

Admin.

October 21, 2005

Memorandum 2005-39

2005-2006 Annual Report (Staff Draft)

Attached to this memorandum is a staff draft of the text of the Commission's *2005-2006 Annual Report*. In the interest of saving photocopying and mailing costs, we have not reproduced here the various tables and appendices that are published with the annual report (e.g., text of Commission's governing statute, cumulative table of legislative action on Commission recommendations, revised Comments to legislation enacted during session, etc.). After approval of the text of the annual report, the staff will assemble the various parts and send the annual report to the printer.

Legislative Program in 2006

The annual report indicates that we are planning to submit two recommendations to the Legislature in 2006 (relating to enforcement of judgments under the family code and oral argument in civil procedure). That part of the annual report will be adjusted to reflect decisions made at the Commission's November meeting.

Activities of Commission Members and Staff

The annual report notes activities of Commission members and staff related to the Commission's work, such as speeches made and articles published during the past year. Please notify the staff if you have any activities of this nature to report.

Report on Statutes Repealed by Implication or Held Unconstitutional

The annual report includes a report on statutes repealed by implication or held unconstitutional. This material has not yet been prepared. We will include it in a supplement to this memorandum.

Editorial Suggestions

If you have any editorial suggestions relating to the draft, please be sure to inform the staff.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

DRAFT 2005-2006 Annual Report

California Law Revision Commission
4000 Middlefield Road, Room D-1
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SUMMARY OF WORK OF COMMISSION

Recommendations to the 2005 Legislature

In 2005, three bills effectuating the Commission's recommendations were enacted, relating to the following subjects:

- Civil discovery
- Common interest development law
- Unincorporated association law

Five bills introduced in 2005 to effectuate the Commission's recommendations remain before the Legislature as two-year bills.

Recommendations to the 2006 Legislature

In 2006, the Commission plans to submit recommendations on the following subjects to the Legislature:

- Enforcement of judgments under the Family Code
- Oral argument in civil procedure

The Commission may submit additional recommendations if work is completed in time to enable their introduction during the legislative session.

The Commission will continue its work on the two-year bills introduced in 2005 and will seek introduction of legislation to effectuate the Commission's recommendation on the procedure for emergency rulemaking by state agencies.

Commission Activities Planned for 2006

During 2006, the Commission will work on the following major topics: mechanics lien law, common interest development law, discovery improvements from other jurisdictions, oral argument in civil procedure, no contest clauses, beneficiary deeds, and possibly contractual arbitration improvements from other jurisdictions. The Commission will also consider other subjects to the extent time permits.

CONTENTS

	<i>Page</i>
2005-2006 ANNUAL REPORT	9
Introduction	9
2006 Legislative Program	10
Major Studies in Progress	11
Mechanics Lien Law	11
Common Interest Development Law	11
Discovery Improvements from Other Jurisdictions	12
Oral Argument in Civil Procedure	12
No Contest Clauses	12
Real Property Transfer on Death Deeds	12
Contractual Arbitration Improvements from Other Jurisdictions	13
Other Subjects	13
Calendar of Topics for Study	13
Criminal Sentencing	13
Oral Argument in Civil Procedure	14
Function and Procedure of Commission	14
Background Studies	16
Recommendations	16
Official Comments	18
Commission Materials as Legislative History	18
Use of Commission Materials To Determine Legislative Intent	20
Publications	24
Electronic Publication and Internet Access	25
Electronic Mail	25
MCLE Credit	25

Personnel of Commission 26

Commission Budget..... 28

Other Activities 28

 National Conference of Commissioners on Uniform
 State Laws..... 28

 Education..... 29

Legislative History of Recommendations in the 2005
 Legislative Session..... 29

 Civil Discovery 30

 Unincorporated Associations..... 30

 Preemption of CID Architectural Standards 30

Report on Statutes Repealed by Implication or Held
 Unconstitutional..... 31

Recommendations 31

APPENDICES

1. Statute Governing the California Law Revision
 Commission 33

2. Calendar of Topics Authorized for Study..... 39

3. Legislative Action on Commission Recommendations
 (Cumulative)..... 43

4. Report of the California Law Revision Commission
 on Chapter 116 of the Statutes of 2005 (Senate
 Bill 702): *Unincorporated Association*
 Governance 71

5. Report of the California Law Revision Commission
 on Chapter 294 of the Statutes of 2005 (Assembly
 Bill 333): *Civil Discovery* 75

6. Commission Publications 95

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November 18, 2005

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In conformity with Government Code Section 8293, the California Law Revision Commission submits this report of its activities during 2005 and its plans for 2006.

Three of the eight bills introduced in 2005 to effectuate the Commission's recommendations were enacted. (Five of these bills are two-year bills and will be considered in 2006).

The Commission is grateful to the members of the Legislature who carried Commission-recommended legislation:

- Assembly Member Tom Harman (Ownership of Amounts Withdrawn from Joint Account, Civil Discovery, Waiver of Privilege by Disclosure)
- Assembly Member Gene Mullin (Common Interest Development Ombudsperson)
- Senator Dick Ackerman (Unincorporated Associations)
- Senator Christine Kehoe (Common Interest Development Architectural Review)
- Senator Alan Lowenthal (Common Interest Development Ombudsperson)

- Senate Committee on Banking, Finance and Insurance
(Financial Privacy)

In 2005, the Commission held five one-day meetings and one two-day meeting. Meetings were held in Burbank, Oakland, and Sacramento.

