

Memorandum 2005-27

**Civil Discovery: Calendar Preference for Writ Review of a
Discovery Ruling on an Issue Common to Consolidated Cases**

In 2002, the Commission began a study of civil discovery, aided by a background report on discovery laws in other jurisdictions, which was prepared by Prof. Gregory Weber of McGeorge School of Law. The Commission has since recommended a nonsubstantive reorganization of the Civil Discovery Act to make the Act more user-friendly. That proposal was enacted and will become operative on July 1, 2005. The Commission has also recommended a number of minor substantive improvements and further technical cleanup, which would be implemented by Assembly Bill 333 (Harman).

This memorandum continues the Commission's work on civil discovery, addressing an issue raised by Senator Joseph Dunn (Chair of the Senate Judiciary Committee). The issue is whether to create a calendar preference for writ review of a discovery ruling when (1) the ruling is in a case that is consolidated with other cases for trial, and (2) the ruling is on an issue common to all of the consolidated cases. For convenient reference in considering this issue, attached is a compilation of statutes establishing a calendar preference for appellate review (Exhibit pp. 1-22).

(Prof. Weber's background report, introductory staff memoranda on civil discovery, and materials relating to the Commission's recommendation on *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004), are classified under Study J-503 in the Commission's filing system. Materials relating to the Commission's recommendations on *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003), and *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004), are classified under Study J-504. For administrative convenience, we have created a new classification — Study J-505 — for the Commission's continuing work on substantive discovery reforms.)

CALENDAR PREFERENCE FOR WRIT REVIEW OF A DISCOVERY RULING IN A CASE
THAT IS CONSOLIDATED WITH OTHER CASES FOR TRIAL

Code of Civil Procedure Section 1048 authorizes consolidation of cases involving a common question of law or fact:

1048. (a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

....

“There are two types of consolidation: a *complete consolidation* resulting in a single action; and a consolidation of separate actions for trial only.” R. Weil & I. Brown, Cal. Practice Guide: Civil Procedure Before Trial *Case Management & Trial Setting* § 12:366, at 12(l)-61 (2005) (emphasis in original); see also *id.* §§ 12:341-12:341.3, at 12(l)-55 to 12(l)-56. Only cases pending in the same court can be consolidated, but a noncomplex case can be transferred from a different court and then consolidated with a case sharing a common question of law or fact. Code Civ. Proc. § 403; R. Weil & I. Brown, *supra*, §§ 12:340, 12:405, at 12(l)-55, 12(l)-66 to 12(l)-67. “Most litigation falls in the ‘noncomplex’ category.” R. Weil & I. Brown, *supra*, § 12:405.2, at 12(l)-67.

(Complex cases pending in different courts cannot be consolidated but can be coordinated under specified conditions. Code Civ. Proc. §§ 404-404.9; Cal. R. Ct. 1500-1550. Coordination is a “rather cumbersome procedure.” R. Weil & I. Brown, *supra*, § 12:370, at 12(l)-62.)

Senator Dunn alerted the Commission to an issue that sometimes arises when cases are consolidated for trial pursuant to Section 1048. Two types of discovery disputes can occur in that context:

- (1) **A generic dispute, common to all of the consolidated cases.** For example, suppose dozens of product liability suits against the same manufacturer for the same product are consolidated. The manufacturer contends that a particular document relating to testing of the product is protected by the lawyer-client privilege. The validity of that contention is a generic issue, one that is relevant to all of the consolidated cases.
- (2) **A case-specific dispute, unique to one of the consolidated cases.** For example, suppose one of the plaintiffs in the preceding

scenario refuses to be deposed at any time during the entire summer because she previously made arrangements to travel abroad. The propriety of her position is a case-specific issue, irrelevant to the other product liability cases that are consolidated with hers.

Senator Dunn's issue relates to writ review of a trial court ruling in a generic discovery dispute.

Specifically, if a party petitions a court of appeal for an extraordinary writ overturning a trial court's ruling on a generic discovery issue, and if the court of appeal elects to entertain the writ, then it may be months or even years before the court of appeal decides the matter on the merits. The delay will be even longer if the matter goes on to the California Supreme Court. Meanwhile, trial preparation either continues in the consolidated cases or is stayed by the appellate court (see Cal. R. Ct. 56).

If the cases are stayed, justice in all of them is delayed and evidence may become stale or unavailable, perhaps eventually resulting in a denial of justice in every case. If discovery and other pretrial preparation continues, however, some or all of it may need to be redone depending on how the court of appeal rules. The parties may incur unnecessary expense and endure needless stress and other litigation hardships. This can occur any time a party seeks writ review of a discovery ruling, but the negative effects are compounded when the writ pertains to a generic issue in consolidated cases.

Senator Dunn therefore asked the Commission to explore the possibility of authorizing or directing a court of appeal to give special priority to a writ proceeding involving a generic discovery issue in consolidated cases. The idea is that by prioritizing such a matter and reducing the time to issue a decision, a court of appeal could minimize the negative effects of delay in that context.

Existing Law

Numerous statutes direct or permit a court to give priority to a particular type of case. A court also has inherent authority to control its calendar consistent with governing law and the administration of justice. We discuss that principle first, then describe the statutory scheme.

Inherent Authority and Code of Civil Procedure Section 187

Dating from the late 19th century, Code of Civil Procedure Section 187 gives courts broad control over court processes:

187. When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, *any suitable process or mode of proceeding may be adopted* which may appear most conformable to the spirit of this code.

(Emphasis added.) “It is beyond dispute that ‘Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.’” *Citizens Utilities Co. v. Superior Court*, 59 Cal. 2d 805, 813, 382 P.2d 356, 31 Cal. Rptr. 316 (1963), quoting *Tide Water Assoc. Oil Co. v. Superior Court*, 59 Cal. 2d 815, 825, 279 P.2d 35 (1955) (footnote omitted).

The court’s inherent authority includes “discretion to grant a motion for calendar preference upon an appropriate showing.” *Warren v. Schechter*, 57 Cal. App. 4th 1189, 1199, 67 Cal. Rptr. 2d 573 (1997); see *Dana Commercial Credit v. Ferns & Ferns*, 90 Cal. App. 4th 142, 147, 108 Cal. Rptr. 2d 278 (2001); see also Code Civ. Proc. § 36(e) (trial setting preference). For example, a court of appeal may exercise its discretion to grant a calendar preference on a nonstatutory ground such as economic hardship. See Cal. R. Ct. 19 Comment.

Similarly, a court of appeal could exercise its discretion to grant a calendar preference for writ review of a generic discovery issue in a case that has been consolidated with other cases for trial. Senator Dunn reports, however, that some appellate court justices are sympathetic to that approach but are reluctant to follow it absent more specific statutory authority.

Statutory Preference In Setting a Case for Trial or Taking Other Action at the Trial Level

Many provisions establish a preference with regard to setting a case for trial or taking other action at the trial level. For example, Code of Civil Procedure Section 36 directs a court to give a trial setting preference on request to a civil litigant over age 70 if the court finds that the party has a substantial interest in the litigation and the litigant’s health is such that a preference “is necessary to prevent prejudicing the party’s interest in the litigation.” The same provision also directs a court to give a trial setting preference on request to a litigant under age 14 who has a substantial interest in an action for personal injury or wrongful death. Section 36 further allows (but does not direct) a court to give a trial setting

preference to a litigant suffering from a medical condition that raises “substantial medical doubt” of survival beyond six months. (For the text of Section 36, see Exhibit pp. 20-22.)

Because the focus here is on writ review, we have not attempted to identify all of the statutes that establish a preference with regard to setting a case for trial or taking other action at the trial level. For further information on such statutes, see R. Weil & I. Brown, *Cal. Practice Guide: Civil Procedure Before Trial Case Management & Trial Setting* §§ 12:240-12:277, at 12(l)-34 to 12(l)-46 (2005). There are also statutes that require trial or other judicial action within a specified time period or a “speedy” or “immediate” trial or other judicial step. R. Mackey, Comment, *California Preference Statutes*, 40 Cal. L. Rev. 288, 288-90 (1952). We have not attempted to identify those statutes here either.

Importantly, if a statute provides a trial setting preference for a particular matter, the existence of that trial setting preference may serve as a basis for giving the matter priority on appeal as well. For example, in *Warren v. Schechter*, 57 Cal. App. 4th 1189, 1199, 67 Cal. Rptr. 2d 573 (1997), the court of appeal pointed out that Section 36 “does not speak to calendar preference on appeal, only to trial setting preference.” (Emphasis in original). But the court determined that “the statute’s rationale for granting calendar preference to certain litigants is equally applicable to appellate proceedings.” *Id.* Relying on that policy consideration, the court’s inherent power to adopt any suitable method of practice not inconsistent with statute or court rule, and Code of Civil Procedure Section 187, the court concluded that “a litigant who may not survive the delay of an appellate court backlog [should] be afforded calendar preference.” *Id.*

The Advisory Committee Comment to Rule 19 of the California Rules of Court reinforces that approach. Citing Section 36 and *Warren*, the Comment makes clear that a litigant may ask a reviewing court to “exercise its discretion to grant preference when a statute provides for trial preference.”

