations on oral argument, such as procedures for exercising the right to present argument and restrictions on the time of argument. Under this authority, a court may refuse to allow oral argument against a motion or demurrer if the opponent fails to 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. Group 2004).

Codification of this principle would read:

> Nothing in this section affects the discretion of the court to impose reasonable limitations on oral argument, including but not limited to conditions for exercising the right to present oral argument and restrictions on the time of argument.
>
> **Comment**. This provision codifies the existing rule that trial courts "retain extensive discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures." Mediterranean Construction Co. 66 Cal. App. 4th at p. 265. See also 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.

Supporting Papers

A concern expressed at the Commission meeting was whether it is appropriate for a court to deny oral argument if supporting papers have not been filed. This may be a problem where the hearing is on short notice (e.g., summary judgment hearing in an unlawful detainer action on five days notice) and the parties do not have an opportunity to file papers.

Under the draft legislation, a court limitation on exercise of an oral argument right must be reasonable. A requirement that supporting papers be filed where there is insufficient time to file them would not be reasonable. We have added general language to the Comment to that effect.

> A court limitation on exercise of an oral argument right must be reasonable. A limitation denying oral argument if supporting papers have not been filed would not be reasonable, for example, in a case in which there was insufficient time to prepare the papers.

Exercise and Waiver of Oral Argument Right

The staff in this draft has not addressed the question of the manner of exercise of the right to oral argument. One of the concerns of the Judicial Council with last year's oral argument legislation is that it would hamstring the courts by mandating oral argument unless all parties waive the right. This draft leaves it to the courts to decide how the oral argument right is to be exercised.

STAFF DRAFT

The draft below compiles the various staff proposals in this memorandum.

Code Civ. Proc. § 1044 (added). Oral argument in civil action

1044. (a) This section governs the right of a party in a civil action to present oral argument to the superior court on a decision by the court under this code. This section does not govern the right to present oral argument in a special proceeding except to the extent incorporated by reference in the statute governing the special proceeding. This section does not govern the right to present oral argument on appeal.

(b) A party has a right to present oral argument on the following matters:

(1) Motion to quash or dismiss for lack of jurisdiction.
(2) Motion for summary judgment.
(3) Demurrer.
(4) Motion for pretrial writ of attachment.
(5) Motion for appointment of receiver.
(6) Motion for discovery involving attorney-client privilege.
(7) Motion to treat party as vexatious litigant.
(8) Motion to dismiss for forum nonconveniens.
(9) Motion to quash service of summons.
(10) Special motion to strike (anti-SLAPP).
(11) Motion for judgment on the pleadings.
(12) Application for claim and delivery.

(13) Action for injunctive relief.

(14) Motion to dismiss for delay in prosecution.

(15) Motion for judgment notwithstanding verdict.

(c) Nothing in subdivision (b) limits the right to present oral argument on a matter if any of the following conditions is satisfied:

(1) The applicable statute provides for oral argument.

(2) The court's decision would be dispositive of the case.

(3) The court's decision would as a practical matter irreparably affect the circumstances of the parties.

(4) The court's decision would determine whether confidential information is protected by a legal privilege.

(d) The court may permit the parties to present oral argument on a matter for which the right to present oral argument is not otherwise provided by this section if the court in its discretion determines that oral argument would be appropriate.

(e) Notwithstanding any other provision of this section, the court may make a decision without oral argument if there is an urgent and compelling need to do so, including but not limited to decision on a matter in which ex parte action is authorized.

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

(g) As used in this section, the term "oral argument" includes argument made by telephone appearance pursuant to court rules providing for telephone appearance. The term does not include presentation of oral testimony that is evidentiary in nature.

Comment. Section 1044 clarifies circumstances under which a party to a civil action has the right to oral argument before the court makes a decision under this code. As used in this section, "civil action" means an ordinary court proceeding for the declaration, enforcement, or protection of a right, or the redress or prevention of a wrong. See Sections 20 (judicial remedies defined), 21 (division of judicial remedies), 22 (action defined), 24 (kinds of actions), 30 (civil action defined). The section does not apply to a special proceeding, a criminal action, a proceeding in a non-judicial tribunal, or an appeal. Although the section is by its terms limited to civil actions, it may be incorporated by reference in a special proceeding. See, e.g., Section 1109 (writ practice).

This section does not govern proceedings in the Supreme Court or Courts of Appeal. Oral argument in proceedings in those courts is governed by 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).

This section is not limited to pre-trial or in limine matters. It applies to trial motions and post-trial motions as well. Cf. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635 (1894) (foreclosure of mechanics lien). However, it does not govern the right to present oral testimony in an evidentiary proceeding. See subdivision (g).

Subdivision (a) makes clear that the section governs oral argument "to the superior court." That includes argument before a judge, temporary judge, or subordinate judicial officer presiding and making the decision on the matter. It does not include another court officer or employee such as a clerk or research attorney.

Subdivision (b) codifies the right to oral argument expressed in case law for the following matters:

(1) Motion to quash or dismiss for lack of jurisdiction. See Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

(2) Summary judgment motion. See Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); Gwartz v. Superior Court, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).

(3) Demurrer. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of administrative remedies); TJX Cos., Inc. v. Superior Court, 87 Cal. App. 4th 747, 104 Cal. Rptr. 2d 810 (2001) (qualification as class action).

