

Admin.

October 4, 2007

Memorandum 2007-37

2007-2008 Annual Report (Staff Draft)

Attached to this memorandum is a staff draft of the text of the Commission's 2007-2008 *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.

Major Studies in Progress

The Annual Report describes the major studies that the Commission will be working on in 2008. That description may be affected by decisions that the Commission makes in its annual review of new topics and priorities. If so, the report will be revised to reflect those decisions.

Additionally, the report is written assuming that AB 403 (which would direct the Commission to study whether the attorney-client privilege should continue after the client's death) is enacted. See, e.g., pp. 3, 11. If AB 403 is not enacted, the report will be revised accordingly.

Calendar of Topics Authorized for Study

In the report, the Commission recommends that the Legislature authorize the Commission to continue its study of the topics previously authorized. See pp. 13, 30.

Personnel of Commission

The report sets forth the members of the Commission, along with the date upon which each member's term expires. See pp. 24-25. The term expiration date for Commissioners Greathouse, Hemminger, and Lee is listed as October 1, 2007.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

Upon reappointment, the staff will revise the report to reflect the new date (October 1, 2011).

Activities of Commission Members and Staff

The 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. See pp. 27-28. Please notify the staff if you have any activities of this nature to report.

Recommendations in the 2007 Legislative Session

The report discusses Commission recommendations submitted to the Legislature in 2007. See pp. 3, 7, 28. This discussion is written with the assumption that AB 310 (relating to technical and minor substantive statutory corrections) will be enacted before the report is submitted. If AB 310 (which is pending before the Governor) is not enacted, appropriate revisions will be made throughout the report. See pp. 3, 7, 10, 28.

Editorial Suggestions

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

Respectfully submitted,

Catherine Bidart
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2007-2008 Annual Report

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

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SUMMARY OF WORK OF COMMISSION

Recommendations to the 2007 Legislature

In 2007, three bills effectuating the Commission's recommendations were enacted, relating to the following subjects:

- Time limits for discovery in an unlawful detainer case
- Technical and minor substantive statutory corrections
- Trial court restructuring

One bill introduced in 2007 to effectuate a Commission recommendation remains before the Legislature as a two-year bill.

Recommendations to the 2008 Legislature

In 2008, the Commission plans to submit recommendations on the following subjects to the Legislature:

- Deposition in out-of-state litigation
- Reorganization of common interest development law
- Miscellaneous hearsay exceptions
- Reorganization of mechanics lien law
- Revision of no contest clause statute
- Technical and minor substantive corrections
- Trial court restructuring

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

Commission Activities Planned for 2008

During 2008, the Commission will work on the following major topics: the attorney-client privilege, miscellaneous hearsay exceptions, nonsubstantive reorganization of weapon statutes, donative transfer restrictions, common interest development law, civil discovery improvements, mechanics lien law, and statutes made obsolete by trial court restructuring. The Commission will also consider other subjects to the extent time permits.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
650-494-1335

SIDNEY GREATHOUSE, Chairperson
PAMELA L. HEMMINGER, Vice Chairperson
DIANE F. BOYER-VINE
SENATOR ELLEN CORBETT
ASSEMBLY MEMBER NOREEN EVANS
DAVID HUEBNER
FRANK KAPLAN
SUSAN DUNCAN LEE
EDMUND L. REGALIA
WILLIAM E. WEINBERGER

October 26, 2007

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 2007 and its plans for 2008.

Three of the four Commission recommendations submitted to the Legislature in 2007 were enacted into law. One of the four recommendations remains before the Legislature as a two-year bill.

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

- Assembly Member Chuck DeVore (Revocable Transfer on Death Deed)
- Assembly Member Mike Eng (Unlawful Detainer)
- Assembly Member Jim Silva (Technical Corrections)
- Senate Committee on Judiciary (Trial Court Restructuring)

To date, the Commission has held six one-day meetings in 2007. In addition, a two-day meeting will be held in December 2007.

Meetings were held in Burbank and Sacramento.

Respectfully submitted,

Sidney Greathouse
Chairperson

2007-2008 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., 2006 Cal. Stat. res. ch. 128 [ACR 73] (nonsubstantive reorganization of weapon statutes); 2006 Cal. Stat. ch. 216 [AB 2034] (donative transfer restrictions).

The Commission has submitted 374 recommendations to the Legislature, of which 345 have been enacted in whole or in substantial part.⁵ Commission recommendations have resulted in the enactment of legislation affecting 22,457 sections of California law: 4,500 sections amended, 9,488 sections added, and 8,469 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

2008 Legislative Program

In 2008, the Commission plans to submit recommendations on the following subjects to the Legislature:

- Deposition in out-of-state litigation
- Reorganization of common interest development law
- Miscellaneous hearsay exceptions
- Reorganization of mechanics lien law
- Revision of no contest clause statute
- Technical and minor substantive corrections
- Trial court restructuring

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

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 5 *infra*.

Major Studies in Progress

During 2008, the Commission will work on the following major topics: the attorney-client privilege, miscellaneous hearsay exceptions, nonsubstantive reorganization of weapon statutes, donative transfer restrictions, common interest development law, civil discovery improvements, mechanics lien law, and statutes made obsolete by trial court restructuring. The Commission will also consider other subjects to the extent time permits.

Attorney-Client Privilege

Pursuant to AB 403 (Tran), enacted as Chapter [REDACTED] of the Statutes of 2007, the Commission will study whether the attorney-client privilege should survive the death of the client, and, if so, under what circumstances. The Commission's report on the matter is due by July 1, 2009.

Miscellaneous Hearsay Exceptions

At the request of the Senate Committee on Judiciary,⁷ the Commission is studying two hearsay issues: present sense impressions and forfeiture by wrongdoing. The Commission is also examining the definition of unavailability for purposes of the hearsay rule and its exceptions. The Commission's report on these matters is due by March 1, 2008.

Nonsubstantive Reorganization of Weapon Statutes

Pursuant to ACR 73 (McCarthy), enacted as Resolution Chapter 128 of the Statutes of 2006, the Commission will continue its review of the portions of the Penal Code relating to the control of deadly weapons, and will recommend legislation that simplifies and reorganizes the material without making any substantive change to the scope of criminal liability under those provisions. The Commission's report on the matter is due by July 1, 2009.

7. See Letter from Senator Ellen Corbett to Brian Hebert (Aug. 20, 2007) (Commission Staff Memorandum 2007-28, Exhibit p. 1 (available from the Commission, www.clrc.ca.gov)).

Donative Transfer Restrictions

Pursuant to AB 2034 (Spitzer), enacted as Chapter 216 of the Statutes of 2006, the Commission will continue to study the operation and effectiveness of the provisions of the Probate Code restricting donative transfers to certain classes of individuals, and will recommend revisions and improvements to those provisions. The Commission's report on the matter is due by January 1, 2009.

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.

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 prepared the background study for the Commission. The Commission will also consider suggestions submitted by interested persons.

Mechanics Lien Law

The Commission will continue its work on mechanics lien law pursuant to a legislative request for a comprehensive review. 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.

Trial Court Restructuring

The Commission will continue its work to identify and study statutes made obsolete as a result of trial court unification, the Lockyer-Isenberg Trial Court Funding Act (1997 Cal. Stat. ch. 850), and the Trial Court Employment Protection and Governance Act (2000 Cal. Stat. ch. 1010).

Other Subjects

The major studies in progress described above will dominate the Commission's time and resources during 2008. The Commission will consider other subjects as time permits, including determination of compensation in eminent domain, interest on a pecuniary gift in a trust, and miscellaneous technical and minor substantive defects.

Calendar of Topics for Study

The Commission's calendar includes 22 topics authorized by the Legislature for study.⁸ The Commission recommends no revision of its calendar in 2008.

Function and Procedure of Commission

The principal duties of the Commission are to:⁹

- (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,¹⁰ bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.
- (3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.¹¹

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

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

10. 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.

11. 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*.

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.¹² However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution.¹³ Additionally, a concurrent resolution¹⁴ or statute¹⁵ may directly confer authority to study a particular subject.

Background Studies

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study

12. 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.

13. Gov't Code § 8298.

14. For an example of a concurrent resolution referring a specific topic to the Commission for study, see 2006 Cal. Stat. res. ch. 128 [ACR 73] (nonsubstantive reorganization of weapon statutes).

15. 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 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 uncoded. See, e.g., 2005 Cal. Stat. ch. 422 (beneficiary deeds).

may be prepared by a member of the Commission's staff or by a specialist in the field who is retained as a consultant.¹⁶ 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 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.¹⁷ When

16. The following persons serve as Commission consultants: James E. Acret, Pacific Palisades; Judge Joseph B. Harvey (ret.), Susanville; Gordon Hunt, Hunt, Ortmann, Blasco, Palffy & Rossell, Pasadena; Prof. J. Clark Kelso, McGeorge School of Law, Capital Center for Government Law and Policy; Prof. Miguel A. Méndez, Stanford Law School; Nathaniel Sterling, former Executive Secretary, California Law Revision Commission, Palo Alto; Prof. Gerald F. Uelman, Santa Clara University School of Law; Prof. Gregory S. Weber, McGeorge School of Law.

17. 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).

the Commission has reached a conclusion on the matter,¹⁸ 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.¹⁹

Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends for enactment, amendment,

18. 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.

19. For recent background studies published in law reviews, see Méndez, *California Evidence Code — Federal Rules of Evidence, VI. Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. Rev. 1 (2006); 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 (2004); 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 (2004); 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. 1003 (2003); Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 Hastings L.J. 885 (2002); Weber, *Potential 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).

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.²⁰

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.²¹ Receipt of a recommendation by the Legislature is noted in the legislative journals, and the recommendation is referred to the appropriate policy committee.²²

The bill introduced to effectuate a Commission recommendation is assigned to legislative committees charged with study of the matter in depth.²³ A copy of the recommendation is provided to 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.²⁴

20. 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.

21. 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").

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

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

24. 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

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.²⁵ 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.²⁶

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 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.²⁷

reports which the committees relied on in recommending passage of the legislation."').

25. 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).

26. 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).

27. 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).

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,²⁸ and are entitled to great weight in construing statutes.²⁹ The materials are a key interpretive aid for practitioners as well as courts,³⁰ and courts may judicially notice and rely on them.³¹ Courts at all levels of the state³² and federal³³

28. See, e.g., *Fair v. Bakhtiari*, 40 Cal. 4th 189, 195, 147 P.3d 653, 657, 51 Cal. Rptr. 3d 871, 875 (2006) (“The Commission’s official comments are deemed to express the Legislature’s intent.”); *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]”).

29. See, e.g., *Dep’t of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal. 4th 1, 13 n.9, 145 P.3d 462, 469 n.9, 50 Cal. Rptr. 3d 585, 593 n.9 (2006) (Commission’s official comments are persuasive evidence of Legislature’s intent); *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].)

30. Cf. 7 B. Witkin, *Summary of California Law Constitutional Law* § 123, at 230 (10th ed. 2005) (Commission reports as aid to construction); Gaylord, *An Approach to Statutory Construction*, 5 Sw. U. L. Rev. 349, 384 (1973).

31. 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); *Hale*, 86 Cal. App. 4th at 927, *supra* note 29; *Barkley v. City of Blue Lake*, 18 Cal. App. 4th 1745, 1751 n.3, 23 Cal. Rptr. 2d 315, 318-19 n.3 (1993).

32. 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).

judicial systems depend on Commission materials to construe statutes enacted on Commission recommendation.³⁴ Appellate courts alone have cited Commission materials in several thousand published opinions.³⁵

Commission materials have been used as direct support for a court's interpretation of a statute,³⁶ as one of several indicia of legislative intent,³⁷ to explain the public policy behind a statute,³⁸ and on occasion to demonstrate (by their silence) the Legislature's

33. 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).

34. See, e.g., *Jevne v. Superior Court*, 35 Cal. 4th 935, 947, 11 P.3d 954, 962, 28 Cal. Rptr. 3d 685, 694-95 (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).

35. 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).

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

37. 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).

38. 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).

intention not to change the law.³⁹ The Legislature's failure to adopt a Commission recommendation may be used as evidence of legislative intent to reject the proposed rule.⁴⁰

Commission materials are entitled to great weight, but they are not conclusive.⁴¹ 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,⁴² nor can it anticipate judicial conclusions as to the significance of existing case authorities.⁴³ 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.⁴⁴

39. 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).

40. 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).

41. 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).

42. *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).

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

44. 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*

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.⁴⁵ 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.⁴⁶ 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 determining the Legislature's intention in adopting the legislation.⁴⁷

A Commission study prepared after enactment of a statute that analyzes the statute is not part of the legislative history of the statute.⁴⁸ However, documents prepared by or for the Commission

Disclosure of Privileged Information, 11 Cal. L. Revision Comm'n Reports 1163 (1973); 1974 Cal. Stat. ch. 227.

45. 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 *Ilkhchooyi 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).

46. 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).

47. 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.

48. 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).

may be used by the courts for their analytical value, apart from their role in statutory construction.⁴⁹

Publications

Commission publications are distributed to the Governor, the Secretary of the Senate, the Chief Clerk of the Assembly, and the Legislative Counsel.⁵⁰ 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 available for purchase.⁵¹ Publications that are out of print are available as electronic files.⁵²

Electronic Publication and Internet Access

Since 1995, the Commission has provided a variety of information on the Internet, including online material and downloadable files.⁵³ Interested persons with Internet access can find the current agenda, meeting minutes, background studies,

49. 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).

50. See Gov't Code § 8291. For limitations on Section 8291, see Gov't Code §§ 7995, 11094-11099.

51. See *Commission Publications*, Appendix 5 *infra*.

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

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

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.⁵⁴

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 are available free of charge on the Internet⁵⁵ or may be purchased in advance from the Commission.

Personnel of Commission

As of October 26, 2007, the following persons were members of the Law Revision Commission:

54. See *Commission Publications*, Appendix 5 *infra*.

55. See "Electronic Publication and Internet Access" *supra*.

Legislative Members⁵⁶

Assembly Member Noreen Evans, Santa Rosa
 Senator Ellen Corbett, San Leandro

Members Appointed by Governor⁵⁷***Term Expires***

Sidney Greathouse, Calabasas Hills <i>Chairperson</i>	October 1, 2007
Pamela L. Hemminger, Los Angeles <i>Vice Chairperson</i>	October 1, 2007
David Huebner, Los Angeles	October 1, 2007
Frank Kaplan, Santa Monica	October 1, 2009
Susan Duncan Lee, San Francisco	October 1, 2007
Edmund L. Regalia, Walnut Creek	October 1, 2009
William E. Weinberger, Los Angeles	October 1, 2009

Legislative Counsel⁵⁸

Diane F. Boyer-Vine, Sacramento

Effective September 1, 2007, the Commission elected Sidney Greathouse as Chairperson (succeeding David Huebner), and Pamela L. Hemminger as Vice Chairperson (succeeding Sidney Greathouse). The terms of the new officers end August 31, 2008.

In January 2007, the Senate Rules Committee appointed Senator Ellen Corbett to serve as the Senate member of the Commission, replacing Bill Morrow.

56. 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.

57. 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).

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

Commission Huebner will not seek reappointment. He will be ending his six years of service as a member of the Commission, including one year as Vice Chairperson and three years as Chairperson. Commissioner Huebner's service is distinguished by his dedication to the work of the Commission.

The following persons are on the Commission's staff:

Legal

BRIAN HEBERT
Executive Secretary

BARBARA S. GAAL
Chief Deputy Counsel

CATHERINE BIDART
Staff Counsel

STEVEN E. COHEN
Staff Counsel

Administrative-Secretarial

DEBORA LARRABEE
*Associate Governmental
Program Analyst*

VICTORIA V. MATIAS
Secretary

In December 2006, Catherine Bidart was appointed to a full-time position on the Commission's legal staff.

Cherie Ackerman assisted the Commission while studying for an LL.M. at the University of Pacific, McGeorge School of Law during the 2006-2007 academic year. Elizabeth Lyon, student at the University of California, Hastings College of the Law, and Andrew Slade, student at the University of California, Davis, School of Law, worked for the Commission during the 2006-2007 academic year on a work-study basis.

In 2007, the Assembly and Senate passed resolutions honoring former Executive Secretary Nathaniel Sterling for his service on the staff of the Law Revision Commission.

Commission Budget

The Commission's operations are funded from the state general fund. The amount appropriated to the Commission for the 2007-08 fiscal year from the general fund is \$728,000.

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 2007, the Commission received donations of library materials from the California Center for Judicial Education and Research (CJER). In addition, Professor Miguel Méndez donated a copy of his new book, *M. Méndez, Evidence — A Concise Comparison of the Federal Rules with the California Code* (2007). 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.⁵⁹

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.⁶⁰ Legislative Counsel and Commission member, Diane F. Boyer-Vine, is a member of the California Commission on Uniform State Laws and the National Conference.

Education

Barbara S. Gaal, Chief Deputy Counsel, attended a two-day symposium on the differences between federal and California evidence law, “Rules of Evidence: FRE v. CEC,” hosted by the

59. Gov’t Code § 8296.

60. Gov’t Code § 8289.

Southwestern University Law School in February 2007. At the symposium, Ms. Gaal gave a presentation on evidence legislation in California. She then wrote an article on the subject, *Evidence Legislation in California*, 36 Sw. U. L. Rev. (forthcoming 2007). In July 2007, Ms. Gaal gave a presentation, organized by the United States-China Exchange Council, to a group of Chinese legislative officials about the Law Revision Commission and its study process. During the same month, Ms. Gaal attended a discussion on the Uniform Interstate Depositions and Discovery Act at the annual meeting of the National Conference of Commissioners on Uniform State Laws.

Legislative History of Recommendations in the 2007 Legislative Session

Four Commission recommendations were submitted to the Legislature in 2007. Three of the recommendations were enacted. One of the recommendations remains before the Legislature as a two-year bill.⁶¹

Unlawful Detainer

Assembly Bill 1126 (2007 Cal. Stat. ch. 113) was introduced by Assembly Member Mike Eng to effectuate the Commission's recommendation on *Time Limits for Discovery in an Unlawful Detainer Case*, 36 Cal. L. Revision Comm'n Reports 271 (2006). The measure was enacted, with amendments.

Technical Corrections

Assembly Bill 310 (2007 Cal. Stat. ch. [redacted]) was introduced by Assembly Member Jim Silva to effectuate the Commission's recommendation on *Technical and Minor Substantive Statutory Corrections*, 35 Cal. L. Revision Comm'n Reports 219 (2006). The measure was enacted, with amendments. See *Report of the California Law Revision Commission on Chapter [redacted] of the Statutes of 2007 (Assembly Bill 310)*, 37 Cal. L. Revision Comm'n Reports 71 (2007) (Appendix 4 *infra*).

61. AB 250 (revocable transfer on death deeds).

Trial Court Restructuring

Senate Bill 649 (2007 Cal. Stat. ch. 43) was introduced by the Committee on Judiciary to effectuate the Commission's recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm'n Reports 341 (2006). 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 prepared⁶² and has the following to report:

- One decision holding a state statute repealed by implication has been found.
- One decision of the United States Supreme Court holding a state statute unconstitutional has been found.
- No decision of the California Supreme Court holding a state statute unconstitutional has been found.

In *Professional Engineers in California Government v. Kempton*,⁶³ the California Supreme Court held that Proposition 35, which added article XXII to the California Constitution, impliedly repealed Government Code Sections 14101, 14130 *et seq.*, and 19130, which prohibited the state and its agencies from contracting with private entities for architecture and engineering services.

62. This study has been carried through 41 Cal. 4th 372 and through 127 S. Ct. 2842 (end of 2006-07 Term).

63. 40 Cal. 4th 1016, 155 P.3d 226, 56 Cal. Rptr. 3d 814 (2007).

In *Cunningham v. California*,⁶⁴ the United States Supreme Court held that California's determinate sentencing law is unconstitutional because it permitted the judge, not the jury, to find the facts that exposes the defendant to an elevated "upper-term" sentence.⁶⁵

Recommendations

The Commission respectfully recommends that the Legislature authorize the Commission to continue its study of the topics previously authorized.⁶⁶

Pursuant to the mandate imposed by Government Code Section 8290, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by Implication or Held Unconstitutional," *supra*, to the extent they have been held unconstitutional and have not been amended or repealed.

64. 127 S.Ct 856 (2007).

65. Legislation to remedy the constitutional defect has been enacted. 2007 Cal. Stat. ch. 3.

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