Study J-103 April 3, 2006

Memorandum 2006-15

Oral Argument in Civil Procedure (Draft of Report)

Attached to this memorandum is a staff draft of a report on oral argument in civil procedure, for the Commission's review and possible adoption.

BACKGROUND

This matter came to us via a joint request from the Chair and Vice Chair of the Senate Judiciary Committee, dated May 4, 2004, that the Law Revision Commission undertake a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument.

The Commission considered the letter at its September 2004 meeting and agreed to undertake the requested study. The Commission decided to commence work on the study forthwith, since as a project to clarify and codify existing law, it appeared to fall within the Commission's general authority to correct technical and minor substantive statutory defects. Gov't Code § 8298.

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

The authorizing legislation was introduced in 2005 and enacted in 2006. See SCR 15 (Morrow), enacted as 2006 Cal. Stat. res. ch. 1.

Meanwhile, the Commission proceeded apace, doing as much as it could until passage of the resolution. The Commission promulgated a tentative recommendation on the matter, which it circulated for comment in 2005. See *Oral Argument in Civil Procedure* (June 2005) (available at www.clrc.ca.gov).

The tentative recommendation took the position that statutory guidance concerning when oral argument must be allowed in civil practice would be

beneficial to both courts and litigants. The Commission recommended the following statutory clarifications:

- Existing case law pertaining to the right to oral argument would be codified. That would help make the rules transparent and readily accessible to all.
- Additional motions on which oral argument is a matter of right would be identified by statute. The Commission tentatively identified 18 different motions for which oral argument should be a matter of right.
- For those motions on which oral argument is not a matter of right, there would 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 tentatively recommended that oral argument should be granted to the litigants when the court's decision could de jure or de facto terminate the case.
- The statutory standards for when oral argument must be allowed would 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.
- Codification of the oral argument right would not preclude the court from imposing reasonable limitations on exercise of the right. Those limitations might include such matters as time for exercising the right and limits on the length of argument.

Comments the Commission received on the tentative recommendation were mixed, but generally negative. Particularly telling were the comments of practicing lawyers, as represented by the State Bar Committee on Administration of Justice and the State Bar Litigation Section. While practicing lawyers generally believe that oral argument is helpful and important, the commenters were apprehensive about the codification effort.

The commenters were concerned that identification of specific motions in which oral argument is a matter of right would make it more difficult to get oral argument on all other motions. At present the courts are liberal in allowing oral argument, and they generally make the right judgment call on when to allow it. A statutory listing of specific hearings is likely to have the effect of generally making it more difficult to get oral argument than it is now.

The commenters were also concerned that a general standard for when oral argument must be allowed, to be applied to motions not specifically identified, would be difficult to interpret and apply in practice, and would cause more problems than it cures. There does not seem to be a problem in practice at

present, and there was significant antipathy to undertaking an effort that could do more harm than good.

The perspective of the practicing lawyers was reinforced by the Commission's experience seeking public comment on this matter. Although we went to great lengths to notify and seek the input of local courts and local bar associations on this project, we received sparse comment. This suggests that our commenters are correct — despite past adverse experience with some courts concerning oral argument, the problem appears to have been solved and things seem to be working smoothly and appropriately.

DRAFT REPORT

The Commission was convinced by the public comment that there no longer appears to be a need to deal with this matter statutorily. The Commission decided to report this conclusion to the Legislature. A staff draft of such a report is attached to this memorandum. The Commission should review the draft and determine whether it accurately captures the Commission's position.

A SECOND LOOK

Before the Commission decides to go forward with the proposed report, the staff suggests the Commission take a moment for a second look at this matter.

Even though things seem quiescent at present, the history of this issue demonstrates that it will be a recurrent problem. The pressure of business in the trial courts will continue to fuel efforts to limit oral argument in the future.

At present there are no clear standards to guide the courts or litigants. The decision is largely discretionary with the trial judge, taking into account a variety of considerations, as announced by the appellate courts from time to time. Is this preferable to a clear statutory formulation of standards, even if the standards may require some interpretation?

The staff is not suggesting that the Commission revisit the concept of identifying individual motions on which oral argument should be a matter of right. However, clearly formulated general standards could be helpful to all concerned.

Set out below, for consideration as a possible alternative, is a draft to implement general statutory standards for oral argument. (If the draft looks familiar, it is because the Commission has seen it before. The staff proposed it in

our first memorandum to the Commission on this subject. The Commission rejected the approach in favor of the attempt to identify specific hearings).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An advantage of this type of approach — over the approach of identifying specific hearings for which oral argument is a matter of right — is that this approach is flexible and adaptable. It wouldn't need to be amended each time a new hearing procedure is added to the code, or get out of whack if a conforming revision is neglected.

It could be argued that the proposed statute merely captures what the courts ought to be doing already under case law. But providing those standards by statute, rather than leaving it to case law, could (1) make the standards more accessible and (2) help to convey the seriousness of the matter to a judge who may be more deferential to a statute than to "Stare decisis and all that stuff." See *Gwartz v. Superior Court*, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).

The State Bar Litigation Section, in commenting on the Commission's tentative recommendation, was favorable to the concept of codification, but not to the approach of the tentative recommendation. They suggested an alternative approach — do not try to specify a laundry list of hearings on which oral argument is mandated, but provide a more concrete and easy to apply general standard, leaving much discretion to the courts. The staff believes the proposal outlined above would satisfy that objective.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

#J-103

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Oral Argument in Civil Procedure

April 2006

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SUMMARY OF REPORT

This report explores the question whether statutory guidance concerning when oral argument must be allowed in civil practice would be beneficial to courts and litigants.

