

Admin.

November 21, 2007

Memorandum 2007-48

New Topics and Priorities

Each fall, the Commission reviews its Calendar of Topics and determines (1) whether to request authority to add or delete any topic, and (2) what its priorities will be for the next year.

To that end, this memorandum summarizes the status of the studies that the Legislature has authorized the Commission to undertake. The memorandum also presents and analyzes suggestions made throughout the past year regarding new topics for the Commission to study. The memorandum concludes with staff recommendations for allocation of the Commission’s resources during the coming year.

At the Commission meeting, the staff does not plan to discuss each of the many ongoing and suggested new topics described in this memorandum. A Commissioner or other interested person who believes a topic warrants discussion should be prepared to raise it at the meeting.

The following letters, email communications, and other materials are attached to and discussed in this memorandum:

	<i>Exhibit p.</i>
• Calendar of Topics	1
• Dennis Armatis, California State Sheriffs’ Ass’n (5/1/07)	4
• Dennis Armatis, California State Sheriffs’ Ass’n (7/23/07)	6
• John Bilheimer, Nevada City (9/7/07)	8
• Thomas Heeter, Corning (2/1/07)	12
• Tom Lasken (10/27/06, item #1)	15
• Tom Lasken (10/27/06, item #2)	16
• Robert Leitzel, Defend Exterminators, Inc. (12/5/06)	19
• Ronald Miller, M.D. (9/17/07)	21
• Michol O’Connor (6/14/07)	23
• Ewald Schlachter, Oakland (4/27/07)	25
• Ewald Schlachter, Oakland (5/2/07)	27
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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.

- J. Michael Schaefer, Baltimore, Maryland (10/29/07)48
- Brenton Ver Ploeg, Ver Ploeg & Lumpkin, P.A. (6/27/07)49
- David Huebner, Chair, California Law Revision Commission
(12/22/06)52

In addition to these suggestions, the Commission has numerous ongoing and pending projects, and suggestions carried over from previous years. The Legislature also assigned two new projects to the Commission, with short deadlines.

As in other recent years, the Commission must be careful not to spread its resources too thin. The Commission’s staff consists of just four attorneys, a full-time secretary, and a half-time administrative assistant. The Commission is likely to have a heavy legislative program for 2008, yet only two of its attorneys have substantial legislative experience. Due to this staffing situation, the existing overload of projects, and upcoming deadlines set by the Legislature, the staff remains generally negative about undertaking any new projects. **The Commission should be highly selective in deciding how to spend its resources.**

REVIEW OF LAST YEAR’S DECISIONS

In 2006, the Legislature assigned two new topics to the Commission: donative transfer restrictions and nonsubstantive reorganization of the deadly weapon statutes. At its annual review of new topics and priorities last fall, the Commission decided to give priority to those topics, which have relatively short deadlines. The Commission declined to work on any other new topic during 2007. It directed the staff to keep information about some of the suggested new topics on hand for future consideration. See CLRC Minutes (October 2006), p. 4.

The Commission further decided to follow its traditional scheme of priorities during 2007:

- (1) Matters for the next legislative session.
- (2) Matters directed by the Legislature.
- (3) Matters for which the Commission has engaged an expert consultant.
- (4) Other matters that have been previously activated but not completed.

The Commission gave specific instructions for seeking approval from the judiciary committees to reactivate its study of the Evidence Code. *Id.*

The Commission also considered what changes should be made in the next resolution regarding its Calendar of Topics, which lists the topics that it is authorized to study. The Commission decided to request that two topics be dropped (alternative dispute resolution and oral argument in civil procedure) and one new topic be added (venue), so that the Commission would have authority to study that topic when its resources permit. *Id.*

ACTION ON LAST YEAR'S DECISIONS

During 2007, the Commission took the following action in response to last year's decisions:

Donative Transfer Restrictions

AB 2034 (Spitzer), 2006 Cal. Stat. ch. 215, directs the Commission to study the operation and effectiveness of the Probate Code provisions that restrict donative transfers to certain classes of individuals. The Commission has begun work on this study. The Commission's final report is due by January 1, 2009. To meet that deadline, the Commission will have to continue to give this study priority in 2008.

Nonsubstantive Reorganization of the Deadly Weapon Statutes

ACR 73 (McCarthy), 2006 Cal. Stat. res. ch. 128, directs the Commission to study the statutes relating to control of deadly weapons. The objective is to propose legislation that would clean up and clarify the statutes nonsubstantively. The Commission has begun work on this major study. The Commission's final report is due by July 1, 2009. To meet that deadline, the Commission will have to continue to give this study priority in 2008.

Review of the Evidence Code

As directed by the Commission, the staff sought guidance from the judiciary committees about reactivating the Commission's study of the Evidence Code.

Since then, the Senate Committee on Judiciary has requested that the Commission study two hearsay issues on an expedited basis: present sense impressions and forfeiture by wrongdoing. See CLRC Memorandum 2007-28, Exhibit p. 1. In October, the Commission approved tentative recommendations relating to those issues. Its final report for the hearsay study is due by March 1, 2008.

A statute was also enacted this year, directing the Commission to study whether and, if so, under what circumstances, the attorney-client privilege should survive the death of the client. The Commission's final report on this topic is due by July 1, 2009. See AB 403 (Tran), 2007 Cal. Stat. ch. 388, § 2. The Commission has not yet commenced this study.

Venue

As the Commission requested last year, its Calendar of Topics has been revised to add a study of "[w]hether the law governing the place of trial in a civil case should be revised." 2007 Cal. Stat. res. ch. 100. The Commission should begin work in this area when its resources permit.

TOPICS LISTED IN THE COMMISSION'S CALENDAR OF TOPICS

The Commission's enabling statute recognizes two types of study topics: (1) those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and (2) those that the Legislature assigns to the Commission directly. Gov't Code § 8293.

The bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. If the Commission identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the Commission to conduct the study.

Direct legislative assignments used to be relatively rare but have become more common in recent years. Some of the major topics the Commission recently addressed (including financial privacy and repeal of statutes made obsolete by trial court restructuring) were directly assigned by the Legislature, not requested by the Commission.

This section of the memorandum reviews the status of matters currently listed in the Commission's Calendar of Topics. The next section discusses matters that the Legislature assigned to the Commission directly.

The Commission's Calendar of Topics currently includes 22 topics. See 2007 Cal. Stat. res. ch. 100. A precise description of each topic is appended as Exhibit pages 1-3. The Commission has completed work on a number of the topics listed in the calendar — the authority is retained in case corrective legislation is needed.

Below is a discussion of each topic in the calendar. The discussion indicates the status of the topic and the need for future work.

1. Creditor's Remedies

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1982 obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of narrower recommendations to the Legislature.

Enforcement of Judgments and Exemptions

Specific statutes direct the Commission to study enforcement and exemptions. These directives are discussed below under "Topics Referred by the Legislature."

Judicial and Nonjudicial Foreclosure of Real Property Liens

Foreclosure is a matter that the Commission has recognized in the past is in need of work. The Commission has always deferred undertaking such a project, because of the magnitude, complexity, and controversy involved in that area of the law. In recent years, the Commission received suggestions from a number of sources regarding foreclosure procedure, including several suggestions from Commission member Ed Regalia. See CLRC Memorandum 2006-36, pp. 21-22 & Exhibit pp. 44-60; CLRC Memorandum 2005-29, p. 20; CLRC Memorandum 2002-17, p. 5 & Exhibit p. 47; CLRC Memorandum 2001-4, Exhibit pp. 1-2. These suggestions underscore that the area deserves attention when the Commission has sufficient resources.

Pursuant to a Commission directive, the staff is monitoring developments relating to the bad faith waste exception to the antideficiency laws. See CLRC Minutes (Nov. 7-8, 2002), pp. 3-4; *Nippon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001); see also Miller, Starr & Regalia, *California Real Estate Deeds of Trust* § 10:217, at 720-22 (2003 update) & 15-16 (2007 Supp.). There do not appear to have been any significant new developments in this area in the past year.

Assignments for the Benefit of Creditors

In late 1996, the Commission decided to study whether to codify, clarify, or change the law governing general assignments for the benefit of creditors,

including but not limited to, changes that might make general assignments useful for purposes of reorganization as well as liquidation. The Commission later hired David Gould of McDermott, Will & Emery in Los Angeles to prepare a background study on this topic. Mr. Gould has done extensive work on this project, but has not yet submitted a final report to the Commission.

2. Probate Code

The Commission drafted the Probate Code and continues to monitor experience under it and make occasional recommendations on it.

Donative Transfer Restrictions

See discussion of “Donative Transfer Restrictions” above.

Creditors’ Rights Against Nonprobate Assets

A nonprobate transfer passes property outside the probate system. As the use of nonprobate transfers in estate planning has increased, the proper treatment of a decedent’s creditors has emerged as a major concern. The Commission recently examined such issues in the context of a revocable transfer on death deed. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 185-91 (2006). The Commission did not address other types of nonprobate transfers, such as a revocable trust. The Uniform Probate Code now has a procedure for dealing with this matter. This is an important topic that the Commission should take up when resources permit. See Hartog & Schenone, *Alice in Tulsa-land: The Dobler Effect on Creditors of Revocable Trusts*, Cal. Trusts & Estates Q. 4 (Summer 2004); CLRC Memorandum 2004-35, p. 5.

The Commission’s former Executive Secretary, Nathaniel Sterling, has extensive expertise in this area and has expressed interest in preparing a background study for the Commission. He estimates that this would take a couple of years. The Commission should give serious consideration to this possibility.

Application of Family Protection Provisions to Nonprobate Transfers

Should the various probate family protections, such as the share of an omitted spouse or the probate homestead, be applied to nonprobate assets? This is another important area that the Commission is well-suited to study. Again, the Commission recently considered such issues in the context of a revocable transfer on death deed. See *TOD Deed, supra*, 36 Cal. L. Revision Comm’n Reports at 182-

85. The Commission determined that “the problem should be addressed globally, not in the context of an individual type of nonprobate transfer instrument.” *Id.* at 185.

Mr. Sterling believes that this area should be studied in conjunction with the issues relating to creditors’ rights against nonprobate assets. It might be advisable to have him to prepare a background study covering both of these topics.

Uniform Trust Code

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated a Uniform Trust Code in 2000. The Reporter for the Uniform Trust Code, Prof. David English of the University of Missouri Law School, is preparing a report on how California law compares with the Uniform Trust Code. The Commission originally funded his work, but had to cancel the contract due to budget cuts. Fortunately, the State Bar Trusts and Estates Section agreed to fund the research instead. The Trusts and Estates Section is checking on the status of this project.

Uniform Custodial Trust Act

In late 2000, the Commission decided to study the Uniform Custodial Trust Act on a low priority basis. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act. The Commission has not had sufficient resources to take any action on this matter.

Interest on a Pecuniary Gift in a Trust

In 2005, the Commission decided to study, on a low priority basis, a narrow issue relating to interest on a pecuniary gift in a trust. The issue involves Probate Code Section 16340, which was drafted by the Commission. See CLRC Minutes (Sept. 2005), pp. 3-4.

The Commission has not yet begun work on this topic. Unless the Commission otherwise directs, the staff will continue to treat it as a low priority matter and work it into the schedule as time permits.

3. Real and Personal Property

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Mechanics Lien Law

The Commission is actively working on a general overhaul of mechanics lien law. The Commission may be able to finalize a proposal for introduction in the Legislature in 2008. For further information on the status of this project, see CLRC Memorandum 2007-57 and CLRC Memorandum 2007-58, which are being prepared for consideration at the meeting on December 13-14, 2007.

Inverse Condemnation

The Commission has dropped inverse condemnation as a separate study topic. However, the Commission has agreed to consider the impact of exhaustion of administrative remedies on inverse condemnation, as part of the administrative procedure study. Prof. Emeritus Gideon Kanner of Loyola Law School is preparing a report for the Commission on this matter. The study was deferred pending resolution of several cases in the courts. The Commission's contract with Prof. Kanner has expired and funding has lapsed, but Prof. Kanner has indicated his intention to perform nonetheless.

Adverse Possession of Personal Property

The Commission withdrew its recommendation on adverse possession of personal property pending consideration of issues that were raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

Severance of Personal Property Joint Tenancy

Another low priority project is statutory authorization of unilateral severance of a personal property joint tenancy (e.g., securities). This would parallel the authorization for unilateral severance of a real property joint tenancy.

Environmental Covenants and Restrictions

Several years ago, the Commission decided, as a low priority matter, to study an issue relating to environmental covenants and restrictions. Public agencies often settle concerns over contaminated property, environmental, and land use

matters by requiring that certain covenants and restrictions on land use be placed in an agreement and recorded, assuming that because the covenants and restrictions are recorded they will be binding on successors in interest in the property. When the Commission decided a study was needed, however, nothing in case law or statutes permitted enforcement of these covenants against successive owners of the land — they did not fall under the language of Civil Code Section 1468 (governing covenants that run with the land), nor were they enforceable as equitable servitudes. The staff is not certain whether this is still the case. We will check on this when time permits.

Procedural Concerns Relating to Code of Civil Procedure Section 1260.040

In late 2005, the Commission decided to study a narrow procedural issue relating to Code of Civil Procedure Section 1260.040, which was drafted by the Commission. See CLRC Minutes (Sept. 2005), p. 3.

The Commission deferred work on this topic in 2006 because a bill to have the Commission conduct a broader study of eminent domain law was pending in the Legislature (AB 1162 (Mullin)). The bill was not enacted. Consequently, it is now appropriate for the Commission to commence work on this topic as a separate item. The staff will work it into the schedule as time permits.

4. Family Law

The Family Code was drafted by the Commission and the general topic of family law has been continued on the Commission's agenda for ongoing review.

Marital Agreements Made During Marriage

California has enacted the Uniform Premarital Agreements Act, as well as detailed provisions concerning agreements relating to rights on death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues. The Commission has indicated its interest in pursuing this topic.

When the Commission undertakes such work, it should also consider clarifying certain issues relating to premarital agreements. See CLRC Memorandum 2005-29, p. 25 & Exhibit pp. 21-36. In particular, the Commission should study whether the right to support can be waived; there are recent cases on this point.

5. Offers of Compromise

Offers of compromise was added to the Commission's Calendar of Topics in 1975, at the request of the Commission. The Commission was concerned with Code of Civil Procedure Section 998, which calls for adjustment of costs following rejection of a compromise offer. The Commission noted several ambiguities in the language of Section 998 and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then, Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis, when staff and Commission time permit work on the topic.

6. Discovery in Civil Cases

The Commission is actively studying civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. Several reforms have already been enacted. A proposal on *Deposition in Out-of-State Litigation* may be ready for introduction in the Legislature in 2008.