But the situation described by Senator Dunn only arises when a writ is taken. Consequently, there is no applicable statute granting a trial preference. At best, Code of Civil Procedure Section 1048 authorizes a court to “make such orders concerning [consolidated cases] as may tend to avoid ... delay.” It would be difficult but perhaps not impossible to successfully argue that (1) this language authorizing a court to take steps to avoid delay is comparable to (2) a trial setting preference that provides a policy basis for granting a preference at the appellate level under the reasoning of *Warren*.

Statutory Preference With Regard to Appellate Review

Numerous statutes expressly establish a preference with regard to appellate review. The staff's research has not been exhaustive, but we have already found the following:

- Cal. Const. art. X A, § 6. Specified decisions regarding water resource development. (Exhibit pp. 2-4.)
- Code Civ. Proc. § 44. Probate proceeding, contested election case, or action against officeholder or candidate for libel or slander during election campaign. (Exhibit p. 4.)
- Code Civ. Proc. § 45. Appeal from judgment freeing or denying recommendation to free dependent child of juvenile court from parental custody or control. (Exhibit p. 4.)
- Code Civ. Proc. § 877.6(e)(2). Writ regarding good faith settlement. (Exhibit pp. 4-5.)
- Code Civ. Proc. § 1062.5. Declaration of rights, duties, and obligations of medical malpractice insurer. (Exhibit pp. 5-6.)
- Educ. Code § 43060. Action to determine validity of special election of June 2, 1987, in specified school districts. (Exhibit pp. 7-8.)
- Elec. Code § 13314. Error or other irregularity in ballot, sample ballot, or voter pamphlet. (Exhibit p. 8.)
- Elec. Code § 14310. Provisional ballot. (Exhibit pp. 8-9.)
- Elec. Code § 16003. Contested presidential election. (Exhibit p. 10.)
- Elec. Code § 16920. Primary election contest other than recount. (Exhibit p. 10.)
- Gov't Code § 7910. Appropriations limit of local jurisdiction. (Exhibit pp. 11-12.)
- Gov't Code § 7911. Return of excess revenues by local jurisdiction. (Exhibit p. 12.)
- Gov't Code § 65752. Challenge to general plan. (Exhibit p. 12.)
- Ins. Code § 12629.44. Order approving plan for rehabilitation, readjustment, or reorganization of mortgage insurer or related matter. (Exhibit p. 13.)
- Prob. Code § 1962. Involuntary sterilization. (Exhibit p. 15.)
- Pub. Res. Code § 21167.1. Environmental impact report. (Exhibit pp. 15-16.)
- Pub. Res. Code § 25903. Certification of site and power facility by Energy Resources Conservation and Development Commission. (Exhibit p. 16.)

- Pub. Util. Code § 1762. Stay of order or decision of Public Utilities Commission on finding of great or irreparable damage. (Exhibit pp. 16-17.)
- Welf. & Inst. Code § 395. Proceeding within jurisdiction of juvenile court. (Exhibit pp. 18-19.)
- Welf. & Inst. Code § 800. Juvenile court jurisdiction of habitual truant or minor guilty of crime. (Exhibit pp. 19-20.)
- Cal. R. Ct. 2211. Writ petition for violation of trial court employee labor relations agreement or labor relations statute. (Exhibit pp. 20-21.)

Other provisions are not altogether clear about whether they apply to appellate review or only establish a preference at the trial level. For example, Code of Civil Procedure Section 1179a (Exhibit p. 6) states that “all courts” shall give precedence to actions for forcible or unlawful detainer. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely. Other provisions are similar. *See* Code Civ. Proc. § 1291.2 (arbitration-related proceedings, Exhibit p. 7); Fish & Game Code § 8610.7 (validity of specified provisions of Marine Resources Protection Act, Exhibit pp. 10-11); Rev. & Tax Code § 2956 (challenge to seizure of property in collecting taxes on unsecured property, Exhibit p. 17); Rev. & Tax Code § 3006 (action for collection of taxes on unsecured property, Exhibit pp. 17-18); Unemp. Ins. Code § 1853 (action by or against Director of Employment Development, Exhibit p. 18); *see also* Code Civ. Proc. § 1260.010 (eminent domain, Exhibit p. 6); Gov’t Code § 66499.37 (Subdivision Map Act, Exhibit p. 12); Pub. Util. Code § 1767 (proceeding involving Public Utilities Commission, Exhibit p. 17).

Perhaps most fundamentally, Penal Code Section 1050 provides that “criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.” (Exhibit pp. 13-15.) Although this language does not expressly cover appellate review, it is clear from other statutes that criminal cases are entitled to precedence at the appellate level. *See, e.g.,* Elec. Code § 16003 (appeal in presidential election contest takes precedence over “all other civil matters”); Gov’t Code § 66499.37 (Subdivision Map Act challenge takes precedence over “all matters of the calendar of the court except criminal, ...”); *see also* Mackey, *supra*, 40 Cal. L. Rev. at 297 (district courts of appeal recognize preference “in the following order: criminal cases, probate cases, cases in which the state is a party, guardianship cases, and unlawful entry and detainer cases”).

Hierarchy of Statutory Preferences With Regard to Appellate Review

The interrelationship between the various statutes that establish a calendar preference for appellate review is unclear. Several statutes give a particular matter precedence over “all” other cases pending in the appellate court. These include:

- Code Civ. Proc. § 45. Appeal from judgment freeing or denying recommendation to free dependent child of juvenile court from parental custody or control. (Exhibit p. 4.)
- Elec. Code § 16920. Primary election contest other than recount. (Exhibit p. 10.)
- Prob. Code § 1962. Involuntary sterilization. (Exhibit p. 15.)
- Welf. & Inst. Code § 395. Proceeding within jurisdiction of juvenile court. (Exhibit pp. 18-19.)
- Welf. & Inst. Code § 800. Juvenile court jurisdiction of habitual truant or minor guilty of crime. (Exhibit pp. 19-20.)

Each of these statutes involves a situation in which the need for immediate attention is obvious. The statutes do not expressly state that a court should give these matters precedence even over a criminal case. That may be implicit, however, in the reference to “all” cases.

Other statutes give a particular matter precedence over “all other civil actions” pending in the appellate court. These are:

- Code Civ. Proc. § 1260.010. Eminent domain. (Exhibit p. 6.)
- Educ. Code § 43060. Action to determine validity of special election of June 2, 1987, in specified school districts. (Exhibit pp. 7-8.)
- Elec. Code § 13314. Error or other irregularity in ballot, sample ballot, or voter pamphlet. (Exhibit p. 8.)
- Elec. Code § 14310. Provisional ballot. (Exhibit pp. 8-9.)
- Elec. Code § 16003. Contested presidential election. (Exhibit p. 10.)
- Fish & Game Code § 8610.7. Validity of specified provisions of Marine Resources Protection Act. (Exhibit pp. 10-11.)
- Gov’t Code § 7910. Appropriations limit of local jurisdiction. (Exhibit pp. 11-12.)
- Gov’t Code § 7911. Return of excess revenues by local jurisdiction. (Exhibit p. 12.)
- Gov’t Code § 65752. Challenge to general plan. (Exhibit p. 12.)

- Pub. Res. Code § 21167.1. Environmental impact report. (Exhibit pp. 15-16.)

Implicitly, these matters do not take precedence over a criminal case. Presumably, they also would not take precedence over any of the matters that have precedence over “all” other cases pending in the appellate court. As a logical issue, it is hard to understand how these matters that have priority over “all other civil actions” are supposed to interrelate with each other. How can each of them take priority over “all other civil actions”? If two such matters are pending before an appellate court, which takes precedence?

Several other provisions take a more analytically satisfying approach. These provisions give a particular matter preference over all other civil actions, “except actions to which special precedence is given by law.” *See* Code Civ. Proc. §§ 1179a (forcible or unlawful detainer, Exhibit p. 6), 1291.2 (arbitration-related proceedings, Exhibit p. 7); Rev. & Tax Code §§ 2956 (challenge to seizure of property in collecting taxes on unsecured property, Exhibit p. 17), 3006 (action for collection of taxes on unsecured property, Exhibit pp. 17-18); *see also* Code Civ. Proc. §§ 877.6(e)(2) (writ regarding good faith settlement, Exhibit pp. 4-5). The apparent intent of these provisions is to give the matters in question priority over regular civil actions, but equal rank with other civil actions that have been given a statutory preference (except perhaps lower rank than those that take priority over “all” other pending cases).