The report details existing law on the matter and reviews the Law Revision Commission's 2005 tentative recommendation to provide further guidance by codification of appropriate standards.

The report summarizes the reaction of the legal community to the codification effort. Experience indicates that court decisions on when to allow oral argument are generally satisfactory.

The report notes that codification may cause problems, both in the interpretation and application of new standards and by creating a negative implication as to hearings not specifically mentioned.

The Commission believes there is not a sufficient problem with denial of oral argument in the courts to warrant legislation on the matter and the interpretive problems that legislation is likely to cause.

This report is made pursuant to authority of 2006 Cal. Stat. res. ch. 1.

ORAL ARGUMENT IN CIVIL PROCEDURE

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ORAL ARGUMENT IN CIVIL PROCEDURE

INTRODUCTION

Background of Study

This report is made pursuant to authority of Resolution Chapter 1 of the Statutes of 2006, that the California Law Revision Commission conduct a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument.

The problem is highlighted by the opinion of the Court of Appeal in *Medix Ambulance Serv., Inc. v. Superior Court*:[1]

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

1. 97 Cal. App. 4th 109, 111-112, 118 Cal. Rptr. 2d 249 (2002).

Recent Developments[2]

In 2000, in response to problems of the type illustrated by *Medix*, the Judicial Council amended Rule 324 of the California Rules of Court, governing tentative rulings. The new procedures require a judge to allow oral argument before making a final ruling and issuing an order.[3]

Nonetheless, it is reported that between 2001 and 2004 several judges in San Diego County and Orange County superior courts continued to use the tentative ruling process to deny civil litigants oral hearings on motions.

In response, the Conference of Delegates of the California Bar Association twice passed a resolution advocating enactment of legislation to define "hearing" as used in the Code of Civil Procedure to mean an oral hearing. Senate Bill 1249 (Morrow), introduced in 2004, would have amended Code of Civil Procedure Section 17 to provide that the term "hearing," as applied to a demurrer, motion, or order to show cause, means oral argument by moving and opposing parties on a record amenable to written transcription, unless affirmatively waived by the parties.

The introduction of SB 1249 highlighted the ongoing problem. The Judicial Council contacted the presiding judges of courts not in compliance with Rule 324. The presiding judges met with noncomplying judges to correct their practices, and also amended local court rules on tentative ruling procedures to conform to Rule 324. The presiding judges of the affected courts have provided written assurance to the Administrative Office of the Courts that the practice of individual judges to deny oral argument has been discontinued.

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

SCOPE OF STUDY

More than 260 provisions of the Code of Civil Procedure use the term "hearing."[4] More than 12,000 provisions of other codes also use that term. Most of the provisions in other codes deal with administrative hearings. Those that deal with court proceedings are often unique to the procedural context in which they occur. This study focuses on general civil practice, including pre-trial, trial, and post-trial motions. It does not extend to special proceedings, evidentiary hearings, or appellate proceedings for the reasons discussed below.

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2. Drawn from Senate Judiciary Committee Analysis of SB 1249 (May 4, 2004), available at <www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1249_cfa_20040505_162538_sen_comm.html>.

3. Cal. R. Ct. 324(a) ("The tentative ruling . . . shall not become the final ruling of the court until the hearing.")

4. Many other statutes require the court to "hear" and determine an issue.

General Civil Practice in the Courts

In order to structure manageable bounds for this study, the Commission has limited it to general civil practice in the courts. That covers civil actions under the Code of Civil Procedure. Excluded by the limitation are:

- Criminal proceedings.[5]
- Administrative hearings.[6]
- Contractual arbitration.[7]
- Special court procedures provided for under other codes.[8]

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

Pre-trial procedures such as a motion for summary judgment, demurrer, or prejudgment remedy (such as attachment or receivership) have been the focus of oral argument concerns. However, this study is not limited to pre-trial motions; it includes trial motions and post-trial motions.

Special Proceedings

This study focuses on civil actions and does not extend to special proceedings. A civil action is generic and is covered by general principles in the Code of Civil Procedure. A special proceeding is ordinarily governed by detailed and unique rules of procedure, even though in some instances the statute governing the specific proceeding may be located in the Code of Civil Procedure. Examples of special proceedings include eminent domain,[9] escheat,[10] and judicial enforcement of arbitration.[11] A special proceeding may incorporate by reference general rules of civil practice (which would include any provisions relating to oral argument).[12]

Evidentiary Hearings

A statute may specify that evidence may be introduced in a hearing orally or in writing or both. This study does not cover a hearing under the Code of Civil Procedure that is evidentiary in nature. The study is concerned with law and motion matters rather than with presentation of evidence.

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5. Case law addresses the right to oral argument in criminal proceedings, but special constitutional considerations may apply to them.

6. Special rules apply in the quasi-adjudicative process. In a local agency quasi-judicial hearing, the agency head must pay attention to the oral argument. See, e.g., Lacy St. Hospitality. Serv. v. Los Angeles, 125 Cal. App. 4th 526, 22 Cal. Rptr. 3d 805 (2004).

7. The right to oral argument in contractual arbitration is within the control of the parties.

8. These procedures are *sui generis* and not readily susceptible to general treatment.

9. Code Civ. Proc. §§ 1230.010-1273.070.

10. *Id*. §§ 1410-1431.

11. *Id*. §§ 1280-1294.2.

12. See, e.g., *id*. § 1109 (writ practice).

Appellate Proceedings

The law governing oral argument in appellate court proceedings is clearer and somewhat different from the law governing oral argument in trial court proceedings.