Respectfully submitted,

Edmund L. Regalia
Chairperson

2005-2006 ANNUAL REPORT

Introduction

The California Law Revision Commission was created in 1953 and commenced operation in 1954 as the permanent successor to the Code Commission,¹ with responsibility for a continuing substantive review of California statutory and decisional law.² The Commission studies the law to discover defects and anachronisms and recommends legislation to make needed reforms.

The Commission ordinarily works on major topics, assigned by the Legislature, that require detailed study and cannot easily be handled in the ordinary legislative process. The Commission's work is independent, nonpartisan, and objective.

The Commission consists of:³

- A Member of the Senate appointed by the Rules Committee
- A Member of the Assembly appointed by the Speaker
- Seven members appointed by the Governor with the advice and consent of the Senate
- The Legislative Counsel, who is an ex officio member

The Commission may study only topics that the Legislature has authorized.⁴

1. See 1953 Cal. Stat. ch. 1445, operative September 9, 1953. The first meeting of the Commission was held on February 23, 1954.

2. See Gov't Code §§ 8280-8298 (statute establishing Law Revision Commission) (Appendix 1 *infra*). See also *1955 Report* [Annual Report for 1954] at 7, 1 Cal. L. Revision Comm'n Reports (1957).

3. For current membership, see "Personnel of Commission" *infra*.

4. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study. See *Calendar of Topics Authorized for Study*, Appendix 2 *infra*. However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution. Gov't Code § 8298. Additionally, a concurrent resolution or statute may directly confer authority to study a particular subject. See, e.g., 2005 Cal. Stat. res. ch. 122 [SCR 42] (no contest clause study); 2005 Cal. Stat. ch. 422 [AB 12] (beneficiary deed study).

The Commission has submitted 366 recommendations to the Legislature, of which 340 have been enacted in whole or in substantial part.⁵ Commission recommendations have resulted in the enactment of legislation affecting 22,384 sections of California law: 4,438 sections amended, 9,483 sections added, and 8,463 sections repealed.

The Commission's recommendations, reports, and other selected materials are published in softcover and later collected in hardcover volumes. Recent materials are also available through the Internet. A list of past publications and information on obtaining printed or electronic versions are at the end of this Annual Report.⁶

2006 Legislative Program

In 2006, the Commission plans to submit recommendations on the following subjects to the Legislature:

- Enforcement of judgments under the Family Code
- Oral argument in civil procedure

The Commission may submit additional recommendations if work is completed in time to enable their introduction during the legislative session.

The Commission will continue its work on the two-year bills introduced in 2005:

- Ownership of Amounts Withdrawn from Joint Account (AB 69)
- State Assistance to Common Interest Developments (AB 770 & SB 551)
- Waiver of Privilege by Disclosure (AB 1133)
- Financial Privacy (SB 1104)

The Commission has general authority to study matters contained in the *Calendar of Topics Authorized for Study* (Appendix 2 *infra*) as approved by concurrent resolution.

5. See *Legislative Action on Commission Recommendations*, Appendix 3 *infra*.

6. See *Commission Publications*, Appendix 6 *infra*.

The Commission will also seek introduction of legislation to effectuate the Commission's recommendation on the procedure for emergency rulemaking by state agencies.

Major Studies in Progress

During 2006, the Commission will work on the following major topics: mechanics lien law, common interest development law, discovery improvements from other jurisdictions, oral argument in civil procedure, no contest clauses, real property transfer on death deeds, and possibly contractual arbitration improvements from other jurisdictions. The Commission will also consider other subjects to the extent time permits.

Mechanics Lien Law

The Commission has reactivated work on mechanics lien law pursuant to a legislative request for a comprehensive review on a priority basis. The Commission has concluded that a "moderate" approach to general revision of the mechanics lien law is appropriate. This will involve maintaining the basic structure of existing law while improving its organization and simplifying and clarifying its drafting. The Commission plans to complete work on the study during 2006.

Common Interest Development Law

The Commission will continue its review of statutes affecting common interest housing developments with the goal of setting a clear, consistent, and unified policy regarding their formation and management and the transaction of real property interests located within them. The objective of the review is to clarify the law and eliminate unnecessary or obsolete provisions, to consolidate existing statutes in one place in the codes, and to determine to what extent common interest developments should be subject to regulation. To date the Commission has recommended and obtained enactment of revisions to clarify the organization of the common interest development governing statute, require associations to use notice and comment rulemaking procedures, standardize association architectural review procedures, and encourage alternative dispute resolution within associations. The

Commission also recommended the creation of a state ombudsperson for common interest developments. Legislation to effectuate that recommendation is pending.

Discovery Improvements from Other Jurisdictions

The Commission will continue its review of discovery developments in other jurisdictions to determine whether they may be appropriate models for improvement of discovery practice in California. Professor Gregory S. Weber of McGeorge School of Law has prepared a background study for the Commission. The Commission will also consider suggestions submitted by interested persons.

Oral Argument in Civil Procedure

Pursuant to a joint request from the Chair and Vice Chair of the Senate Judiciary Committee, the Commission will report on the need to clarify the availability of oral argument in hearings under the Code of Civil Procedure.

No Contest Clauses

Pursuant to SCR 42 (Campbell), enacted as Resolution Chapter 122 of the Statutes of 2005, the Commission will commence a comprehensive study, and prepare a report, concerning the apparent advantages and disadvantages of the state's no contest clause provisions, set forth in Part 3 (commencing with Section 21300) of Division 11 of the Probate Code. The study will include a review of various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code. The Commission will present to the Legislature an evaluation of the range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.

Real Property Transfer on Death Deeds

Pursuant to AB 12 (Devore), enacted as Chapter 422 of the Statutes of 2005, the Commission will study the conveyance of real property through a nonprobate transfer by means of a beneficiary deed. The object of the study is to determine whether

legislation establishing a beneficiary deed should be enacted in California.