There are other variations as well:

- A provision that gives a matter preference “over all other civil litigation except equity cases, cases involving extraordinary writs, or summary proceedings.” Unemp. Ins. Code § 1853 (action by or against Director of Employment Development, Exhibit p. 18).
- Two provisions that give a matter preference after “cases in which the people of the state are parties.” Code Civ. Proc. §§ 44 (probate proceeding, contested election case, or action against officeholder or candidate for libel or slander during election campaign, Exhibit p. 4), 1062.5 (declaration of rights, duties, and obligations of medical malpractice insurer, Exhibit pp. 5-6).
- Two provisions that give a matter preference over all civil cases except election cases. Ins. Code § 12629.44 (order approving plan for rehabilitation, readjustment, or reorganization of mortgage insurer or related matter, Exhibit p. 13); Pub. Util. Code § 1767 (proceeding involving Public Utilities Commission, Exhibit p. 17).

- A provision that gives a matter preference over “all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.” Gov’t Code § 66499.37 (Subdivision Map Act, Exhibit p. 12).
- A court rule that gives a matter priority “over other matters to the extent permitted by law and the rules of court.” Cal. R. Ct. 2211 (writ petition for violation of trial court employee labor relations agreement or labor relations statute, Exhibit pp. 20-21).
- A provision that says an application for a stay “shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.” Pub. Util. Code § 1762 (stay of order or decision of Public Utilities Commission on finding of great or irreparable damage, Exhibit pp. 16-17).
- A provision that simply provides that certain appeals “shall be given preference” Pub. Res. Code § 25903 (certification of site and power facility by Energy Resources Conservation and Development Commission, Exhibit p. 16).
- A constitutional provision that says certain matters should be given preference over “all civil actions or proceedings” and the “provisions of this section shall supersede any provisions of law requiring courts to give preference to other civil actions or proceedings.” Cal. Const. art. art. X A, § 6 (Exhibit pp. 2-4). This provision relates to the peripheral canal project that the voters rejected on June 8, 1982. It appears to be obsolete, in whole or at least in part.

It is hard to tell precisely how all of these rules are supposed to interrelate. It would be helpful to seek information on how the appellate courts are applying them. The staff will attempt to obtain such information. We encourage input on this point.

Analysis

Although there are lots of statutes establishing a calendar preference for appellate review, there is no provision specifically applicable in the situation Senator Dunn describes. The question is whether to create one.

The circumstances in which calendar preferences are granted vary, but all involve situations in which time appears to be of the essence for one policy reason or another. The same is true with regard to the situation described by Senator Dunn. It may not be quite as urgent as some of the examples, such as a contested presidential election or a dispute over whether to make a child a ward of the court. But the situation is certainly comparable to some of the other

examples, such as a writ regarding a good faith settlement, a declaration of the rights and duties of a medical malpractice insurer, or an order approving a plan for rehabilitation of a mortgage insurer.

It thus seems reasonable to try to address that situation similarly. The importance of avoiding delay in consolidated cases is already recognized to some extent in Code of Civil Procedure Section 1048, which says that “[w]hen actions involving a common question of law or fact are pending before the court, ... it may order all the actions consolidated and it may make such orders concerning proceedings therein *as may tend to avoid unnecessary costs or delay.*” (Emphasis added.) Alabama and New York have similar rules. *See* Ala. R. Civ. Proc. 42; N.Y. C.P.L.R. 602. Likewise, in proposing the creation of an Interstate Complex Litigation Panel, the American Law Institute proposed that “[w]hen the Interstate Complex Litigation Panel transfers and consolidates state cases pursuant to § 1, ... the transferee court shall have power to accord any matter calendar preference.” *See Selected Provisions of the ALI Complex Litigation Proposal: Statutory Recommendations & Reporter’s Study*, 1995 B.Y.U. L. Rev. 1135, 1154-55 (1995). Senator Dunn’s suggestion would simply extend this principle of expediting consolidated cases to the context of writ review of a discovery ruling in such cases.

As yet, we have not found any state or other jurisdiction that has a statute along those lines. Our research is continuing, but it seems likely that we will have to proceed without the benefit of a statute that could serve as a model.

That leads to a number of issues, as discussed below.

Scope of reform

As discussed above, the interrelationship between the various statutes establishing an appellate-level calendar preference is unclear. It is tempting to try to clarify this matter, as was proposed more than a half century ago:

It is recognized that the statutes and their application in California have created some difficulties. However, it does not seem that they have proved so unworkable that the statutory method of preference need be abolished.

The legislature is in a better position than are individual judges to determine competing factors governing what actions are in the public interest. By continuing to allow the legislature to mark out the guide posts for the courts the advantage of uniformity is preserved.

It would be advisable for the legislature to review the present list of actions to determine whether each is so vital as to receive special treatment. *Those found to be entitled to preference should be included in one statute with a definite order of priority listed.* This single statute would have the advantages of facility of reference and elimination of present conflicting provisions.

Mackey, *supra*, at 297 (emphasis added). It might also be appropriate to add new preferences in addition to what Senator Dunn suggests. *See, e.g., Billings, That Thing Called Pro Bono*, 11 Utah Bar J. 23, 24 (Sept. 1998) (proposing calendar preference for pro bono case). Or perhaps the system should be revised to give an appellate court greater control over its calendar (e.g., by making all, or at least some, of the statutory preferences discretionary rather than mandatory). *See generally* Witkin, *New California Rules on Appeal*, 17 So. Cal. L. Rev. 238, 239-43 (1944).

However, the Commission lacks authority to conduct a thorough study of the statutes granting calendar preferences. To do such a study, it would have to request and receive authority from the Legislature. It may be appropriate to make such a request in the future, but for now the Commission's resources are limited and **it seems best to focus on the narrow issue raised by Senator Dunn.** The Commission can always revisit this decision if it proves unworkable.

The problem Senator Dunn describes, however, could arise when a writ is taken with regard to any pretrial ruling on an issue common to consolidated cases, not just a generic discovery ruling. **It seems advisable to cover all generic pretrial rulings**, even though the Commission's study is focused on civil discovery. Although the Legislature did not expressly authorize the Commission to study civil discovery "and related matters," it is often necessary to address related matters in conducting a study. In this instance, it would be illogical to create a statutory preference with regard to a generic discovery ruling but not with regard to other generic pretrial rulings. Because the only sensible approach is to include all generic pretrial rulings, we are confident that such an approach is consistent with the legislative grant of authority.

Mandatory or discretionary preference

Another issue is whether to make the new statutory preference mandatory, as opposed to discretionary. If the preference were discretionary, an appellate court could examine factors such as the number of consolidated cases in determining whether to give a writ preference over other pending matters. The need for a

preference is much stronger if a writ raises an issue common to many consolidated cases than if it raises an issue common to only a few consolidated cases.

But all of the existing appellate-level statutory preferences we have found thus far appear to be mandatory. A discretionary preference may have little impact, particularly because an appellate court already has inherent discretion to control its calendar consistent with governing law and the sound administration of justice. The staff therefore recommends **creating a *mandatory* calendar preference for a writ challenging a pretrial ruling on an issue that is common to consolidated cases.**

Extent of priority

The most difficult issue is how much priority to give to such a matter. Should it be ranked with a contested primary election (other than a recount), involuntary sterilization, and the other situations that are given statutory preference over “all other cases pending in the appellate court?” Probably not. The degree of urgency is not comparable.

Should our situation be given preference over “all other civil actions,” like many of the statutes that establish an appellate-level calendar preference? Again, this seems ill-advised. The practice of giving multiple matters precedence over “all other civil actions” creates an insoluble conundrum. Each such statute fails to take into account the existence of the other, similar statutes that also require a matter to take priority over “all other civil actions.”

A better alternative might be to give our situation precedence over all other civil actions, “except another action to which precedence is given by law.” We believe that such a limitation should be read into each of the provisions that take precedence over “all other civil actions.” If the statutes are so construed, then the language we suggest should put our situation on equal footing with other situations that receive a calendar preference, except (1) a criminal case, (2) a matter that takes precedence over “all other cases pending in the appellate court,” and perhaps (3) some of the unusual provisions discussed at pages 9-10. This might not be the optimal result, if the statutes were carefully evaluated and ranked with regard to urgency based on the policy considerations at stake. But it might be the best that can be done given the lack of coherence in the existing statutory scheme. The staff is tentatively inclined in this direction, although our

thoughts may change as we obtain further information about how the calendaring system actually works in the appellate courts.