The right of counsel to appear and orally argue is generally recognized in an appeal or original proceeding that is decided on the merits by a written opinion in an appellate court.[13] The right is of constitutional dimension in California due to the requirement that judgment be concurred in by a majority of judges present at the argument.[14]

In a criminal appeal, "The right to oral argument on appeal is recognized in the California Rules of Court, the Penal Code, the state Constitution, and prior decision of [the supreme] court."[15] The appellate oral argument right applies in a civil case as well.[16] Appellate courts may use tentative opinion procedures and other techniques to streamline the appellate process, so long as they do not discourage exercise of the oral argument right.[17]

The right to oral argument on appeal does not extend to every decision on the merits in the appellate courts. California law does not grant a right to present oral argument in a proceeding for issuance of a peremptory writ of mandate or prohibition in the first instance (as opposed to a proceeding for issuance of an alternative writ or an order to show cause, in which there is a right to oral argument).[18] Nor is there a right to oral argument when the Supreme Court considers an attorney's request for review of a State Bar Court disbarment recommendation.[19]

The right to oral argument on appeal is clear, and is of constitutional dimension. The Law Revision Commission does not recommend further codification of the law on the matter.

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13. 9 B. Witkin, California Procedure *Appeal* § 663(a), at 696-97 (4th ed. 1997).

14. See Cal. Const. art. VI, § 2 (Supreme Court), § 3 (Court of Appeal). There are limits, however. See, e.g., Metro. Water Dist. v. Adams, 19 Cal. 2d 463, 468, 122 P. 2d 257 (1942):

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

15. People v. Brigham, 25 Cal. 3d 283, 285, 599 P.2d 100, 157 Cal. Rptr. 905 (1979).

16. Moles v. Regents of the Univ. of Cal., 32 Cal. 3d 867, 654 P.2d 740, 187 Cal. Rptr. 557 (1982).

17. People v. Pena, 32 Cal. 4th 389, 399, 83 P.3d 506, 9 Cal. Rptr. 3d 107 (2004).

18. Lewis v. Superior Court, 19 Cal. 4th 1232, 970 P.2d 872, 82 Cal. Rptr. 2d 85 (1999).

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

EXISTING CALIFORNIA LAW[20]

Importance of Oral Argument

Oral argument is deeply ingrained in our legal tradition. Its importance to the legal process has often been noted. It has been said that, "Oral argument may lift up the fallen or cause the tottering to fall."[21] It can "clear the air" and "is often as effective as a catalytic converter."[22] When an attorney appears in a courtroom to advocate a position, according to one judge, "the judicial process loses its arid, abstruse, and remote character. A lively interchange between counsel and the bench, not possible by the submission of written briefs, may lead a judge to rethink his or her position and even alter the outcome of the proceeding."[23] Another judge has poetically noted that, "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!"[24]

Public Policy and Due Process

Despite the burden of heavy court workloads, recent appellate opinions have emphasized that it is critical that a party have its day in court[25] — "Justice unseen is justice undone."[26] A court must not only be fair to all litigants but must also appear to be so.[27] Oral argument enhances public visibility and accountability of the judicial process.[28] Although oral argument may not be the sine qua non of

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20. The following overview of existing law is adapted from Thomas, *The Rites and Rights of Oral Arguments*, Cal. Lawyer, Sept. 2004, at 40-41.

21. TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 754, 104 Cal. Rptr. 2d 810 (2001).

22. *TJX Cos*., 87 Cal. App. 4th at 755.

23. *Lewis*, 19 Cal. 4th at 1266 (Kennard, J., dissenting).

24. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1978).

25. Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 112, 118 Cal. Rptr. 2d 249 (2002).

26. *TJX Cos*., 87 Cal. App. 4th at 755.

27. Solorzano v. Superior Court, 18 Cal. App. 4th 603, 615, 22 Cal. Rptr. 2d 401 (1993). The judge must also pay attention at the hearing. *Cf.* Lacy St. Hospitality Serv. v. Los Angeles, 125 Cal. App. 4th 526, 530, 22 Cal. Rptr. 3d 805 (2004) (dictum):

> Sitting as "judges" in the appeal, the council was obligated to pay attention as is the obligation of sitting members of the judiciary. (Accord, In re Grossman (1972) 24 Cal. App. 3d 624, 629, 101 Cal. Rptr. 176 ["Members of the bar have the right to expect and demand courteous treatment by judges ..."]; Model Code of Judicial Conduct Canon 3(B)(4) (American Bar Association 2000) ["A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity ..."].)

28. Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781 (1998).

accurate judicial decision-making, the quality and appearance of justice is improved when a judge listens before deciding.[29]

Courts have acknowledged that, because of basic due process concerns, a court is on shaky ground when it entirely bars parties from having a say.[30] "It is wise public policy to conduct judicial proceedings in the sunshine, unless there is a very good reason not to do so."[31]

No Automatic Right to Oral Argument

Notwithstanding the policy considerations favoring oral argument, California courts have long held that a party does not have an automatic right to present oral argument on every kind of motion brought before a court.[32] The fact that a statute provides for a "hearing" does not necessarily entitle a party to argue the case orally before a judge.[33]

In the absence of a clear legislative directive regulating oral argument in the case, a court will consider whether the statutory scheme read as a whole, in context, and taking into account its nature and purpose, requires oral argument. That may include analyzing whether the judge acts as a fact finder or adjudicates an issue at the hearing, as well as whether any procedural remedy, such as making an evidentiary objection or orally moving to continue, is provided for during the hearing.[34] A court may consider whether the proceeding involves a critical pretrial matter that is of substantial significance to a party, such as summary judgment.[35] A court may also look to whether the motion or other pretrial proceeding involves a real and genuine dispute or whether oral argument would simply amount to an "empty gesture."[36]

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

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29. Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

30. Titmas v. Superior Court, 87 Cal. App. 4th 738, 742, 104 Cal. Rptr. 2d 803 (2001); see also Monarch Healthcare v. Superior Court, 78 Cal. App. 4th 1282, 1286, 93 Cal. Rptr. 2d 619 (2000) (criticizing court orders that "issue like a bolt from the blue out of the trial judge's chambers" (internal quotations and citations omitted)).