The Commission has received numerous suggestions from interested persons, and has also identified other topics to address. The Commission is working through these matters as time permits. Thus far, the focus has been on relatively noncontroversial issues of clarification. This approach has been successful and may be more productive than investigating a major reform that might not be politically viable.

The Commission in 1995 decided to investigate discovery of computer records. This matter is not under active consideration, but the staff is following developments in this area. The topic is being extensively studied in the federal court system and by national organizations such as the American Bar Association. Last summer, NCCUSL adopted a uniform act on the topic, which will be known as the "Uniform Rules Relating to the Discovery of Electronically Stored Information." The staff will continue to monitor developments in this area.

7. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for public improvements of different types. The statutes overlap and duplicate each

other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's calendar in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. The Commission has decided to prioritize this matter somewhat, subject to current overriding priorities such as studies with a deadline set by the Legislature.

8. Rights and Disabilities of Minor and Incompetent Persons

The Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons since authorization of this study in 1979. It is anticipated that more recommendations will be submitted as the need becomes apparent.

9. Evidence

The California Evidence Code was enacted in 1965 on recommendation of the Commission, and the study has been continued on the Commission's agenda since then for ongoing review. The Commission has made numerous recommendations on evidence issues, most of which have been enacted.

A number of years ago, the Commission engaged Prof. Miguel Méndez of Stanford Law School to prepare a comprehensive comparison of the California Evidence Code with the Federal Rules and the Uniform Rules. Prof. Méndez has since prepared a series of articles on this topic. Most of his articles have been published; a few are still in preparation or in press.

In late 2002, the Commission began active consideration of the hearsay issues and the role of judge and jury, but suspended its work in 2005 due to concern expressed by a key legislative contact. For discussion of subsequent developments, see "Review of the Evidence Code" above.

10. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961 on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

Last year, the Commission took steps to drop alternative dispute resolution from its Calendar of Topics, because it did not contemplate doing any further work in that area. However, the Legislature decided to retain the topic on the Calendar, so that the Commission will continue to have authority to study alternative dispute resolution if a need for such work arises.

11. Administrative Law

This topic was authorized for Commission study in 1987 both by legislative initiative and at the request of the Commission. After extensive studies, a number of bills dealing with administrative adjudication and administrative rulemaking were enacted. The Commission should retain authority to study this area, in case any adjustments are needed in the laws enacted on its recommendation.

12. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988 pursuant to a suggestion of the California Judges Association. The staff did a substantial amount of preliminary work on the topic in 1990.

Award of Costs and Contractual Attorney's Fees to Prevailing Party

A number of years ago, the Commission began studying one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission considered a number of issues and drafts, but had to put the matter on the back burner due to its complexity and other demands on staff and Commission time.

Standardization of Attorney's Fee Statutes

The Commission has decided, on a low priority basis, to study the possibility of standardizing language in attorney's fee statutes. For example, many provisions allowing recovery of a "reasonable attorney's fee," are qualified by somewhat different standards. An effort would be made to provide some uniformity in the law, with a comprehensive statute and uniform definitions. If it proves to be too difficult to conform existing statutes, an effort would be made to create a statutory scheme and definitions that future legislation could incorporate.

13. Uniform Unincorporated Nonprofit Association Act

The Commission's recommendations on *Unincorporated Associations*, *Nonprofit Association Tort Liability*, and *Unincorporated Association Governance* have been enacted. Although the Commission has no plans to do further work in this area, it should retain authority to study the area in case issues arise relating to the provisions enacted on its recommendation.

14. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. Constitutional amendments and legislation recommended by the Commission have been enacted.

Two related projects have been assigned by the Legislature. They are discussed below under "Topics Referred by the Legislature."

15. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters. In this regard, we have been monitoring developments relating to the Uniform Electronic Transactions Act ("UETA"). California enacted a version of UETA in 1999 (Civ. Code §§ 1633.1-1633.17), but that version differs from the final version approved by NCCUSL. As a result, the California version appears to be preempted to some extent by the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). As yet, the courts have not determined the scope of preemption. We will continue to monitor this situation.

16. Common Interest Developments

CID law was added to the Commission's Calendar of Topics in 1999 at the request of the Commission. The Commission is actively engaged in this study, and has divided it into three phases:

Nonjudicial Dispute Resolution

The effort here is to provide some simple and expeditious means of avoiding or resolving disputes within common interest communities before they escalate into full-blown litigation.

The Commission made this a high priority matter and issued several recommendations. Three of these were enacted with some revisions: (1) *Common Interest Developments: Procedural Fairness in Association Rulemaking and Decisionmaking*; (2) *Common Interest Development Law: Architectural Review and Decisionmaking*; and (3) *Alternative Dispute Resolution in Common Interest Developments*.

In 2005, the Commission issued a recommendation on *Common Interest Development Ombudsperson Pilot Project*. Two bills to implement that

recommendation were introduced. One of the bills was vetoed and the other died in the Legislature.

Uniform Common Interest Ownership Act

In late 2003, the Commission considered whether the Uniform Common Interest Ownership Act (“UCIOA”) should be adopted in California in place of the Davis-Stirling Common Interest Development Act. The Commission decided to recommend against adoption of UCIOA at that time. The Commission is using UCIOA as a source of ideas as it studies issues relating to common interest developments. The Commission may at some point reevaluate whether to recommend adoption of UCIOA. CLRC Minutes (Nov. 2003), p. 8.

General Revision of Common Interest Development Law

Numerous issues with existing California law have been brought to the Commission’s attention. The staff has compiled and cataloged many of the issues. See CLRC Memorandum 2005-3. New suggestions continue to arrive.

Two proposals have been enacted on Commission recommendation: *Organization of Davis-Stirling Common Interest Development Act* and *Preemption of CID Architectural Restrictions*.

The Commission is now working on reorganization and simplification of CID law. Legislation on that subject may be ready for introduction in the Legislature in 2008.

After the Commission completes work on reorganization and simplification of CID law, it should determine which CID issues to study next.

17. Legal Malpractice Statutes of Limitations

The statute of limitations for legal malpractice was added to the Commission’s Calendar of Topics in 1999, at the request of the Commission. The Commission examined a number of issues, including the limitations period for estate planning malpractice.

In 2004, the Commission put its work on the limitations period for estate planning malpractice on hold, referring that aspect of this study to the State Bar for further consideration. The Commission continued to work on other issues relating to the limitations period for legal malpractice.

In 2006, the Commission decided to discontinue the study altogether. The topic remains on its Calendar of Topics, in case future developments make it worthwhile to recommence the study.

18. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The objectives are to coordinate the public records law with laws protecting personal privacy, and to update the public records law in light of electronic communications and databases.

While this is an important and topical study, we have not given it priority. The staff will work it into the Commission's agenda as staff and Commission resources permit.

19. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission began work on this matter, but received extensive negative input.

In 2002, the scope of the Commission's authority with regard to criminal sentencing was narrowed. The Commission is currently authorized to study only "[w]hether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary and obsolete provisions."

In 2004, the Commission decided to entirely drop criminal sentencing from the Commission's Calendar of Topics. Perhaps fortuitously, however, the Commission was unable to implement that decision in the resolution of authority that the Legislature passed in early 2006.

Since then, the Legislature has directed the Commission to study and report on nonsubstantive reorganization of the statutes governing deadly weapons. In light of that ongoing study, it appears advisable to retain the existing authority to study criminal sentences for enhancements. See CLRC Memorandum 2006-35.

20. Subdivision Map Act and Mitigation Fee Act

Study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics in 2001, at the request of the Commission. The objective of the study is a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes. The Commission has not commenced work on this study.

21. Uniform Statute and Rule Construction Act

Study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics in 2003, at the request of the Commission. The Commission has indicated its intention to give this study a low priority.

22. Venue

See discussion of "Venue" under "Action on Last Year's Decisions" above.

TOPICS REFERRED BY THE LEGISLATURE

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature. Gov't Code § 8298. The Commission exercises this authority from time to time. A proposal on *Obsolete References to Recording Technology* may be ready for introduction in the Legislature in 2008. See CLRC Memorandum 2007-43 and its First Supplement.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. The Commission obeys this directive annually in its Annual Report. However, the Commission does not ordinarily sponsor legislation to effectuate the recommendation, for a number of reasons. The Commission has requested staff research on the subsequent history of statutes held unconstitutional or repealed by implication. The staff is gathering the requested information on a low priority basis.

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the Law Revision Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from time to time under this authority. Debtor-creditor technical revisions were enacted on Commission recommendation in 2002.

Exemptions from Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(a) requires the Law Revision Commission, decennially, to review the exemptions from execution and recommend any changes in exempt amounts that appear proper. The Commission completed its second decennial review in 2003. Legislation recommended by the Commission was enacted by 2003 Cal. Stat. ch. 379.

Trial Court Unification Procedural Reform

Government Code Section 70219 directs the Commission to study issues in judicial administration growing out of trial court unification. The Commission obtained enactment of a number of recommendations on these issues.

The major project remaining under Section 70219 is a review of basic court procedures under unification to determine what, if any, changes should be made. The Commission has examined four different matters:

- (1) **Appellate and writ review under trial court unification.** After circulating a tentative recommendation, the Commission discontinued further work on this project due to state budgetary constraints on court operations. The Commission may reactivate this study in the future, as circumstances warrant.
- (2) **Criminal procedure under trial court unification.** After circulating a tentative recommendation and receiving negative input, the Commission decided against making a final recommendation on this subject.
- (3) **Jurisdictional limits of small claims cases and limited civil cases.** The Commission did extensive work on this topic, in collaboration with the Judicial Council. In 2005, the Legislature increased the small claims limit to \$7,500 for a claim brought by a natural person. Due to the enactment of this legislation, the Commission decided to end its study of the jurisdictional limits of small claims and limited civil cases.
- (4) **Equitable relief in a limited civil case.** The Commission issued a tentative recommendation on this topic in 2005. In light of the comments on the tentative recommendation, the Commission decided to take a broader view of the role of the limited civil case in the unified court system, before determining whether to proceed with the proposal. Matters to be reviewed include the number of limited civil cases filed, the cost of economic litigation procedures compared with the cost of unlimited civil case litigation, the satisfaction level of the courts with the limited civil case system, and the approach taken in other jurisdictions that have a unified court system. The staff is seeking a consultant to prepare a background study.

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of statutes that have become obsolete due to trial court restructuring (unification, state funding, and employment reform). See Gov't Code § 71674. In response to this directive, three substantial bills have been enacted on Commission recommendation. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43.

More work is in progress. At the December meeting, the Commission might be able to finalize a recommendation on *Appellate Jurisdiction of Bail Forfeiture*, as well as a recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 4*. See CLRC Memorandum 2007-49 and CLRC Memorandum 2007-50, both of which are in preparation. If either or both of these recommendations are finalized in December, the staff will seek an author to introduce the proposed legislation in 2008.

Other issues still require study; some issues are not yet ripe for consideration. The Commission should continue its work in this area.

Revocable Transfer on Death (TOD) Deed

In 2006, the Commission approved a final recommendation on *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006). A bill to implement this recommendation was introduced in 2007. It is pending in the Legislature as a two-year bill. See AB 250 (DeVore).

No Contest Clause

SCR 42 (Campbell), 2005 Cal. Stat. res. ch. 42, directs the Commission, in consultation with the Senate and Assembly Judiciary Committees, to conduct a comprehensive study and prepare a report concerning the advantages and disadvantages of the provisions of the Probate Code relating to no contest clauses. The measure also requires the Commission to “[r]eview the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.”

Work on these issues is in progress and the Commission might be able to approve a final recommendation at the December meeting. For further discussion of this study, see CLRC Memorandum 2007-52.

Nonsubstantive Reorganization of the Deadly Weapon Statutes

See discussion of “Nonsubstantive Reorganization of the Deadly Weapon Statutes” under “Action on Last Year’s Decisions” above.

Donative Transfer Restrictions

See discussion of “Donative Transfer Restrictions” under “Action on Last Year’s Decisions” above.

NEW STUDIES ASSIGNED TO THE COMMISSION BY THE LEGISLATURE

The Legislature assigned two new studies to the Commission this year. Both of these studies are subject to a relatively short deadline and will require substantial work.

Miscellaneous Hearsay Exceptions

See discussion of “Review of the Evidence Code” under “Action on Last Year’s Decisions” above.

Post-Death Attorney-Client Privilege

See discussion of “Review of the Evidence Code” under “Action on Last Year’s Decisions” above.

CARRYOVER SUGGESTIONS FROM LAST YEAR

Last year, the Commission decided that five suggested new topics should be retained for reconsideration this year. One of those topics is foreclosure, which is discussed under “Judicial and Nonjudicial Foreclosure of Real Property Liens” above. The four remaining carryover suggestions are discussed below.

Duties Where Settlor of Revocable Trust is Incompetent

A number of years ago, the Commission began investigating issues that arise when the settlor of a revocable trust allegedly becomes incompetent. The Commission tabled its work in 2000, in view of an “ongoing project to address these issues by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee.” CLRC Minutes (June 2000), p. 12.

In 2005, the Commission received a request from John Beauclair to study certain points in this area. See CLRC Memorandum 2005-29, pp. 20-21 & Exhibit pp. 6-9. We attempted to refer Mr. Beauclair's comments to the Trusts and Estates Section for consideration, but discovered that the Trusts and Estates Section was no longer studying the area. To our knowledge, no legislation has been enacted and the area remains unsettled. This matter would fall within the Commission's authority to study the Probate Code. **It deserves attention at some point.**

Renewal of Judgment

In connection with the Commission's study of *Enforcement of a Money Judgment Under the Family Code*, John Jones raised issues relating to the procedure for renewal of a judgment. See Second Supplement to CLRC Memorandum 2005-37, Exhibit pp. 2-3. The points raised by Mr. Jones are specific, concrete suggestions based on practical experience. **They may be worth pursuing when resources are available.** It would not be necessary to request new authority to undertake such work. The issues raised by Mr. Jones fall within the Commission's existing authority to study creditor's remedies.

Accord and Satisfaction

Last year, Commission member Bill Weinberger alerted the Commission to a conflict between two statutes relating to accord and satisfaction (Civil Code § 1526(a); Com. Code § 3311). This statutory conflict is an obvious candidate for clean-up legislation.

Earlier this year, Assembly Member Ira Ruskin's office tentatively expressed interest in pursuing this matter. The State Bar agreed to help examine the issue. **It does not appear necessary for the Commission to get involved.**

Litigation Deadlines

Last year, the Commission considered a suggestion by Richard Best, former discovery commissioner for San Francisco County Superior Court. Mr. Best noted that some litigation deadlines refer to court days, other deadlines refer to calendar days, and still other deadlines do not specify which type of days are to be counted. He suggested the possibility of establishing a default rule to apply in the latter situation.

It was not clear from Mr. Best's comments whether he was referring to civil litigation, criminal cases, or both. The problem to which he refers clearly exists in both types of cases, but probably should be examined separately in each context.