Proposed provision

The approach the staff recommends **could be implemented by a provision along the following lines:**

Code Civ. Proc. § 1048.1 (added.) Calendar preference for writ review of pretrial ruling on issue common to consolidated cases

1048.1. When several cases are consolidated for some but not all purposes pursuant to Section 1048, a party to one of those cases petitions for an extraordinary writ on an issue common to all of the cases, and the reviewing court issues an alternative writ or an order to show cause, the reviewing court shall give the writ petition precedence over all other civil actions in setting the case for hearing and hearing the matter, except another action to which precedence is given by law.

Comment. Section 1048.1 is added to ensure prompt disposition of a writ petition on an issue that is common to consolidated cases, so that trial preparation in those cases can proceed without undue delay or unnecessary expense or effort. A writ petition under this section is entitled to the same degree of scheduling priority as any matter that is given statutory precedence over “all other civil actions” (e.g., Code Civ. Proc. § 1260.010; Educ. Code § 43060; Elec. Code §§ 13314, 14310, 16003; Fish & Game Code § 8610.7; Gov’t Code §§ 7910, 7911, 6752; Pub. Res. Code § 21167.1) or “all other civil actions except actions to which special precedence is given by law” (e.g., Code Civ. Proc. §§ 1179a, 1291.2; Rev. & Tax Code §§ 2956, 3006; see also Code Civ. Proc. §§ 877.6(e)(2)). For the procedure to use in obtaining a calendar preference from an appellate court, see Cal. R. Ct. 19.

If the Commission would like to pursue this approach (with or without modifications), the next step would be to prepare a draft of a tentative recommendation for the Commission to review. We would simultaneously attempt to gather more information on how appellate courts are actually implementing the existing statutory calendar preferences.

When the Commission considers the draft of the tentative recommendation, it will be able to refine the draft as it deems appropriate. Once the Commission approves a tentative recommendation, the proposal will be circulated to interested parties for comment. The Commission will then have an opportunity to review the comments and further refine the proposal before approving a final recommendation and submitting the proposal to the Legislature.

Obsolete provisions

Several of the statutes establishing a calendar preference for appellate review appear to be obsolete, in whole or in part. *See* Educ. Code § 43060 (action to determine validity of special election of June 2, 1987, in specified school districts, Exhibit pp. 7-8); Fish & Game Code § 8610.7 (validity of specified provisions of Marine Resources Protection Act, Exhibit pp. 10-11); Gov't Code § 7910 (appropriations limit of local jurisdiction, Exhibit pp. 11-12). Pursuant to Government Code Section 8298, the Commission could investigate the possibility of eliminating this obsolete material. This would be a good project for a student to work on.

The constitutional provision we found establishing a calendar preference for appellate review (Cal. Const. art. X A, § 6) also appears to contain obsolete material. But the Commission's authority to correct technical defects pursuant to Government Code Section 8298 is limited to statutes; it does not extend to a constitutional provision. This is just as well, because the procedure for revising a constitutional provision is long and difficult, even if the reform is trivial and noncontroversial. We became well aware of this when proposing the repeal of an obsolete constitutional provision relating to the municipal courts. Although the voters ultimately approved the proposed reform, the process was a considerable drain on Commission resources and we are not eager to repeat it.

Respectfully submitted,

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Exhibit

STATUTES ESTABLISHING A CALENDAR PREFERENCE FOR APPELLATE REVIEW

☞ **Staff Note.** Shown below are statutes that appear to establish a calendar preference for appellate review in a particular context. Key language is in boldface italics. This listing may not be exhaustive. Some statutes may establish a calendar preference for appellate review without using the search terms that the staff used in compiling this list. Other statutes grant a calendar preference to a particular matter, but are ambiguous regarding whether that preference applies to appellate review. The staff is continuing to search for additional relevant statutes.

In addition to these statutes, the staff found one Rule of Court that appears to establish a calendar preference for appellate review in a particular context. That rule is reproduced below, after the list of statutes.

In *Warren v. Schechter*, 57 Cal. App. 4th 1189, 1199, 67 Cal. Rptr. 2d 573 (1997), the court of appeal considered Code of Civil Procedure Section 36, which “does not speak to *calendar preference on appeal*, only to *trial setting preference*.” (Emphasis in original). The court pointed out that “the statute’s rationale for granting calendar preference to certain litigants is equally applicable to appellate proceedings.” *Id.* Relying on that policy consideration, the court’s inherent power to adopt any suitable method of practice not inconsistent with statute or court rule, and Code of Civil Procedure Section 187, the court concluded that “a litigant who may not survive the delay of an appellate court backlog [should] be afforded calendar preference.” *Id.* That analysis might apply not only to Section 36, but also to other provisions. For convenient reference, Section 36 is reproduced below under “Other Relevant Statutes.”

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STATUTES THAT APPEAR TO ESTABLISH A CALENDAR PREFERENCE FOR APPELLATE REVIEW

Cal. Const. art. X A, § 6. Specified decisions regarding water resource development

(a) The venue of any of the following actions or proceedings brought in a superior court shall be Sacramento County:

(1) An action or proceeding to attack, review, set aside, void, or annul any provision of the statute enacted by Senate Bill No. 200 of the 1979-80 Regular Session of the Legislature.

(2) An action or proceeding to attack, review, set aside, void, or annul the determination made by the Director of Water Resources and the Director of Fish and Game pursuant to subdivision (a) of Section 11255 of the Water Code.

(3) An action or proceeding which would have the effect of attacking, reviewing, preventing, or substantially delaying the construction, operation, or maintenance of the peripheral canal unit described in subdivision (a) of Section 11255 of the Water Code.

(4) An action or proceeding to require the State Water Resources Development System to comply with subdivision (b) of Section 11460 of the Water Code.

(5) An action or proceeding to require the Department of Water Resources or its successor agency to comply with the permanent agreement specified in subdivision (a) of Section 11256 of the Water Code.

(6) An action or proceeding to require the Department of Water Resources or its successor agency to comply with the provisions of the contracts entered into pursuant to Section 11456 of the Water Code.

(b) An action or proceeding described in paragraph (1) of subdivision (a) shall be commenced within one year after the effective date of the statute enacted by Senate Bill No. 200 of the 1979-80 Regular Session of the Legislature. Any other action or proceeding described in subdivision (a) shall be commenced within one year after the cause of action arises unless a shorter period is otherwise provided by statute.

(c) The superior court or *a court of appeals shall give preference to the actions or proceedings described in this section over all civil actions or proceedings pending in the court.* The superior court shall commence hearing any such action or proceeding within six months after the commencement of the action or proceeding, provided that any such hearing may be delayed by joint stipulation of the parties or at the discretion of the court for good cause shown. *The provisions of this section shall supersede any provisions of law requiring courts to give preference to other civil actions or proceedings.* The provisions of this subdivision may be enforced by mandamus.

(d) The Supreme Court shall, upon the request of any party, transfer to itself, before a decision in the court of appeal, any appeal or petition for extraordinary relief from an action or proceeding described in this section, unless the Supreme Court determines that the action or proceeding is unlikely to substantially affect (1) the construction, operation, or maintenance of the peripheral canal unit described in subdivision (a) of Section 11255 of the Water Code, (2) compliance with subdivision (b) of Section 11460 of the Water Code, (3) compliance with the permanent agreement specified in Section 11256 of the Water Code, or (4) compliance with the provisions of the contracts entered into pursuant to Section 11456 of the Water Code. *The request for transfer shall receive preference on the Supreme Court's calendar.* If the action or proceeding is transferred to the Supreme Court, the Supreme Court shall commence to hear the matter within six months of the transfer unless the parties by joint stipulation request additional time or the court, for good cause shown, grants additional time.

(e) The remedy prescribed by the court for an action or proceeding described in paragraph (4), (5), or (6) of subdivision (a) shall include, but need not be limited to, compliance with subdivision (b) of Section 11460 of the Water Code, the permanent agreement specified in Section 11256 of the Water Code, or the provisions of the contracts entered into pursuant to Section 11456 of the Water Code.

(f) The Board of Supervisors of the County of Sacramento may apply to the State Board of Control for actual costs imposed by the requirements of this section upon the county, and the State Board of Control shall pay such actual costs.

(g) Notwithstanding the provisions of this section, nothing in this Article shall be construed as prohibiting the Supreme Court from exercising the transfer authority contained in Article VI, Section 12 of the Constitution.

☞ **Staff Note.** This constitutional provision appears to be obsolete, in whole or at least in part. A referendum regarding the peripheral canal project was rejected by the voters on June 8, 1982. The procedure for revising the Constitution is difficult, so it would not be advisable for the Commission spend time investigating this point, even if it had authority to do so.

Code Civ. Proc. § 44. Probate proceeding, contested election case, or action against officeholder or candidate for libel or slander during election campaign

44. Appeals in probate proceedings, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign *shall be given preference in hearing in the courts of appeal, and in the Supreme Court* when transferred thereto. All these cases shall be placed on the calendar *in the order of their date of issue, next after cases in which the people of the state are parties.*

Code Civ. Proc. § 45. Appeal from judgment freeing or denying recommendation to free dependent child of juvenile court from parental custody or control

45. An appeal from a judgment freeing a minor who is a dependent child of the juvenile court from parental custody and control, or denying a recommendation to free a minor from parental custody or control, *shall have precedence over all cases in the court to which an appeal in the matter is taken.* In order to enable the child to be available for adoption as soon as possible and to minimize the anxiety to all parties, the appellate court shall grant an extension of time to a court reporter or to counsel only upon an exceptional showing of good cause.

Code Civ. Proc. § 877.6. Good faith settlement

877.6. (a) (1) Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005. Upon a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced.

(2) In the alternative, a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith

settlement and a proposed order. The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. The notice, application, and proposed order shall be given by certified mail, return receipt requested. Proof of service shall be filed with the court. Within 25 days of the mailing of the notice, application, and proposed order, or within 20 days of personal service, a nonsettling party may file a notice of motion to contest the good faith of the settlement. If none of the nonsettling parties files a motion within 25 days of mailing of the notice, application, and proposed order, or within 20 days of personal service, the court may approve the settlement. The notice by a nonsettling party shall be given in the manner provided in subdivision (b) of Section 1005. However, this paragraph shall not apply to settlements in which a confidentiality agreement has been entered into regarding the case or the terms of the settlement.

(b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing.

(c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

(d) The party asserting the lack of good faith shall have the burden of proof on that issue.

(e) When a determination of the good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of written notice of the determination, or within any additional time not exceeding 20 days as the trial court may allow.

(1) The court shall, within 30 days of the receipt of all materials to be filed by the parties, determine whether or not the court will hear the writ and notify the parties of its determination.

(2) If the court grants a hearing on the writ, the hearing shall be given special precedence over all other civil matters on the calendar of the court except those matters to which equal or greater precedence on the calendar is granted by law.

(3) The running of any period of time after which an action would be subject to dismissal pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2 shall be tolled during the period of review of a determination pursuant to this subdivision.

Code Civ. Proc. § 1062.5. Declaration of rights, duties, and obligations of medical malpractice insurer

1062.5. Any insurer who issues policies of professional liability insurance to health care providers for professional negligence, as defined in Chapter 1 as amended by Chapter 2, Statutes of 1975, Second Extraordinary Session, any health

care provider covered by such a policy, or any potentially aggrieved person, may bring an action in the superior court for a declaration of its, his, or her rights, duties, and obligations under Chapter 1 as amended by Chapter 2, Statutes of 1975, Second Extraordinary Session.

The court shall permit any of the following persons to intervene in the action:

(1) The Attorney General.

(2) Any other person whose appearance is determined by the court to be essential to a complete determination or settlement of any issues in the action.

The action shall be commenced in the superior court in the county in which the Attorney General is required to reside and keep his office pursuant to Section 1060 of the Government Code.

The action shall be set for trial at the earliest possible date and shall take precedence over all cases other than those in which the state is a party.

The court may make a binding declaration of the rights, duties, and obligations of the insurer, whether or not further relief is or could be claimed at the time. The declaration may be affirmative or negative in form and effect and shall have the force and effect of a final judgment.

If the declaration is appealed, the appeal shall be given precedence in the court of appeal and Supreme Court and placed on the calendar in the order of its date of issue immediately following cases in which the state is a party.

The remedy established by this section is cumulative, and shall not be construed as restricting any remedy established for the benefit of any party to the action by any other provision of law. No declaration under this section shall preclude any party from obtaining additional relief based upon the same facts.

Code Civ. Proc. § 1179a. Forcible or unlawful detainer

1179a. In all proceedings brought to recover the possession of real property pursuant to the provisions of this chapter ***all courts, wherein such actions are or may hereafter be pending, shall give such actions precedence over all other civil actions therein, except actions to which special precedence is given by law,*** in the matter of the setting the same for hearing or trial, and ***in hearing the same,*** to the end that all such actions shall be quickly heard and determined.

☞ **Staff Note.** This provision states that “all courts” shall give preference to the specified actions and proceedings on request. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely.

Code Civ. Proc. § 1260.010. Eminent domain

1260.010. Proceedings under this title ***take precedence over all other civil actions in the matter of setting the same for hearing*** or trial in order that such proceedings shall be quickly heard and determined.

☞ **Staff Note.** This provision does not expressly establish a calendar preference for appellate review. A leading treatise interprets the provision to apply to appellate review. See 9 B. Witkin, *California Procedure Appeal* § 657, at 692 (4th ed. 1997).

Code Civ. Proc. § 1291.2. Arbitration-related proceedings

1291.2. In all proceedings brought under the provisions of this title, *all courts wherein such proceedings are pending shall give such proceedings preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law*, in the matter of setting the same for hearing and in hearing the same to the end that all such proceedings shall be quickly heard and determined.

☞ **Staff Note.** This provision states that “all courts” shall give preference to the specified actions and proceedings on request. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely.

Educ. Code § 43060. Action to determine validity of special election of June 2, 1987, in specified school districts

43060. (a) In the action of California Building Industry Association v. Governing Board of the Newhall School District, et al., (Los Angeles County Superior Court (c658159)) brought to determine the validity of the special election of June 2, 1987, held in the William S. Hart Union High School District, the Castaic Union School District, the Newhall School District, the Saugus Union School District, or the Sulphur Springs Elementary School District, *including the hearing of the action on appeal from the decision of a lower court, all courts where the action is or may hereafter be pending shall give the action preference over all other civil actions*, with respect to setting the action for hearing or trial and hearing the action, to the end that the action shall be quickly heard and determined.

(b) If the action described in subdivision (a) is appealed, at the completion of the filing of briefs, the appellant shall notify the reviewing court that the briefs have been filed. Upon receipt of notice that the briefs have been filed, the clerk of the reviewing court shall set the appeal for hearing on the first available date on the court calendar.

(c) Section 43040.5, as added by Section 1 of the act adding this section, shall become operative only if the school districts named in Section 43040.5 prevail in the litigation described in subdivision (a).

(d) No city or county shall condition the issuance of a building permit on the payment of any tax required by special election as described in subdivision (a) unless Section 43040.5 becomes operative, as provided in subdivision (c), or unless a court of competent jurisdiction so orders.

(e) No school district enumerated in Section 43040.5 shall condition the collection of, or certification of compliance with, any developer fee or other requirement levied by the governing board of that school district under Section 53080 of the Government Code on the payment of any tax required by special election as described in subdivision (a) unless Section 43040.5 becomes operative, as provided in subdivisions (c), or unless a court of competent jurisdiction so orders, so long as the applicant for the building permit agrees in writing to pay the

special tax, together with interest from the date of issuance of the building permit at a reasonable rate as determined by the court, in the event that the school district prevails in the litigation described in subdivision (a).

☞ **Staff Note.** This provision probably is obsolete, in whole or at least in part. It might be appropriate to repeal the provision or amend it to delete obsolete material. The Commission could investigate this possibility pursuant to Government Code Section 8298 (“The commission may study and recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study.”).

Elec. Code § 13314. Error or other irregularity in ballot, sample ballot, or voter pamphlet

13314. (a) (1) Any elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of any name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur.

(2) A peremptory writ of mandate shall issue only upon proof of both of the following: (A) that the error, omission, or neglect is in violation of this code or the Constitution, and (B) that issuance of the writ will not substantially interfere with the conduct of the election.

(3) *The action or appeal shall have priority over all other civil matters.*

(b) Venue for a proceeding under this section shall be exclusively in Sacramento County in any of the following cases:

(1) The Secretary of State is named as a real party in interest or as a respondent.

(2) A candidate for statewide elective office is named as a party.

(3) A statewide measure that is to be placed on the ballot is the subject of the proceeding.

Elec. Code § 14310. Provisional ballot

14310. (a) At all elections, a voter claiming to be properly registered but whose qualification or entitlement to vote cannot be immediately established upon examination of the index of registration for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot as follows:

(1) An election official shall advise the voter of the voter’s right to cast a provisional ballot.

(2) The voter shall be provided a provisional ballot, written instructions regarding the process and procedures for casting the provisional ballot, and a written affirmation regarding the voter’s registration and eligibility to vote. The written instructions shall include the information set forth in subdivisions (c) and (d).

(3) The voter shall be required to execute, in the presence of an elections official, the written affirmation stating that the voter is eligible to vote and registered in the county where the voter desires to vote.

(b) Once voted, the voter's ballot shall be sealed in a provisional ballot envelope, and the ballot in its envelope shall be deposited in the ballot box. All provisional ballots voted shall remain sealed in their envelopes for return to the elections official in accordance with the elections official's instructions. The provisional ballot envelopes specified in this subdivision shall be a color different than the color of, but printed substantially similar to, the envelopes used for absentee ballots, and shall be completed in the same manner as absentee envelopes.

(c)(1) During the official canvass, the elections official shall examine the records with respect to all provisional ballots cast. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. A variation of the signature caused by the substitution of initials for the first or middle name, or both, shall not invalidate the ballot.

(2) Provisional ballots shall not be included in any semiofficial or official canvass, except upon: (A) the elections official's establishing prior to the completion of the official canvass, from the records in his or her office, the claimant's right to vote; or (B) the order of a superior court in the county of the voter's residence. A voter may seek the court order specified in this paragraph regarding his or her own ballot at any time prior to completion of the official canvass. ***Any judicial action or appeal shall have priority over all other civil matters.***

(3) The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.

(A) If the ballot cast by the voter contains the same candidates and measures on which the voter would have been entitled to vote in his or her assigned precinct, the elections official shall count the votes for the entire ballot.

(B) If the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in his or her assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in his or her assigned precinct.

(d) The Secretary of State shall establish a free access system that any voter who casts a provisional ballot may access to discover whether the voter's provisional ballot was counted and, if not, the reason why it was not counted.

(e) The Secretary of State may adopt appropriate regulations for purposes of ensuring the uniform application of this section.

(f) This section shall apply to any absent voter described by Section 3015 who is unable to surrender his or her unvoted absent voter's ballot.

(g) Any existing supply of envelopes marked "special challenged ballot" may be used until the supply is exhausted.

Elec. Code § 16003. Contested presidential election

16003. In a contest of the election of presidential electors *the action or appeal shall have priority over all other civil matters*. Final determination and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December.

Elec. Code § 16920. Primary election contest other than recount

16920. Either party to a contest may appeal to the district court of appeal of the district where the contest is brought, if the appeal is perfected by the appellant within 10 days after judgment of the superior court is pronounced. *The appeal shall have precedence over all other appeals* and shall be acted upon by the district court of appeal within 10 days after the appeal is filed.

Fish & Game Code § 8610.7. Validity of specified provisions of Marine Resources Protection Act

8610.7. (a) Commencing on July 1, 1993, there shall be paid to any person who submitted the form required by Section 7 of Article XB of the California Constitution within the 90-day period specified in subdivision (a) of that section, holds a permit issued pursuant to Section 5 of Article XB, who operates in the zone established pursuant to that article, who surrenders that permit to the department between July 1, 1993, and January 1, 1994, inclusive, and who agrees to permanently discontinue fishing with gill and trammel nets within the zone, a one-time compensation consisting of the average annual ex vessel value of the fish other than any species of rockfish landed by a fisherman, which were taken pursuant to a valid general gill net or trammel net permit issued pursuant to Sections 8681 and 8682 within the zone during the years 1983 to 1987, inclusive. The department shall determine the amount of compensation to be paid by reviewing logs and landing receipts submitted to the department.

(b) Any person who did not submit the form required by Section 7 of Article XB of the California Constitution within the 90-day period specified in subdivision (a) of that section, or whose claim to compensation cannot be verified, shall not be compensated.

(c) Any person who is denied compensation by the department, as a result of the department's failure to verify landings, may appeal that decision to the commission.

(d) The State Board of Control shall, prior to the disbursement of any funds, verify the eligibility of each person seeking compensation and the amount of the compensation to be provided in order to ensure compliance with this section.

(e) Notwithstanding any other provision of law, any legal action or proceeding to challenge the validity of subdivision (b) of Section 3, or of Section 7, of Article XB of the California Constitution shall be commenced on or before April 1, 1993. In all actions brought to challenge the validity of subdivision (b) of Section 3, or of Section 7, of Article XB of the California Constitution, including the hearing of

any such action on appeal from the decision of a lower court, *all courts where those actions are filed or pending shall give preference to those actions over all other civil actions filed or pending in that court*, with respect to setting the action for trial or hearing, and in trying or hearing the matter, to the end that all such actions shall be heard and determined as expeditiously as possible.

(f) If subdivision (b) of Section 3, or Section 7, of Article XB of the California Constitution is held invalid, any compensation paid to a person pursuant to this section shall be repaid to the state. No person shall be issued any permit or license pursuant to this article until repayment has been made.

☞ **Staff Note.** This provision states that “all courts” shall give preference to the specified actions and proceedings on request. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely.

More importantly, the provision probably is obsolete, in whole or at least in part. It might be appropriate to repeal the provision or amend it to delete obsolete material. The Commission could investigate this possibility pursuant to Government Code Section 8298 (“The commission may study and recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study.”).

Gov’t Code § 7910. Appropriations limit of local jurisdiction

7910. Each year the governing body of each local jurisdiction shall, by resolution, establish its appropriations limit and make other necessary determinations for the following fiscal year pursuant to Article XIII B at a regularly scheduled meeting or noticed special meeting. Fifteen days prior to the meeting documentation used in the determination of the appropriations limit and other necessary determinations shall be available to the public. The determinations made pursuant to this section are legislative acts.

Any judicial action or proceeding to attack, review, set aside, void, or annul the action of the governing body taken pursuant to this section for the 1980-81 fiscal year shall be commenced within 60 days of the effective date of the resolution or the effective date of the act which added this section to the Government Code, whichever date is later.

For the 1981-82 fiscal year and each fiscal year thereafter, any judicial action or proceeding to attack, review, set aside, void, or annul the action of the governing body taken pursuant to this section shall be commenced within 45 days of the effective date of the resolution.

All courts wherein such actions are or may be hereafter pending, *including any court reviewing such action on appeal from the decision of a lower court, shall give such actions preference over all other civil actions therein*, in the manner of setting the same for hearing or trial and in hearing the same to the end that all such actions shall be quickly heard and determined.

☞ **Staff Note.** The second paragraph of this provision appears to be obsolete. It might be appropriate to amend the provision to delete that paragraph. The Commission could investigate this possibility pursuant to Government Code Section 8298 (“The commission may study and

recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study.”).

Gov’t Code § 7911. Return of excess revenues by local jurisdiction

7911. For the purposes of Section 2 of Article XIII B, a local jurisdiction may return excess revenues by granting a tax credit or refund, by providing a temporary suspension of tax rates or fee schedules, or by any other means consistent with the intent of that section. The determination by the governing body of such entity of the means by which such excess revenues are to be returned is a legislative act.

Judicial review of such determination may be obtained only by a proceeding for a writ of mandate which shall be brought within 30 days after the governing body’s determination.

All courts wherein such actions are or may be hereafter pending, *including any court reviewing such action on appeal from the decision of a lower court, shall give such actions preference over all other civil actions therein*, in the manner of setting the same for hearing or trial and in hearing the same, to the end that all such actions shall be quickly heard and determined.

Gov’t Code § 65752. Challenge to general plan

65752. All actions brought pursuant to Section 65751, *including the hearing of any such action on appeal from the decision of a lower court, shall be given preference over all other civil actions* before the court in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be speedily heard and determined.

Gov’t Code § 66499.37. Subdivision Map Act

66499.37. Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. *Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.*

☞ **Staff Note.** It is ambiguous whether this provision is meant to encompass appellate review of a trial court’s ruling on a Subdivision Map Act challenge. Such an interpretation appears likely. *See generally* Presenting Jamul v. Board of Supervisors, 231 Cal. App. 3d 665, 670, 282 Cal. Rptr. 564 (1991) (Section 66499.37 manifests patent legislative objective that validity of decision by local legislative body or advisory agency be judicially determined as expeditiously as is consistent with requirements of due process).

Ins. Code § 12629.44. Order approving plan for rehabilitation, readjustment, or reorganization of mortgage insurer or related matter

12629.44. *Appeals from orders approving plans shall be given preference in the hearing on appeal over all other appeals, except contested election cases and cases in which the people of the State are parties.*

Penal Code § 1050. Criminal case

1050. (a) The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end, the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. Continuances also lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails. It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, ***criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.*** In further accordance with this policy, death penalty cases in which both the prosecution and the defense have informed the court that they are prepared to proceed to trial shall be given precedence over, and set for trial and heard without regard to the pendency of, other criminal cases and any civil matters or proceedings, unless the court finds in the interest of justice that it is not appropriate.

(b) To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary and (2) within two court days of learning that he or she has a conflict in the scheduling of any court hearing, including a trial, an attorney shall notify the calendar clerk of each court involved, in writing, indicating which hearing was set first. A party shall not be deemed to have been served within the meaning of this section until that party actually has received a copy of the documents to be served, unless the party, after receiving actual notice of the request for continuance, waives the right to have the documents served in a timely manner. Regardless of the proponent of the motion, the prosecuting attorney shall notify the people's witnesses and the defense attorney shall notify the defense's witnesses of the notice of motion, the date of the hearing, and the witnesses' right to be heard by the court.

(c) Notwithstanding subdivision (b), a party may make a motion for a continuance without complying with the requirements of that subdivision. However, unless the moving party shows good cause for the failure to comply with those requirements, the court may impose sanctions as provided in Section 1050.5.

(d) When a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. At the conclusion of the hearing, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. A statement of the finding and a statement of facts proved shall be entered in the minutes. If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted.

(e) Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause.

(f) At the conclusion of the motion for continuance, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. A statement of facts proved shall be entered in the minutes.

(g)(1) When deciding whether or not good cause for a continuance has been shown, the court shall consider the general convenience and prior commitments of all witnesses, including peace officers. Both the general convenience and prior commitments of each witness also shall be considered in selecting a continuance date if the motion is granted. The facts as to inconvenience or prior commitments may be offered by the witness or by a party to the case.

(2) For purposes of this section, “good cause” includes, but is not limited to, those cases involving murder, as defined in subdivision (a) of Section 187, allegations that stalking, as defined in Section 646.9, a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or Section 11165.6, or domestic violence as defined in Section 13700, or a case being handled in the Career Criminal Prosecution Program pursuant to Sections 999b through 999h, or a hate crime, as defined in Title 11.6 (commencing with Section 422.6) of Part 1, has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. A continuance under this paragraph shall be limited to a maximum of 10 additional court days.

(3) Only one continuance per case may be granted to the people under this subdivision for cases involving stalking, hate crimes, or cases handled under the Career Criminal Prosecution Program. Any continuance granted to the people in a case involving stalking or handled under the Career Criminal Prosecution Program shall be for the shortest time possible, not to exceed 10 court days.

(h) Upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court on an indictment or information is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days.

(i) A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the court shall state on the record the facts proved that justify the length of the continuance, and those facts shall be entered in the minutes.

(j) Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382, the court must immediately notify the Chair of the Judicial Council.

(k) This section shall not apply when the preliminary examination is set on a date less than 10 court days from the date of the defendant's arraignment on the complaint, and the prosecution or the defendant moves to continue the preliminary examination to a date not more than 10 court days from the date of the defendant's arraignment on the complaint.

(l) This section is directory only and does not mandate dismissal of an action by its terms.

Prob. Code § 1962. Involuntary sterilization

1962. (a) Any court order granting a petition under this chapter shall be accompanied by a written statement of decision pursuant to Section 632 of the Code of Civil Procedure detailing the factual and legal bases for the court's determination on each of the findings required under Section 1958.

(b) When a judgment authorizing the conservator of a person to consent to the sterilization is rendered, an appeal is automatically taken by the person proposed to be sterilized without any action by that person, or by his or her counsel. The Judicial Council shall provide by rule for notice of and procedure for the appeal. *The appeal shall have precedence over other cases in the court in which the appeal is pending.*

Pub. Res. Code § 21167.1. Environmental impact report

21167.1. (a) In all actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5, *including the hearing of an action or proceeding on appeal from a decision of a lower court, all courts in which the action or proceeding is pending shall give the action or proceeding preference over all other civil actions*, in the matter of setting the action or proceeding for hearing or trial, and in hearing or trying the action or proceeding, so that the action or proceeding shall be quickly heard and determined. The court shall regulate the briefing schedule so

that, to the extent feasible, the court shall commence hearings on an appeal within one year of the date of the filing of the appeal.

(b) To ensure that actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5 may be quickly heard and determined in the lower courts, the superior courts in all counties with a population of more than 200,000 shall designate one or more judges to develop expertise in this division and related land use and environmental laws, so that those judges will be available to hear, and quickly resolve, actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5.

(c) In any action or proceeding filed pursuant to this chapter that is joined with any other cause of action, the court, upon a motion by any party, may grant severance of the actions. In determining whether to grant severance, the court shall consider such as matters judicial economy, administrative economy, and prejudice to any party.

Pub. Res. Code § 25903. Certification of site and power facility by Energy Resources Conservation and Development Commission

25903. If any provision of subdivision (a) of Section 25531, with respect to judicial review of the decision on certification of a site and related facility, is held invalid, judicial review of such decisions shall be conducted in the superior court subject to the conditions of subdivision (b) of Section 25531. The superior court shall grant priority in setting such matters for review, and *the appeals from any such review shall be given preference in hearings in the Supreme Court and courts of appeal.*

Pub. Util. Code § 1762. Stay of order or decision of Public Utilities Commission on finding of great or irreparable damage

1762. (a) Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court or court of appeal except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended, the order suspending it shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto.

(b) The specific finding made pursuant to subdivision (a) shall certify that great or irreparable damage would otherwise result to the petitioner and specify the nature of the damage.

(c) The Supreme Court or court of appeal may grant a temporary stay restraining the operation of the commission order or decision, other than an order or decision authorizing an increase or decrease in rates or changing a rate classification, at any time before the required hearing and determination of the application for a stay when, in the opinion of the court, irreparable loss or damage would result to petitioner unless the temporary stay is granted. The temporary stay shall remain in force only until the hearing determination of the application for a stay upon notice.

The hearing of the application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.

Pub. Util. Code § 1767. Proceeding involving Public Utilities Commission

1767. All actions and proceedings under this part and all actions or proceedings to which the commission or the people of the State of California are parties in which any question arises under this part, or under or concerning any order or decision of the commission, *shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes*, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or proceeding in which he is allowed to intervene.

☞ **Staff Note.** This provision does not expressly establish a calendar preference for appellate review. A leading treatise interprets the provision to apply to appellate review. See 9 B. Witkin, *California Procedure Appeal* § 657, at 692 (4th ed. 1997).

Rev. & Tax Code § 2956. Challenge to seizure of property in collecting taxes on unsecured property

2956. In all special proceedings for a writ brought under this article, *all courts in which such proceedings are pending shall, upon the request of any party thereto, give such proceedings precedence over all other civil actions and proceedings, except actions and proceedings to which special precedence is otherwise given by law*, in the matter of the setting of them for hearing or trial and in their hearing or trial, to the end that all such proceedings shall be quickly heard and determined.

☞ **Staff Note.** This provision states that “all courts” shall give preference to the specified actions and proceedings on request. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely.

Rev. & Tax Code § 3006. Action for collection of taxes on unsecured property

3006. (a) The tax collector may commence an action for recovery of taxes on property on the unsecured roll prior to the date such taxes become delinquent if, in the tax collector’s opinion, it is necessary to do so in order to insure payment of such taxes because of the financial condition of the assessee or for other appropriate reasons.

The tax collector shall file a declaration under penalty of perjury, as part of the complaint, setting forth the grounds and necessity for the action prior to the delinquency date. The tax collector shall also be entitled, upon application, to an ex parte writ of attachment of so much of the assessee’s property as is necessary to satisfy the taxes on the basis of the tax collector’s declaration.

(b) An assessee named in an action under subdivision (a) may file with the court a bond sufficient to pay the taxes alleged due in the complaint and petition the court to release the attached property.

(c) If the court determines that the action and writ of attachment prior to the delinquency date are unnecessary, the court shall require the county to pay all costs of suit, including attorney's fees, incurred by the assessee, and the sureties shall be released from liability on the bond. The court may, in its discretion, require payment of the taxes in question as a condition of releasing the sureties. In that case, however, the assessee shall be entitled to interest from the county at the rate of 7 percent per annum from the date the taxes are paid until the date the taxes would have become delinquent.

(d) In any case where an action by the tax collector under this section is dismissed and the assessee is not required by the court to pay the taxes as a condition of dismissal and subsequent to the delinquency date the taxes remain unpaid, the county shall be entitled to recover, in addition to the taxes and all penalties and costs accruing thereon, all costs ordered by the court to be paid by the county to the assessee in the first action and all costs incurred by the county in any subsequent actions of the county in collecting the taxes.

(e) In all actions and proceedings brought under this section, ***all courts in which the actions and proceedings are pending shall, upon the request of any party thereto, give the actions and proceedings precedence over all other civil actions and proceedings, except actions and proceedings to which special precedence is otherwise given by law,*** in the matter of setting them for hearing or trial, and in their hearing or trial, to the end that all the actions and proceedings shall be quickly heard and determined.