31. *TJX Cos*., 87 Cal. App. 4th at 754.

32. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 P.635 (1894).

33. Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 112-114, 118 Cal. Rptr. 2d 249 (2002).

34. *In re* Marriage of Dunn, 103 Cal. App. 4th 345, 348, 126 Cal. Rptr. 2d 636 (2002); *TJX Cos*., 87 Cal. App. 4th at 751; *Titmas*, 87 Cal. App. 4th at 741.

35. See Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 266-67, 77 Cal. Rptr. 2d 781 (1998).

36. See Lewis v. Superior Court, 19 Cal. 4th 1232, 1258-59, 970 P.2d 872, 82 Cal. Rptr. 2d 85 (1999).

- Motion to quash or dismiss for lack of jurisdiction.[37]
- Summary judgment motion.[38]
- Demurrer.[39]
- Discovery motion involving attorney-client privilege.[40]
- Motion to treat party as vexatious litigant.[41]
- Motion for pretrial writ of attachment.[42]
- Motion for appointment of receiver.[43]
- Sanctions motion.[44]

Courts have acknowledged the importance of oral argument whenever there is doubt about a relevant matter — that is precisely when oral argument may be most beneficial.[45] Oral argument is also important when a substitute judge is filling in for the judge to whom the matter is regularly assigned.[46]

Although a party has a right to oral argument in connection with the motions listed above, a court retains substantial discretion to impose reasonable limitations, including limiting the time of argument.[47] A court may also refuse to allow a party oral argument against a motion or demurrer if the party fails to timely invoke the procedure or file written opposition to it.[48] After presentation of evidence,

37. *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 784, 170 Cal. Rptr. 642 (1980).

38. Brannon v. Superior Court, 114 Cal. App. 4th 1203, 1208-13, 8 Cal. Rptr. 3d 491 (2004); *Mediterranean*, 66 Cal. App. 4th at 265; Gwartz v. Superior Court, 71 Cal. App. 4th 480, 83 Cal. Rptr. 2d 865 (1999).

39. See Medix Ambulance Serv., Inc. v. Superior Court, 97 Cal. App. 4th 109, 113-15, 118 Cal. Rptr. 2d 249 (2002)(sexual harassment complaint against employer); *TJX Cos.*, 87 Cal. App. 4th at 755 (whether suit should proceed as a class action).

40. Titmas v. Superior Court, 87 Cal. App. 4th 738, 744-45, 104 Cal. Rptr. 2d 803 (2001).

41. Bravo v. Ismaj, 99 Cal. App. 4th 211, 225, 120 Cal. Rptr. 2d 879 (2002).

42. Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).

43. See Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

44. *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

45. *TJX Cos.*, 87 Cal. App. 4th at 755.

46. *Id.* at 755 ("Hearing oral argument is one of the best ways for substitute judges to demonstrate to the satisfaction of the parties and the public that judicial responsibility has been exercised rather than abdicated.").

47. *Brannon*, 114 Cal. App. 4th at 1211 (citing *Mediterranean*, 66 Cal. App. 4th at 265); Sweat v. Hollister, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995).

48. *Brannon*, 114 Cal. App. 4th at 1211; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial § 9:168 (Rutter Group 2004).

argument to the court may be submitted on briefs — oral argument is not a matter of right.[49]

In summary, California law does not recognize an absolute right to oral argument by litigants in its courts, and though specific areas have emerged where the courts agree that a right to oral argument generally exists, courts retain the ability to circumscribe the right by reasonable procedures.

2005 TENTATIVE RECOMMENDATION

The Law Revision Commission believes that the approach of the courts to determine whether oral argument must be allowed is generally sound. However, legislative intent may be a matter of dispute. Few if any statutes state explicitly that oral argument must be allowed on a particular matter.

Would the law be improved by codification of express standards for determining when oral argument is a matter of right? That could avoid the need for briefing, examination of legislative history, and resort to public policy arguments, in a case where the right to oral argument is contested.

As part of this study the Commission developed a tentative recommendation to provide more precise statutory guidance.[50] In brief, the 2005 tentative recommendation would make the following statutory clarifications to the law governing oral argument in civil practice:

(1) Existing case law pertaining to the right to oral argument would be codified. That would take advantage of previous judicial review of the matter, and make those rules transparent and readily accessible to all.

(2) Additional matters on which oral argument is a matter of right would be identified by statute.

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

(4) The statutory standards for when oral argument must be allowed would 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 in the circumstances of a particular case.

(5) The statutory standards for when oral argument must be allowed would not preclude the court from imposing reasonable limitations on the exercise of the oral

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49. See, e.g., Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 P. 635 (1894) (foreclosure of mechanics lien).

50. Tentative Recommendation on *Oral Argument in Civil Procedure* (June 2005) (available from the Commission, www.clrc.ca.gov).

argument right. Those limitations might include such matters as time for exercising the right and limits on the length of argument.

The details of the 2005 tentative recommendation that was circulated for public comment are elaborated below.

Specific Hearings the Courts Have Addressed

When confronted with a question of the right to oral argument in a particular proceeding, the objective of the court is to ascertain legislative intent on the matter. In the absence of a clear indication of legislative intent the court will apply general standards.[51] General standards developed by the courts have not been grounded in due process of law[52] as much as in general concern about fairness.[53]

Motions on Which Oral Argument May Be Denied

The courts have generally held that oral argument at a hearing on a motion is not a matter of right, but may be allowed in the court's discretion.[54]

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

- Motion for dismissal for failure to timely amend.[55]
- Motion to compel discovery.[56]
- Motion to withdraw motion to vacate default.[57]
- Motion to reopen for additional evidence.[58]

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51. See, e.g., Titmas v. Superior Court, 87 Cal. App. 4th 738, 742, 104 Cal. Rptr. 2d 803 (2001):

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

52. Due process requires that a litigant be afforded notice and an opportunity to be heard. Often that means an opportunity for a written submission to the decisionmaker. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 731, 297 P.2d 789 (1956). There are suggestions in the cases that due process may require oral argument where important consequences are at stake. See, e.g., *Mediterranean*, 66 Cal. App. 4th at 266 n.11.

53. Whether or not oral argument is constitutionally guaranteed, most attorneys, and judges, believe that it is desirable. See, e.g., Millar, *Friends, Romans and Judges—Lend Us Your Ears: The Tradition of Oral Argument*, Orange County Lawyer, Jan. 2002, at 10. See also TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 754, 104 Cal. Rptr. 2d 810 (2001) (internal quotations and citations omitted):

> Our own experience with appellate argument confirms its utility. Oral argument may lift up the fallen or cause the tottering to fall. It separates the wheat from the chaff by affording "a direct dialogue between the litigant and the bench ... in ways that cannot be matched by written communication, and for many judges a personal exchange with counsel makes a difference in result."

54. See, e.g., 6 B. Witkin, California Procedure *Proceedings Without Trial* §34(b), at 429 (4th ed. 1997).

55. Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989).

56. *In re* Marriage of Lemen, 113 Cal. App. 3d 769, 170 Cal. Rptr. 642 (1980).

57. Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956).

- Motion for new trial.[59]

Motions on Which Oral Argument Must Be Allowed

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

- Motion to quash or dismiss for lack of jurisdiction.[60]
- Summary judgment motion.[61]
- Demurrer.[62]
- Motion for pretrial writ of attachment.[63]
- Motion for appointment of receiver.[64]
- Discovery motion involving attorney-client privilege.[65]
- Motion to treat party as vexatious litigant.[66]

There is no single rationale supporting an oral argument right in these matters. The decision that oral argument must be allowed is based on the relative importance of the motion being heard, including whether (1) the motion has the potential to limit or terminate a party's access to court, (2) the motion could result in the granting of a provisional remedy that may as a practical matter effectively end the dispute, or (3) the motion would put at risk the ability of parties generally to consult openly with their attorneys.

Legislative Intent

Existing cases address the oral argument right in a small fraction of statutory hearings. The legislative intent with respect to the remainder of the hearings under the Code of Civil Procedure is indeterminate.

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58. Ensher, Alexander & Barsoom, Inc. v. Ensher, 225 Cal. App. 2d 318, 37 Cal. Rptr. 327 (1964).

59. Kimmel v. Keefe, 9 Cal. App. 3d 402, 88 Cal. Rptr. 47 (1970).

60. *Lemen*, 113 Cal. App. 3d at 769.

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

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

63. Hobbs v. Weiss, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999).

64. Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (1982).

65. Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001).

66. Bravo v. Ismaj, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (2002).

Statutory Construction

A statute may provide for a "hearing" or for the court to "hear" a matter, or that the matter must be "heard." The term itself seems to suggest oral argument, but the courts have rejected that reading.[67]

One provision of the Code of Civil Procedure makes specific reference to oral argument.[68] Section 661 addresses oral argument on a motion for new trial. The statute is ambiguous. If the motion is heard by a judge other than the trial judge, it "shall be argued orally or shall be submitted without oral argument, as the judge may direct." The implication is that, if heard by the trial judge, there is a right to oral argument on the motion. However, the cases have consistently held that the right to oral argument on a motion for new trial is within the discretion of the judge.[69]

Other provisions of the Code of Civil Procedure are likewise suggestive, but inconclusive, with respect to oral argument. A statute that requires the court to set a date for hearing seems to imply that there will be an actual event at which arguments may be made.[70] A requirement that the judge permit the parties to argue at a hearing,[71] or to appear before the court and make argument,[72] is also suggestive of the intent to allow oral argument.

Motion Procedure Generally

Section 1005.5 of the Code of Civil Procedure provides that upon the due service and filing of a notice of motion, the motion is deemed to have been made and pending before the court, "but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled." *Brannon v. Superior Court* interprets

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67. See, e.g., Lewis v. Superior Court, 19 Cal. 4th 1232, 1247-1248, 970 P.2d 872, 82 Cal. Rptr. 2d 85 (1999).

68. In addition, one statute provides the right to oral argument in arbitration of an international commercial dispute on request of a party. We do not deal with arbitration in this study.