Contractual Arbitration Improvements from Other Jurisdictions

During late 2005, the Commission will hold a stakeholder meeting to determine whether there are issues relating to contractual arbitration that the Commission can productively study. If such issues are identified, the Commission will work on them in 2006. Professor Roger P. Alford of Pepperdine Law School serves as the Commission's consultant on this project, and has published a background study.

Other Subjects

The major studies in progress described above will dominate the Commission's time and resources during 2006. The Commission will consider other subjects as time permits, including statutes of limitation in legal malpractice actions, equitable relief in a limited civil case, determination of compensation in eminent domain, interest on a pecuniary gift in a trust, trial court restructuring, and miscellaneous technical and minor substantive defects.

Calendar of Topics for Study

The Commission's calendar includes 21 topics authorized by the Legislature for study.⁷ The Commission recommends that one topic be deleted from its calendar and that one new topic be added.

Criminal Sentencing

The Commission's calendar of topics includes a review of whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised. Many of the proposed revisions considered by the Commission have been separately enacted into law.⁸ Other proposals appear too controversial or otherwise inappropriate for further Commission study. The Commission recommends that this topic be deleted from its calendar.

7. See *Calendar of Topics Authorized for Study*, Appendix 2 *infra*.

8. See 2002 Cal. Stat. ch. 126.

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 cooperate with legislative committees⁹ and to study and recommend revisions to correct technical or minor substantive defects in state statutes.¹⁰ 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.

Function and Procedure of Commission

The principal duties of the Commission are to:¹¹

- (1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.
- (2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,¹² bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.

9. Gov't Code § 8295.

10. Gov't Code § 8298.

11. Gov't Code §§ 8280-8298 (statute governing California Law Revision Commission). See Appendix 1 *infra*.

12. The Legislative Counsel, an ex officio member of the Law Revision Commission, serves as a Commissioner of the Commission on Uniform State Laws. See Gov't Code § 8261. The Commission's Executive Secretary serves as an Associate Member of the National Conference of Commissioners on Uniform State Laws.

- (3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.¹³

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study.¹⁴ However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution.¹⁵ Additionally, a concurrent resolution¹⁶ or statute¹⁷ may directly confer authority to study a particular subject.

13. Gov't Code § 8289. The Commission is also directed to recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. See "Report on Statutes Repealed by Implication or Held Unconstitutional" *infra*.

14. Gov't Code § 8293. Section 8293 requires a concurrent resolution authorizing the Commission to study topics contained in the calendar of topics set forth in the Commission's regular report to the Legislature. Section 8293 also requires that the Commission study any topic that the Legislature by concurrent resolution or statute refers to the Commission for study.

15. Gov't Code § 8298.

16. For an example of a concurrent resolution referring a specific topic to the Commission for study, see 2005 Cal. Stat. res. ch. 122 [SCR 42] (no contest clause study).

17. Code of Civil Procedure Section 703.120(a) requires the Commission to review statutes providing for exemptions from enforcement of money judgments every 10 years and to recommend any needed revisions. The Commission also has continuing statutory authority to study enforcement of judgments pursuant to Code of Civil Procedure Section 703.120(b).

Government Code Section 70219 requires the Commission, in consultation with the Judicial Council, to perform follow-up studies taking into consideration the experience in courts that have unified. For a list of specific studies, see *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

Government Code Section 71674 requires the Commission to recommend repeal of provisions made obsolete by the Trial Court Employment Protection

Background Studies

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study may be prepared by a member of the Commission's staff or by a specialist in the field who is retained as a consultant.¹⁸ Law professors and practicing attorneys who serve as consultants have already acquired the considerable knowledge necessary to understand the specific problems under consideration, and receive little more than an honorarium for their services. From time to time, expert consultants are also retained to advise the Commission at meetings.

Recommendations

After making its preliminary decisions on a subject, the Commission ordinarily distributes a tentative recommendation to interested persons and organizations, including the State Bar, local and specialized bar associations, public interest organizations, and business and professional associations. Notice of the availability of the tentative recommendation is mailed to interested persons on the

and Governance Act (Gov't Code § 71600 *et seq.*), Lockyer-Isenberg Trial Court Funding Act of 1997 (1997 Cal. Stat. ch. 850), and the implementation of trial court unification.

Statutory authority may be uncodified. See, e.g., 2005 Cal. Stat. ch. 422 (beneficiary deeds).

18. The following persons serve as Commission consultants: James E. Acret, Thelen, Reid & Priest, Pacific Palisades; Prof. Roger P. Alford, Pepperdine University School of Law; Prof. Michael Asimow, UCLA Law School; Prof. David M. English, University of Missouri Law School; Prof. Susan F. French, UCLA Law School; David Gould, McDermott, Will & Emery, Los Angeles; Brian Gurwitz, Deputy District Attorney, Orange County; Prof. Edward C. Halbach, Jr., Berkeley; Judge Joseph B. Harvey (ret.), Susanville; Keith Honda, Principal Administrative Analyst, Monterey County; Prof. Michael Hone, University of San Francisco School of Law; Gordon Hunt, Hunt, Ortmann, Blasco, Palffy & Rossell, Pasadena; Prof. Gideon Kanner, Berger & Norton, Burbank (formerly with Loyola Law School); Prof. J. Clark Kelso, McGeorge School of Law, Capital Center for Government Law and Policy; Prof. William M. McGovern, UCLA Law School; Prof. Miguel A. Méndez, Stanford Law School; Mark Overland, Overland & Gits, Santa Monica; Prof. Frederick Tung, University of San Francisco School of Law; Prof. Gerald F. Uelmen, Santa Clara University School of Law; Prof. Gregory S. Weber, McGeorge School of Law; Judge David S. Wesley, Los Angeles Superior Court.