The general provisions in the Code of Civil Procedure governing computation of time (e.g., Code Civ. Proc. §§ 10, 12-13b) contain other ambiguities that may also warrant clarification.

Attempting codewide clean-up of the rules governing computation of time would be an ambitious and difficult project. Well-crafted legislation would be very useful, however, assisting numerous people calendaring deadlines on a daily basis. **This might be an appropriate project for the Commission when it has sufficient resources for such an undertaking.**

SUGGESTED NEW TOPICS

During the past year, the Commission received a variety of suggestions for new topics and priorities. These are analyzed below.

Creditor's Remedies

One of the new suggestions relates to creditor's remedies.

Electronic Transmission of Instructions to Sheriff or Marshal

The Civil Committee of the California State Sheriffs' Association ("CSSA") suggests that the Commission study the possibility of amending Code of Civil Procedure Sections 262, 488.030, and 687.010 to accommodate electronic transmission of creditor's instructions to a sheriff or marshal. Exhibit pp. 4-5. The amendments proposed by the committee "would provide the Sheriff/Marshal the same protections from liability when the instructions from the creditor are received electronically, with no actual signature on paper form." *Id.* at 4. The amendments are modeled on recently adopted court rules on electronic filing (Cal. R. Ct. 2050-2060). *Id.*

The concept of revising these provisions to accommodate electronic transmission of instructions is clearly worthy of study and would be a suitable project for the Commission. Research and analysis would be required, however, to determine whether the approach proposed by CSSA's Civil Committee is the best means of addressing the situation.

In addition, the suggestion raises questions about the proper treatment of other documents that may be submitted to state agencies electronically. It might

be appropriate to study those issues at the same time as examining CSSA's suggestion. Prof. J. Clark Kelso of McGeorge School of Law, who has served as Chief Information Officer of the State of California, might be willing to assist the Commission with a project of that scope.

If the Commission undertook a broad study of such issues, however, the study would take longer to complete than if the Commission focused narrowly on the three provisions included in CSSA's suggestion. CSSA warns that "conducting a comprehensive study of other documents that may be submitted to state agencies electronically ... would be an overwhelming, time-consuming task, that would include many more complex issues than the specific revisions we are suggesting." Exhibit p. 6.

If the suggested study was limited to electronic transmission of instructions for levying on property, it would fall within the Commission's existing authority to study creditor's remedies. If it was broadened into a general study of electronic transmission of documents to government agencies, it would still fall within the Commission's authority to study administrative law. For a study of that magnitude, however, it probably would be advisable to seek specific authority from the Legislature before commencing the work.

Probate Code

Three of the new suggestions would fall within the Commission's existing authority to study the Probate Code.

Escheat

Attorney Ewald Schlachter urges the Commission to consider repealing Code of Civil Procedure Section 1430(c) and Probate Code Section 11603(c), which relate to escheat. Exhibit p. 25. He says that "we are confronting an emergency of significant proportions," which "affects **all** cases in which all or a part of a probate estate cannot be distributed to the person entitled to receive it, because this **person** cannot be found." Exhibit p. 27 (emphasis in original). In four separate communications, he has provided extensive analysis in support of his position. Exhibit pp. 15-47.

Mr. Schlachter's analysis is complicated and difficult to follow. It appears, however, that he is questioning the basic premise of the two provisions in question. Subdivision (c) was added to Code of Civil Procedure Section 1430 in 1997, in a bill sponsored by the Bureau of Missing Heirs. See 1997 Cal. Stat. ch.

671, § 1. It affords a means of avoiding permanent escheat of property that has not been claimed:

(c) Except as otherwise provided in this subdivision, a named beneficiary of property that escheats pursuant to this title or, if the beneficiary is deceased or a court renders a judgment that the beneficiary is dead, a blood relative of the named beneficiary may claim property described in subdivision (a) at any time within five years after the date of entry of judgment in any proceeding under this chapter. The named beneficiary or, if a court has rendered a judgment that the named beneficiary is dead, the blood relative of the named beneficiary shall be entitled to immediate payment upon this claim. If a court has not rendered a judgment that the named beneficiary is dead, payment of the claim of a blood relative of the named beneficiary shall be made on the day before the expiration of the five-year period described in this section. This subdivision shall not apply to authorize a claim by any person, including any issue or blood relative of that person, whose interest or inheritance was specifically restricted or barred by a provision in the donating or transferring instrument.

Similarly, subdivision (c) was added to Probate Code Section 11603 in 2000, on recommendation of this Commission. See 2000 Cal. Stat. ch. 17, § 4.6; *Alternate Distributee for Unclaimed Distribution*, 29 Cal. L. Revision Comm'n Reports 743 (1999). It provides:

(c) If the whereabouts of a distributee named in the order is unknown, the order shall provide for alternate distributees and the share to which each is entitled. The alternate distributees shall be the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the doctrine of cy pres. If the distributee named in the order does not claim the share to which the distributee is entitled within five years after the date of the order, the distributee is deemed to have predeceased the decedent for the purpose of this section and the alternate distributees are entitled to the share as provided in the order.

The Commission explained the reform as follows:

Under this recommendation, when a court orders distribution from a decedent's estate to a person whose whereabouts is unknown, the court must also provide for an alternate distributee. Should the primary distributee fail to claim the share within three years after the date of the order, the primary distributee would be presumed to have predeceased the decedent for purposes of

distribution, and the alternate distributee would be entitled to that share. In the case of a charitable devise, the alternate distributee would be determined pursuant to the doctrine of *cy pres*. *This procedure would effectuate the presumed intent of a decedent that the decedent's property go to the decedent's beneficiaries, rather than escheat to the state.*

Alternate Distributee, supra, 29 Cal. L. Revision Comm'n Reports at 745 (emphasis added).

The staff is not aware of anyone other than Mr. Schlachter who has concerns about Code of Civil Procedure Section 1430(c) or Probate Code Section 11603(c). **Absent evidence of more widespread dissatisfaction with these two recently enacted provisions, the staff is not convinced it would be worthwhile to study them.**

POLST

Dr. Ronald Miller of the University of California, Irvine, writes that "it would be appropriate and very helpful" to have the Commission study whether to "make Physician Orders for Life-Sustaining Treatment (POLST) official policy in California." Exhibit p. 21. He sent this suggestion "with the approval of Judy Citko, the POLST Paradigm leader for California." *Id.* at 22.

Dr. Miller explains that the

POLST Paradigm form is a standardized order sheet with alternative orders in several categories that can be checked off by a physician ... to comport with the preferences of an individual patient. Common categories (and alternatives) are: CardioPulmonary Resuscitation (CPR versus DNAR., Do Not Attempt Resuscitation), medical interventions (full treatment, limited interventions, or comfort measures only, and whether to transfer the patient to an institution with greater medical proficiency), antibiotics (prevent or eradicate infection, use only to prevent discomfort, no antibiotics but use other measures to relieve symptoms), and nutrition and hydration (long-term feeding tube or parenteral nutrition, time-limited trial, no feeding tube or intravenous nutrition and hydration). POLST forms may state the patient's diagnosis and prognosis, the patient's values, goals, and preferences (whether these have been explicitly stated, are presumed by substituted judgment, or are a best-interest judgment) and with whom they and the orders have been discussed (the patient, surrogate, agent under a durable power, or court-appointed guardian). These orders and information are printed on two sides of a brightly colored, distinctive page readily found in the

patient's hospital, nursing home, hospice, or home health chart or on the patient's refrigerator at home.

Id. at 21-22.

Use of POLST has been spreading around the country. *Id.* at 21. According to Dr. Miller, perhaps "the most important benefit" of POLST is it encourages or requires a physician "to discuss the patient's preferences and the orders with the patient and/or surrogate." *Id.* at 22.

POLST is proposed as a supplement to, not as a replacement for, a patient's advance directive. *Id.* at 21. As Dr. Miller explains, "the legislation we seek would supplement the Health Care Decisions Act of 2000, which we believe to be very sound legislation, in large measure to the excellent work of your Commission." *Id.*

Due to the Commission's long history of work on healthcare decision-making, **POLST would be an appropriate topic for it to study at some point.** Such a study is likely to involve controversy, however, and the current staff does not have expertise in the area. The Commission **should be careful not to undertake this project until it is able to devote substantial resources to it.**

Use of TOD Deed by Owner of Stock Cooperative

In the Commission's study of TOD deeds, Bob Sheppard expressed concern that a TOD deed could not be used to transfer an ownership interest in a stock cooperative. See CLRC Memorandum 2007-9, pp. 7-8 & Exhibit pp. 5-6. The Commission decided not to address this problem in connection with the TOD recommendation but instead to consider it as a new topic request. CLRC Minutes (April 2007), p. 3.

Because the TOD recommendation has not yet been enacted, the suggestion is premature. The staff will re-alert the Commission to the issue next fall if the TOD recommendation is enacted.

Real and Personal Property

One of the new suggestions would fall within the Commission's existing authority to study real and personal property.

Termite Company Conflicts of Interest

Bob Leitzel is the owner and president of Defend Exterminators, a company specializing in termite removal. He says "there is a conflict of interest problem in my industry that leads termite companies to defraud consumers." Exhibit p. 20.

Mr. Leitzel explains that in the termite industry, the company that inspects property for termite damage also repairs the damage. *Id.* “[W]hat’s worse,” he says, is that “our industry gives the exams away for free and makes money only on the remediation of termite problems found.” *Id.* As a result, “many termite companies make up problems where they don’t exist.” *Id.* He suggests solving this problem by creating two different kinds of companies: termite inspection companies and termite remediation companies. *Id.*

He has not proposed this suggestion to persons within the termite industry due to “the anticipated backlash.” *Id.* As he puts it, a “fatted pig is hard to remove from a lion’s den.” *Id.*

Mr. Leitzel thus recognizes that his suggested approach would be highly controversial and difficult to enact. The Commission is ill-suited to such an undertaking. The Legislature is the best forum for resolution of a serious conflict between interest groups, such as consumers and termite companies.

At the staff’s suggestion, Mr. Leitzel has already taken steps to find a legislator to pursue his idea. *See id.* **The Commission should stay out of the matter and leave it to the Legislature.**

Administrative Law

Two suggestions would fall within the Commission’s existing authority to study administrative law.

Scheduling of an Administrative Hearing

The first of these suggestions is not really new, but involves a problem that attorney Tom Lasken raised last year. In particular, Mr. Lasken pointed out that the Office of Administrative Hearings (“OAH”) often schedules an administrative hearing based solely on input from the agency, without contacting the respondent. See CLRC Memorandum 2006-36, pp. 28-30 & Exhibit pp. 11-14. This procedure may be both inefficient and unfair to the respondent. *Id.* Mr. Lasken suggested that OAH be required to consult the respondent before scheduling an administrative hearing. *Id.*; see also First Supplement to CLRC Memorandum 2006-36, pp. 2-3 & Exhibit pp. 6-9.

In last year’s memo on new topics and priorities, the staff wrote:

Mr. Lasken’s suggestion that the respondent be consulted before scheduling an administrative hearing seems fair, reasonable, and a matter of commonsense. One would hope, however, that it would not be necessary to address the matter by statute. ... The staff

recommends **awaiting the outcome of Mr. Lasken's effort to address the problem with OAH.**

CLRC Memorandum 2006-36, pp. 29-30 (emphasis in original). The Commission agreed with this assessment and decided to send a letter to the Director of OAH, urging OAH to reexamine the existing method of scheduling an administrative hearing. CLRC Minutes (Oct. 2006), p. 4. A copy of that letter (without the enclosures) is attached. See Exhibit p. 52.

In a number of recent communications, Mr. Lasken reports that OAH has not changed its manner of scheduling an administrative hearing. Exhibit pp. 16-18; Email from T. Lasken to B. Gaal (9/6/07). The Commission has not even received a response to the letter it sent to the Director of OAH last year.

Unfortunately, this matter appears to warrant attention as soon as the Commission has sufficient resources to address it.

Petition for Reinstatement (Gov't Code § 11522)

Mr. Lasken also suggests that the Commission study the procedure applicable to a petition for reinstatement of a license under Government Code Section 11522. Exhibit p. 15. He points out that there presently are no rules governing this process. *Id.* He describes a case in which he represented a person who applied for reinstatement, but "had no idea what DRE considered to be issues until the denial order was issued." *Id.* He says:

When you think about it, a person applying for reconsideration has fewer rights under the Administrative Procedure Act than a person applying for an original license. At least applicants have a right to a Statement of Issues, and notice and an opportunity to be heard before an impartial tribunal.

Id.

Mr. Lasken might be correct that the procedure for seeking reinstatement of a license should be clarified. In most instances, however, we suspect that the grounds for denying reinstatement are similar to the grounds that were given for revoking or suspending the license. Absent additional evidence that petitioners are being unfairly surprised by unexpected issues, **the need for clarification does not appear sufficiently pressing to justify a study, given the other, more compelling topics the Commission has been asked to examine.**

Licensing a Nonresident as a Life Insurance Analyst

California Insurance Code Section 1833 provides: “A license to act as a life insurance analyst shall not be issued to any person not residing in this state, nor to any person who is under 18 years of age at the time of application.” Attorney Brenton Ver Ploeg writes that the Department of Insurance recently refused to give one of his clients an opportunity to apply for such a license. Exhibit pp. 49-51. Although his client is a nonresident, she has “a lifetime of considerable experience in the disability insurance industry.” *Id.* at 50.

Mr. Ver Ploeg helped his client challenge this decision. He informed the Department that the “unconstitutional nature” of the nonresident prohibition in Section 1833 “seems so obvious that enforcement of that provision in the face of a qualified potential applicant is confusing.” *Id.* Citing key cases, he explained that “[r]esidency requirements for professional licenses have, as far as I know, been found unconstitutional on a virtually universal basis” *Id.* at 51.

Mr. Ver Ploeg requested that the Department “either act to license qualified non-residents or, in the alternative, provide ... a written explanation for what you believe the rational basis is for this restriction so that the issue may be crystallized for further resolution.” *Id.* at 50. The staff does not know the outcome of his request.

Regardless of whether the Department decided to continue enforcing the nonresident prohibition, statutory clean-up may be in order. On initial consideration, the unconstitutionality of the prohibition seems clear-cut. If this is in fact the case, the Commission could perhaps address the matter pursuant to its authority to correct technical and minor substantive statutory defects (Gov’t Code § 8298). **This would be a small, narrow project that the Commission might be able to squeeze in on a low priority basis.**

(In addition to the documents attached at Exhibit pages 49-51, Mr. Ver Ploeg sent a few other documents relating to this matter. To conserve resources, we have not reproduced those other documents. They are available on request.)