(4) Motion for pretrial writ of attachment. See Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).

(5) Motion for appointment of receiver. See Cal-American Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982).

(6) Discovery motion involving attorney-client privilege. See Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (1993).

(7) Motion to treat party as vexatious litigant. See Bravo v. Ismaj, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (2002).

Subdivision (b) also identifies the following matters in which oral argument must be allowed because the court's decision may be dispositive of the case, either de jure or de facto:

(8) Forum nonconveniens. See Section 410.30.

(9) Quash service of summons. See Section 418.10.

(10) Special motion to strike (anti-SLAPP). See Section 425.16.

(11) Judgment on the pleadings. See Section 438.

(12) Claim and delivery. See Section 512.020.

(13) Injunctive relief. See Section 526.

(14) Delay in prosecution. See Section 583.110.

(15) Judgment notwithstanding verdict. See Section 629.

Subdivision (c)(1) codifies the existing rule that the court must ascertain legislative intent to determine whether a particular statute provides for oral argument. While subdivision (b) identifies some statutes that require oral argument, that provision is not intended as a comprehensive listing.

Under subdivision (c)(1), unless a statute expressly provides for oral argument, a reference in the statute to a "hearing," "argument," or "appearance" is not necessarily construed to require oral argument but should be considered by the court in its determination of legislative intent. Courts have determined legislative intent based on the context of the particular statute, 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.

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 n. 3, 187 Cal. Rptr. 703 (1982).

Under subdivision (c)(2) the court must allow oral argument in a proceeding in which the court's decision could result directly in dismissal of the case. This generalizes existing rules relating to:

• Motion to quash or dismiss for lack of jurisdiction. See Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

• Motion for summary judgment. See Brannon v. Superior Court, 114 Cal. App. 4th 1203, 8 Cal. Rptr. 3d 491 (2004).

• Demurrer. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 118 Cal. Rptr. 2d 249 (2002) (exhaustion of

administrative remedies); *TJX Cos.*, 87 Cal. App. 4th at 755 (qualification as class action). See subdivision (b).

Under subdivision (c)(3) the court must allow oral argument in a proceeding in which the court's decision could so fundamentally affect the circumstances of the parties that as a practical matter it will resolve the case. This generalizes existing rules relating to prejudgment remedies such as pretrial writ of attachment and appointment of a receiver. See Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999) (pretrial writ of attachment); (Cal-American Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982) (appointment of receiver). See subdivision (b).

Subdivision (c)(4) codifies the holding in *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (1993) (attorney-client privilege), and extends it to other privileges such as the attorney's work product privilege and the mediation communications privilege.

Subdivision (d) codifies existing case law providing for court discretion to allow oral argument. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956). Some of the same factors used to determine legislative intent under subdivision (c)(1) may also be relevant to exercise of the court's discretion, such as the possible need for a record due to the likelihood of judicial review, whether the judge is in doubt about the proper resolution of the matter, and whether oral argument would contribute materially to the quality and appearance of justice.

Subdivision (e) codifies the court's authority to abrogate the oral argument requirement in an extraordinary situation. See, e.g., Cohen v. Herbert, 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922 (1960) ("So serious a matter as appointment of a receiver should not be made without a full and complete hearing unless the due administration of justice clearly requires it.") An urgent and compelling need could arise, for example, in a situation where speed or secrecy is required to protect against imminent loss or injury or because of the likelihood that a party will abscond or assets will otherwise be dissipated. A matter in which ex parte action is authorized would typify this type of decision. It should be noted, however, that the party seeking a decision ex parte must ordinarily make a personal appearance. See Cal. R. Ct. 379(i).

Subdivision (f) codifies the existing rule that trial courts "retain extensive discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures." *Mediterranean Construction Co.*, 66 Cal. App. 4th at 265. See also 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. A court

limitation on exercise of an oral argument right must be reasonable. A limitation denying oral argument if supporting papers have not been filed would not be reasonable, for example, in a case in which there was insufficient time to prepare the papers.

Subdivision (g) makes clear that a provision allowing for telephone appearance would satisfy an oral argument requirement under this section. Cf. Section 1006.5 (standard of judicial administration for telephone appearance); Gov't Code § 68070.1 (telephone appearance in nonevidentiary law and motion hearings); Cal. R. Ct. 298 (telephone appearance).

☞ **Staff Note.** The listing of specific determinations in subdivision (b) is preliminary and illustrative. The provision is subject to further research of hearings under the Code of Civil Procedure.

This draft represents an effort to write a statute that gives clear guidance as to when oral argument must be allowed. The staff is not satisfied, however, that this basic approach is workable, even after further refinement. The effort to provide certainty necessarily conflicts with the need to recognize important qualifications and exceptions. Think about criteria the courts have considered relevant when deciding whether to permit oral argument — is the motion made in good faith or for purposes of delay and hindrance, does the motion go to core issues in the case or to side issues, etc. We need either to recognize that concerns such as these are valid and allow for their consideration, or to override them in the interest of a clear simple rule.

CONCLUSION

Once we are satisfied with the general structure of the statute, we will prepare it in the form of a tentative recommendation and circulate it for comment. We could do this after we have conducted a complete review of all motions, hearings, and decisions under the Code of Civil Procedure or, perhaps better, simultaneously with that review. We would solicit from persons commenting on the tentative recommendation their advice as to which matters are most in need of oral argument.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary