Study J-103 September 16, 2005

Memorandum 2005-34

Oral Argument in Civil Procedure (Comments on Tentative Recommendation)

The Commission circulated its tentative recommendation on *Oral Argument in Civil Procedure* (June 2005) for public comment over the summer. The comments received are attached as an Exhibit to this memorandum.

The memorandum analyzes the comments received and addresses both the policy concerns and the specific problems identified in the comments. The memorandum concludes with a range of practical options for the Commission to consider in deciding how to proceed with this study.

SUMMARY OF TENTATIVE RECOMMENDATION

The tentative recommendation starts from the position that statutory guidance concerning when oral argument must be allowed in civil practice would be beneficial to both courts and litigants. The proposed law would include the following statutory clarifications:

(1) Existing case law pertaining to the right to oral argument should be codified. This would help make the rules transparent and readily accessible to all.

(2) Additional matters on which oral argument is a matter of right should be identified by statute. The Commission particularly solicited comment on whether

the specific matters it identified are appropriate, and whether there are others it failed to identify that should also be included in the statutory listing.

(3) For those matters on which oral argument is not a matter of right, there should be a clear and easy to apply standard for determination of whether oral argument must be allowed in the circumstances of the particular case. The Commission recommended that oral argument should be granted to the litigants when the court's decision could de jure or de facto terminate the case.

(4) The statutory standards for when oral argument must be allowed should not preclude the court from permitting oral argument in an appropriate case. That could be done by court rule or by exercise of the court's discretion.

(5) Codification of the oral argument right should not preclude the court from imposing reasonable limitations on exercise of the right. Those limitations could include such matters as time for exercising the right and limits on the length of argument.

GENERAL OBSERVATIONS

Circulation of Tentative Recommendation

All Commission tentative recommendations in the civil practice area are circulated to key interest groups typically affected by them, such as the plaintiff and defense bar, relevant State Bar Committees, the California Judges Association, and the Judicial Council. On this tentative recommendation, because of its potentially far reaching impact, we made a special effort to notify others who might have a special interest, such as local bar associations and superior courts of various counties.

The added effort did not generate a tidal wave of comment.

Current Situation

One question that runs through a number of the comments we received is whether denial of the right to oral argument is still a problem in practice. The current project was precipitated by adverse experience in Orange and San Diego Counties. But the tentative recommendation recites the Senate Judiciary Committee's analysis to the effect that there is no evidence of a continuing problem of noncompliance with court rules mandating oral argument in certain circumstances.

The commenters generally affirm that there is not currently a problem:

- Los Angeles Superior Court (Exhibit p. 7 — "We do not believe that a problem exists currently.")
- California Judges Association (Exhibit p. 8 — "CJA is not aware that a large number of individuals are being denied their right to an oral argument.")
- Committee on Administration of Justice (Exhibit p. 9 — "the general experience of CAJ members has been that most trial courts allow oral argument on the vast majority of civil law and motion and other significant matters.")
- State Bar Litigation Section (Exhibit p. 22 — "the number of circumstances in which Courts improperly refuse to hold oral argument is limited state-wide.")

Or, put another way, "Nowhere in the detailed memorandum of the Commission is there any objective, statistical evidence that yet another statute governing judicial behavior is necessary." Judge Kleinberg (Exhibit p. 15).

This consideration leads to one of the fundamental issues raised by the commenters on the tentative recommendation — is it worthwhile to establish new rules, which will generate their own problems in interpretation and implementation, when there is no real problem to be solved or benefit to be gained by it?

Attitudes Towards the Value of Oral Argument

Our commenters expressed a variety of attitudes towards the value of oral argument in civil procedure. The State Bar Litigation Section, for example, states (Exhibit p. 20):

> When properly exercised, oral presentations provide the benefit of a more complete presentation of the legal issues for the Court and enhance the experience of the litigants by promoting confidence that each side's concerns have been heard and considered. As the comments to the draft also recognize, oral argument is not a panacea. It can reduce the speed with which decisions are rendered, and procedural requirements of an oral hearing can result in the reversal on appeal of decisions that are nonetheless correct on their merits.

On the other hand, Judge Kleinberg characterizes the view that oral argument enhances the quality of justice as "romanticized and inaccurate ... it is rare indeed that the few minutes of off-the-cuff, shoot from the hip remarks of counsel can

prove more persuasive than a brief presumably prepared with care in the relative calm of a lawyer's office." Exhibit p. 14.

Judge Kleinberg's comments demonstrate a fundamental difference in perspective between members of the bench and members of the bar on this issue. The judge details in his letter the meticulous process he follows in reviewing briefs and making tentative rulings, a process that renders oral argument to a large extent superfluous. But it is the experience of many members of the bar that such a high level of judging is not uniform throughout the state, due perhaps to the crush of business and limitations on a judge's time. Even though a judge may have reviewed written submissions, the judge may not have given the materials the careful reading they deserve or may not have appreciated their full significance. In some cases papers may not even have made it into the file by the time the judge makes a tentative ruling. It is for the very reason of crowded calendars that an attorney may need the opportunity to sharpen the judge's focus on critical points.

Most of the commenters on the tentative recommendation see value in oral argument but are concerned about the trade-off in loss of judicial efficiency.

Basic Positions of the Commenters

Somewhat predictably, attorneys (or at least some of them) tend to support statutory clarification of the right to oral argument, and judges tend to want discretion in when to allow oral argument. This is an oversimplification, as we will see as we walk through the various positions that have been expressed on the tentative recommendation.

It is particularly noteworthy that the State Bar Committee on Administration of Justice is opposed to the proposed law, and the State Bar Litigation Section has mixed feelings about it. But it is also noteworthy that judges sit on, and are advisors to, the State Bar Litigation Section.

In fact there appears to be overlap in a number of the communications we have received. See, for example, the comments of Judge Czuleger (Exhibit p. 6) who also sits on the Judicial Council (Exhibit p. 3), and of Judge Kleinberg (Exhibit p. 11) who also sits on the Executive Committee of the State Bar Litigation Section (Exhibit p. 20).

Support

Commenters who express general support for the tentative recommendation include:

- Richard E. Best (Exhibit p. 1 — "The right to a meaningful hearing goes to the heart of the adversary process and to due process.")
- James S. Marinos (Exhibit p. 18). Mr. Marinos has practiced law continuously since admitted to the bar in 1957. His comments are made "strictly as those of one practitioner but, I might suggest that my experience is a considerable factor in terms of my continuous activity in the civil jurisprudence area for nearly one-half century."
- Frances L. Diaz (Exhibit p. 24 — "I comment to add support to the recommendation of the Law Revision Commission's consideration of how important it is to allow counsel to present oral argument at a SLAPP Hearing.")

The position of the State Bar Litigation Section is mixed (Exhibit p. 21 — "the Litigation Section supports and opposes parts of the draft legislation"). We will review their issues in detail below. However, the staff's assessment is that on balance the Section is opposed to the core provisions of the tentative recommendation.

Opposition

Commenters who express general opposition to the tentative recommendation include:

- Judicial Council (Exhibit p. 3). The Council supports the right to oral argument where appropriate, but does not support this draft, for reasons that we will elaborate below.
- Los Angeles Superior Court (Exhibit p. 6). Their letter reports the views of a majority of judges presiding in civil courtrooms who responded to the tentative recommendation. "As the largest trial court in the state, we believe that we have a deep pool of information to draw from in order to assist the Commission." Their opinion is that the proposed changes to the law are unnecessary and potentially counterproductive.
- California Judges Association (Exhibit p. 8). CJA is concerned that the proposed law would needlessly increase the cost of litigation by mandating oral argument.
- State Bar Committee on Administration of Justice (Exhibit p. 9). The Committee speaks only for itself and not for the State Bar Board of

Governors or the overall membership of the State Bar. The Committee believes that oral argument should be the rule rather than the exception in significant civil law and motion and other matters, but that the proposed law "will likely generate complexity, expense, and unintended consequences that outweigh, on balance, the likely benefits."

- Hon. James P. Kleinberg (Exhibit p. 11). Judge Kleinberg writes as an individual and not on behalf of the Santa Clara County Superior Court on which he sits. Judge Kleinberg details his experience on the bench and also his background as a business and commercial litigator for over 33 years. He argues that we should not be working to expand the statutory scheme for oral argument, but rather to rationalize and reduce it.
- State Bar Litigation Section (Exhibit p. 20). The Litigation Section represents more than 9,000 attorneys. The Section supports some and opposes other aspects of the tentative recommendation. On balance, the staff would characterize its position as "opposed."

POLICY CONSIDERATIONS

The comments offered by our correspondents present a range of perspectives on the role of oral argument in civil procedure. At one extreme is the position that oral argument should be available on all motions, subject to narrowly defined exceptions. At the other extreme is the position that judges should have absolute discretion on whether to allow oral argument on a particular matter. Each of these positions has a legitimate grounding in public policy.

Most of our commenters acknowledge that as a practical matter a balance must be achieved between the ideal of the full day in court and the reality of the need for judicial economy.

The tentative recommendation seeks to strike this balance by identifying specific types of motions where oral argument more likely than not will be appropriate, and by providing general standards for courts to follow in other circumstances. Ultimately, the question is whether the proposal is an improvement over existing law. Under existing law nothing is codified, there is a great deal of court discretion, and there is an overlay of case law with respect to specific motions and general standards.

Those who believe that the tentative recommendation does not represent an improvement over existing law make a number of general points:

(1) Judges are in the best position to determine whether argument is needed after reviewing the written materials.

(2) Not only are judges in the best position to make the determination as to whether oral argument would be useful, but experience shows that judges generally do a good job of recognizing those situations and allowing oral argument where appropriate. See for example the comments of the Los Angeles Superior Court (Exhibit p. 6 — "The occasion for not taking oral argument when it occurs arises when the face of the papers demonstrates oral argument will not assist the judge in making the decision. In these instances, the required ruling emerges clearly from reading the submitted writings, and further oral argument cannot change the result.")

(3) Allowing judicial discretion enables efficient and generally accurate administration of justice. See for example the comments of the Los Angeles Superior Court (Exhibit p. 6 — "Removing judges' discretion not to take oral argument will inevitably consume additional time and resources of lawyers, litigants, and judges on those occasions when appearances in court are essentially unnecessary.")

(4) In most cases the issues are fairly clear and oral argument is a waste of time. See for example the comments of Judge Kleinberg (Exhibit p. 14 — "most cases don't warrant the time commitment oral argument entails. ... I respectfully suggest the members of the Commission sit through a law and motion calendar and decide whether oral argument added value to the decision-making process.").

(5) Even in cases, or especially in cases, where there is a legitimate issue, written submissions are generally more helpful than oral argument, the value of which has been overstated. See for example the comments of Judge Kleinberg (Exhibit p. 17 — "Rather than adding yet another statute, we should be encouraging lawyers to improve their memoranda, rather than letting them assume they'll fill in the blanks at a later, crowded hearing.").

(6) Existing law is sufficiently clear to provide reasonable guidance to lawyers and the courts. See for example the comments of the Judicial Council (Exhibit p. 3 — "current statutory and case law is sufficiently clear ... that it is not necessary at this time to attempt to codify the law concerning the right to oral argument.")

(7) If a problem does occur under existing law, it can be remedied by appellate review, combined with appropriate judicial education.

(8) New legislation attempting to define the scope of oral argument will create its own interpretation and implementation problems without good cause, since there appear to be no problems in practice at present. See for example the comments of the State Bar Committee on Administration of Justice (Exhibit p. 9 — "the proposed legislation will likely generate complexity, expense, and unintended consequences that outweigh, on balance, the likely benefits").

(9) If clarification of the law is needed at all, it should be done by court rule, rather than by statute. Court rule is more flexible and can be adjusted readily to address problems as they arise. See, for example, the comments of the California Judges Association (Exhibit p. 8 — "Court Rules would provide for the same transparency and accessibility as codification.").

The State Bar Litigation Section cautions against removing too much discretionary authority from the courts. The Section indicates there are different circumstances in different jurisdictions, and the local bar in some counties may accept or promote practices in the court that would be unfamiliar and ill-suited to practice in other counties. They caution against overreacting to circumstances such as those in Orange and San Diego Counties (Exhibit p. 21):

> The solution to this problem need not be a new rule that eliminates the flexibility enjoyed by the remaining courts against whom few or no complaints have been made. This result may remedy a prior court error in one location but may create problems in other locations that did not previously exist.

The State Bar Litigation Section is also concerned about potential problems in implementing a new oral argument regimen, particularly a shifting of resources to litigate procedural grounds. Any new rules adopted need to be clear and specific both in their language and their consequences, particularly with respect to a matter that may form the basis for reversal on appeal. (Exhibit p. 21):

> While it is important that the procedures used be fair and adequate, the ultimate goal is to produce a just substantive result. Thus appeals premised solely on procedural bases should be minimized where the procedural error does not affect a substantive right.

Codification of Existing Law

The tentative recommendation would codify existing case law pertaining to the right to oral argument. Specifically:

> (b) A party has a right to present oral argument on the following matters:
> (1) Motion to quash or dismiss for lack of jurisdiction.
> (2) Motion for summary judgment or summary adjudication.
> (3) General demurrer.
> (4) Motion for pretrial writ of attachment.
> (5) Motion for appointment of receiver.
> (6) Motion for discovery involving attorney-client privilege.
> (7) Motion to treat party as vexatious litigant.

Concept of Codification

The concept of codification of existing cases mandating the right to oral argument was approved by James Marinos (Exhibit p. 18) and by the State Bar Litigation Section (Exhibit p. 21). The Bar Section acknowledges the benefit of having a specific statute that recognizes the right that was previously granted by the courts.

Mr. Marinos cautions that it is necessary to be absolutely sure that the codification clearly, accurately and succinctly summarizes or articulates the true and accurate holdings in those decisions. The State Bar Litigation Section was uncertain that some of the decisions being codified were intended to create a right to oral argument in every circumstance in which the issues arise and no matter what the outcome. "We encourage you to examine the issue carefully as well as its ramifications on a variety of motions, including discovery motions." Exhibit p. 21.

The staff believes these are good points, and in fact the tentative recommendation recognizes that the above listing is an oversimplification. We think we have picked up and codified the main limitations of the court holdings in other provisions of the draft. See subdivisions (e) (urgent and compelling need) and (f) (reasonable limitations). However, if the Commission proceeds on these lines, **we will doublecheck the holdings** in light of the concerns expressed.

Subdivision (b)(6) — Attorney-Client Privilege

With respect to subdivision (b)(6) — attorney-client privilege — Richard Best raises the question of other important privileges. Exhibit p. 2.

The staff notes that we do cover other privileges in subdivision (c)(4). The reason for the split treatment of privileges is that subdivision (b) codifies existing case law, whereas subdivision (c) states general principles of oral argument.

If the Commission proceeds on these lines, **we will make a better effort to integrate the two concepts**. Perhaps we would delete subdivision(b)(6) in reliance on subdivision (c)(4).

Additional Motions

The tentative recommendation identifies additional matters on which oral argument should be a matter of right.

> (b) A party has a right to present oral argument on the following matters:
>
> ...
>
> (8) Motion for class certification.
> (9) Motion to dismiss on ground of inconvenient forum.
> (10) Motion to quash service of summons.
> (11) Special motion to strike (anti-SLAPP).
> (12) Motion for judgment on the pleadings.
> (13) Application for claim and delivery.
> (14) Motion or order to show cause for injunctive relief.
> (15) Motion to dismiss for delay in prosecution.
> (16) Motion for judgment notwithstanding verdict.
> (17) Motion to appoint referee.
> (18) Petition to order arbitration.

The tentative recommendation particularly solicited comment on whether these matters are appropriate, and whether there are others we have failed to identify that should also be included in the statutory listing.

Whether The Listed Matters are Appropriate

The State Bar Litigation Section takes the position that oral argument will ordinarily be useful on the **motions identified in paragraphs (8)-(18)**, but it is not clear that it should be mandatory in every case and no matter what the resolution. "For example, it is not clear that each of these motions will always present issues that are as weighty or as final as a motion for summary judgment." And the denial of a motion is not as final as the granting of a motion. "While listing specific motions promotes clarity, it reduces flexibility in the disposition of individual cases." Exhibit p. 3. Many of the motions listed could be resolved in at least some circumstances without oral argument, particularly

where the motion is denied rather than granted. Accordingly, the Section would remove all of these items from the mandatory list.

Judge Kleinberg suggests that of the matters identified in subdivision (b), the following motions "are susceptible to presentation in writing and, in my experience, are not enhanced by oral argument" (Exhibit p. 16):

> **(1) Motion to quash or dismiss for lack of jurisdiction.**
> **(3) General demurrer.**
> **(9) Motion to dismiss on ground of inconvenient forum.**
> **(10) Motion to quash service of summons.**
> **(12) Motion for judgment on the pleadings.**
> **(15) Motion to dismiss for delay in prosecution.**
> **(18) Petition to order arbitration.**

The staff notes that, with respect to items (1) and (3), they are included on the list because existing case law has determined that there is a right to oral argument on them. That, of course, would not preclude the Commission from recommending that oral argument not be allowed on them as a matter of right.

On **paragraph (11), special motion to strike (anti-SLAPP)**, Frances L. Diaz writes to emphasize the importance of allowing oral argument at a SLAPP hearing. "I whole-heartedly support the recommendation of the Law Revision Commission in making it clear that oral argument should never be disallowed to litigants, particularly with the highly abused SLAPP motions being filed by defense counsel in legal malpractice cases. ... These types of abuses can be better controlled with clarifications from the Law Revision Commission that guarantee the litigants a full right to make a complete record. Oral argument in SLAPP cases is necessary." Exhibit p. 24.

Whether Additional Matters Should Be Added to the List

Richard Best argues that this provision should be flipped on its head. Oral argument should be a matter of right in all cases, except for specific statutory carve outs. Exhibit p. 2.

James Marinos says that additional matters should be identified and codified. "These matters should include any situation where the substantive rights, privileges or entitlements of a party to litigation will be materially affected." Exhibit p. 18. However, he fails to identify any particular motion to which he would apply that standard. Rather, he would apparently leave it to the courts to apply the standard — oral argument should be allowed "when it appears that any substantive right of a litigant will be affected."

Both the Judicial Council and the State Bar Committee on Administration of Justice are dubious about creation of a list such as this, since some matters will undoubtedly be missed. They point out a few motions (detailed below) that would seem to qualify based on general criteria outlined in the tentative recommendation that have been overlooked. CAJ also questions the practicality of compiling a manageable list of matters that a spectrum of practitioners would regard as reasonably complete.

With respect to specific motions, Richard Best suggests that paragraph (8) — motion for class certification — be expanded to include **approval of a class action settlement**. Exhibit p. 2.

While not advocating adoption or expansion of this sort of detailed listing, the Judicial Council identifies a number of matters that might well go on the list of motions for which oral argument is required based on general criteria enunciated elsewhere in the tentative recommendation:

- **Motion for change of venue.**
- **Motion to sell real property.**
- **Hearing on final report and account by receiver or other court fiduciary.**

The State Bar Committee on Administration of Justice likewise has doubts about the effort to identify specific matters that require oral argument. They note that the following matters, which arguably should be on the list, are not included:

- **Motion for terminating, issue, evidentiary, or monetary sanctions.**
- **Motion for consolidation, severance, or bifurcation.**
- **Motion to disqualify counsel.**
- **Motion for change of venue.**
- **Motion for new trial.**

The staff notes that the reason a motion for new trial is not included on this list is case law to the effect that oral argument is not a matter of right on that issue. Of course, that would not preclude the Commission from recommending a change to the law, if that appears appropriate.

Inclusio Unius Est Exclusio Alterius?

The Judicial Council worries that a definitive listing such as this might be read to exclude other matters, causing more problems than it solves. "If a list that

is incomplete is codified in a statute, parties may need to argue for the right to oral argument in situations where such a right should be afforded." Exhibit p. 4.

CAJ also is concerned that a specific listing of some hearings may, as a practical matter, make it harder to get oral argument on unlisted matters, despite any clear legislative intent to the contrary. "Matters not included in the list may well be viewed by some courts as presumptively 'less important' and thus not worthy of oral argument." Exhibit p. 10.

The staff thinks **we can adequately deal with the *inclusio unius* problem** by more precise statutory language and more thorough commentary explanation. Of course, CAJ is probably right that a proponent of oral argument on an unlisted motion will have the burden of persuasion that oral argument is allowed, but we do not see this as a problem.

General Standard

The tentative recommendation proposes "a clear and easy to apply standard" for determining whether oral argument must be allowed on matters not specifically identified in the statute. The proposed law sets out several distinct grounds, including whether the court's decision on the matter "would as a practical matter irreparably affect the circumstances of the parties":

> (c) Nothing in subdivision (b) limits the right to present oral argument on a matter if any of the following conditions is satisfied:
> (1) The applicable statute provides for oral argument.
> (2) The court's decision would be dispositive of the case.
> (3) The court's decision would as a practical matter irreparably affect the circumstances of the parties.
> (4) The court's decision would determine whether confidential information is protected by a legal privilege.
> (5) The court's decision would result in determination of an issue in the case by a nonjudicial officer.

Introductory Language

Subdivision (c) provides general standards that are to be applied in determining whether oral argument must be allowed on a matter not listed in subdivision (b). The comments we received nonetheless demonstrate quite a bit of confusion about how this provision operates, and the interrelation of subdivisions (b) and (c).

For example, Richard Best says the items in subdivision (c) are important and should be mandatory (which is what we intended). The Judicial Council is concerned that an incomplete listing in subdivision (b) may be read to preclude

oral argument on other matters, notwithstanding subdivision (c). CAJ is concerned that the listing, while not intended as exclusive, will backfire and that, particularly in close cases, it will be concluded that there is no oral argument right for unlisted hearings. The State Bar Litigation Section can't tell whether subdivision (c) is intended to create a right to oral argument in itself or whether it seeks only to modify a right to oral argument that may arise from another source.

The staff thinks this matter should be clarified. The Commission's intention was to create a separate right to oral argument on the matters identified in the subdivision. If the Commission proceeds with this approach, we will couch the lead-in as a direct statement of the right to oral argument, rather than as an indirect statement.

Subdivision (c)(2) —Decision Dispositive

The State Bar Litigation Section finds subdivision (c)(2) ambiguous — is it the expected resolution contemplated by the court that would be dispositive, or the motion that has the potential to be dispositive (i.e., a dispositive order is among the relief sought by the moving party). They take the position that an order granting a dispositive motion without oral argument is generally of greater concern than the denial of the same motion, and they suggest that the Commission consider drafting a more refined provision along these lines. Exhibit p. 22.

The **staff agrees with this observation**, and would refine the language if the Commission proceeds along these lines.

Subdivision (c)(3) — Decision as Practical Matter Would Irreparably Affect Circumstances

Judge Kleinberg takes the position that this and the preceding general standard do not provide the greater certainty and clarity the tentative recommendation seeks to achieve (Exhibit p. 16):

> These subsections have the potential to create satellite litigation as to what is meant by "dispositive", "practical matter", "irreparably", and "the circumstances of the parties." In short, instead of clarifying a problem the Commission concedes doesn't exist, more mischief will be created.

The State Bar Litigation Section takes the same position. While the intent is understandable, the provision is ambiguous in its application. Parties will

disagree on whether a motion will irreparably affect the circumstances of the parties. This could vary from a motion to compel answers, to a request for admission, to a motion in limine to exclude evidence. "In advance, no one could be certain who is right or that the appellate court might take a different viewpoint. Moreover, it is difficult if not impossible for the court to know a case well enough to know when or how to determine the answer to the question." Exhibit p. 22. They would eliminate the provision.

On the other hand, James Marinos believes that the standard of subdivision (c) is appropriate. "One cannot imagine in a democratic society that a litigant could be deprived of a fair trial or hearing without an opportunity to argue the matter before the court that has jurisdiction of the case." Exhibit p. 18.

The staff notes that the Commission looked at a couple of different standards before settling on "irreparably affect the circumstances of the parties". The Commission selected that standard because it already has an established and well-known meaning in California law. As noted in the Comment, it generalizes existing rules relating to prejudgment remedies such as pretrial writ of attachment and appointment of a receiver.

Subdivision (c)(5) — Determination of Issue by Nonjudicial Officer

The State Bar Litigation section was uncertain as to the purpose of subdivision (c)(5). They were not aware of a specific issue that requires a statutory remedy.

The Commission was specifically concerned about a motion to refer a matter to arbitration. The Commission felt as a general principle that a court decision that would have the effect of denying a party a judicial forum should be subject to oral argument. This is simply a matter of policy.

Court Discretion

The statutory oral argument requirements would not preclude the court from permitting oral argument in an appropriate case:

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

James Marinos agrees with this principle, and would make clear that the argument should be on the record. A record may be necessary to document issues and legal points that go up on appeal. "Oftentimes reviewing courts

inquire whether parties and counsel made attempts to seek clarification or reconsideration of rulings and they often want to know if those important measures were taken at the trial level." Exhibit pp. 18-19.

The staff thinks **we do not need to take any special action with respect to the record**. All courts are now courts of record. Cal. Const. art. VI, § 1. The creation of a record of proceedings is governed by general principles under Code of Civil Procedure Section 269.

Emergency Hearing

Under the draft, the court could abrogate an oral argument right in case of emergency or other extraordinary circumstances:

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

The State Bar Litigation Section believes a provision such as this is essential. "It is obvious that an exception for circumstances of urgent need is required." Exhibit p. 23.

Richard Best is concerned that the exception could nullify the rule unless more specifically described. He thinks that, at a minimum, a judge who denies a hearing should be required to make specific findings and factual determinations in writing to support the denial. This should be done sufficiently in advance that a person deprived of a hearing has a meaningful and practical recourse. Exhibit p. 2.

Mr. Best also indicates that an ex parte matter is often appropriate for oral argument as recognized by existing Rules of Court requiring notice and an opportunity to be heard. The staff believes Mr. Best is correct. See Rules of Court 379. **We will suggest some fine tuning** of this provision if the Commission decides to proceed along these lines.

Court Control

The court would have discretion to impose reasonable limitations on exercise of the oral argument right. The limitations could include such matters as time for exercising the right and length of argument:

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

The State Bar Litigation Section thinks this provision is essential. "[T]he need for the courts to have a role in defining the manner in which a litigant can waive or give notice of an intent to exercise the right" is obvious. Exhibit p. 23.

James Marinos agrees that courts should be able to impose reasonable limitations on exercise of the oral argument right (Exhibit p. 19):

> It is obvious that the trial court has many burdens, responsibilities and frequently heavy challenges. As a result, the court should utilize its inherent authority and exercise its prudent discretion to impose a reasonable limitation on the length of time each party will be entitled to argue. Oral argument can be extremely critical and important by the court should be able to maintain reasonable timing, decorum and progress in its own court and with respect to its own calendar.

Richard Best has the same concerns about a court abusing the authority granted to limit argument under this provision as he does with a court abusing the authority granted to deny argument under the preceding provision. He would apply the same protections — advance written notice, with reasons.

The Judicial Council, on the other hand, is concerned that the draft does not go sufficiently far to protect the right of the court to impose reasonable limitations on oral argument. For example, the tentative recommendation notes that under existing law a court may refuse to allow oral argument if no written opposition is filed. But this right is not expressly codified in the proposal, leaving the matter to further litigation. Because this issue is not dealt with expressly, the effect of the tentative recommendation is to make the law less clear or certain. "Accordingly, in this regard, courts and practitioners may be better off without the legislation." Exhibit p. 4.

The staff thinks **it would certainly be consistent with the remainder of the tentative recommendation** — which identifies specific instances where oral argument must be allowed — to identify specific instances where oral argument may be denied.

Telephone Hearings

The tentative recommendation makes clear that the oral argument requirement may be satisfied by providing an opportunity for a telephonic appearance.

> (g) As used in this section, the term "oral argument" includes argument made by telephone appearance pursuant to court rules

> providing for telephone appearance. The term does not include presentation of oral testimony that is evidentiary in nature.

Richard Best argues that the oral argument right should include the **right** to appear by telephone or other remote electronic means, as a matter of basic access to the courts. He indicates that despite Rules of Court providing for telephonic hearings, there is evidence that individual judges do not comply, courts are not equipped, and compliance with the rule is not enforced. "The right to appear by telephone needs to be clear and enforceable." Exhibit p. 1.

We should perhaps **seek additional input from the Judicial Council** on this matter.

Other Issues

Research Attorney

The tentative recommendation contemplates that an oral argument requirement would not be satisfied by an appearance before a research attorney. The argument should be made to the decisionmaker in the case. The draft includes Comment language to that effect.

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

Richard Best would elevate the discussion from the Comment to the statute — the limitation on research attorneys should be stated expressly "and clarified to require hearings by the judicial officer making the decision." Exhibit p. 2. Given the questions our commenters have raised about oblique language in the draft generally, **the staff is inclined to adopt this suggestion**.

Enforcement

Richard Best states that enforcement and accountability are particularly important with respect to the oral argument right. Appellate oversight is not an appropriate remedy for the ordinary motion. Failure of a court to permit oral argument should render the decision void or voidable and subject the judge to disciplinary proceedings. He suggests "a prompt, inexpensive and automatic remedy such as filing a formal notice of invalidity of the ruling." Exhibit p. 1.

The staff is unfamiliar with the concept of a "notice of invalidity". If the Commission is interested, **we will seek additional information** about it.

Tentative Rulings

The key cases leading to the present study involve abuse by judges of the tentative ruling procedure.

Judge Kleinberg describes in some detail the tentative ruling process he follows, pursuant to which he reviews written materials, makes tentative rulings the day before the hearing, and allows attorneys to make an appearance if they have anything to add to what is in their papers (Exhibit p. 12):

> The consequence of this approach is that few cases are argued in court on Fridays — typically 5 to 10 each week. The response from counsel to this methodology has been universally positive, in part I suspect because tentative rulings that are automatically final if not opposed has been commonplace in a number of trial courts. I am convinced this process is far more efficient than having lawyers show up *en masse* to perhaps wait for hours until their case is called, only to repeat what they have written weeks before. I am also confident that the process is fair and complete, and that while at least one party in each case is disappointed with the result, both sides believe they've received a fair hearing.

Judge Kleinberg concludes that Rule of Court 324, which governs tentative rulings, appears to be working and we should not create new issues.

The Judicial Council believes that if the Commission decides to go forward with proposed legislation, the legislation should make clear the courts' ability to continue to use the tentative ruling procedure. Exhibit p. 4. **This sounds reasonable to the staff**, and we would implement it.

CONCLUSION

Where Do We Go From Here?

The Chair and Vice Chair of the Senate Judiciary Committee, in referring this matter to the Commission for review, remark that the administration of justice might be improved by clarifying the circumstances in which litigants are entitled to oral argument.

Is it better to have a standard, even though nebulous, or simply leave the matter to court discretion without a standard? Is it better to give some indication of legislative intent or to leave things in their current state, where legislative

intent is not obvious and the issue requires litigation to resolve? These are the basic policy issues the Commission must confront.

Commenters are concerned that we should not add "yet another statute" to the law governing oral argument, particularly when the new law will have its own problems in interpretation and application, and when there appears to be no problem in practice at the present.

The staff notes that, in fact, there are essentially no statutes that govern the matter. It is currently left largely to court discretion, with problems resolved by pronouncements of the appellate courts.

That approach seems to work reasonably well, despite the recent problems in Orange and San Diego Counties. The State Bar Litigation Section comments that, "In general, our judges do a very admirable job of identifying circumstances in which the litigants or themselves would benefit from an oral presentation and allowing it." Exhibit p. 22.

The Commission has a number of obvious options available to it in light of the comments received on the tentative recommendation:

(1) Continue to develop the tentative recommendation, addressing specific problems in it identified by the commenters, making the draft more clear and precise. The value of this approach is that it would give guidance to courts and attorneys, perhaps without engendering litigation over the meaning of the new provisions, as is feared by many commenters.

(2) Develop a less ambitious proposal along the lines suggested by the State Bar Litigation Section. This would not try to specify a laundry list of hearings on which oral argument is mandated, but would seek to provide a more concrete and easy to apply general standard, leaving much discretion to the courts.

(3) Adopt the suggestion of the Judicial Council that the matter be the subject of court rules. If we did this, we would want to provide sufficient statutory guidance to the Council and parameters for the rules, as well as a reasonable deadline for their adoption. We would also want to get the Council's commitment that it would not attack the proposal in the legislative process on the basis of the cost to it of preparing rules. The staff cautions, however, that historically the Legislature has not looked favorably on delegating its control of civil procedure to the courts. Perhaps the situation would be somewhat different on this issue.

(4) If the Commission is convinced by the argument that there is not a sufficient problem to warrant disruption of a system of significant court

discretion that appears to work reasonably well and is reasonably efficient, then we should so report to the Legislature.

Jurisdictional Issue

The Commission should be aware of a jurisdictional issue on this study. The study was undertaken at the request of the Chair and Vice Chair of the Senate Judiciary Committee. The Commission does not have independent authority to study civil procedure matters, but it does have general authority to study and recommend revisions to correct technical or minor substantive defects in the statutes. Gov't Code § 8298.

The Commission decided to commence work immediately in response to the Committee request under our technical and minor substantive authority, since the request was to conduct a comprehensive review of the statutes and applicable case law "in order to clarify the circumstances in which parties are entitled to oral argument." However, the Commission also decided to sponsor a concurrent resolution to specifically authorize the study of oral argument due to the possibility that the Commission might want to recommend more than a simple codification of existing law. See *2004-2005 Annual Report, 34 Cal. L. Revision Comm'n Reports* 1, 14 (2004):

> **Oral Argument in Civil Procedure**
>
> The Commission has received a joint request from the Chair and Vice Chair of the Senate Judiciary Committee to conduct a study to clarify the availability of oral argument in hearings under the Code of Civil Procedure. The Commission has agreed to undertake the study. The Commission believes the project falls within its general statutory authority to study and recommend revisions to correct technical or minor substantive defects in state statutes. [Gov't Code § 8298.] However, it would be advisable also for the Legislature to add this matter to the Commission's calendar of topics. This would eliminate any question of jurisdiction, enable the Commission to recommend major substantive changes to existing law if the study shows they are needed, and keep the Legislature and interested parties apprised of the Commission's work.

The concurrent resolution was duly introduced in the 2005 legislative session. See SCR 15 (Morrow). However, due to various unrelated matters including, eventually, expansion of the resolution to incorporate the Commission's entire calendar of topics for study, the resolution got off to a late start on its trip through the Legislature. When the Legislature recessed in September, the resolution had passed the Senate unanimously, had passed the Assembly

Judiciary Committee unanimously with a recommendation that it be put on the Assembly's consent calendar, and was pending in the Assembly Appropriations Committee. It cannot be finally acted on before January 2006.

Where does that leave us? If our recommendation is merely to clarify existing law, there is no problem. If our recommendation is to make minor substantive revisions to existing law, there is no problem. But if our recommendation is to do more in this area, we must wait until we receive legislative sanction. There may be some other options, which we can discuss in light of the outcome of our deliberative process on this study.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Richard E. Best
3560 Pierce Street
San Francisco, Ca. 94123

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE TENTATIVE RECOMMENDATION
Oral Argument in Civil Procedure
Proposed Code Civ. Proc. § 1044 (added). Oral argument in civil action

I submit the following comments for consideration by the Law Revision Commission as to the proposed legislation. Thank you for the opportunity to comment and for your consideration.

COMMENTS

Rules, and the violation thereof, must have consequences to be effective. The right to a meaningful hearing goes to the heart of the adversary process and to due process. The party deprived of the right to oral argument should be provided a prompt, inexpensive and automatic remedy such as filing a formal notice of invalidity of the ruling. Otherwise, courts that fail to provide oral argument will not be held accountable and the rule will not achieve its intended purpose. Failure of a court to permit oral argument should render the decision void or voidable and subject the judge to disciplinary proceedings. There have been several appellate decisions requiring oral argument--- indicating that a legal obligation established by case law was not enough to encourage compliance and requiring an expensive appellate review to obtain compliance. Appellate review is not a practical remedy for the ordinary motion. The importance of enforcement and accountability are particularly important on this issue.

The right to oral argument should include the right to argument by telephone or other remote electronic means. The economics of the practice of law and existing technology [especially the telephone which has been around for a few years] should mandate this option be provided. This becomes even more important when oral argument is mandated and local counsel will be present. Despite CRC rules for telephonic hearings, anecdotal evidence suggests individual judges do not comply, courts are not equipped to provide or do not provide this basic access, and compliance with this rule is not enforced. Although subpart (g) recognizes that telephonic hearings are included, it is subject to "court rules" which tend to be either disregarded or are subject to variation by the local courts contrary to CRC Rule 981.1. The right to appear by telephone needs to be clear and enforceable. The comment notes that "allowing for telephone appearance would satisfy an oral argument requirement" but the converse should be added to the rule: i.e. failure to permit a telephonic appearance is a denial of oral argument and a violation of the requirement. The right to appear

and argue by telephone is a matter of basic access to the courts.

The rule should be written as mandatory for all motions unless expressly excluded by statute and (b) should be a list of those motions where oral argument is not required.

Subsection(b)(6) provides for oral hearing when attorney-client privilege is involved in the discovery dispute. Why limit it to that privilege? What about the right to privacy or self-incrimination, or psychological examinations, or medical records, etc. Should it also include any motion involving a request for discovery sanctions or spoliation issues now subject to motion as a result of the Cedar-Sinai case? The CLR comment cites authorities suggesting oral argument is required on other privilege issues.

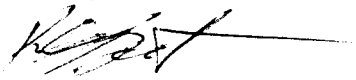
Subsection (b)(8) provides for class certification hearings. What about approvals of class action settlements?

Subsection (c)(1)-(4) would seem to be as important as those listed in (b) and should be moved to that mandatory category.

Subsections (e) and (f) create huge exceptions that could nullify the rule unless more specifically outlined. At a minimum, the judge who denies or limits a hearing should be required to make specific findings and factual determinations in writing to support such denials. Such determination must be made sufficiently in advance that the person deprived of a hearing has some meaningful and practical recourse. Otherwise, those few judges who precipitated this issue will be able to to deny hearings as in the past based on these sections. Ex parte matters are often appropriate for oral arguments as recognized by existing CRC requiring notice and an opportunity to be heard.

The comment regarding hearings by research attorneys should be included in the statute expressly and clarified to require hearings by the judicial officer making the decision.

Respectfully submitted,



Richard E. Best

Judicial Council of California
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Director, Office of Governmental Affairs

August 18, 2005

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Subject: Comments on Tentative Recommendation: Oral Argument in Civil Procedure

Dear Mr. Sterling:

The Judicial Council believes that current statutory and case law is sufficiently clear on the issue of the right to oral argument in civil proceedings and that it is not necessary at this time to attempt to codify the law regarding the right to oral argument. The California Courts of Appeal have specifically recognized that in a number of types of matters the parties have the right to oral argument. These precedents provide guidance for the trial courts to determine other types of matters in which parties have the right to oral argument. In addition, under existing law, the trial courts may exercise their discretion to decide that there are matters on which oral argument would be useful even though parties are not entitled to it as a matter of right.

Although the Commission's proposal to codify a list of matters in which parties have the right to oral argument is intended to result in greater certainty, it may cause difficulties. There may be types of matters on which parties should be entitled to oral argument, but which are not included on the list in proposed Code of Civil Procedure section 1044(b). For instance, this list does not include such matters as a motion for change of venue, a motion to sell real property, or a hearing on a final report and account by a receiver or other court fiduciary. Arguably under the criteria used by the Commission, all of these matters should be included on the list.

If a list that is incomplete is codified in a statute, parties may need to argue for the right to oral argument in situations where such a right should be afforded. The Judicial Council recognizes that the Commission's proposal is intended to create greater clarity and certainty as to the right to oral argument. But the enactment of the proposed legislation may have effects contrary to what is intended.

The Judicial Council is also concerned about preserving the trial courts' ability to impose reasonable limitations on oral argument. It recognizes that the proposed legislation in the Tentative Recommendation attempts to preserve this ability. That recommendation states that under existing law, "a court may refuse to allow oral argument against a motion or demurrer if the opponent fails to timely invoke the procedure or file written opposition to it." (Tentative Recommendation, page 16.) The Tentative Recommendation indicates that the proposed law would codify this principle, but in fact it does not appear to do this. The proposed statute nowhere states that a court may refuse to allow oral argument if no written opposition is filed; instead, the courts' ability to limit oral argument under these circumstances is merely implied. The Commission's Comment provides for an exception to a court's ability to limit oral argument if a party has failed to submit papers.[1] This, of course, presumes that a court has the ability to limit oral argument for failure to file papers in the first place. But the statute does not expressly codify the court's ability to do so.

As the Commission's Tentative Recommendation observes, current law recognizes that the courts may impose reasonable restrictions on oral argument. Nevertheless, the proposed legislation in the Tentative Recommendation may actually make this less clear or certain. Accordingly, in this regard, courts and practitioners may be better off without the legislation.

However, if the Commission determines that any legislation on the right to oral argument is needed, the Judicial Council recommends that the legislation simply authorize the council to adopt rules in this area. If the proposed legislation goes forward, it should also make clear that courts may limit the right to oral argument if a party fails to file a timely opposition or to comply with other reasonable procedural requirements imposed by the courts. The courts' ability to continue using their current tentative ruling procedures should be clear and unambiguous.

For all of the preceding reasons, although the Judicial Council supports the right to oral argument in appropriate types of matters, it does not support the proposed legislation in the Tentative Recommendation on Oral Argument in Civil Proceedings. If you have any questions, please feel free to contact me at (916) 323-3121.

[1] See Comment, page 22: "A court limitation or exercise of oral argument must be reasonable. A limitation denying oral argument if supporting papers have not been filed would not be reasonable, for example, if there is insufficient time to prepare the papers."

Sincerely,

Daniel A. Pone
Senior Attorney

PO/DP/dr
cc: Members of the Judicial Council

The Superior Court
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CHAMBERS OF
J. STEPHEN CZULEGER
ASSISTANT PRESIDING JUDGE

TELEPHONE
(213) 974-5550

August 18, 2005

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Request for Public Comment Regarding Right to Oral Argument

Dear Mr. Sterling:

Presiding Judge William A. MacLaughlin has asked me to respond on behalf of our court to your recent Request for Public Comment concerning the right to oral argument in certain civil pre-trial matters. Thank you for the opportunity for us to provide some assistance to the Commission. As the largest trial court in the state, we believe that we have a deep pool of information to draw from in order to assist the Commission.

A copy of the Law Revision Commission's Request for Public Comment Regarding Oral Argument in Civil Procedure was sent to all the judges presiding in civil courtrooms in Los Angeles. The majority of those that responded expressed the opinion that the proposed change is unnecessary and potentially counterproductive.

The present rules of procedure provide judges with discretion to decide many, but not all, motions and other matters on submitted papers. Current case law and statutes provide guidance for when oral argument is required. Most judges entertain oral argument in most instances. The occasion for not taking oral argument when it occurs arises when the face of the papers demonstrates oral argument will not assist the judge in making the decision. In these instances, the required ruling emerges clearly from reading the submitted writings, and further oral argument cannot change the result.

Removing judges' discretion not to take oral argument will inevitably consume additional time and resources of lawyers, litigants, and judges on those occasions when appearances in court are essentially unnecessary. It will involve a mandated step away from judicial economy in an area of procedure where judicial discretion appears presently to be producing appropriate economics for those who use and serve the civil court system.

Furthermore, any attempt to provide a comprehensive list of all hearings requiring oral argument will fail to cover all possible variations and may result in oral argument being disallowed simply because the type of hearing was not included in the legislative mandated list. Judges currently possess the discretion and guidance necessary to allot appropriate oral argument.

In conclusion, we urge that the Law Revision Commission's tentative recommendation not be adopted. We do not believe that a problem exists currently and if one presents itself, we are convinced that ongoing judicial education combined with appellate review is adequate to resolve any perceived difficulties.

Should you need any additional information, please do not hesitate to contact me.

Very truly yours,

J. Stephen Czuleger
Assistant Presiding Judge

JSC:vh
6 sterling

c: Honorable William A. MacLaughlin, Presiding Judge
Honorable Charles W. McCoy, Supervising Judge
John A. Clarke, Executive Officer/Clerk

ESTABLISHED 1929

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August 24, 2005

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: Oral Argument in Civil Procedure

Dear Mr. Sterling:

I am writing you on behalf of the California Judges Association (CJA) in opposition to the current recommendation regarding oral argument in civil procedure.

CJA is not aware that a large number of individuals are being denied their right to an oral argument. Additionally, if there were a problem, it would be more appropriately addressed by Court Rule rather than legislation. Court Rules would provide for the same transparency and accessibility as codification.

CJA believes that the recommendation of the Commission will needlessly increase the cost of litigation by mandating oral argument. CJA strongly urges the Commission to revise its recommendation to provide any necessary clarification to the law be done through Court Rule, and not by statute.

Please feel free to contact me if you have any questions.

Sincerely,

Kate Benoit

Kate Benoit
Legislative Counsel

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ADMINISTRATION OF JUSTICE

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
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TO: The California Law Revision Commission

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

DATE: August 25, 2005

SUBJECT: Oral Argument in Civil Procedure – Tentative Recommendation

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the June 2005 Tentative Recommendation of the California Law Revision Commission ("CLRC"), *Oral Argument in Civil Procedure*, and appreciates the opportunity to submit these comments.

I. INTRODUCTION

The CLRC has requested comments on the proposed addition of Code of Civil Procedure Section 1044, which would address the right of a party in a civil action to present oral argument to the superior court. CAJ believes that oral argument in significant civil law and motion and other matters should be the rule rather than the exception. But CAJ believes the proposed legislation will likely generate complexity, expense, and unintended consequences that outweigh, on balance, the likely benefits.

II. ANALYSIS

First, the experience of most CAJ members suggests that the perceived problem may not be sufficiently prevalent to warrant legislative action and that there are existing cases and statutes that adequately address the situation. Attempting to impose a legislative "fix" for the perceived problem may be overly complicated and problematic, and – like any legislative change – may foster collateral litigation regarding the interpretation and application of the new legislation. If trial courts commonly were denying oral argument on important law and motion and other matters, the benefits of such legislation might justify the potential implementation issues. That does not, however, appear to be the case.

While CAJ is aware of well-publicized incidents arising in certain courts, the general experience of CAJ members has been that most trial courts allow oral argument on the vast majority of civil law and motion and other significant matters. Moreover, CAJ believes that trial courts should – subject to existing law addressing the right to oral argument – retain a certain amount of discretion to limit or dispense with oral argument when the circumstances of the

particular case so warrant, and that that county-by-county variations concerning workload, organizational structure, staffing, and other factors may have an impact on the exercise of that discretion. Absent some evidence that abuse of such discretion is a widespread problem, CAJ questions the need for Section 1044.

Second, CAJ is concerned that – despite any clear legislative intent to the contrary – the attempt to enumerate specific proceedings in which there is a right to oral argument is likely to have the practical effect of making it more likely that oral argument will be denied for proceedings not specifically listed. Matters not included in the list may well be viewed by some courts as presumptively "less important" and thus not worthy of oral argument. CAJ recognizes that subdivision (c) is designed to preserve a right to present oral argument on matters that are not listed in subdivision (b), but CAJ anticipates debate on the scope of that subdivision – particularly subdivision (c)(3) – and the conclusion, at least in close cases, that a matter not included in subdivision (b) is excluded from the list of matters giving rise to a right to oral argument.

Third, CAJ believes the proposed legislation's list of matters in which a party would have a right to oral argument is incomplete. CAJ identified several matters that appear to be on an equal footing with the matters that are listed in subdivision (b), including: motions for terminating, issue, evidentiary, or monetary sanctions; motions for consolidation, severance or bifurcation; motions to disqualify counsel; motions for change of venue; and motions for new trial. CAJ believes the difficulty of compiling a manageable list of matters that a spectrum of practitioners would regard as reasonably complete raises a significant question about the practicality of the very approach of codifying a list.

III. CONCLUSION

For all of the reasons above, CAJ recommends that the proposed addition of Code of Civil Procedure Section 1044 not be pursued.

DISCLAIMER

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

Superior Court
State of California

Santa Clara County Superior Court Building
191 North First Street
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Chambers of
James P. Kleinberg, Judge

August 26, 2005

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Oral Argument in Civil Procedure

Dear Mr. Sterling:

I write in response to the Commission's Tentative Recommendation on this topic dated June, 2005. Of course, I do so as an individual and not on behalf of our court or any other organized group.

1. Background

By way of background, prior to taking the bench I was a business and commercial litigator for over 33 years. Law and motion practice was a very substantial part of my work as a lawyer, and I argued cases at the trial and appellate level (both state and federal courts) throughout California and the United States. I was active in bench-bar committees devoted to the improvement of the administration of justice, chaired the State Bar's Federal Court Committee, sat on the Bar's Committee on Administration of Justice, and am concluding a term on the executive committee of the Section of Litigation.

Since appointment to the bench I have sat on three calendar-intensive assignments: misdemeanor arraignments and pre-trials, family court, and civil discovery. During my two years in family court I presided over three law and motion calendars every week, with 20 or more cases on each day. My Friday morning civil discovery calendar, which is for virtually all the civil cases in our court, regularly contains 30+ scheduled motions. After settlements and continuances the list declines to 20+. As to those cases I post

telephonic tentative rulings the day before. This was a new concept for our court. On only a few occasions I have simply stated "parties to appear" when I truly needed to hear from counsel. The parties have until 4:00 PM to advise the Court and the other side if they wish to contest the tentative. If they do not do so, the tentative ruling becomes the order of the Court the next morning.

No one is precluded from making an appearance, but I make it clear in written protocols and on the morning of the hearing that counsel are not to repeat what is in their papers.[1] Those papers have been carefully reviewed before the tentative is issued and I consider it wasteful and unnecessary for arguments to be repeated. Depending on the case, I allow varying amounts of time for argument, but rarely more than 6-10 minutes per case. On a few occasions, when I had questions I needed answered, or there were multiple parties with differing points of view, the arguments have lasted as long as 20 minutes or, in one case, longer. And, on occasion, I have amended the tentative ruling after argument.

The consequence of this approach is that few cases are argued in court on Fridays – typically 5 to 10 each week. The response from counsel to this methodology has been universally positive, in part I suspect because tentative rulings that are automatically final if not opposed has been commonplace in a number of trial courts. I am convinced this process is far more efficient than having lawyers show up *en masse* to perhaps wait for hours until their case is called, only to repeat what they have written weeks before. I am also confident that the process is fair and complete, and that while at least one party in each case is disappointed with the result, both sides believe they've received a fair hearing.

[1] A retired judge of our Court used to preface law and motion sessions by saying to counsel, "Are you proud of your papers?" This question was designed, of course, to eliminate repetition; it almost always caused consternation among certain lawyers. Circuit Judge Richard Linn of the United States Court of Appeals for the Federal Circuit has written a thoughtful piece, "Effective Appellate Practice Before the Federal Circuit", 2 J.Marshall Rev. Intell. Prop. L. 1 (2002), which contains the same advice.

2. Perspective

In the perfect litigation world there would be plenty of time for judges to read every paper, hear arguments in every case, thoughtfully consider in a calm atmosphere the issues, and render detailed opinions replete with analyses, citations, and footnotes. In such a world the lawyers would be well-prepared, focused, articulate, and polite advocates who would not argue inappropriate positions. Such a world does not exist.

In fact, there are many compromises made because the reality of limited time and resources does not permit us to "do it all." Indeed, the limitation or preclusion of oral arguments is but one example of the compromises courts make every day to manage their workloads.

Thus, another example is the courts' relief from writing "reasoned opinions" for all their decisions. When a preliminary injunction is denied the trial court is not required to prepare a statement of decision or explain its reasoning. *Whyte v. Schlage Lock*, (2002) 101 Cal. App.4th 1443, 1450-1451. Of course, in a trade secrets case (such as *Whyte*) a decision denying injunctive relief could well "as a practical matter irreparably affect the circumstances of the parties" or "be dispositive of the case." Proposed Code of Civil Procedure § 1044 (c)(2),(3). Similarly, if a party does not comply with discovery, it runs the risk of terminating sanctions. If the discovery law and motion judge makes that order, no statement of decision is necessary. Other examples abound: e.g., an order denying a motion for new trial does not need to spell out the court's reasons.

Similarly, in family law proceedings, the court has the discretion to refuse testimony, and may limit the evidence to that presented in the moving and responding papers. *Reifler v. Superior Court* (1974), 39 Cal. App. 3d 479.

Litigants and counsel (and sometimes the courts) are often frustrated with not having opinions on every motion. Yet, thankfully, no one has suggested this rule needs to be changed. The point is that there are numerous examples

of limits in civil litigation we have all come to accept as part of the reality that courts cannot "do it all."

This leads me to the well-meaning, but misguided effort of the Commission.

3. The Romanticized and Inaccurate Notion of Oral Argument

"Oral argument may lift up the fallen or cause the tottering to fall." *TJX Cos. V. Superior Court,* (2001) 87 Cal. App. 4th 747, 754

"An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!" Kaufman, *Appellate Advocacy in the Federal Courts,* 79 F.R.D. 165, 171 (1978)

Oh, that arguments in our trial courts could be so inspiring! Unfortunately, as anyone who actually attends our trial courts can readily observe, it is rare indeed that the few minutes of off-the-cuff, shoot from the hip remarks of counsel can prove more persuasive than a brief presumably prepared with care in the relative calm of a lawyer's office. That is probably why a number of courts throughout the country have made oral argument "by invitation only." Our appellate courts require parties to request oral argument in a timely way or lose the opportunity to do so. Why? No doubt because, as in the trial courts, most cases don't warrant the time commitment oral argument entails.

It is a common malady of older age that one thinks things were better "in the good old days" – I've been guilty of it myself. So we all tend to remember "a time" – unspecified – when litigation was supposedly conducted at an elevated level with learned lawyers and judges discoursing at length on obtuse points of law. This memory may have been a fiction at the time, and it is certainly one now. To prove this point, and if they haven't done so recently, I respectfully suggest the members of the Commission sit through a law and motion calendar and decide whether oral argument added value to the decision-making process.

4. The Recommendations

The Recommendations are a solution in search of a problem. Nowhere in the detailed memorandum of the Commission is there any objective, statistical evidence that yet another statute governing judicial behavior is necessary. The closest factual reason for this proposal is the experience several years ago of "several" Superior Court judges in Orange County who crossed the line by not allowing oral argument and were reversed by the District Court of Appeal. Justice Sills stated in *Gwartz* "But sometimes it seems as though we have to remind the lower court there is a judicial pecking order when it comes to the interpretation of statutes." 71 Cal. App. 4th at 481-2. I have to believe the able Judges in Orange County have now got the message.[2]

Apparently, based on this limited authority, a magazine article[3], and, I assume, entreaties by constituents to the Legislature the Commission has spent much valuable time working on this non-issue. But the Commission itself concludes, after reviewing *Gwartz* and the amendment to Rule 324 of the Rules of Court that "There is no evidence that noncompliance with Rule 324 remains a problem." Tentative Recommendation, June 2005 at 2.

In my view, the recommendations are unnecessary and do not provide the "greater certainty and clarity" desired.

Two examples from the recommended statute stand out:

> Proposed Section 1044(b) provides:
>
> "A party has a right to present oral argument on the following matters:
>
> * * * [list of motions]"

---

[2] *Gwartz v. Superior Court*, (1999), 71 Cal. App. 4th 480 and *Medix Ambulance Service v. Superior Court*, (2002) 97 Cal. App. 4th 109

[3] Millar, "Friends, Romans and Judges – Lend Us Your Ears: The Tradition of Oral Argument", Orange County Lawyer, January, 2002

Proposed Section 1044(c) provides:

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

* * *

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

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

* * * "

These subsections have the potential to create satellite litigation as to what is meant by "dispositive", "practical matter", "irreparably", and "the circumstances of the parties." In short, instead of clarifying a problem the Commission concedes doesn't exist, more mischief will be created.

The Commission has also asked whether the specific hearings identified in proposed subdivision (b) are appropriate, and whether there should be others. Provided the issues have been briefed or a party has waived doing so, I can see the following as unworthy of a "right" to oral argument: (1) Motion to quash or dismiss for lack of jurisdiction, (3) General demurrer, (9) Motion to dismiss on ground of inconvenient forum, (10) Motion to quash service of summons, (12) Motion for judgment on the pleadings, (15) Motion to dismiss for delay in prosecution, and (18) Petition to order arbitration. All of these motions are susceptible to presentation in writing and, in my experience, are not enhanced by oral argument.

5. Conclusion

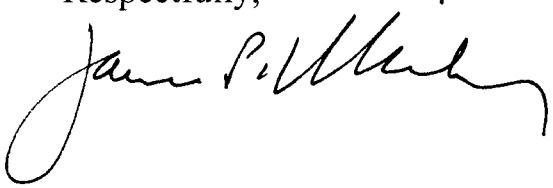
I understand and appreciate the tradition of oral argument in our courts. But, we should be working not to expand our statutory scheme but to rationalize

and reduce it. The argument for this new law is undone by the Commission's own thorough survey of cases, statutes and rules on the subject which appear to me to cover the subject adequately. Rather than adding yet another statute, we should be encouraging lawyers to improve their memoranda, rather than letting them assume they'll fill in the blanks at a later, crowded hearing.

In short, as the Commission itself has concluded, it appears Rule 324 is working and we should not create new issues.

Thank you for your consideration.

Respectfully,



cc: Hon. Alden E. Danner, Presiding Judge

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OUR FILE NO.: 999.90

August 26, 2005

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation – Oral Argument in Civil Procedure

Dear Ladies and Gentlemen:

I am a member of the California Bar, Bar Number 27794. I have practiced law continuously in this state since I was admitted in 1957. I have personally been involved in hundreds of civil litigation matters including well over 100 trials that went to a jury verdict and scores of matters tried before the court without a jury. I have read and reviewed the comments on the tentative recommendation and respectfully request to submit the following:

1. Existing case law pertaining to the right to oral argument should be codified and clarified. However, it is incumbent on the Commission to be absolutely sure that the interpreters of the case law and the authors of the proposed legislation clearly, accurately and succinctly summarize or articulate the true and accurate holdings in those decisions.

2. Certainly, additional matters on which oral argument is a matter of right should be identified and codified. These matters should include any situation where the substantive rights, privileges or entitlements of a party to a litigation will be materially affected. Granted, the court must have discretion to determine and evaluate certain matters and certain issues but there should be a predicate requiring oral argument when it appears that any substantative right of a litigant will be affected.

3. The Commission's recommendation that oral argument should be granted to the litigants when the courts decision could *de jury* or *de facto* terminate the case is certainly appropriate. One cannot imagine in a democratic society that a litigant could be deprived of a fair trial or hearing without an opportunity to argue the matter before the court that has jurisdiction of the case.

4. The trial court should be authorized to retain and exercise its own discretion in cases deemed appropriate for oral argument, on the record. Such a record may be necessary and important to document issues and legal points that may well go up on appeal. Oftentimes

Re: Tentative Recommendation – Oral Argument in Civil Pocedures

reviewing courts inquire whether parties and counsel made attempts to seek clarification or reconsideration of rulings and they often want to know if those important measures were taken at the trial level.

5. Codification of the oral argument rights definitely should not preclude the court from reasonable limitations on exercise of the right. However, "reasonable" is critical to the concept. It is obvious that the trial court has many burdens, responsibilities and frequently heavy challenges. As a result, the court should utilize its inherent authority and exercise its prudent discretion to impose a reasonable limitation on the length of time each party will be entitled to argue. Oral argument can be extremely critical and important but the court should be able to maintain reasonable timing, decorum and progress in its own court and with respect to its own calendar.

The above comments are made strictly as those of one practitioner but, I might suggest that my experience is a considerable factor in terms of my continuous activity in the civil juris prudence area for nearly one-half century. Your consideration of this communication will be greatly appreciated.

Sincerely,

James S. Marinos

JSM:dv/sa

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September 1, 2005

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Via Fascimile and E-Mail

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Re: Oral Argument in Civil Procedure, Tentative Recommendation

To Whom It May Concern:

I write on behalf of the Litigation Section of the State Bar of California with respect to the CLRC's tentative recommendation regarding Oral Argument in Civil Procedure. I am the Vice Chair of the Executive Committee for the Litigation Section and am the co-chair of the Rules and Legislation Subcommittee. These comments are prepared on behalf of the Litigation Section and have received the approval of the Executive Committee.

These comments are provided solely on behalf of the Litigation Section of the State Bar of California. This positions have not been adopted either by the State Bar's Board of Governors or overall membership and are not to be construed as representing the position of the State Bar of California. Membership in the Litigation Section is voluntary, and funding for the section's activities, including legislative activities, is obtained entirely from voluntary sources. The Litigation Section represents more than 9,000 attorneys admitted to practice in California who represent clients in court, before administrative bodies, and in alternative resolution procedures.

The Litigation Section appreciates the effort to which the Commission has gone in the study of the issue of oral hearings in civil matters. The section applauds the openness of the California legal system, its accessibility to residents, and the efforts that it makes to do justice in a rational, efficient and open matter. Generally, oral arguments contribute to that aim. When properly exercised, oral presentations provide the benefit of a more complete presentation of the legal issues for the Court and enhance the experience of the litigants by promoting confidence that each side's concerns have been heard and considered. As the comments to the draft also recognize, oral argument is not a panacea. It can reduce the speed with which decisions are rendered, and procedural requirements of an oral hearing can result in the reversal on appeal of decisions that are nonetheless correct on their merits. This itself may increase the cost to litigants and/or delays the resolution of civil disputes.

Three concerns guide the Litigation Section in these comments. First, the Litigation Section recognizes that there is a benefit to judicial flexibility. California is an extremely diverse state. In some locations, problems exist that are only dreamed of in other locations. Similarly, the local bar in some areas accept or promote practices in some superior courts that would be both unfamiliar and ill-suited to practice in other superior courts. Occasionally, the tailoring of justice to the individual location can stray too far afield. Thus, one portion of the state's courts may adopt practices that are inadequate to protect civil litigants or that are inconsistent with the letter or spirit of the rules. This would appear to be the case in certain prior decisions arising from Orange (and perhaps San Diego) County with respect to the use of oral argument. The solution to this problem need not be a new rule that eliminates the flexibility enjoyed by the remaining courts against whom few or no complaints have been made. This result may remedy a prior error in one location but may create problems in other locations that did not previously exist.

Second, the harm committed by a failure to hold oral argument is generally greater when a Court grants a motion that disposes entirely of an action as compared to the denial of an equivalent motion. While this is not always the case, entry of a judgment generally cuts off further efforts to complete the record or to revisit the result. Denial of a dispositive motion may not bar to further argument or development on the substantive issue. Thus, the risk of error presented by the lack of oral argument generally are greater when a court grants dispositive motions rather than when it denies dispositive motions.

Third, procedural rules benefit from clarity and specificity both in their language and in the dictated result. This is particularly true with respect to matters that may form the basis of a claim for reversal on appeal. While it is important that the procedures used be fair and adequate, the ultimate goal is to produce a just substantive result. Thus, appeals premised solely on procedural bases should be minimized where the procedural error does not affect a substantive right.

Based on the foregoing principles, the Litigation Section supports and opposes parts of the draft legislation. To the extent that sections (a) and (b)(1) to (b)(5) codify existing decisions, the section recognizes the benefit of having a specific statutory section that recognizes the right that was previously granted by the courts. After research, the drafters of these comments were uncertain that the decisions to which the CLRC points with respect to sections (b)(6) and (b)(7) were intended to create a right to oral argument in every circumstance in which the issues arise and no matter what the outcome. We encourage you to examine the issue carefully as well as its ramifications on a variety of motions, including discovery motions.

With respect to the motions identified in categories (b)(8) to (b)(18), the section agrees that oral argument will usually be useful; however, it is not clear that it should be mandatory in every case and no matter what the resolution. Accordingly, the section does not favor the

inclusion of these items on a mandatory list. For example, it is not clear that each of these motions will always present issues that are as weighty or final as a motion for summary judgment. Moreover, the denial of such a motion may not preclude the parties of raising the same or appropriate procedural or substantive defense later. While listing specific motions promotes clarity, it reduces flexibility in the disposition of individual cases. The Litigation Section believes that many of the motions described could be resolve in at least some circumstances without an oral hearing, particularly in circumstances where they were denied rather than granted.

Moreover, the Litigation Section finds subsection (c) to be unduly ambiguous both in its language and its application. The preface in the first sentence ("Nothing is subdivision (b) limits the right to present oral argument . . . ") is unclear as to whether it intends to create a right to oral argument in itself or whether it seeks only to make clear that the statute does not modify a right to oral argument that may arise from another source. Further, item (c)(1) is ambiguous regarding whether it means that the expected resolution contemplated by the court would be dispositive or whether the motion has the potential to be dispositive (i.e. a dispositive order is among the relief sought by the moving party). As discussed above, the need for oral argument may differ in each circumstance. As noted above, an order granting a dispositive motion without oral argument is generally of greater concern than the denial of the same motion. While there are practical considerations that may make it difficult to draft and implement a rule limited to circumstances in which a court grants a motion that disposes of a case, consideration of that option should be given if the Commission moves forward with the proposal.[1] Similarly, section (c)(3) is very ambiguous in its application. While the intent is understandable, the actual result is very uncertain. Parties will differ quite vehemently regarding what motions "irreparably affect the circumstances of the parties." This could vary from a motion to compel answers to requests for admission to a motion in limine to exclude evidence. In advance, no one could be certain who is right or that the appellate court might take a different viewpoint. Moreover, it is difficult if not impossible for the court to know a case well enough to know when or how to determine the answer to the question. Thus, the Litigation Section suggests that subsection (c)(3) be eliminated. Finally, it is unclear to the Litigation Section what result is being sought by subsection (c)(5). The drafters were not aware of a specific issue in this regard that requires a statutory remedy.

The Litigation Section would not add any additional categories of motions for which oral argument is required. In general, it is the assessment of the Litigation Section that the number of circumstances in which Courts improperly refuse to hold oral argument is limited state-wide and can be remedied in other, equally effective ways. In general, our judges do a very admirable job of identifying circumstances in which the litigants or themselves would benefit from an oral presentation and allowing it.

[1] This option also has the benefit of limiting the application of the rule to cases that would be subject to an immediate appeal.

Finally, to the extent that the Commission goes forward without modification of subsections (b) and (c), the Litigation Section believes that subsections (e) and (f) are essential components of any proposal. It is obvious that an exception for circumstances of urgent need is required. Equally obvious to the Litigation Section is the need for the courts to have a role in defining the manner in which a litigant can waive or give notice of an intent to exercise the right.

Thus, as stated above, the Litigation Section would recommend that the tentative draft be revised to reflect its comments. Specifically, the Litigation Section would:

A. Reduce the number of items currently included in subsection (b);

B. Either abandon subsection (c) or revise subsection (c) to make specific and clear the additional circumstances in which oral argument is necessary or advisable and to limit the need for an oral hearing to circumstances in which the court intends to grant a motion that would be dispositive as a matter of law.

C. Retain in any draft subsections (e) and (f).

The Litigation Section sincerely appreciates your consideration of these comments and appreciates the work that the Commission does on behalf of the state of California.

Sincerely,

Erik J. Olson

cc: Litigation Section Executive Committee

From: Frances L. Diaz
To: sterling@clrc.ca.gov
Sent: Tuesday, September 06, 2005
Subject: Oral Argument in SLAPP Hearings is Absolutely Necessary

I comment to add support to the recommendation of the Law Revision Commission's consideration of how important it is to allow counsel to present oral argument at a SLAPP Hearing.

Unfortunatley, even though CCP 425.17 was enacted to make a statement about the abuses of the "broad interpretation" of CCP 426.16 language used in previous cases, trial judges use the so-called anti-SLAPP motion as a means of summarily dismissing a lawsuit based upon the trial court's erronous understanding of the facts recited in a declaration submitted in opposition to the anti-SLAPP motion.

Case in point: Moore v. Kaufman, a legal malpractice case where Moore expressly alleges in her complaint that Kaufman breached his duty of loyalty to Moore when Kaufman represented Moore in her capacity as a member of a board of directors of a small professional corporation that Kaufman represented. The trial judge erroneously stated that the issue of the lawyer's "duty" was a non-issue and even though there were mutliple causes of action, the trial judge decided that Moore's legal malpractice complaint was a SLAPP complaint and dismissed the case.

The case, Los Angeles Superior Court Case No. BC 228943, is a clear example of why oral argument is necessary because trial judges misstate the underlying facts, take unauthorized approaches to the statute and notwithstanding what is actually alleged in a complaint, misstate the record. If oral argument is allowed to be denied, whatever the trial judge states as "being the record" stands for the reviewing court and there is nofair opporunity to correct the trial court's misstatement of the record for review.

I whole-heartedly support the recommendation of the Law Revision Commission in making it clear that oral argument should never be disallowed to litigants, particularly with the highly abused SLAPP motions being filed by defense counsel in legal malpractice cases.

When reviewing the hundreds of recent SLAPP opinions, it is all too clear that often trial judges are improperly using the anti-SLAPP motion as a summary judgment motion -- wrongly weighing the evidence and deciding that plaintiffs have no "probablity of prevailing." To make matters worse, in the case of BC 228943, the trial judge actually allowed the defense counsel to name the plaintiff's lawyer in the SLAPP judgment as having joint and several liability for the cost award. The issue has been litigated for over four (4) years now and has been the subject of multiple writ petitions and appeals -- even a jail sentence because the trial court found that when plaintiff's counsel "challenged" the trial court's authority to hold the plaintiff's counsel jointly and severally liable on the SLAPP dismissal, that challenge was deemed "contemptuous."

A SLAPP proceeding is a very serious matter, and is easily abused --especially when trial judges decide that they can award costs against a plaintiff's lawyer without notice and disregard the automatic stay provisisions of CCP 916.

In Case BC 228943, the defendant, an attorney in a malpractice case, persuaded the trial judge to award him costs in the sum of $42,000 -- however, the trial judge allowed the judgment to be altered while an appeal was pending to include the plaintiff's lawyer as a "co-judgment debtor" on the statutory cost award. These types of abuses can be better controlled with clarificaitons from the Law Revision Commission that guarantee the litigants a full right to make a complete record. Oral argument in SLAPP cases is necessary.

Thank you,

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