Limited Liability Companies and Limited Liability Partnerships

At a meeting earlier this year, Commission member William Weinberger raised the possibility of examining whether the codes have been properly conformed to reflect the creation of limited liability companies (LLCs) and limited liability partnerships (LLPs). CLRC Minutes (Jan. 2007), p. 6. The

Commission decided to consider this point in its annual review of new topics and priorities. *Id.*

The staff has since discussed the idea with the Chief Counsel to the Senate Committee on Judiciary. He cautioned that conforming the codes to reflect the creation of LLCs and LLPs has to be done very selectively, not on a blanket basis. Much such work has already been done. The Chief Counsel believes that any remaining problems can and will be pursued by the affected parties. In his opinion, there is no need for the Commission to get involved.

In light of this advice, the staff recommends against undertaking such a project. If the Commission disagrees, it will need to seek authority from the Legislature before commencing the suggested study.

Litigation

The remaining suggestions relate to litigation procedure.

Court Reporter in a Misdemeanor or Infraction Case

Under Code of Civil Procedure Section 269(a)(2), court reporting of certain proceedings in a felony case is mandatory “on the order of the court, *or at the request of the prosecution, the defendant, or the attorney for the defendant.*” (Emphasis added.) Under Section 269(a)(3), however, court reporting of the same proceedings in a misdemeanor or infraction case is mandatory only “on the order of the court.”

Thomas Heeter suggests amending Section 269 to require court reporting in a misdemeanor case “on the order of the court, *or at the request of the prosecution, the defendant, or the attorney for the defendant.*” Exhibit p. 13 (emphasis added). He urges the Commission to study this possibility. *Id.* at 12.

From previous work on court reporting, the staff is confident that such a reform would be extremely controversial and is not likely to be enacted. **We recommend that the Commission conserve its resources for other matters.** If for some reason the Commission is inclined to pursue the idea, it will need to obtain authority from the Legislature before undertaking the suggested study.

Five Year Deadline for Bringing a Civil Case to Trial

A civil case must be brought to trial within five years after it is commenced. Code Civ. Proc. § 583.310. This rule is subject to some limitations.

In particular, Code of Civil Procedure Section 583.340 provides:

583.340. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

- (a) The jurisdiction of the court to try the action was suspended.
- (b) Prosecution or trial of the action was stayed or enjoined.
- (c) *Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.*

(Emphasis added.) This provision was enacted in 1984, on the Commission's recommendation.

With regard to subdivision (c), the Commission's Comment states:

Subdivision (c) codifies the case law "impossible, impractical, or futile" standard. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as State of California v. Superior Court, 98 Cal. App. 3d 643, 159 Cal. Rptr. 650 (1979) and Brown v. Superior Court, 62 Cal. App. 3d 197, 132 Cal. Rptr. 916 (1976).

(Emphasis added.)

The Commission's recommendation further explains:

Under existing law the time during which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply. *The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.*

Revised Recommendation Relating to Dismissal for Lack of Prosecution, 17 Cal. L. Revision Comm'n Reports 905, 918-19 (1984) (emphasis added, footnotes omitted).

Attorney John Bilheimer of Nevada City maintains that the court of appeal misconstrued Section 583.040(c) in a recent case he handled, *Tamburina v. Combined Insurance*, 247 Cal. App. 4th 323, 54 Cal. Rptr. 3d 175 (2007). See Exhibit pp. 8-11. In *Tamburina*, The trial court dismissed the case for failure to comply with the five year deadline of Section 583.010. The court of appeal reversed. It found that (1) for 424 days it was impracticable to bring the case to trial, due to illnesses of the plaintiff and his counsel, and (2) there was a causal connection between those illnesses and the failure to satisfy the five year deadline. *Id.* at 336. Instead of automatically excluding the 424 days from the running of the five year period, however, the court of appeal remanded for a determination of whether the plaintiff was reasonably diligent in prosecuting the case at all stages of the proceedings. *Id.* at 326-27, 336-37. The court of appeal said that such a showing was necessary for the tolling exception to apply. *Id.*

Mr. Bilheimer believes that such a showing should not be required. In his view, "*Tamburina* continues (along with cases cited therein) to resurrect *State of California v. Superior Court* (1979) 98 Cal.App.3d 643 and *Brown v. Superior Court* (1976) 62 Cal.App.3d 197, which cases were noted as expressly overruled in the Law Revision Comment." Exhibit p. 10. He urges the Commission to address this situation. *Id.*

To undertake such a study, the Commission would have to seek authority from the Legislature. In light of the Commission's limited resources, the staff hesitates to get involved in this issue at this time. The matter may still be sorted out satisfactorily in the courts. Rather than requesting permission to conduct a study, **it might be better to monitor the area for awhile and then assess the need for statutory reform.**

(In addition to the documents attached at Exhibit pages 8-11, Mr. Bilheimer sent us the published decision in *Tamburina* and his client's petition for review, which was denied. To conserve resources, we have not reproduced those documents. They are available on request.)

Requirement that a Proof of Service Be Signed By a Nonparty

J. Michael Schaeffer of Baltimore, Maryland, reports that for over a decade he has "contacted Cal. State Bar presidents and the Cal. Judicial Council about ... a horrible inconsistency between state and federal practice, and state v. state practice" Exhibit p. 48. "In exasperation," he has approached the Commission "upon referral of Francisco Gomez, office of the State Bar Executive Director." *Id.*

Mr. Schaeffer's concern relates to proofs of service. In California, a proof of service of summons can only be signed by a nonparty. See Code Civ. Proc. § 414.10; Judicial Council Form POS-010. Similarly, a proof of service of any other document in a civil case must be signed by a nonparty. See Code Civ. Proc. § 1013a; Judicial Council Form POS-020.

If the staff understands Mr. Schaeffer correctly, he would like the latter rule to be changed, such that a nonparty can sign a proof of service for a document other than a summons. Mr. Schaeffer appears to be especially concerned about the situation of a pro se litigant. He writes:

I end up getting neighbors, Kinko's employees, man on the street, to sign proof-of-service on a motion, address change, etc. when dealing with California Courts. We should be consistent with Federal practice. Will I live long enough to see it? Am 70 and this is a constant problem as I manage millions in assets that provoke small claims Pro Se litigation.

Exhibit p. 48.

The staff can see that having to obtain a nonparty's signature on each proof of service might be a nuisance for a pro se litigant. On the other hand, the requirement of such a signature may help to prevent an unscrupulous pro se litigant from being able to claim that a document was served when it actually was not. The Commission on Access to Justice has expertise in pro se litigation and is well-suited to evaluate this matter. **We would refer Mr. Schaefer's suggestion to that commission.**

Notice of Privacy Rights

Michol O'Connor points to an apparent inconsistency between two parallel provisions. Exhibit pp. 23-24. Code of Civil Procedure Section 1985.3 establishes a procedure for notifying a consumer of the consumer's privacy rights. Subdivision (g) of that provision refers to "a motion under Section 1987.1 to enforce the subpoena."

Code of Civil Procedure Section 1985.6 establishes a procedure for notifying an employee of the employee's privacy rights. Subdivision (f)(4) of that provision is almost identical to subdivision (g) of Section 1985.3, but it refers to "a motion under subdivision (c) of Section 1987 to enforce the subpoena." Mr. O'Connor thinks there might be an error in one of the two provisions. Exhibit p. 23. To assist the Commission in evaluating this matter, he has included the text of

Sections 1985.3(g), 1985.6(f)(4), 1987(c), and 1987.1 in his communication. See Exhibit pp. 23-24.

It does appear odd that Section 1985.3(g) refers to Section 1987.1, while Section 1985.6(f)(4) refers instead to Section 1987(c). On initial review, it would seem more logical to refer to both Section 1987(c) and Section 1987.1 in Section 1985.3(g), and to do the same in Section 1985.6(f)(4).

These statutes apply to production of consumer and employment records at trial. More typically, however, they apply to production of consumer and employment records in the discovery process.

The staff is therefore inclined to handle Mr. O'Connor's suggestion in the context of the Commission's ongoing study of civil discovery. He has also submitted some other comments that relate to provisions within the Civil Discovery Act. We are keeping those comments for consideration in the discovery study as well.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2008. Completion of prospective recommendations for the next legislative session becomes the highest priority at this time of year. That is followed by matters that the Legislature has indicated should receive a priority and other matters that the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to projects for which a consultant has delivered a background study, because it is desirable to take up the matter before the research goes stale and while the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

Legislative Program for 2008

Active topics on which the Commission might be able to finalize a recommendation in time for introduction in 2008 include:

- Statutory clarification and simplification of CID law.
- Mechanics lien law comprehensive revision.
- No contest clause.
- Deposition in out-of-state litigation.
- Trial court restructuring (appellate jurisdiction of bail forfeiture; miscellaneous issues).

- Obsolete references to recording technology.

In addition, the Commission's report on present sense impressions and forfeiture by wrongdoing is due by March 1, 2008. That will be after the bill introduction deadline. Nonetheless, it might still be possible to find a vehicle for whatever legislation the Commission recommends.

The Legislature's Priorities

Of the topics that might be included in the 2008 legislative program, several were assigned by the Legislature: mechanics lien law, no contest clause, trial court restructuring, and the two hearsay issues.

The Legislature has also indicated several other priority matters for the Commission:

Donative Transfer Restrictions

The Commission's report on donative transfer restrictions is due by January 1, 2009. The Commission will need to give this matter priority to be able to meet that deadline.

Nonsubstantive Reorganization of Weapon Statutes

The Commission's report on nonsubstantive reorganization of the deadly weapons statutes is due by July 1, 2009. This is a huge project and the Commission obviously will need to give it priority to meet the deadline.

Post-Death Attorney-Client Privilege

The Commission's report on whether and to what extent the attorney-client privilege should survive the client's death is due by July 1, 2009. Again, the Commission will need to give this matter priority to be able to meet the deadline.

Remaining Trial Court Restructuring Issues

The original deadline for the Commission's report on trial court restructuring was January 1, 2002. That deadline was removed after the Commission submitted a major legislative proposal on the topic and requested authority to continue to do cleanup work in the area.

Although the statute directing the Commission's study no longer includes a deadline, we can infer from the original deadline that the Legislature expects the Commission to promptly address issues relating to trial court restructuring once they are ripe for action. Since removal of the deadline, two more bills have been

enacted on Commission recommendation, and a fourth such bill probably will be introduced in 2008. But other issues remain to be addressed. The Commission's work on this topic should continue to receive high priority.

Consultant Studies

For some ongoing studies, the Commission has the benefit of a consultant's assistance:

Common Interest Development Law

This is a very large project. Prof. Susan French of UCLA Law School prepared a background study for the Commission. The Commission has barely begun to tackle the dozens of problems that have been identified with the Davis-Stirling Act.

Discovery Improvements From Other Jurisdictions

The Commission has made progress on civil discovery, but it has gotten many suggestions from interested persons that it has not yet considered. Prof. Weber's background study covers numerous issues. Although the Commission made preliminary decisions regarding which issues to pursue, it has not yet addressed most of the ones it selected.

Review of the California Evidence Code

Prof. Méndez of Stanford Law School is available to assist the Commission in studying the evidence issues discussed in the articles he prepared for the Commission. For now, the Commission should focus on the hearsay issues and attorney-client privilege issue assigned by the Legislature. It may be appropriate to turn to other issues in the future, if that is acceptable to the judiciary committees.

Other Activated Topics

Apart from the 2007 legislative program, legislatively set priorities, and projects for which the Commission has assistance of a consultant, the Commission has also commenced work on attorney's fees, which it had to interrupt when other projects became more pressing. The Commission should turn back to that work if time permits.

CONCLUSION

The Commission's agenda continues to be very full. If it just sticks with already activated projects and legislative priorities, it will have more than enough to do in the coming year.

The staff recommends following the traditional scheme of Commission priorities:

- (1) Matters for the next legislative session,
- (2) Matters directed by the Legislature,
- (3) Matters for which the Commission has an expert consultant, and
- (4) Other matters that have been previously activated but not completed.

Projects falling within each of these categories are identified above and are already included in the Commission's Calendar of Topics.

We do not recommend undertaking any new projects, except the ones assigned by the Legislature and perhaps, if time permits, the narrow project on licensing a nonresident as a life insurance analyst. It does not appear necessary to request any changes in the Calendar of Topics.

The Commission should, however, seriously consider the possibility of having its former Executive Secretary conduct a background study on creditors' rights against nonprobate assets and application of family protection provisions to nonprobate transfers. These areas have needed attention for many years. Mr. Sterling is well-qualified to prepare such a background study; he is also available and interested in doing so. He estimates that it would take him a couple of years. By the time he could complete his report, it seems reasonably likely that the Commission and staff would be ready to turn to it. We did not discuss financial arrangements with him, but we will do so if the Commission is interested in pursuing this possibility. Although a Commission consultant normally works for a nominal fee, the Commission needs to pay careful attention to budget constraints.

The suggestions relating to the following topics deserve serious consideration in the future:

- Foreclosure.
- Duties where settlor of revocable trust is incompetent.
- Renewal of judgment.
- Litigation deadlines.

- Electronic transmission of instructions to sheriff or marshal.
- POLST.
- Use of TOD deed by owner of stock cooperative (if the Commission's TOD recommendation is enacted).
- Scheduling of an administrative hearing.

The Commission should reconsider these suggestions next fall. By then, some of the Commission's ongoing projects should be coming to an end and its new attorneys will have gained more experience. It might be realistic to add some new projects at that time.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

CALENDAR OF TOPICS AUTHORIZED FOR STUDY

The Commission's calendar of topics authorized for study includes the subjects listed below. Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see ACR 35 (Evans), enacted as 2007 Cal. Stat. res. ch. 100.

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

3. Real and personal property. Whether the law should be revised that relates to real and personal property including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restriction on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon assignment, subletting, termination, or abandonment of a lease, and related matters.

4. Family law. Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.

5. Offers of compromise. Whether the law relating to offers of compromise should be revised.

6. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.

7. Special assessments for public improvements. Whether the acts governing special assessments for public improvement should be simplified and unified.

8. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

9. Evidence. Whether the Evidence Code should be revised.

10. Alternative dispute resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.

11. Administrative law. Whether there should be changes to administrative law.

12. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigant should be revised.

13. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.

14. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.

15. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

16. Common interest developments. Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within them, and to determine to what extent they should be subject to regulation.

17. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.

18. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in

public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.

19. Criminal sentencing. Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.

20. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code), and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters.

21. Uniform Statute and Rule Construction Act. Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or part, and related matters.