Commission's mailing list and publicized in legal newspapers and other relevant publications. Notice is also posted on the Commission's website and emailed to interested persons.

Comments received on the tentative recommendation are considered by the Commission in determining what recommendation, if any, will be made to the Legislature.¹⁹ When the Commission has reached a conclusion on the matter,²⁰ its recommendation to the Legislature (including a draft of any necessary legislation) is published and distributed in printed form and on the Internet. If a background study has been prepared in connection with the recommendation, it may be published by the Commission or in a law review.²¹

19. For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A. J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965). See also Quillinan, *The Role and Procedures of the California Law Revision Commission in Probate and Trust Law Changes*, 8 Est. Plan. & Cal. Prob. Rep. 130-31 (Cal. Cont. Ed. Bar 1987).

20. Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. Dissents are noted in the minutes of the meeting at which the recommendation is approved.

21. For recent background studies published in law reviews, see Méndez, *California Evidence Code - Federal Rules of Evidence, V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence*, 39 U.S.F. L. Rev. 455 (2005); Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 Pepp. Disp. Resol. L.J. 1 (2005); Méndez, *California Evidence Code - Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003); Méndez, *California Evidence Code - Federal Rules of Evidence, II. Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 411 (2003); Méndez, *California Evidence Code - Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003); Méndez, *California Evidence Code - Federal Rules of Evidence, IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. Rev. 139 (2003); Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 Hastings L.J. 885 (2002); Weber, *Potential*

Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends for enactment, amendment, or repeal. The Comments are included in the Commission's published recommendations. A Comment indicates the derivation of a section and often explains its purpose, its relation to other law, and potential issues concerning its meaning or application.²²

Commission Materials as Legislative History

Commission recommendations are printed and sent to both houses of the Legislature, as well as to the Legislative Counsel and Governor.²³ Receipt of a recommendation by the Legislature is noted in the legislative journals, and the recommendation is referred to the appropriate policy committee.²⁴

The bill introduced to effectuate a Commission recommendation is assigned to legislative committees charged with study of the matter in depth.²⁵ A copy of the recommendation is provided to

Innovations in Civil Discovery: Lessons for California from the State and Federal Courts, 32 McGeorge L. Rev. 1051 (2001).

For a list of background studies published in law reviews before 2000, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971); 11 Cal. L. Revision Comm'n Reports 1008 n.5, 1108 n.5 (1973); 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976); 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982); 17 Cal. L. Revision Comm'n Reports 819 n.6 (1984); 18 Cal. L. Revision Comm'n Reports 212 n.17, 1713 n.20 (1986); 19 Cal. L. Revision Comm'n Reports 513 n.22 (1988); 20 Cal. L. Revision Comm'n Reports 198 n.16 (1990); 32 Cal. L. Revision Comm'n Reports 585 n.14 (2002).

22. Commission Comments are published by Lexis Law Publishing and Thomson/West in their print and CD-ROM editions of the annotated codes, and printed in selected codes prepared by other publishers. Comments are also available on Westlaw and Lexis.

23. See Gov't Code §§ 8291, 9795; see also *Reynolds v. Superior Court*, 12 Cal. 3d 834, 847 n.18, 528 P.2d 45, 53 n.18, 117 Cal. Rptr. 437, 445 n.18 (1974) (Commission "submitted to the Governor and the Legislature an elaborate and thoroughly researched study").

24. See, e.g., Senate J. Aug. 18, 2003, at 2031 (noting receipt of 2002-2003 recommendations and their transmittal to the Committee on Judiciary).

25. See, e.g., Office of Chief Clerk, California State Assembly, California's Legislature 126-27 (2000) (discussing purpose and function of legislative committee system).

legislative committee members and staff before the bill is heard and throughout the legislative process. The legislative committees rely on the recommendation in analyzing the bill and making recommendations to the Legislature concerning it.²⁶

If an amendment is made to the bill that renders one of the Commission's original Comments inconsistent, the Commission generally will adopt a revised Comment and provide it to the committee. The Commission also provides this material to the Governor's office once the bill has passed the Legislature and is before the Governor for action. These materials are a matter of public record.

Until the mid-1980's, a legislative committee, on approving a bill implementing a Commission recommendation, would adopt the Commission's recommendation as indicative of the committee's intent in approving the bill.²⁷ If a Comment required revision, the revised Comment would be adopted as a legislative committee Comment. The committee's report would be printed in the journal of the relevant house.²⁸

The Legislature has discontinued the former practice due to increased committee workloads and an effort to decrease the volume of material reprinted in the legislative journals. Under

26. The Commission does not concur with the suggestion of the court in *Conservatorship of Wendland*, 26 Cal. 4th 519, 542, 28 P.3d 151, 166, 110 Cal. Rptr. 2d 412, 430 (2001), that a Commission Comment might be entitled to less weight based on speculation that the Legislature may not have read and endorsed every statement in the Commission's report. That suggestion belies the operation of the committee system in the Legislature. See White, *Sources of Legislative Intent in California*, 3 Pac. L.J. 63, 85 (1972) ("The best evidence of legislative intent must surely be the records of the legislature itself and the reports which the committees relied on in recommending passage of the legislation.").

27. See, e.g., *Baldwin v. State*, 6 Cal. 3d 424, 433, 491 P.2d 1121, 1126, 99 Cal. Rptr. 145, 150 (1972). For a description of legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App. 3d 877, 884, 109 Cal. Rptr. 421, 426 (1973).

28. For an example of such a report, see *Report of Senate Committee on Judiciary on Assembly Bill 3472*, Senate J. June 14, 1984, reprinted in 18 Cal. L. Revision Comm'n Reports 1, 115 (1986).

current practice, a legislative committee relies on Commission materials in its analysis of a bill, but does not separately adopt the materials. Instead, the Commission makes a report detailing the legislative history of the bill, including any revised Comments. Bill reports are published as appendices to the Commission's annual reports.²⁹

Use of Commission Materials To Determine Legislative Intent

Commission materials that have been placed before and considered by the Legislature are legislative history, are declarative of legislative intent,³⁰ and are entitled to great weight in construing statutes.³¹ The materials are a key interpretive aid for practitioners as well as courts,³² and courts may judicially notice

29. Commission reports have in the past been published as well in the legislative journals. See, e.g., *In re Marriage of Neal*, 153 Cal. App. 3d 117, 124, 200 Cal. Rptr. 341, 345 (1984) (noting that Chairman of Senate Judiciary Committee, when reporting on AB 26 on Senate floor, moved that revised Commission report be printed in Senate Journal as evidence of legislative intent).

30. See, e.g., *People v. Williams*, 16 Cal. 3d 663, 667-68, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976) (“The official comments of the California Law Revision Commission on the various sections of the Evidence Code are declarative of the intent not only of the draft[ers] of the code but also of the legislators who subsequently enacted it. [Citation]”).

31. See, e.g., *Hale v. Southern Cal. IPA Med. Group, Inc.*, 86 Cal. App. 4th 919, 927, 103 Cal. Rptr. 2d 773, 778 (2001):

In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute. (*Kern v. County of Imperial* (1990) 226 Cal. App. 3d 391, 400, fn. 8 [276 Cal. Rptr. 524]; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal. App. 3d 524, 535, fn. 7 [260 Cal. Rptr. 713].) In particular, reports and interpretive opinions of the Law Revision Commission are entitled to great weight. (*Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal. App. 4th 23, 30, fn. 10 [17 Cal. Rptr. 2d 340].)

32. Cf. 7 B. Witkin, *Summary of California Law Constitutional Law* § 96, at 149 (9th ed. 1988) (Commission reports as aid to construction); Gaylor, *An Approach to Statutory Construction*, 5 Sw. U. L. Rev. 349, 384 (1973).

and rely on them.³³ Courts at all levels of the state³⁴ and federal³⁵ judicial systems depend on Commission materials to construe statutes enacted on Commission recommendation.³⁶ Appellate courts alone have cited Commission materials in several thousand published opinions.³⁷

33. See, e.g., *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005) (providing overview of materials that may be judicially noticed in determining legislative intent); *Barkley v. City of Blue Lake*, 18 Cal. App. 4th 1745, 1751 n.3, 23 Cal. Rptr. 2d 315, 318-19 n.3 (1993).

34. See, e.g., *Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997) (California Supreme Court); *Administrative Management Services, Inc. v. Fidelity & Deposit Co.*, 129 Cal. App. 3d 484, 181 Cal. Rptr. 141 (1982) (court of appeal); *Rossetto v. Barross*, 90 Cal. App. 4th Supp. 1, 110 Cal. Rptr. 2d 255 (2001) (appellate division of superior court).

35. See, e.g., *California v. Green*, 399 U.S. 149 (1970) (United States Supreme Court); *Southern Cal. Bank v. Zimmerman (In re Hilde)*, 120 F.3d 950 (9th Cir. 1997) (federal court of appeal); *Williams v. Townsend*, 283 F. Supp. 580 (C.D. Cal. 1968) (federal district court); *Ford Consumer Fin. Co. v. McDonell (In re McDonell)*, 204 B.R. 976 (B.A.P. 9th Cir. 1996) (bankruptcy appellate panel); *In re Garrido*, 43 B.R. 289 (Bankr. S.D. Cal. 1984) (bankruptcy court).

36. See, e.g., *Jevne v. Superior Court*, 35 Cal. 4th 935, 947, 28 Cal. Rptr. 3d 685, 964-95 (2005) (Commission report entitled to substantial weight in construing statute); *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 308 & n.6, 6 P.3d 713, 718 & n.6, 99 Cal. Rptr. 2d 792, 797 & n.6 (2000) (Comments to reenacted statute reiterate the clear understanding and intent of original enactment); *Brian W. v. Superior Court*, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 720 (1978) (Comments persuasive evidence of Legislature's intent); *Volkswagen Pac., Inc. v. City of Los Angeles*, 7 Cal. 3d 48, 61-63, 496 P.2d 1237, 1247-48, 101 Cal. Rptr. 869, 879-80 (1972) (Comments evidence clear legislative intent of law); *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968) (Comments entitled to substantial weight); *County of Los Angeles v. Superior Court*, 62 Cal. 2d 839, 843-44, 402 P.2d 868, 870-71, 44 Cal. Rptr. 796, 798-99 (1965) (statutes reflect policy recommended by Commission).

37. In this connection it should be noted that the Law Revision Commission should not be cited as the "Law Revision Committee" or as the "Law Review Commission." See, e.g., *Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1132 (E.D. Cal. 2002) (Law Revision "Committee"); *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1010 n.2, 33 Cal. Rptr. 2d 158, 160 n.2 (1994) (Law "Review" Commission).

Commission materials have been used as direct support for a court's interpretation of a statute,³⁸ as one of several indicia of legislative intent,³⁹ to explain the public policy behind a statute,⁴⁰ and on occasion to demonstrate (by their silence) the Legislature's intention not to change the law.⁴¹ The Legislature's failure to adopt a Commission recommendation may be used as evidence of legislative intent to reject the proposed rule.⁴²

Commission materials are entitled to great weight, but they are not conclusive.⁴³ While the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every consistent or inconsistent case is noted in the Comments,⁴⁴ nor can it anticipate judicial conclusions as to the significance of existing case authorities.⁴⁵

38. See, e.g., *People v. Ainsworth*, 45 Cal. 3d 984, 1015, 755 P.2d 1017, 1036, 248 Cal. Rptr. 568, 586 (1988).

39. See, e.g., *Heieck & Moran v. City of Modesto*, 64 Cal. 2d 229, 233 n.3, 411 P.2d 105, 108 n.3, 49 Cal. Rptr. 377, 380 n.3 (1966).

40. See, e.g., *Southern Cal. Gas Co. v. Public Utils. Comm'n*, 50 Cal. 3d 31, 38 n.8, 784 P.2d 1373, 1376 n.8, 265 Cal. Rptr. 801, 804 n.8 (1990).

41. See, e.g., *State ex rel. State Pub. Works Bd. v. Stevenson*, 5 Cal. App. 3d 60, 64-65, 84 Cal. Rptr. 742, 745-46 (1970) (finding that Legislature had no intention of changing existing law where "not a word" in Commission's reports indicated intent to abolish or emasculate well-settled rule).

42. See, e.g., *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 935-36, 496 P.2d 480, 490, 101 Cal. Rptr. 568, 578 (1972).

43. See, e.g., *Redevelopment Agency v. Metropolitan Theatres Corp.*, 215 Cal. App. 3d 808, 812, 263 Cal. Rptr. 637, 639 (1989) (Comment does not override clear and unambiguous statute). Commission materials are but one indicium of legislative intent. See, e.g., *Estate of Joseph*, 17 Cal. 4th 203, 216, 949 P.2d 472, 480, 70 Cal. Rptr. 2d 619, 627 (1998). The accuracy of a Comment may also be questioned. See, e.g., *Buzgheia v. Leasco Sierra Grove*, 30 Cal. App. 4th 766, 774, 36 Cal. Rptr. 2d 144, 149 (1994); *In re Thomas*, 102 B.R. 199, 202 (Bankr. E.D. Cal. 1989).

44. *Cf. People v. Coleman*, 8 Cal. App. 3d 722, 731, 87 Cal. Rptr. 554, 559 (1970) (Comments make clear intent to reflect existing law even if not all supporting cases are cited).

45. See, e.g., *Arellano v. Moreno*, 33 Cal. App. 3d 877, 885, 109 Cal. Rptr. 421, 426-27 (1973) (noting that decisional law cited in Comment was

Hence, failure of the Comment to note every change the recommendation would make in prior law, or to refer to a consistent or inconsistent judicial decision, is not intended to, and should not, influence the construction of a clearly stated statutory provision.⁴⁶

Some types of Commission materials may not properly be relied on as evidence of legislative intent. Courts have on occasion cited preliminary Commission materials such as tentative recommendations, correspondence, and staff memoranda and drafts in support of their construction of a statute.⁴⁷ While these materials may be indicative of the Commission's intent in proposing the legislation, only the Legislature's intent in adopting the legislation is entitled to weight in construing the statute.⁴⁸ Unless preliminary Commission materials were placed before the Legislature during its consideration of the legislation, those materials are not legislative history and are not relevant in

distinguished by the California Supreme Court in a case decided after enactment of the Commission recommendation).

46. The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973); 1974 Cal. Stat. ch. 227.

47. See, e.g., *Rojas v. Superior Court*, 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2005) (tentative recommendation, correspondence, and staff memorandum and draft); *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12-13, 960 P.2d 1031, 1037, 78 Cal. Rptr. 2d 1, 7 (1998) (tentative recommendation). However, in some cases, proposed legislation will be based on a tentative, rather than final, Commission recommendation. See, e.g., *Estate of Archer*, 193 Cal. App. 3d 238, 243, 239 Cal. Rptr. 137, 140 (1987). In that event, reliance on the tentative recommendation is proper.

See also *Ilkhechooyi v. Best*, 37 Cal. App. 4th 395, 406, 45 Cal. Rptr. 2d 766, 772-73 (1995) (letter responding to tentative recommendation); D. Henke, *California Legal Research Handbook* § 3.51 (1971) (background studies).

48. *Cf. Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1589, 1 Cal. Rptr. 2d 595, 598 (1991) (linking Commission's intent and Legislature's intent); *Guthman v. Moss*, 150 Cal. App. 3d 501, 508, 198 Cal. Rptr. 54, 58 (1984) (determination of Commission's intent used to infer Legislature's intent).

determining the Legislature's intention in adopting the legislation.⁴⁹

A Commission study prepared after enactment of a statute that analyzes the statute is not part of the legislative history of the statute.⁵⁰ However, documents prepared by or for the Commission may be used by the courts for their analytical value, apart from their role in statutory construction.⁵¹

Publications

Commission publications are distributed to the Governor, the Secretary of the Senate, the Chief Clerk of the Assembly, and the Legislative Counsel.⁵² Commission materials are also distributed to interest groups, lawyers, law professors, courts, district attorneys, and law libraries throughout the state.

The Commission's reports, recommendations, and studies are republished in hardcover volumes that serve as a permanent record of the Commission's work and, it is believed, are a valuable contribution to the legal literature of California. These volumes are available at many county law libraries and at some other libraries. About half of the hardcover volumes are out of print, but others are

49. The Commission concurs with the opinion of the court in *Juran v. Epstein*, 23 Cal. App. 4th 882, 894 n.5, 28 Cal. Rptr. 2d 588, 594 n.5 (1994), that staff memoranda to the Commission should not be considered as legislative history.

50. See, e.g., *Duarte v. Chino Community Hosp.*, 72 Cal. App. 4th 849, 856 n.3, 85 Cal. Rptr. 2d 521, 525 n.3 (1999).

51. See, e.g., *Sierra Club v. San Joaquin Local Agency Formation Comm'n*, 21 Cal. 4th 489, 502-03, 981 P.2d 543, 551-52, 87 Cal. Rptr. 2d 702, 712 (1999) (unenacted Commission recommendation useful as "opinion of a learned panel"); *Hall v. Hall*, 222 Cal. App. 3d 578, 585, 271 Cal. Rptr. 773, 777 (1990) (Commission staff report most detailed analysis of statute available); *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 309-10, 160 Cal. Rptr. 862, 866 (1979) (law review article prepared for Commission provides insight into development of law); *Schonfeld v. City of Vallejo*, 50 Cal. App. 3d 401, 407 n.4, 123 Cal. Rptr. 669, 673 n.4 (1975) (court indebted to many studies of Commission for analytical materials).

52. See Gov't Code § 8291. For limitations on Section 8291, see Gov't Code §§ 9795, 11094-11099.

available for purchase.⁵³ Publications that are out of print are available as electronic files.⁵⁴

Electronic Publication and Internet Access

Since 1995, the Commission has provided a variety of information on the Internet, including online material and downloadable files.⁵⁵ Interested persons with Internet access can find the current agenda, meeting minutes, background studies, tentative and final recommendations, staff memoranda, and general background information.

Since 2002, all Commission publications and staff memoranda are available as electronic files. Recent publications and memoranda may be downloaded from the Commission's website. Files that are not on the website are available on request.⁵⁶

Electronic Mail

Email commenting on Commission proposals or suggesting issues for study is given the same consideration as letter correspondence, if the email message includes the name and regular mailing address of the sender. Email to the Commission may be sent to *commission@clrc.ca.gov*.

The Commission distributes the majority of its meeting agendas, staff memoranda, and other written materials electronically, by means of its website and email distribution lists. The Commission encourages use of email as an inexpensive and expedient means of communication with the Commission.

MCLE Credit

The Commission is approved by the State Bar of California as a minimum continuing legal education provider. Participants and attendees at Commission meetings may be eligible to receive MCLE credit. To receive credit for participation or attendance at a meeting, a person must register at the meeting. Meeting materials

53. See *Commission Publications*, Appendix 6 *infra*.

54. See "Electronic Publication and Internet Access" *infra*.

55. The URL for the Commission's website is <<http://www.clrc.ca.gov>>.

56. See *Commission Publications*, Appendix 6 *infra*.

are available free of charge on the Internet⁵⁷ or may be purchased in advance from the Commission.

Personnel of Commission

As of November 18, 2005, the following persons were members of the Law Revision Commission:

Legislative Members⁵⁸

Senator Bill Morrow, San Juan Capistrano
[Assembly member vacant]

Members Appointed by Governor⁵⁹

Term Expires

Edmund L. Regalia, Walnut Creek <i>Chairperson</i>	October 1, 2005
David Huebner, Los Angeles <i>Vice-Chairperson</i>	October 1, 2007
Sidney Greathouse, Calabasas Hills	October 1, 2007
Pamela L. Hemminger, Los Angeles	October 1, 2007
Frank Kaplan, Santa Monica	October 1, 2005
Susan Duncan Lee, San Francisco	October 1, 2007
William E. Weinberger, Los Angeles	October 1, 2005

Legislative Counsel⁶⁰

Diane F. Boyer-Vine, Sacramento

57. See “Electronic Publication and Internet Access” *supra*.

58. The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov’t Code § 8281.

59. Seven Commission members are appointed by the Governor with the advice and consent of the Senate. Gov’t Code § 8281. These Commissioners serve staggered four-year terms. *Id.* The provision in Government Code Section 8281 to the effect that Commission members appointed by the Governor hold office until the appointment and qualification of their successors has been superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov’t Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

60. The Legislative Counsel serves on the Commission by virtue of office. Gov’t Code § 8281.

Effective September 1, 2005, the Commission elected Edmund L. Regalia as Chairperson (succeeding William E. Weinberger), and David Huebner as Vice Chairperson (succeeding Edmund L. Regalia). The terms of the new officers end August 31, 2006.

In April 2005, the Governor appointed Sidney Greathouse, Pamela L. Hemminger, David Huebner, and Susan Duncan Lee to four-year terms ending October 1, 2007.

In November 2004, Ellen Corbett's ended her service as the Commission's Assembly Member.

The following persons are on the Commission's staff:

Legal

NATHANIEL STERLING
Executive Secretary

BRIAN HEBERT
Assistant Executive Secretary

STEVEN E. COHEN
Staff Counsel

BARBARA S. GAAL
Staff Counsel

Administrative-Secretarial

KORRENE BRADFORD
Staff Services Analyst

VICTORIA V. MATIAS
Secretary

In September 2005, Steven E. Cohen was appointed to a full-time position on the Commission's legal staff. In October 2005, Korrene Bradford was appointed to a half-time position as Staff Services Analyst.