69. See, e.g., Kimmel v. Keefe, 9 Cal. App. 3d 402, 88 Cal. Rptr. 47 (1970).

70. See, e.g., *Lewis*, 19 Cal. 4th at 1249-1250:

> Section 1094's statement that "the court must proceed to hear or fix a day for hearing the argument of the case," and section 1090's provision allowing the court to "postpone the argument" until after a trial of factual issues, both suggest that the hearing of the argument will occur at a specific time. [FN. Because it is written in the disjunctive, section 1094's requirement that "the court must proceed to hear *or* fix a day for hearing the argument of the case" (italics added) arguably contemplates that, under some circumstances, a court may consider written arguments alone, without setting a particular day for the hearing.] Similarly, rule 56(e) specifies that "the return shall be made at least five days before the date set for hearing." If "hearing" simply meant "consideration" of written arguments, there would be no need to select a particular date for considering the arguments. (See *Gulf Coast Investment Corp. v. Nasa 1 Business Center*, *supra*, 754 S.W.2d at p. 153 [where a rule required the court to notify the parties of the "date, time and place of the hearing," the trial court abused its discretion in refusing to hold an oral hearing].)

71. See, e.g., Code Civ. Proc. § 170.3(c)(6) (motion to disqualify judge). *Cf.* Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 422, 285 Cal. Rptr. 659 (1991).

72. See, e.g., Code Civ. Proc. § 259(b) (exception to determinations of court commissioner).

the phrase "hearing of the motion" to mean an oral hearing.[73] Based on this interpretation, the court concludes that the Legislature intended to provide parties to a summary judgment motion the right to oral argument because there is no language to the contrary in the summary judgment statute. The court cautions that its reasoning with respect to a summary judgment motion cannot necessarily be applied to other prejudgment motions.[74]

Telephone Appearance

An argument on legislative intent can also be derived from statutes governing telephonic court appearances.[75]

Code of Civil Procedure Section 1006.5 requires the Judicial Council to adopt a standard of judicial administration that permits counsel for a party to a civil action to appear by telephone at any hearing of a demurrer, order to show cause, or pretrial motion. The implication of the statute is that it is legislative policy to allow oral argument — either telephonic or in person — in those particular proceedings.

That implication may be inconsistent with Government Code Section 68070.1, which suggests there is an oral argument right by telephone in every law and motion hearing, presumably subject to Judicial Council rules limiting that right.

The Judicial Council has not acted to limit the right. The Rules of Court currently provide that a party "may appear by telephone in any conference or hearing at which witnesses are not expected to be called to testify," except that a personal appearance is required at a settlement or case management conference and any other conference or hearing in which the court determines that "a personal appearance would materially assist in a determination of the proceeding or in resolution of the case."[76] The implication is that oral argument must be allowed, either by telephone or in person.

General Considerations

A case can be made that the entire scheme of the Code of Civil Procedure points towards oral argument on motions generally. This position is based not just on terminology such as "hearing on the motion" and "appearance at the hearing," but on the legislative intent of such statutes as Code of Civil Procedure Sections 1005.5 (party shall not be deprived of right to hearing on a motion) and 1006.5 (mandating that Judicial Council adopt standard of judicial administration for telephone appearance on demurrer, order to show cause, and pretrial motion), and Government Code Section 68070.1 (providing for telephone appearance in any

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73. 114 Cal. App. 4th 1203, 1209, 8 Cal. Rptr. 3d 491 (2004).

74. *Id*. at 1211.

75. The definition of a telephonic appearance is unclear, particularly with respect to video conferencing and webcasting. The Commission does not address the issue in this report.

76. Cal. R. Ct. 298(b), (c)(3).

nonevidentiary law and motion hearing, subject to limitation in Judicial Council rules).

The existing general provisions all stop short of mandating oral argument and ultimately leave the matter in the hands of the courts. That may be the result of concern about the press of business in the trial courts, the need for flexibility in processing litigation, or the perception that the courts may be in the best position to ascertain the need for and value of oral argument in diverse types of proceedings.

Additional Hearings Where Oral Argument is Appropriate

The Law Revision Commission's tentative recommendation identifies specific types of hearings where oral argument would be appropriate, even though there is not yet a case law determination of the right. Oral argument may be critical on the following matters, in addition to those already identified by the courts:

- Motion for class certification.[77]
- Motion to dismiss on ground of inconvenient forum.[78]
- Motion to quash service of summons.[79]
- Special motion to strike (anti-SLAPP).[80]
- Motion for summary adjudication.[81]
- Motion for judgment on the pleadings.[82]
- Application for claim and delivery.[83]
- Motion or order to show cause for injunctive relief.[84]
- Motion to dismiss for delay in prosecution.[85]
- Motion for judgment notwithstanding verdict.[86]
- Motion to appoint referee or appraiser.[87]
- Petition to order arbitration.[88]

77. See Code Civ. Proc. § 382.
78. See *id.* § 410.30.
79. See *id.* § 418.10.
80. See *id.* § 425.16.
81. See *id.* § 437c(f).
82. See *id.* § 438.
83. See *id.* § 512.020.
84. See *id.* § 526.
85. See *id.* § 583.110.
86. See *id.* § 629.
87. See *id.* § 639.
88. See *id.* § 1281.2.

General Standard for Oral Argument

The tentative recommendation includes a straightforward general standard that would apply to types of hearings not specifically identified by statute. One inquiry commonly made by the courts in determining whether oral argument is required is whether the decision can have the effect de jure or de facto of resolving the case. The Law Revision Commission believes this is a sound general standard, and the tentative recommendation proposes to codify that standard.[89]

In addition, sometimes a court's decision would result in determination of an issue by a nonjudicial officer, such as an arbitrator. The tentative recommendation proposes that in these circumstances, the court's decision would be subject to oral argument by the parties.[90]

Court Discretion

The tentative recommendation would not constrain the court in its discretion from permitting oral argument in other cases.[91] The courts in recent years have developed an extensive body of criteria for determining whether oral argument should be allowed on a particular motion.[92] The factors considered by the courts include:

- Whether the judge acts as a fact finder or adjudicates an issue at the hearing.
- Whether the statute provides the parties procedural remedies at the time of the hearing, such as an evidentiary objection or an oral motion for a continuance.
- Whether the decision involves a critical pretrial matter of considerable significance to the parties.
- Whether the issues are so obvious or well settled that oral argument would amount to an empty gesture.
- The need for a record of the proceedings due to the likelihood of judicial review of the decision.
- Whether the judge is substituting for a judge to whom the judicial proceeding is regularly assigned.
- Whether the judge is in doubt about the proper resolution of an issue in the proceeding.

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89. See *Tentative Recommendation*, *supra* note 50, at 19 (proposed Section 1044(c)(2)-(3)).

90. See *Tentative Recommendation*, *supra* note 50, at 19 (proposed Section 1044(c)(5)).

91. See, e.g., Muller v. Muller, 141 Cal. App. 2d 722, 297 P.2d 789 (1956).

92. See, e.g., Lewis v. Superior Court, 19 Cal. 4th 1232, 82 Cal. Rptr. 2d 85, 970 P.2d 872 (1999); *In re* Marriage of Dunn, 103 Cal. App. 4th 345, 126 Cal. Rptr. 2d 636 (2002); TJX Cos. v. Superior Court, 87 Cal. App. 4th 747, 751, 755, 104 Cal. Rptr. 2d 810 (2001); Titmas v. Superior Court, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803 (2001); Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 77 Cal. Rptr. 2d 781 (1998); Cal-Am. Income Prop. Fund VII v. Brown Dev. Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703 (1982).

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

These considerations are relevant, but would not be mandated by the tentative recommendation. The courts would have been allowed discretion to permit oral argument in any case where it would materially assist in the proper resolution of the matter, even though not statutorily required. Court discretion could be exercised under this general standard, or pursuant to court rules.[93]

Existing court rules mandate oral argument in some circumstances where it is not otherwise required by law. If a court uses a tentative ruling procedure, Rule 324 specifies an oral argument requirement.[94] Court rules are silent concerning the right to oral argument in other circumstances, but the rules appear to assume that oral argument will generally be allowed in law and motion hearings.[95] That is also the conclusion of the court in *Brannon*.[96]

Court Control

The court may impose reasonable limitations on oral argument, such as procedures for exercising the right to present argument and restrictions on the time of argument. Under this authority, a court may refuse to allow oral argument against a motion or demurrer if the opponent fails to timely invoke the procedure or file written opposition to it.[97] The tentative recommendation proposes to codify this principle.

A court may deny oral argument if supporting papers have not been filed. Where the hearing is on short notice,[98] the parties may not have an opportunity to file papers. The tentative recommendation would make clear that a limitation on exercise of the oral argument right must be reasonable.[99]

PUBLIC COMMENT

The Law Revision Commission sought public comment on the tentative recommendation in 2005. The proposal was circulated to key interest groups that

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

94. Cal. R. Ct. 324(a)(1).

95. See, e.g., *id.* R. 321 (time of hearing), R. 324.5 (reporting of proceedings).

96. 114 Cal. App. 4th 1203, 1209, 8 Cal. Rptr. 3d 491.

97. *Brannon*, 114 Cal. App. 4th at 1211; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial § 9:168 (Rutter Group 2004); See also Mediterranean Constr. Co. v. State Farm Fire & Cas. Co., 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781 (1998); Sweat v. Hollister, 37 Cal. App. 4th 603, 43 Cal. Rptr. 2d 399 (1995); Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 262 Cal. Rptr. 155 (1989).

98. For example, a summary judgment hearing in an unlawful detainer action on five days notice.

99. See *Tentative Recommendation*, *supra* note 50, at 20 (proposed Section 1044(f)).

would be affected by it, including the plaintiff and defense bar, relevant State Bar committees, the California Judges Association, and the Judicial Council. In addition, the Commission notified others that might not ordinarily be aware of a project such as this, including local bar associations and the superior courts of the counties.

The Commission received some, though not extensive, comment on the proposal. The relative lack of interest is consistent with the Commission's ultimate finding that oral argument does not generally appear to be a problem in practice.

Current Practice

This study was precipitated by adverse experience in several counties. Commenters on the tentative recommendation question whether there is an ongoing problem that still needs to be addressed. The responses of both bench[100] and bar[101] indicate general satisfaction with current practice. Typical comments are:

> "The general experience of [our] members has been that most trial courts allow oral argument on the vast majority of civil law and motion and other significant matters."

> "[T]he number of circumstances in which Courts improperly refuse to hold oral argument is limited state-wide."

This is consistent with experience reported in the 2004 Senate Judiciary Committee staff analysis of the issue.[102]

The commenters on the tentative recommendation raise a fundamental issue — 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?

Role of Oral Argument

Comments on the tentative recommendation display a variety of attitudes towards the value of oral argument in civil procedure. Generally speaking, there is a split between bench and bar.

The State Bar Litigation Section expresses a typical attorney perspective:[103]

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100. See comments of the Los Angeles Superior Court and the California Judges Association, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

101. See comments of the State Bar Committee on Administration of Justice and the State Bar Litigation Section, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

102. Senate Judiciary Committee Analysis of SB 1249 (May 4, 2004), available at <www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1249_cfa_20040505_162538_sen_comm.html>.

103. See comments of the State Bar Litigation Section, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

> 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.