22. Venue. Whether the law governing the place of trial in a civil case should be revised.

**REQUEST FOR AMENDMENTS TO CODE OF CIVIL PROCEDURE
SECTIONS 262, 488.030, AND 687.010**

SUBMITTED BY: **California State Sheriffs' Association Civil Committee**
Liaison - Cpl. Dennis Armatis, Riverside County Sheriff's Department
4095 Lemon Street, 4th Flr., Riverside CA 92501
Phone: (951) 955-2063 Email: darmatis@riversidesheriff.org

SUBJECT: **Plaintiff/Creditor's Instructions Sent to the Sheriff/Marshal by
Electronic Means. Liability Issues.**

SUMMARY OF PROPOSED CHANGES

In 2003, the Judicial Council adopted California rules of court on electronic filing (Cal. Rules of Court, rules 2050-2060). These rules outline courts' roles and responsibilities in employing electronic filing as well as authorizing courts to mandate electronic filing in complex civil and consolidated cases. In response to the growing trend towards electronic filings, the California State Sheriff's Association Civil Committee is requesting changes to the Code of Civil Procedure sections 262, 488.030, and 687.010. The amendments would allow the Sheriff/Marshal to accept electronically sent instructions from creditors, and that instructions so received, would provide the same protections to the Sheriff/Marshal, as instructions with an actual signature on paper form. Currently, the Sheriff/Marshal is protected from liability for actions taken in conformance with the provisions of the statutes in reliance on information contained in the signed, written instructions from the creditor. The proposed amendments would provide the Sheriff/Marshal the same protections from liability when the instructions from the creditor are received electronically, with no actual signature on paper form.

PROPOSED CHANGES TO THE CODE OF CIVIL PROCEDURE SECTIONS

(Changes denoted in boldface)

CCP 262. No direction or authority by a party or his attorney to a sheriff, in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing, signed by the attorney of the party, or by the party, if he has no attorney. **The writing is deemed signed by the attorney of the party, or by the party, if the document is sent electronically to the sheriff.**

CCP 488.030. (a) The plaintiff shall give the levying officer instructions in writing. The instructions shall be signed by the plaintiff's attorney of record or, if the plaintiff does not have an attorney of record, by the plaintiff. **The instructions are deemed signed by the plaintiff's attorney of record or, if the plaintiff does not have an attorney of record, by the plaintiff, if the document is sent electronically to the sheriff.** The instructions shall contain the information needed or requested by the levying officer to comply with the provisions of this title, including but not limited to:

(1) An adequate description of any property to be levied upon.

(2) A statement whether the property is a dwelling.

(3) If the property is a dwelling, whether it is real or personal property.

(b) Subject to subdivision (c), the levying officer shall act in accordance with the written instructions to the extent the actions are taken in conformance with the provisions of this title.

(c) Except to the extent the levying officer has actual knowledge that the information is incorrect, the levying officer may rely on any information contained in the written instructions

CCP 687.010. (a) The judgment creditor shall give the levying officer instructions in writing. The instructions shall be signed by the judgment creditor's attorney of record or, if the judgment creditor does not have an attorney of record, by the judgment creditor. **The instructions are deemed signed by the judgment creditor's attorney of record or, if the judgment creditor does not have an attorney of record, by the judgment creditor, if the document is sent electronically to the sheriff.** The instructions shall contain the information needed or requested by the levying officer to comply with the provisions of this title, including but not limited to:

(1) An adequate description of any property to be levied upon.

(2) A statement whether the property is a dwelling.

(3) If the property is a dwelling, whether it is real or personal property.

(b) Subject to subdivision (c), the levying officer shall act in accordance with the written instructions to the extent the actions are taken in conformance with the provisions of this title.

(c) Except to the extent the levying officer has actual knowledge that the information is incorrect, the levying officer may rely on any information contained in the written instructions.

California Rules of Court

Rule 2.257. Requirements for signatures on documents

(b) Documents not signed under penalty of perjury

If a document does not require a signature under penalty of perjury, the document is deemed signed by the party if the document is filed electronically.

(Subd (b) amended effective January 1, 2007.)

Respectfully Submitted,

Corporal Dennis Armatas, Riverside County Sheriff's Department

On behalf of the California State Sheriffs' Association Civil Committee

**EMAIL FROM CORPORAL DENNIS ARMATIS,
CALIFORNIA STATE SHERIFFS' ASSOCIATION
(7/23/07)**

Re: Request for Amendments to Code of Civil Procedure Sections 262, 488.030, and 687.010

Ms. Gaal,

I sent this email to you last week, but received a message that the email was not delivered, so I am sending it again. If you already received it, sorry for the duplication.

I presented your questions and concerns to the CSSA Civil Procedures Committee at our meeting.

First question:

“Are any of the writings that would be affected by the proposal ones that must be signed under penalty of perjury?”

The answer would be no. None of the instructions or correspondence between the Sheriff and creditors are required to be signed under the penalty of perjury, so this would not be an issue.

Second question:

“Would any efforts be made to verify the identity of a person submitting an electronic document? If so, how would the person’s identity be verified? Should anything be said about the verification process in the three code sections that CSSA suggests amending?”

Currently, when a creditor or the creditor’s attorney comes into the Sheriff’s office to have papers or a levy served, there is no verification process conducted. In fact, many times the process is dropped off by a runner or the documents are received through the mail. Therefore, we think there would be no requirement for verification of identity when instructions are received through electronic means.

In regard to the issue of conducting a comprehensive study of other documents that may be submitted to state agencies electronically, we feel this would be an overwhelming, time-consuming task, that would include many more complex issues than the specific revisions we are suggesting. The revisions we have requested would only affect three CCP code sections that deal specifically with creditor’s instructions to the Sheriff. This same language corresponds to the verbiage found in the California Rules of Court [Rule 2.257(b)] and CCP 1010.6(a)(2), which deal with this same subject.]

We do understand that the Law Revision Commission has very limited resources and an enormous work-load, and we do appreciate your help and attention in this matter. If there is anything further I or the committee can do to assist in moving this matter along, please let me know.

Again, Thank you very much,

Sincerely,

Cpl. Dennis Armatis

HALEY & BILHEIMER
Attorneys at Law

Telephone 530.265.6357

Facsimile 530.478.9485

505 COYOTE STREET, SUITE A
NEVADA CITY, CALIFORNIA 95959

Law Revision Commission
RECEIVED

September 7, 2007

SEP 11 2007

Steven Cohen, Esq.
California Law Review Commission
3200 5th Avenue
Sacramento, CA 95817

File: _____

Re: *Tamburina v. Combined et al.*
Sacramento County Superior Court
Case No. 99 AS06622

Reported Decision: *Tamburina v. Combined Insurance, et al.* (2007) 147
Cal.App.4th 323 (copy enclosed)

Law Revision Comment at Issue: Comment of Code Civ. Proc. § 583.340

Dear Mr. Cohen:

Thank you for speaking with me today. The purpose of this letter is to respectfully request that the Law Review Commission clarify, or expressly state, in its comment to Code of Civil Procedure section 583.340, that "reasonable diligence" is no longer a factor in ascertaining tolling under that section. Courts are ignoring the logical directive set forth in the Law Revision's Comment.¹

A case must be brought to trial within five years of its filing. (Code Civ. Proc. § 583.310.)

Section 583.340, enacted in 1984, reads in relevant part as follows (emphasis added):

In computing the time within which an action must be brought to trial pursuant to this article, *there shall be excluded* the time during which any of the following conditions existed:

¹ All further references are to the Code of Civil Procedure unless otherwise noted.

To: Steven Cohen, Esq.
Date: September 7, 2007
Page - 2 -

...

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

In recommending passage of that statute, the Law Revision Commission stated that its language “increases certainty and *minimizes the need for a judicial hearing* to ascertain whether or not the statutory period has run.” (17 Cal. Law Revision Comm’n. Repts. 905, 919; emphasis added.)

In proposing the statute to the Legislature, the California Law Revision Commission took note of two specific cases in which the courts had ordered dismissal, following long periods of admitted disability, because the plaintiffs had not been reasonably diligent in advancing their cases to trial in the last part of the five-year period: *State of California v. Superior Court* (1979) 98 Cal.App.3d 643, and *Brown v. Superior Court* (1976) 62 Cal.App.3d 197. The Commission stated that the purpose of the new statute was to *overrule* these and similar cases:

Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, *regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial*. This *overrules* cases such as *State of California v. Superior Court*, 98 Cal.App.3d 643, 159 Cal.Rptr. 650 (1979), and *Brown v. Superior Court*, 62 Cal.App.3d 197, 132 Cal.Rptr. 916 (1976).

17 Cal.L.Rev.Comm. Reports 905 (1984) (emphasis added).²

In other words, it is irrelevant that a plaintiff had a reasonable period to bring trial the case to trial after the impracticability - the impracticability tolls the five-year period. A reasonable period to bring a case to trial *necessarily* implies that a reasonably diligent plaintiff could bring the case to trial within that time. Therefore the Law Revision Commission comment could just as easily state:

Under Section 583.340 the time within which an action must be brought to trial is

² Law Revision Comments are to be given substantial weight. (*Sierra Nevada Memorial-Miners Hospital v. Superior Court* (1990) 217 Cal.App.3d 464, 470.)

To: Steven Cohen, Esq.

Date: September 7, 2007

Page - 2 -

tolled for the period of the excuse, *regardless whether the plaintiff is reasonably diligent at the end of the period of the excuse to bring the action to trial.*

The meaning is the same. How can there be anything but a failure of diligence if a plaintiff does not get a case to trial when there is a reasonable period of time remaining after the period of excuse?

The Law Revision Commission made clear that the section was to be liberally construed (emphasis added):

Subdivision (c) codifies the case law “impossible, impractical, or futile” standard. *The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits.* See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Notwithstanding the foregoing, in the Third District Court of Appeal in *Tamburina v. Combined Insurance, et al.* (2007) 147 Cal.App.4th 323, found that the plaintiff Jay Tamburina had been unable to bring his case to trial for a period of 424 days due to serious illness. Since the trial court had ordered Mr. Tamburina’s case dismissed at a point when trial was to commence in just eighty days based on section 583.310, that finding should have required a remand with directions to restore the case to the trial calendar. Instead, the Court remanded the case with directions to hold a hearing and make findings as to whether Tamburina had been “reasonably diligent” in his prosecution of the case, with special attention to such diligence at the end of the five-year period.

By doing so, *Tamburina* continues (along with cases cited therein) to resurrect *State of California v. Superior Court* (1979) 98 Cal.App.3d 643 and *Brown v. Superior Court* (1976) 62 Cal.App.3d 197, which cases were noted as expressly overruled in the Law Revision Comment. The Law Revision Comment should clarify the logical consequence of its obvious intended meaning by expressly stating there is no further “reasonable diligence” requirement as a result of section 583.340.

///

To: Steven Cohen, Esq.

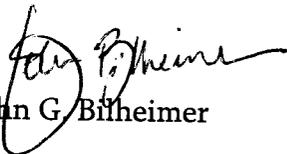
Date: September 7, 2007

Page - 2 -

I also enclose a copy of our petition for review to the California Supreme Court. The petition was denied. Thank you for your consideration and please call me if you have any questions.

Very truly yours,

HALEY & BILHEIMER



John G. Bilheimer

JGB:gil

cc: John D. Montague, Esq. (w/out enclosures)

THOMAS W. HEETER
1240 6th Street
Corning, CA 96021

Law Revision Commission
RECEIVED

FEB - 2 2007

February 1, 2007

Miss Barbara Gaal
California Law Revision Commission
400 Middle Field Road, Room D-1
Palo Alto, CA 94303

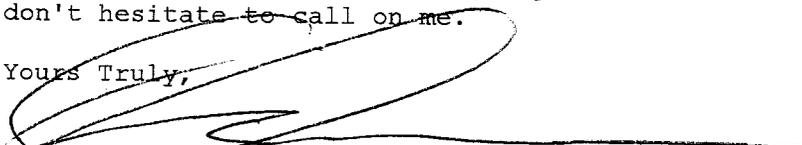
File: _____

Dear Miss Gaal:

Thank You for listening to my thoughts on an amendment to 269(a) to be considered when You are determining where to focus Your resources in the Fall. I appreciate Your attention very much.

Should You wish to contact me, i can be reached at 530-774-7028. i will attempt contact You again in the Fall in eager anticipation that my hopes of a text change will be favorably considered by You and Your team. Should You think of any way in which i can serve You, please don't hesitate to call on me.

Yours Truly,


thomas HEETER

w/enclosure

As of 01/01/2007, Section 269 (a) of the California Code of Civil Procedure relating to when a person may have a court reporter reads as follows:

269. (a) An official reporter or official reporter pro tempore of the superior court shall take down in shorthand all testimony, objection made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer in the following cases:

- (1) In a civil case, on the order of the court or at the request of a party.
- (2) In a felony case, on the order of the court, or at the request of the prosecution, the defendant, or the attorney for the defendant.
- (3) In a misdemeanor or infraction case, on the order of the court.

I propose that CCCP 269(a) be amended to read as follows:

269. (a) An official reporter or official reporter pro tempore of the superior court shall take down in shorthand (or an alternative other than shorthand if all parties agree) all testimony, objection made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer in the following cases:

- (1) In a civil case, on the order of the court or at the request of a party.
- (2) In a felony case, on the order of the court or at the request of the prosecution, the defendant, or the attorney for the defendant.
- (3) In a misdemeanor case, on the order of the court, or at the request of the prosecution, the defendant, or the attorney for the defendant.
- (4) In an infraction case, on the order of the court.

NOTES:

1. In the case of a felony, the California Code of Civil Procedure Section 269(a)(2) provides that a felony defendant may have an verbatim record on the order of the court OR at the request of the defendant.
2. However, the California Code of Civil Procedure, Section 269(a)(3) provides that a misdemeanor defendant may have a verbatim record on the order of the Court ONLY.
3. This difference violates due process and/or the equal protection clause of the U.S. Constitution; specifically the United States Supreme Court in the

case of **Mayer v. City of Chicago**, (1971) 404 U.S. 189, 195-196 [30 L.Ed. 372, 378-379, 92 S.Ct 410 which held:

“Today, the former distinction between felonies and misdemeanors has been abandoned. Insofar as the right of a convicted defendant to an adequate record on appeal is concerned, a ‘distinction between felony and nonfelony offenses’ will no longer ‘satisfy the requirements of the Fourteenth Amendment . . .”

4. The holding of the U.S. Supreme Court was previously recognized by the California appellate courts in the case of **Preston v. Municipal Court**, (1961) 188 Cal. App. 2d 76, 83-84 [10 Cal. Rptr. 301].
5. The seminal case relied on by the Defendant in support of having a Court Reporter make a verbatim record of the Court proceedings is: **In re Armstrong**, (1981) 126 Cal. App. 3d 568 which recites both under California State law principals and Federal law principals:

“It is now well settled that the state must allow access by an appealing defendant in a criminal case, to ‘a record of sufficient completeness’ to permit proper consideration of his appeal”

citing **March v. Municipal Court**, 7 Cal 3d 422, 428; and **Draper v. Washington**, (1963) 372 U.S. 487, 499 [9 L.Ed. 899, 907, 83 S.Ct. 744].

EMAIL FROM TOM LASKEN (10/27/06)

Re: Petitions for Reinstatement

Dear Ms. Gaal and Professor Asimow,

Another issue that may be ripe for review is that of Petitions for Reinstatement pursuant to Government Code Section 11522.

Presently there are no rules governing this process, and last year I represented a client who had petitioned and been denied for reasons which were, in my opinion, completely arbitrary and capricious. After a process of at least a year of supplying information to DRE and answering questions, he had no idea what DRE considered to be issues until the denial order was issued. I represented him on a Petition for Reconsideration, but by that time DRE had dug in its heels. If I understand the law correctly, administrative mandamus would not be available, so a denied petitioner would carry the burdens associated with traditional mandamus.

This client recently contacted me about taking another run at it. At least this time we will have the final Order Denying Reconsideration to use to get some idea of what he needs to address. When you think about it, a person applying for reconsideration has fewer rights under the Administrative Procedure Act than a person applying for an original license. At least applicants have a right to a Statement of Issues, and notice and an opportunity to heard before an impartial tribunal.

My armchair recommendation would be to amend Section 11522 so that persons wishing to be reinstated have a Statement of Issues filed against them. As in Statements of Issues, there would be no statute of limitations on issues the agencies wish to raise, and petitioners would have the same burden of proof as an original applicant, but at least petitioners would not be blindly answering questions designed to lead them into traps, as happened to my client.

Thank you.

Tom Lasken

EMAIL FROM TOM LASKEN (10/27/06)

Re: OAH and DRE Ex Parte Follies Continue

Hi Barbara,

Attached is a copy of another objection to the *ex parte* setting of hearings by DRE and OAH. I had collected documents from three other cases to send you, but this came up naturally in the flow of the case so I decided to copy you. I can give you more examples. The practice within DRE varies between offices and among individual attorneys. But the official position of both DRE and OAH, as far as I know, has not changed. Judge Cohn is a different Presiding Judge in Oakland from the one whose ruling of December 2005 I sent you a while ago, so I have no idea what he will do with this. It doesn't really call for any action so he will probably ignore it.

This case does illustrate the practical aspect of the problem of setting hearings *ex parte*. More work for everyone.

By the way, it's not a contentious issue. I get along well with David Seals and while he said he would not make conferring before setting hearings a rule since it isn't office policy, he would try to work with me informally. I think this one just slipped by him.

Did Ron Diedrich ever respond to the letter the Commission sent him?

Tom Lasken

Thomas C. Lasken
Attorney at Law
P.O. Box 8298
Loma Rica, CA 95901-8405
(916) 449-9677 (Voice)
(916) 290-9073 (Fax)

LASKEN LAW OFFICES

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July 6, 2007

Michael Cohn
Acting Presiding Administrative Law Judge
Office of Administrative Hearings
1515 Clay Street, Suite 206
Oakland, CA 94612

VIA FACSIMILE

NOTICE OF REPRESENTATION AND OBJECTION TO EX PARTE COMMUNICATIONS

Re: Application of Stephen Davis Brock
H-4778 SAC; OAH Number Unknown

Dear Judge Cohn:

Please be advised that I have been retained to represent the Respondent in this matter. I do not know the OAH number for this case because it does not appear on the OAH web site calendar, and although I have received a Notice of Hearing from DRE for August 3, 2007, DRE did not put the OAH number on the notice. Despite the fact that I notified counsel for DRE on June 18, 2007, via email that I would be representing Respondent, and specifically asked that a hearing date not be set without conferring with me, DRE and OAH set the matter for hearing without notice to the Respondent or the opportunity to for him to be heard.

Respondent strongly objects to the fact that this matter was set for hearing by means of illegal *ex parte* communications between the DRE and OAH in direct violation of Section 11430.10 of the Government Code.¹

The California Law Revision Commission has written the Director of OAH, Ron Diedrich, expressing its opinion that Requests for Setting as presumably (“presumably” because I have not seen them) used in this case are illegal *ex parte* communications, and it is disturbing that OAH continues to confer *ex parte* with DRE about dates and times of hearings, especially where, as here, there was counsel of record who was excluded from those communications.

As it turns out, the date of August 3, 2007, is not an available date for me because of prior obligations and workload in that week. Respondent has not yet obtained discovery in this case, and there is insufficient time before August 3 for me to have the DRE file copied, review it, discuss settlement, and prepare for the hearing.

¹ Section 10430.20(b) addresses permissible *ex parte* communication which “concerns a matter of procedure or practice, including a request for a continuance that is not in controversy.” Issues regarding available hearing dates for all parties, are definitely “in controversy” unless the parties have explicitly agreed otherwise.

Judge Michael Cohn

July 6, 2007

Page 2

Today I emailed counsel for DRE, David Seals, about stipulating to a continuance of the case. I am optimistic that Mr. Seals would not object to a continuance in this case and that a later suitable date can be agreed upon. Consequently, Respondent is not making a motion for continuance at this time. But the fact remains that the setting of the current date involved prohibited *ex parte* communications between DRE and OAH and that this objection should not have been necessary.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas C. Lasken". The signature is fluid and cursive, with the first name "Thomas" being more legible than the last name "Lasken".

THOMAS C. LASKEN
Attorney at Law

TCL:mw

cc: David B. Seals, Esq. (DRE)
Barbara Gaal, Esq. (California Law Revision Commission)

**EMAIL FROM BOB LEITZEL
OF DEFEND EXTERMINATORS (12/5/06)**

Hi Steve,

Thank you for taking the time to talk with me today. Upon your advice I did call my local State Senator and have begun the conversation. Please find attached a copy of the memo I sent to them. If you could include it in the topics for consideration for your next review session I would be very appreciative. If there is any one else whom, after review, you feel I should send this to, or if there is any way that I could be of further assistance in any matter, please let me know.

Sincerely,

Bob Leitzel
President
Defend Exterminators
P.O. Box 630444
Simi Valley, CA 93063
805-526-4510 office
866-626-BUGS toll free
805-526-4518 fax
www.defendexterminators.com



November 16, 2007

Senator Tom McClintock
c/o Allison Bonburg
223 E Thousand Oaks Blvd..
Suite 400
Thousand Oaks, CA 91360

Dear Mr. McClintock:

I am a Termite Company owner. As I see it, there is a conflict of interest problem in my industry that leads termite companies to defraud consumers.

In the simplest of terms, we are the only industry that I know of who both examine the subject for problems and prescribe and perform solutions to fix any problems that exist. For example, doctors examine patients and prescribe drugs, and home inspectors examine homes and prescribe corrections. But doctors and home inspectors have pharmacies and contractors who come later to fix any problems. Legislators, watchdog groups and even the lay consumer understand very easily the conflict of interest that would occur if doctors started making money by prescribing drugs.

And what's worse, our industry gives the exams away for free and makes money only on the remediation of termite problems found.

Real estate agents ask termite companies to diagnose structures that are for sale and fix any problems that come up. So of course many termite companies make up problems where they don't exist. Consumers know less about termites than they do transmissions so it's easy for termite companies to defraud them. But it shouldn't be that way.

There are other industries that defraud consumers like the automotive repair industry and even contractors but we are the only industry that performs legally specific inspections/examinations for important reasons and then do the remediation work also.

The Solution: Change the licensing to separate inspection companies from remediation companies. Make one license like home inspectors or appraisers and one license like painters or plumbers. While there would be many parties to convince such as real estate agents and even termite companies, the consumer's rights have to come first.

I would be available at your convenience to outline the current legislation and offer a detailed solution. Please let me know if there is anyone else I should talk to about this issue.

Sincerely,

Robert Leitzel
Defend Exterminators Inc.

P.S.: I have not brought this up to industry for the anticipated backlash. A fatted pig is hard to remove from a lion's den. But I have brought this up to the Registrar of the Structural Pest Control Board, Kelli Okuma. She was surprised and pleased with the suggestion and I am sure, depending on the verbiage, would be in support of this type of change.

EX 20

SEP 21 2007

UNIVERSITY OF CALIFORNIA, IRVINE

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File: _____

PROGRAM IN MEDICAL ETHICS
COLLEGE OF MEDICINE

Program in Medical Ethics
Department of Medicine
University of California Irvine Medical Center
101 The City Drive — Mail Route 81
Orange, California 92668

Barbara S. Gaal
Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road -- Room D1
Palo Alto, CA 94303-4739

September 17, 2007

Dear Chief Deputy Counsel Gaal:

As we discussed, it would be appropriate and very helpful to have review by the California Law Review Commission of a proposal for legislation to make Physician Orders for Life-Sustaining Treatment (POLST) official policy in California. We believe legislative endorsement of the use of such orders to supplement patients' advance directives would significantly improve the likelihood that patients' preferences for end-of-life care would be followed. Thus, POLST is proposed to supplement, not supplant, advance directives, and the legislation we seek would supplement the Health Care Decisions Act of 2000 which we believe to be very sound legislation, in large measure due to the excellent work of your Commission.

POLST development began in Oregon in 1991, has been endorsed as state law in Oregon, Washington, and West Virginia, and I believe is widely utilized (if not state-wide legislation or pilot-project legislation) in Utah, New York, and Wisconsin. POLST development has begun in at least 14 other states. Three counties in California (Humboldt, Riverside, and Ventura) are utilizing POLST, and individuals in Los Angeles, Orange, and San Diego Counties are seriously considering doing so as well. The Southern California Bioethics Committee Consortium unanimously endorsed the concept and will discuss POLST on September 19 with the National POLST Paradigm Initiative representative for California, Judy Citko, JD, Executive Director of the California Coalition for Compassionate Care, 1215 K St -- Suite 800, Sacramento, CA 95814. She has recently received commitment for significant funds from a foundation to support implementation of POLST in six California Counties.

The POLST Paradigm form is a standardized order sheet with alternative orders in several categories that can be checked off by a physician (and in some jurisdictions by a physician assistant or nurse practitioner) to comport with the preferences of an individual patient. Common categories (and alternatives) are: CardioPulmonary Resuscitation (CPR versus DNAR., Do Not Attempt Resuscitation), medical interventions (full treatment, limited interventions, or comfort measures only, and whether to transfer the patient to an institution with greater medical proficiency), antibiotics (prevent or eradicate infection, use only to prevent discomfort, no antibiotics but use other measures to relieve symptoms), and nutrition and hydration (long-term feeding tube or parenteral nutrition, time-limited trial, no feeding tube or intravenous nutrition and hydration). POLST forms may state the

intravenous nutrition and hydration). POLST forms may state the patient's diagnosis and prognosis, the patient's values, goals, and preferences (whether these have been explicitly stated, are presumed by substituted judgment, or are a best-interest judgment) and with whom they and the orders have been discussed (the patient, surrogate, agent under a durable power, or court-appointed guardian). These orders and information are printed on two sides of a brightly colored, distinctive page readily found in the patient's hospital, nursing home, hospice, or home health chart or on the patient's refrigerator at home.

Perhaps the most important benefit of POLST is that they encourage or require the physician to discuss the patient's preferences and the orders with the patient and/or surrogate. In some jurisdictions the orders must be countersigned by the patient or surrogate. The orders allow patient preferences to be known wherever the patient is located (hospital, nursing home, hospice, home, or elsewhere in the community). The orders convert patients' expressed preferences into medically appropriate, medically worded, understandable action items likely to conform to the standard of care. Thus we believe they are more likely to be followed than a patient's advance directive which too often is vague or not applicable to the patient's circumstances (that may not have been anticipated). Immunity from litigation for healthcare professionals who follow POLST in good-faith, as with advance directives, may further increase the likelihood of compliance with patient preferences.

For the history of POLST, consult the website, www.POLST.org <<http://www.polst.org/>> , which also provides citations to the literature. If there is additional information you would like to have or if there is any way in which I can be of assistance, please do not hesitate to so request (rbmiller@uci.edu, 714-281-7001, or 7001 East Country Club Lane, Anaheim Hills, California 92807-4413). Sincere thanks for your interest in POLST and anything you may do to advance legislation that we believe will not only improve patient care but may allow legislative simplification (not only by POLSTs being applicable to all institutions and locations, but also by supplanting the EMSA prehospital Do Not Attempt Resuscitation form and the California Medical Association's Preferred Intensity of Treatment form (which is used in only some nursing homes)).

With best personal regards and many thanks,



Ronald B. Miller, M.D.
7001 East Country Club Lane
Anaheim Hills, CA 92807 -- 4413
714-281-7001

Ronald B. Miller, M.D., Clinical Professor of Medicine Emeritus, founding Chief of the Renal Division, founding Director of the Program in Medical Ethics, Department of Medicine, President of the UCI Emeriti Association, University of California, Irvine.

PS: I am sending this letter with the approval of Judy Citko, the POLST Paradigm leader for California. Should you wish, you may contact her at 916-552-7573, by fax at 916-552-2615, or jcitko@finalchoices.org

EMAIL FROM MICHOL O'CONNOR (6/14/07)

Re: Error in CCP 1985.3 or 1985.6

Ms. Gaal –

I would like to report what I think is an error in CCP §1985.3, dealing with notice to consumer of privacy rights, or CCP §1985.6, dealing with notice to an employee of privacy rights. Both sections deal with a subpoenaing party's motion to enforce a subpoena after objections have been filed. However, the two provisions make a cross-reference to two different provisions in CCP. Below, I have provided the two provisions and underlined and highlighted their differences.

THE PROBLEM PROVISIONS:

In CCP §1985.3(g) (last unnumbered paragraph), it states:

The party requesting a consumer's personal records may bring a motion under Section 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney.

In CCP §1985.6(f)(4), it states:

The party requesting an employee's employment records may bring a motion under subdivision (c) of Section 1987 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the employment records and the employee or the employee's attorney.

THE CROSS-REFERENCED PROVISIONS:

Of the two sections cross-referenced in the two CCP provisions above, I think the cross reference to CCP §1987(c) is the correct one because it deals with a motion to enforce a subpoena. By comparison, CCP §1987.1 deals with a motion to quash or limit the subpoena, not a motion to enforce it.

CCP §1987(c) provides:

(c) If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, it may include a request that the party or person bring with him or her books, documents or other things. The notice shall state the exact materials or things desired and that the party

or person has them in his or her possession or under his or her control. Within five days thereafter, or any other time period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required.

Subject to this subdivision, the notice provided in this subdivision shall have the same effect as is provided in subdivision (b) as to a notice for attendance of that party or person.

CCP §1987.1 provides:

When a subpoena requires the attendance of a witness or the production of books, documents or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by the party, the witness, or any consumer described in Section 1985.3, or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the parties, the witness, or the consumer from unreasonable or oppressive demands including unreasonable violations of a witness's or consumer's right of privacy. Nothing herein shall require any witness or party to move to quash, modify, or condition any subpoena duces tecum of personal records of any consumer served under paragraph (1) of subdivision (b) of Section 1985.3

----- * ----- * -----

I hope this short summary of the problem is enough to explain it. If this issue is addressed and resolved in any manner, I would appreciate learning of the result. If you want to contact me about this, I would be glad to talk to you or anyone else about it.

Thank you for your time and attention.

Michol O'Connor
Michol@swbell.net
713-520-9555

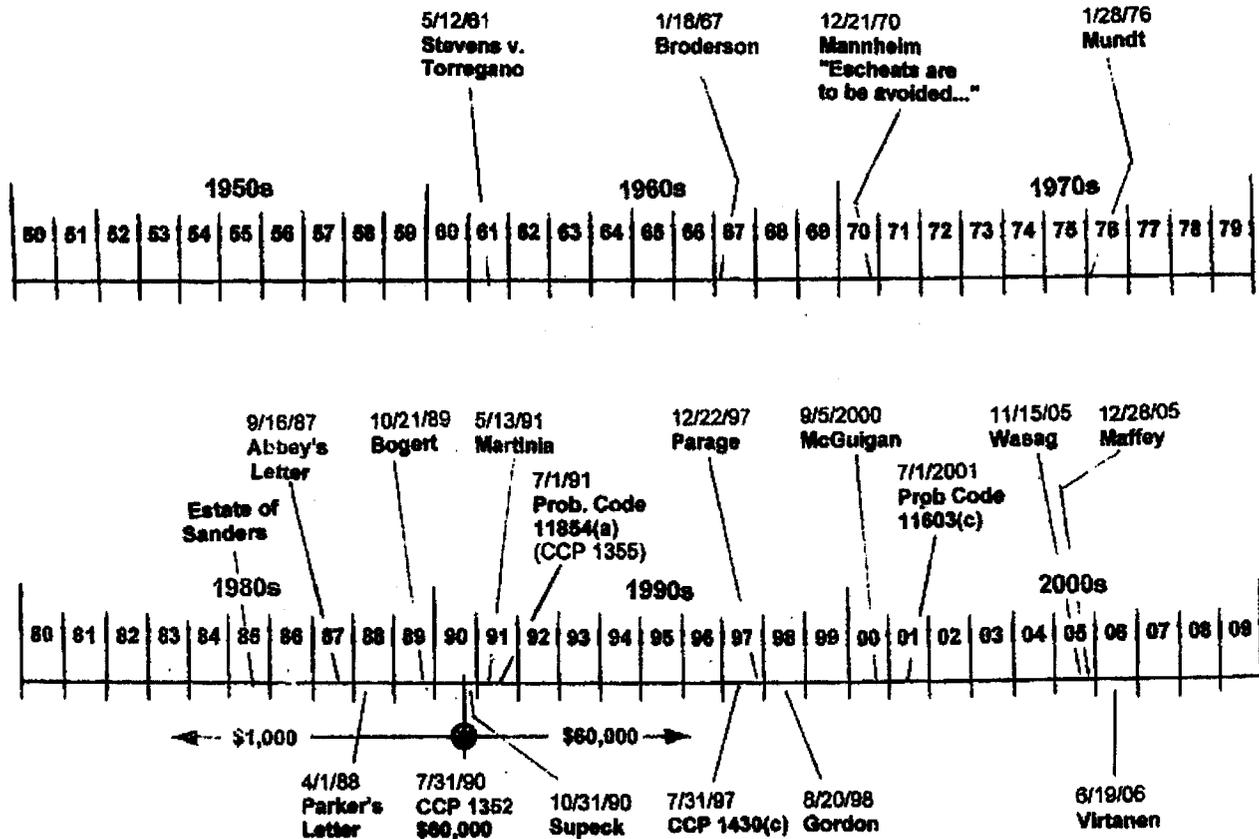
EMAIL FROM EWALD SCHLACHTER (4/27/07)

Re: Revision of escheat statutes

Mr. Hebert:

I suggest that you urgently consider repealing Probate Code, Section 11603(c) and Code of Civil Procedure, Section 1430(c).

The following time line will help the understanding of the historic development:



What you see above is a statement of the major events in my work with heir finders who locate claimants to property escheated under Probate Code, Section 11850 (formerly 1064).

The philosophical principle underlying the statutes regulating such claims has been stated by the Supreme Court of California in **Mannheim v. Superior Court** (1970) **3 Cal 3rd 678**; 91 Cal Rptr 585; 2 P 2nd 17.

It is expressed in the maxim:

Escheats are to be avoided wherever possible.

The Supreme Court addressed the problem of “cleaning up” the undistributable portions of the residue in probate proceedings as quickly as possible during a claims period of nominally 11 years, starting with the deposit of the undistributable residue with the county treasurer.

The procedure so originally established has been corrupted by two statute additions, Probate Code, Sections 11603(c) and CCP 1430(c).

It now takes at least 11 years, unless the **missing heir** personally appears or his/her death can be established.

The public policy expounded by the Supreme Court in the last four pages of the **Mannheim** decision, starting on page **691**, at head note **(14)**, has been turned into its exact opposite. What the Supreme Court characterized as “**purposeless and unreasonable**” in the first paragraph of page **693** has been turned into a corrupt practice to protect the “rights” of the missing heirs for the **ulterior purpose** of favoring selected heir finders.

I will elaborate the above, with particular emphasis on the “**ulterior purposes**”, in following letters.

This matter requires your immediate attention to correct a manifest abuse of the law.

Sincerely,

Ewald O. Schlachter
State Bar #36532

EMAIL FROM EWALD SCHLACHTER (5/2/07)

Re: Emergency in escheat legislation

Mr. Hebert:

Thank you for your reply.

If the routine submission in October is the best we can do, we will have to accept it and make the best of the situation.

However, we are confronting an emergency of significant proportions.

Urgent action is needed.

Fortunately, as explained below, the needed action involves only a correction of the terminology on the basis of the existing record.

The law, as stated, is ambiguous because of the use of collective terms that broaden the apparent coverage of the subject matter far beyond the intent of the legislature as it appears from the record of the deliberations leading up to the enactment.

Particulars

This emergency affects **all** cases in which all or a part of a probate estate cannot be distributed to the person entitled to receive it, because this **person** cannot be found.

The problem arises upon the choice of the technical term which describes this “**person**” in CCP1430(c) as mentioned in my fax of 5/1/2007.

In a very small number of cases, the technical term describing this “person” is “**legatee**”, as you see it in the copy from the appeals opinion in **Bogert v. Davis** on page 2 of my fax letter of 5/1/07.

In the vast majority of cases the technical term describing such “persons”, is “**heir**”.

In statutes dealing with such persons collectively, these persons are collectively referred to as **distributees**.

An example of such usage is found in Probate Code. Section 11603(b)(1). In this context, it makes no difference whether the “distributee” is an “heir” or a “legatee”.

When such a “distributee” cannot be located, as specified in Probate Code, Section 11850(a), the proper technical term is still “distributee”, because the reference is generally to all cases whether the “distributee” is a “legatee” or an “heir”. The money is

ordered deposited “in the name of the distributee” with the county treasurer, where it may be claimed by any person entitled.

However, the matter gets critical, when we examine the claims procedure, as set forth in Probate Code, Section 11854(a), where we suddenly see that “**A person...**” may claim the money.

What happened to the technicalities we see above?

Can a “legatee” claim?

Can an “heir” claim?

The answer is complex, because the “legatee” or “heir”, are now members of the large class of proper claimants against the distributive share that had to be deposited with the county treasurer because it could not be delivered to the respective “distributee”. In order to increase the chances that claimants may appear at all and relieve the state of the necessity to keep the money safe, the class of persons who can appear to claim has been enlarged to include **any** person who, if he/she had been the **only** person to become known to the probate court as entitled, he/she would have been found entitled the **entire amount** available for distribution.

To put that more specifically: the “legatee” mentioned above and also the “heir” mentioned above are not the **only** persons entitled to claim. The rules of precedence whereby the person is identified who is immediately entitled to distribution in probate proceedings have been suspended. What remains of the preference enjoyed by “legatees” and “heirs” is expressed in the third sentence of Probate Code, Section 11854(a), beginning with the words “Unless the petition is filed by the person named in the decree for distribution...” All **other persons** must comply with the special requirements according to Section 1355 of the Code of Civil Procedure.

If no claimant appears to claim the money while it is held by the county treasurer, it is sent to the state treasurer and must be claimed, pursuant to Section 11854(d), as provided in Title 10, of Part 3, of the Code of Civil procedure.

Now we are at the pivotal point:

Section 1430, as reproduced in my fax letter of 5/1/07, is part of Title 10 of the Code of Civil Procedure.

And the immediate problem addressed in my fax letter of 5/1/07 is situated in the terminology of subsection (c) which was added by **SB 999** of 1997 and misstates the intent of the legislature, as it appears from the record of the transactions in the legislature that led up to the enactment of subsection (c).

The particular problem is that the phrase “named beneficiary” refers to a person who is entitled because he/she has been named in the **will** of a testator/decedent and not to an

heir who is a person found entitled under the rules of Probate Code, Section 6402, because of his/her **blood** relationship with the decedent who died **without leaving a will**.

A first element of confusion is introduced by the use of the terms "**Beneficiary**" which refers to the person called a "**distributee**" in Probate Code, Section 11850.

The use of the term "**named beneficiary**" is particularly deceptive, because it tricks readers into believing that it refers to **all** persons in whose name the property may be deposited according to Probate Code, Section 11850(a). In fact, it refers **only** to property bequeathed in a will. That is to say, it refers only to cases of **testate succession**. The deception results from the fact that the decision in **Bogert v. Davis**, as shown on page 2 of my fax of 5/1/07, explicitly refers to the deposit as having been made "**...in the name of the named legatee**" while the reference in subsection (c) uses the broader terminology to conceal the limitation clearly expressed in the court decision that led to the enactment of subsection (c).

As I have stated in my fax of 5/1/07, I have run twice iinto the fact that courts are confused. In **Gordon** and in **Maffey**, the court believed that the phrase "named beneficiary" refered to **all cases**, "testate" and also "intestate" succession. while it actually refers according to the ruling of the appeals court in **Bogert v. Davis**, **only** to testate cases. Both, Gorden and also Maffey, are intestate cases.

There are now hundreds of cases in which the courts have proceeded under the wrong assumption of the effect of **Bogert v. Davis** which appears to have been incorporated into subsection (c) of CCP 1430. There are hundreds of claimants whose rights are violated by the simple fact that the statute does not reflect the intent of the legislature.

And the matter can be easily corrected by simply changing the wording of the statute to make it **correctly reflect** the intent of the legislature.

It is a matter of record that the legislature did **not** intend the amendment of CCP1430 by adding subsection (c) to affect **intestate** succession.

I will fax the text of the statement by the Judicature Commission which explicitly deals with this matter.

All the facts needed to justify the "emendment" of the code are already on the record. There is more involved than a mere play on words: an **amendment** adds matter that was not expressed. An **emendment** brings out matter that is kept from coming through because of the use of the wrong term in expressing the intent of the legislature.

As stated above, I will fax additional material later today.

Ewald O. Schlachter

Ewald O. Schlachter. Attorney at Law, CB#36532
354 Vernon St., #206, Oakland, CA 94610-3010
Ph (510) 452-0151, Fx (510) 452-0159

May 3, 2007

Mr. Brian Hebert
California Law Rev. Commission
3200 5th Avenue
Sacramento, CA 95817

Fax letter to 1-916-739-7071

Re: CCP 1430(c)

Dear Mr. Hebert:

I got my first escheat case a few weeks after I had opened my store front office. A gentleman stepped in and asked whether I had the time to take on his heir finder escheat cases.

I had time, of course, but what was escheat?

He pulled a sheaf of paper from his brief case and put it on my desk: **Nothing to it - here are samples of my cases.**

There was indeed nothing to it, then, in the line he was working. He traveled around the San Francisco - Oakland Bay area counties and checked the probate files.

His cases were all at the county level, under Probate Code, Section 1064, which is now, without substantive changes, Section 11854.

That first case was in 1968. (See the time line on my email of 4/27/07).

Since then, I learned a lot about escheats at the county level and also at the state level. There were changes in various ways, but the principle remained as outlined in **Mannheim v. Superior Court (1970)** until I began to notice indices of the development that resulted in the present corruption.

These were creeping indices, little things that, at that time and in that context, provided food for thought.

There was then, as now, no book one might consult for guidance in gaining a comprehensive understanding. **Mannheim** provides an illustration of the problem in **studying up on escheat law by cases**: of its 15 pages, 12 deal with abstruse technical matters of pleading and public policy that appear to afford no practical guidance and invite the dismissal of this case as an authority in the resolution of practical matters. That holds for attorneys who only occasionally get an excheat case and it also holds for judges who now and then confront this rare specialty, even probate judges.

And, as you see on page 7/9 below, at the bold mark, even specialists contributing to the legislative deliberations tend to dismiss **Mannheim** after reading the summary on page 678.

Actually, **Mannheim** is the leading authority on all essential issues which arise in the practice of escheat law at all levels.

Since I took up law after working in other fields, in particular in engineering, I found it necessary to start diagramming escheat law in order to provide myself with a means to quickly get up to speed on prior insights when a new problem came up.

I prepared the diagram you see on page 3/9 to reflect the procedure starting with probate and ending with the permanent escheat at the end of either phase **x-3** or **y-5** in cases that arose under Probate Code, Sections **1027** (no known heirs) and **1060** (known but unlocated heirs) before the 1991 renumbering and **11850** respectively **11900** now.

The relevant provisions of the Code of Civil Procedure were introduced in 1951 and have remained unchanged with the exception of the series of changes which started with "**Abbey's letter**" in 1987.

The diagram on page 4/9 shows the principal changes which, all essentially incompatible with the authority of **Mannheim**, resulted in the **Corruption of the Ideal Solution**.

The principal corruptive element is illustrated by two of my cases, **Gordon** in 1998 and **Maffey** in 2005.

The central element of the corruption is the persistent promotion by the state controller's office of the notion that the **questionable holding** of **Bogert v. Davis** applies to **all** cases starting by the deposit under Probate Code, Section **11950**, not **only** to cases involving **testate succession**.

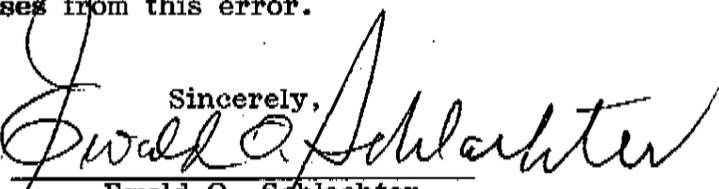
Although it would be desirable to have **Bogert** eliminated as an authority, the damage done by the state controller's persistent advocacy of **Bogert** as "**existing law**" see page 5/9, below, would be undone by the **emendment** of CCP 1430(c) described in my fax letter of 5/1/07, because possible 95% of all escheat cases arising in probate are **intestate cases**.