Inna Portnova, a student at Boalt Hall School of Law, worked for the Commission during the 2004-2005 academic year on a work-study basis. Sara Poster, a student at Boalt Hall School of Law, worked for the Commission as an extern during spring semester 2005. She continued to work for the Commission for the remainder of the year on a work-study basis. Ariana Gallisá, a student at Stanford Law School, worked for the Commission during the summer of 2005 through the Stanford Public Interest Law Foundation. Olga Kotlyarevskaya, a student at Boalt Hall School of Law, worked for the Commission on a work-study basis during fall semester 2005.

Commission Budget

The Commission's operations are funded from the state general fund. The amount appropriated to the Commission for the 2005-06 fiscal year from the general fund is \$685,000.

The Commission's general fund allocation is supplemented by \$15,000 budgeted for income generated from sale of documents to the public, representing reimbursement for the production and shipping cost of the documents.

The Commission also receives substantial donations of necessary library materials from the legal publishing community, especially California Continuing Education of the Bar, Lexis Law Publishing, and Thomson/West. The Commission receives additional library materials from other legal publishers and from other law reform agencies on an exchange basis, and has full access to the Stanford University Law Library and the McGeorge Law School Library. In 2005, the Commission received donations of library materials from the California Center for Judicial Education and Research (CJER) and Professor William Slomanson of the Thomas Jefferson School of Law. The Commission is grateful for these contributions.

Other Activities

The Commission is directed by statute to cooperate with bar associations and other learned, professional, or scientific associations, institutions, or foundations in any manner suitable for the fulfillment of the purposes of the Commission.⁶¹

National Conference of Commissioners on Uniform State Laws

The Commission is directed by statute to receive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws.⁶² Legislative Counsel and Commission member, Diane F. Boyer-Vine, is a member of the California Commission on Uniform State Laws and the National Conference. The Commission's Executive

61. Gov't Code § 8296.

62. Gov't Code § 8289.

Secretary, Nathaniel Sterling, is an associate member of the National Conference.

Mr. Sterling attended the National Conference in Pittsburgh, Pennsylvania, in July 2005. Mr. Sterling also served during 2005 as a member of National Conference drafting committees on the Uniform Power of Attorney Act and revision of the Uniform Common Interest Ownership Act and the Model State Administrative Procedure Act.

Education

Brian Hebert, Assistant Executive Secretary, made presentations on state oversight of common interest developments to the Community Associations Institute (April 2005), the California Dispute Resolution Council (May 2005), and the Executive Council of Homeowners (May 2005). In October 2005, Mr. Hebert met with visiting officials of the Chinese national government to describe the role of the Commission in the legislative process.

Barbara Gaal, Staff Counsel, made presentations on the 2004 Reorganization of the Civil Discovery Act to the San Francisco Association for Docket, Calendar, and Court Services (June 2005) and the San Francisco Legal Professionals Association (October 2005). In October 2005, Ms. Gaal made a presentation at the Stanford Law School on government legal practice.

Legislative History of Recommendations in the 2005 Legislative Session

The Commission's recommendations were included in eight bills in the 2005 legislative session. Three of the bills were enacted. Five bills are two-year bills and will be considered in the 2006 legislative session.⁶³

63. The two-year bills are: AB 69 (Harman) (Ownership of Amounts Withdrawn from Joint Account); AB 770 (CID Ombudsperson); AB 1133 (Harman) (Waiver of Privilege by Disclosure); SB 551 (CID Ombudsperson); SB 1104 (Sen. Banking, Fin. and Ins. Comm.) (Financial Privacy).

Civil Discovery

Assembly Bill 333 (2005 Cal. Stat. ch. 294) was introduced by Assembly Member Tom Harman to effectuate the Commission's recommendations on *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004) and *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004). The measure also includes follow-up legislation for Chapter 182 of the Statutes of 2004, relating to the nonsubstantive reorganization of the Civil Discovery Act. The measure was enacted, with amendments. See *Report of the California Law Revision Commission on Chapter 294 of the Statutes of 2005 (Assembly Bill 333)*, 35 Cal. L. Revision Comm'n Reports 75 (2005) (Appendix 5 *infra*).

Unincorporated Associations

Senate Bill 702 (2005 Cal. Stat. ch. 116) was introduced by Senator Dick Ackerman to effectuate the Commission's recommendations on *Unincorporated Association Governance*, 34 Cal. L. Revision Comm'n Reports 231 (2004) and *Nonprofit Association Tort Liability*, 34 Cal. L. Revision Comm'n Reports 257 (2004). The measure was enacted, with amendments. See *Report of the California Law Revision Commission on Chapter 116 of the Statutes of 2005 (Senate Bill 702)*, 35 Cal. L. Revision Comm'n Reports 71 (2005) (Appendix 4 *infra*).

Preemption of CID Architectural Standards

Senate Bill 853 (2005 Cal. Stat. ch. 37) was introduced by Senator Christine Kehoe to effectuate the Commission's recommendations on *Preemption of CID Architectural Restrictions*, 34 Cal. L. Revision Comm'n Reports 117 (2004) and *Obsolete Cross-References to Former Code of Civil Procedure Section 383*, 34 Cal. L. Revision Comm'n Reports 127 (2004). The measure was enacted, with amendments.

Report on Statutes Repealed by Implication or Held Unconstitutional

Government Code Section 8290 provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared and has the following to report:

[Research is in progress. See First Supplement to Memorandum 2005-39 for content to be inserted here.]

Recommendations

The Commission respectfully recommends that the Legislature authorize the Commission to study the topic of oral argument in civil procedure and to remove from the Commission's calendar of topics the review of the law governing criminal sentences for enhancements relating to weapons or injuries.