Judges are less enthusiastic about the helpfulness of oral argument, noting that in some cases counsel may be unprepared or may add nothing to what has already been submitted. Oral argument may consume time but not significantly enhance the quality of adjudication.[104]

The level of adjudication is not uniformly high throughout the state, in the experience of many members of the bar, due perhaps to high case loads and limitations on a judge's time. Even though a judge may have reviewed a written submission, the judge may not have had the opportunity to study it in depth or to appreciate its full significance. A paper may not have made it into the file by the time the judge makes a tentative ruling. It can be critical for an attorney to appear and direct the judge's focus to key points.

On balance, most commenters on the tentative recommendation, whether from the bench or bar, see value in oral argument but are concerned about the trade-off in loss of judicial efficiency.

Basic Positions of Commenters

Perhaps predictably, attorneys tend to support statutory clarification of the right to oral argument, and judges tend to want discretion in when to allow oral argument. But while attorneys are generally supportive of the concept of statutory clarification, even they are generally negative about the tentative recommendation.

Typical positions are:

- State Bar Committee on Administration of Justice 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."
- The State Bar Litigation Section sees some benefits to codification, but on balance believes that the approach of the tentative recommendation would cause more problems than it solves.
- Judicial Council supports the right to oral argument where appropriate, but does not support the approach of the tentative recommendation.

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104. See, e.g., comments of Judge James P. Kleinberg, of the Santa Clara County Superior Court, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov). Judge Kleinberg details the meticulous process he follows in reviewing briefs and making tentative rulings, a process that he believes renders oral argument to a large extent superfluous.

- Los Angeles Superior Court believes the proposed changes to the law are unnecessary and potentially counterproductive.

The commenters generally 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 that balance by identifying specific types of motions where oral argument would more likely than not be appropriate, and by providing general standards for courts to follow in other circumstances. The ultimate question is whether that approach would be 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.

The State Bar Litigation Section warns against removing discretion from the courts. Circumstances in various jurisdictions differ, and the local bar in one county may accept or promote practices in the court that is unfamiliar and ill-suited to practice in another. The Section cautions against overreacting to circumstances such as those in Orange and San Diego Counties:[105]

> 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 Litigation Section is also concerned about problems in implementing a new oral argument regime, particularly shifting resources to litigate the procedural issue. New rules would 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.

Codification of Specific Hearings for Which Oral Argument is a Right

Codification of Existing Cases

The tentative recommendation would codify existing cases mandating the right to oral argument. That would preserve the effect of previous court determinations and help avoid litigation over those matters in the future.

Practitioners are concerned about distorting the holdings in those cases by the codification process. The State Bar Litigation Section, for example, is uncertain that the holdings in existing cases are unqualified. "While listing specific motions promotes clarity, it reduces flexibility in the disposition of individual cases."[106] Many of the motions listed could be resolved in some circumstances without oral

105. See comments of the State Bar Litigation Section, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

106. *Ibid.*

argument, particularly where the motion is denied rather than granted. Accordingly, the Litigation Section would not attempt to codify prior court rulings.

Identification of Other Hearings

The tentative recommendation also identifies other hearings for which no court determination of the oral argument right exists but that appear appropriate for oral argument.

Many commenters are skeptical of the creation of a comprehensive list, since some matters would undoubtedly be missed. They also question the practicality of compiling a manageable list of matters that a spectrum of practitioners would regard as reasonably complete.

Inclusio Unius Est Exclusio Alterius

Commenters worry that a definitive listing of hearings in which oral argument is a matter of right could cause 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."[107] The listing would likely make it harder to get oral argument on an unlisted matter, despite 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."[108] The upshot is that a proponent of oral argument on an unlisted motion would have the burden of persuasion that oral argument is allowed, making it more difficult for a practitioner to obtain oral argument than under existing law.

General Standards

The tentative recommendation proposes straightforward standards for determining whether oral argument must be allowed on matters not specifically identified by statute. Among the key factors are whether the court's decision on the matter (1) would be dispositive of the case or (2) would as a practical matter irreparably affect the circumstances of the parties.

The reaction of commenters to the concept of general standards such as these is mixed. While some think the principle is sound, many are concerned about the practical implementation of the standards. They feel that the standards are ambiguous, and that parties and judges will disagree as to their application to a particular motion. "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

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107. See comments of the Judicial Council of California, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

108. See comments of State Bar Committee on Administration of Justice, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

impossible for the court to know a case well enough to know when or how to determine the answer to the question."[109]

Commenters are concerned that 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. This is clearly expressed in the comments of the State Bar Committee on Administration of Justice that, "the proposed legislation will likely generate complexity, expense, and unintended consequences that outweigh, on balance, the likely benefits."[110]

COMMISSION CONCLUSION

The genesis of this project is the concept that, "a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument."[111]

Is it better to state 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?

The matter is currently left largely to court discretion, with problems resolved by case law enunciation of standards. 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."[112]

Both bench and bar are concerned about the proposal to codify the law governing oral argument. They question whether it is worthwhile to establish new rules — which will generate their own problems in interpretation and implementation — when there is no real problem to be solved and only marginal benefit to be gained by doing so.

The Law Revision Commission is satisfied that there is not a sufficient problem to warrant disruption of the current system of significant court discretion. That system appears to work reasonably well and is reasonably efficient. The Commission recommends against codification in the present circumstances.

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109. See comments of State Bar Litigation Section, attached to Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

110. See Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).

111. Letter from Martha Escutia, Chair, and Bill Morrow, Vice Chair, Senate Judiciary Committee, to Frank Kaplan, Chair, California Law Revision Commission (Aug. 27, 2004), available at <www.clrc.ca.gov/pub/2004/MM04-34.pdf>, Exhibit 6.

112. See Cal. L. Revision Comm'n, Memorandum 2005-34 (9/16/2005) (available at www.clrc.ca.gov).