☞ **Staff Note.** This provision states that "all courts" shall give preference to the specified actions and proceedings on request. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely.

Unemp. Ins. Code § 1853. Action by or against Director of Employment Development

1853. The courts of this State shall give preference on their calendar to any civil action brought by or against the director over all other civil litigation except equity cases, cases involving extraordinary writs, or summary proceedings.

☞ **Staff Note.** This provision states that the "courts of this State" shall give preference on request. It is to some extent ambiguous whether the provision is meant to encompass appellate review, although that interpretation seems likely.

Welf. & Inst. Code § 395. Proceeding within jurisdiction of juvenile court

395. A judgment in a proceeding under Section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment; but no such order or judgment shall be stayed by the appeal, unless, pending the appeal, suitable provision is made for the maintenance, care, and custody of the person alleged or found to come within the provisions of Section 300, and unless the provision is approved by an order of the juvenile court. ***The appeal shall have precedence over all other cases in the court to which the appeal is taken.***

A judgment or subsequent order entered by a referee shall become appealable whenever proceedings pursuant to Section 252, 253, or 254 have become completed or, if proceedings pursuant to Section 252, 253, or 254 are not initiated, when the time for initiating the proceedings has expired.

An appellant unable to afford counsel, shall be provided a free copy of the transcript in any appeal.

The record shall be prepared and transmitted immediately after filing of the notice of appeal, without advance payment of fees. If the appellant is able to afford counsel, the county may seek reimbursement for the cost of the transcripts under subdivision (c) of Section 68511.3 of the Government Code as though the appellant had been granted permission to proceed in forma pauperis.

Welf. & Inst. Code § 800. Juvenile court jurisdiction of habitual truant or minor guilty of crime

800. (a) A judgment in a proceeding under Section 601 or 602 may be appealed from, by the minor, in the same manner as any final judgment, and any subsequent order may be appealed from, by the minor, as from an order after judgment. Pending appeal of the order or judgment, the granting or refusal to order release shall rest in the discretion of the juvenile court. ***The appeal shall have precedence over all other cases in the court to which the appeal is taken.***

A ruling on a motion to suppress pursuant to Section 700.1 shall be reviewed on appeal even if the judgment is predicated upon an admission of the allegations of the petition.

A judgment or subsequent order entered by a referee shall become appealable whenever proceedings pursuant to Section 252, 253, or 254 have become completed or, if proceedings pursuant to Section 252, 253, or 254 are not initiated, when the time for initiating the proceedings has expired.

(b) An appeal may be taken by the people from any of the following:

(1) A ruling on a motion to suppress pursuant to Section 700.1 even if the judgment is a dismissal of the petition or any count or counts of the petition. However, no appeal by the people shall lie as to any count which, if the people are successful, will be the basis for further proceedings subjecting any person to double jeopardy.

(2) An order made after judgment entered pursuant to Section 777 or 785.

(3) An order modifying the jurisdictional finding by reducing the degree of the offense or modifying the offense to a lesser offense.

(4) An order or judgment dismissing or otherwise terminating the action before the minor has been placed in jeopardy, or where the minor has waived jeopardy. If, pursuant to this paragraph, the people prosecute an appeal of the decision or any review of that decision, it shall be binding upon the people and they shall be prohibited from refileing the case which was appealed.

(5) The imposition of an unlawful order at a dispositional hearing, whether or not the court suspends the execution of the disposition.

(c) Nothing contained in this section shall be construed to authorize an appeal from an order granting probation. Instead, the people may seek appellate review of any grant of probation, whether or not the court imposes disposition, by means of a petition for a writ of mandate or prohibition which is filed within 60 days after probation is granted. The review of any grant of probation shall include review of any order underlying the grant of probation.

(d) An appellant unable to afford counsel, shall be provided a free copy of the transcript in any appeal.

(e) The record shall be prepared and transmitted immediately after filing of the notice of appeal, without advance payment of fees. If the appellant is able to afford counsel, the county may seek reimbursement for the cost of the transcripts under subdivision (c) of Section 68511.3 of the Government Code as though the appellant had been granted permission to proceed in forma pauperis.

(f) All appeals shall be initiated by the filing of notice of appeal in conformity with the requirements of Section 1240.1 of the Penal Code.

RULES OF COURT

Cal. R. Ct. 2211. Writ petition for violation of trial court employee labor relations agreement or labor relations statute

2211. (a) This rule applies to petitions filed under subdivision (a) of Government Code sections 71639.5 and 71825.2.

(b)(1) The petition must state the following on the first page, below the case number, in the statement of the character of the proceeding (see rule 201(f)(6)): “Petition filed under Government Code sections 71639.5 and 71825.2 — assignment of Court of Appeal justice required.”

(2) When the petition is filed, the clerk of the court must immediately request of the Judicial Assignments Unit of the Administrative Office of the Courts the assignment of a hearing judge from the panel established under subdivision (e).

(3) The judge assigned to hear the petition in the superior court must be a justice from a Court of Appeal for a district other than the district for that superior court.

(c)(1) The superior court must hear and decide the petition on an expedited basis and must give the petition priority over other matters to the extent permitted by law and the rules of court.

(2) The petition must be heard by a judge assigned by the Chief Justice from the panel of hearing judges established under subdivision (e).

(d) ***An appeal of the superior court decision must be heard and decided on an expedited basis in the Court of Appeal for the district in which the petition was heard and must be given priority over other matters to the extent permitted by law and the rules of court.*** The notice of appeal must state the following on the first page, below the case number, in the statement of the character of the proceeding (see rule 201(f)(6)): “Notice of Appeal on petition filed under

Government Code sections 71639.5 and 71825.2 — expedited processing requested.”

(e) The panel of judges who may hear the petitions in the superior court must consist of Court of Appeal justices selected by the Chief Justice as follows:

(1) The panel must include at least one justice from each district of the Court of Appeal.

(2) Each justice assigned to hear a petition under (c)(2) must have received training on hearing the petitions as specified by the Chief Justice.

OTHER RELEVANT STATUTES

Code Civ. Proc. § 36. Party over age 70, party under age 14, or party suffering from medical condition raising substantial medical doubt of survival beyond 6 months

36. (a) A party to a civil action who is over the age of 70 years may petition the court for a preference, which the court shall grant if the court makes all of the following findings:

(1) The party has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party’s interest in the litigation.

(b) A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to subdivision (a) shall be given preference over a case subject to this subdivision.

(c) Unless the court otherwise orders, notice of a motion for preference shall be served with the memorandum to set or the at-issue memorandum by the party serving the memorandum, or 10 days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of 70 years.

(d) In its discretion, the court may also grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by clear and convincing medical documentation which concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and which satisfies the court that the interests of justice will be served by granting the preference.

(e) Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by a showing of cause which satisfies the court that the interests of justice will be served by granting this preference.

(f) Upon the granting of such a motion for preference, the clerk shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party’s attorney, or upon a showing of

good cause stated in the record. Such a continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.

(g) Upon the granting of a motion for preference pursuant to subdivision (b), a party in an action based upon a health provider's alleged professional negligence, as defined in Section 364, shall receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted.

☞ **Staff Note.** In *Warren v. Schecter*, 57 Cal. App. 4th 1189, 1199, 67 Cal. Rptr. 2d 573 (1997), the court of appeal noted that “Code of Civil Procedure section 36 does not speak to *calendar preference on appeal*, only to *trial setting preference*.” (Emphasis in original.) The court further noted, however, that “the statute’s rationale for granting calendar preference to certain litigants is equally applicable to appellate proceedings.” *Id.* Relying on that policy consideration, the court’s inherent power to adopt any suitable method of practice not inconsistent with statute or court rule, and Code of Civil Procedure Section 187, the court concluded that “a litigant who may not survive the delay of an appellate court backlog [should] be afforded calendar preference.” *Id.* The court recommended, however, that the Judicial Council amend the California Rules of Court “to provide expressly for appellate calendar preference for ailing or elderly litigants.” *Id.* at 1199-2000. The Judicial Council followed up on that suggestion in the Comment to Rule 19 of the California Rules of Court, which explains that the rule is broad in scope and includes a motion for preference on the grounds that “the reviewing court should exercise its discretion to grant preference when a statute provides for trial preference (e.g., [Code Civ. Proc.], §§ 35 [certain election matters], 36 [party over 70 and in poor health; party with terminal illness; minor in wrongful death action]; see *Warren v. Schecter* (1997) 57 Cal. App. 4th 1189, 1198-1199).”