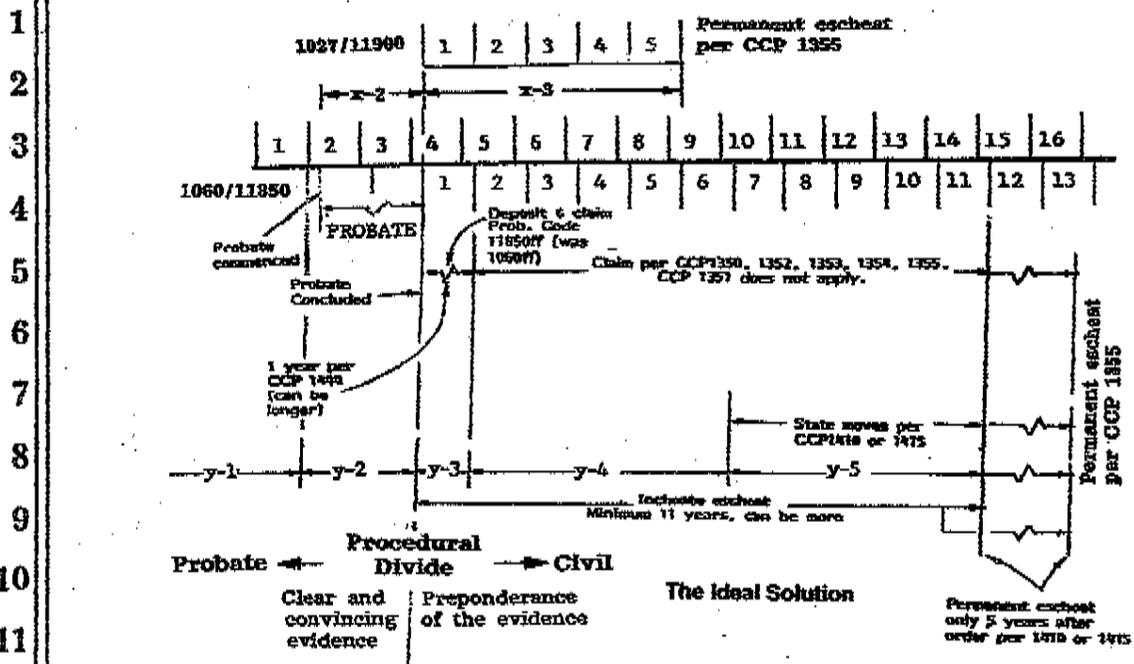
The requested emendment of CCP1430(c) is urgent, because the persistent effort by the state controller's office has resulted in the corruption of the general perception of the law by attorneys and judges. In **Maffey**, the attorney for the estate proceeded, in his preparation of the Administrator's First and Final Report and in the suggested Decree of Distribution, on the assumption that CCP 1430(c) made it proper to "**distribute**" the missing heir's share to the **missing heir by depositing with the county treasurer under Prob. Code 11850**.

And the judge signed the suggested Decree of **Final Distribution**, because it appeared to be consistent with his perception of the law.

The proposed emendment of CCP **1430(c)** would immediately protect the bulk of all probates of **intestate cases** from this error.

EOS:is
c: RAW

Sincerely,

Ewald O. Schlachter



13 The diagram illustrates the original process for the management of
 14 distributive shares which for various reasons cannot be delivered upon the
 15 closing of probate proceedings.

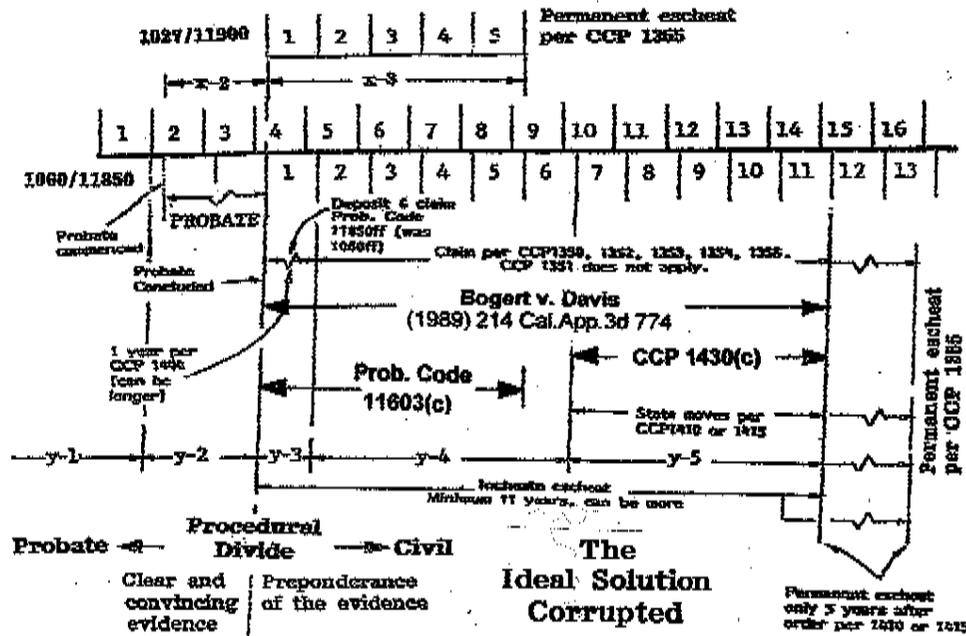
16 When no heir is identified in the course of the probate phase x-2, the
 17 probate court declares the distributable property escheated and title
 18 settled in the State of California subject to claims by parties entitled
 19 during the phase x-3.

20 When an heir is identified in the course of the probate proceeding y-2,
 21 but at the time of the closing of the probate is unavailable to receive
 22 his/her distributive share, the probate court orders that the property be
 23 deposited with the county treasurer in the name of the distributee. The
 24 county treasurer holds the property one year, during phase y-3, subject to
 25 claims by parties entitled and, if no claimant has appeared, transfers the
 26 property to the state treasurer subject to management by the state controller
 27 during phase y-4 subject to claims by parties entitled. If no claims are
 28 filed, the state controller initiates an action in the (civil) department of

1 the Superior Court of Sacramento County to secure a judgment declaring that
 2 the property has escheated subject to claims by parties entitled during
 3 phase y-5. If no claimants appear by the end of phase y-5, the property is
 4 permanently lost to all claims.

5 This was the process addressed by the Supreme Court in Mannheim v.
 6 Superior Court. It resulted in the quick disposition of undistributed
 7 residues found in probate proceedings.

8 In the meantime, the process has been unnecessarily "improved", as
 9 shown by this diagram:



21 None of these improvements was needed, because their objectives were
 22 fully covered by the original process, as illustrated on page 3.

23
24
25
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27
28

4/9

SENATE JUDICIARY COMMITTEE
John L. Burton, Chairman
1997-98 Regular Session

SB 999	S
Senator Maddy	B
As Amended March 31, 1997	
Hearing Date: April 1, 1997	9
Code of Civil Procedure	9
TC	9

SUBJECT

Claims Against Escheated Property

DESCRIPTION

A (This bill would allow a blood relative of either a missing named beneficiary or of the decedent or donor or of his or her predeceased spouse to claim a bequest that was devised to the named beneficiary. ^R

BACKGROUND

B) Existing law provides that a missing named beneficiary's unclaimed bequest from a decedent will permanently escheat to the state after a minimum period of 11 years (Code of Civil Procedure Section 1430.). The unclaimed bequest will first escheat to the County Treasurer of the county where the decedent's estate was probated. After one year, the unclaimed property escheats to the Unclaimed Property Fund, which is under the authority of the California State Controller. The Controller holds it for five years and if no claim is made, the Attorney General is notified and is required to file suit to divest the bequest from the missing beneficiary. A default judgment is entered and under existing law the missing beneficiary is given an additional five years to claim the property. Only the missing beneficiary can claim the bequest during this second five years. If the bequest is left unclaimed after the five-year period is over, then it permanently escheats to the state.

CHANGES TO EXISTING LAW

Existing law makes no provisions for a person other than a named beneficiary to claim an inheritance left by a decedent. If a named beneficiary is missing and cannot be found, the bequest permanently escheats to the state.

(more)

19

5/9

SB 999 (Maddy)

Page 2

b2

This bill would also allow a blood relative of either the beneficiary or of the decedent ~~or donor or his or her predeceased spouse~~ to claim property that has been adjudged to belong to the state within five years after entry of such a judgment. *This provision does not apply to authorize a claim by any person, including any issue or blood relative of that person, whose interest as inheritance was specifically restricted or approved by a provision in the donation or transferring instrument.*

COMMENTS

1. Stated need for the bill

The sponsor of the bill, the Bureau of Missing Heirs, a private firm that specializes in the finding of heirs, claims that this bill follows California's long-standing policy that there should be no permanent escheat where there are heirs to claim the bequest. As support, the sponsor cites Mannheim v. Superior Court (1970) 3 Cal. 3d 678, where the California Supreme Court said that the state is a mere stakeholder for the claims of heirs and that permanent escheat should be avoided whenever possible. By giving other heirs a right to claim the escheated bequest during the default judgment period, the chance of a permanent escheat is reduced and thus would be in keeping with California's stated policy to give heirs a chance to redeem an estate of a decedent before it permanently escheats.

2. This bill does not involve the rights of heirs under intestate succession

This bill's subject matter does not involve the rights of heirs under intestate succession, and therefore does not appear to advance California's long-standing policy that there should be no permanent escheat where there are heirs to claim the bequest.

According to Probate Code Section 44, the term "heir" means any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession. Intestacy involves a person who dies without leaving a valid will. Any part of the estate of the decedent not effectively disposed of by will passes to the decedent's intestate heirs as prescribed by the laws of intestate succession in Probate Code Sections 6400-6413.

This bill's subject matter does not involve the rights of heirs under intestate succession. Under the situations contemplated by this bill, the decedent would have left a valid will and would have designated specific named beneficiaries for the purpose of receiving a bequest. Having left a valid will, the decedent's property will be devised according to the will, and intestate succession is avoided. Hence, the decedent will have no heirs, but will have named beneficiaries.

(more) 20

6/9

SB 999 (Maddy)

Page 3

Thus, the Mannheim holding might not be applicable to this bill. In Mannheim, the Court dealt with a situation where the decedent died intestate and left no heirs of her own. The Court held that, under the current California laws at the time, the decedent's deceased spouse's heirs can take the inheritance of the decedent. The Mannheim decision does not appear applicable to this bill because the decision specifically limited itself to intestate succession and the rights of heirs to claim property before it escheats to the state.

3. The creation of new classes of claimants for probate

This bill would create new classes of claimants eligible to receive bequests that were not intended for these claimants to receive. Under this bill, a decedent's bequest could go not only to any blood relative of the decedent or any blood relative of the decedent's deceased spouse, but could go to any blood relative of the missing beneficiary. There is no current provision in the Probate Code that allows blood relatives of a missing beneficiary to claim a bequest that was not intended for them by the decedent. There is no public policy being served by creating these new classes of claimants.

In addition, this bill does not place a limit on the degrees of kinship a person must have with either the decedent, the decedent's deceased spouse, or the missing beneficiary in order to claim a bequest. Conceivably, this could mean that a blood cousin 24 times removed from a missing beneficiary could claim a decedent's bequest that had been specifically earmarked for the missing beneficiary.

SHOULD THESE NEW CLASSES OF CLAIMANTS BE CREATED?

4. Public policy - Effectuating the testator's intent

It is settled public policy in California that probate requires, to the closest extent possible, effectuating the intent and wishes of the decedent. It is unclear under this bill whether this public policy would be fulfilled. In a typical probate of a will, the decedent specifically intended for a named beneficiary to receive a bequest. If the beneficiary is missing, it cannot be reasonably inferred that the decedent would have intended for the bequest to go to anyone who happens to be a blood relative of the decedent, the decedent's deceased spouse, or of the missing beneficiary, and who happens to have filed the earliest claim for the bequest. If this is the inference, then the opposite situation could also be true; the decedent intentionally omitted other relatives from receiving the bequest because the decedent did not want the other relatives to receive the bequest. By devising a bequest to a designated beneficiary, the decedent has expressed his intent for the bequest; no other intent can be inferred from this devise other than what is expressed in the testamentary instrument. Continuing to allow only the named beneficiary the right to claim the bequest is likely the best means of fulfilling the public policy of effectuating the

(more)

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SB 999 (Maddy)
Page 4

decedent's intent as closely as possible. Conversely, allowing a person who has been intentionally omitted in the will to claim the missing beneficiary's bequest would be contrary to the testator's intent.

WOULD THIS BILL ALLOW DELIBERATELY OMITTED PARTIES FROM A BEQUEST TO NONETHELESS CLAIM THE PROPERTY, CONTRARY TO THE TESTATOR'S INTENT?

5. Public policy - Prompt administration and settlement of estates

It is settled public policy in California that estates that are being probated should be promptly administered and settled, and that probate proceedings should be expeditiously conducted. This policy was adopted so that there is finality in the probate process. For example, if a named beneficiary is missing, existing law allows for no one other than the named beneficiary to claim his or her bequest. By doing so, there will be no competing interests trying to claim the bequest during the years allowed for the named beneficiary to claim the bequest. This practice allows for probate to be finalized and expeditiously conducted.

The provisions in this bill will lengthen the probate process significantly for cases that involve missing beneficiaries. The probate process could foreseeably be extended another six years, as the claim to a decedent's bequest is held in limbo for six years, then opened up so that members within the new classes of claimants who are blood related to the decedent, or to the decedent's deceased spouse, or to the missing beneficiary, can race to claim the bequest.

6. State costs of determining validity of claim

This bill would cause the state to incur the costs of determining the validity of a claim to the missing beneficiary's bequest. The State Controller's Office has not been able to estimate the amount of costs involved. However, the State Controller's Office does believe that the costs will be substantial because of an anticipated jump in claims for escheated property, and the need to investigate these claims. In addition, the State Controller's Office fears that this bill will lead to increased litigation against them, as aggrieved parties who have been denied the escheated property might seek to file suit.

7. Fairness of a first come, first serve provision?

This bill would create a right for a wide number of individuals to claim property before it escheats to the state. There is no priority order to determine who might have a greater claim to the bequest. This could result in an unfair situation where a distant relative of a decedent's deceased spouse's claim to a missing beneficiary's bequest will win out over the claim of a missing

(more)

22

SB 999 (Maddy)
Page 5

beneficiary's spouse or the claim of the decedent's children simply because he or she filed a claim first with the State Controller's Office.

SHOULD "FIRST COME - FIRST SERVED" BE THE RULE?

Support: None known

Opposition: State Controller of California

HISTORY

Source: The Bureau of Missing Heirs

Related Pending Legislation: None

Prior Legislation: None

23

9/9

Ewald O. Schlachter, Attorney at Law, SB#36532
354 Vernon St., #206. Oakland, CA 94610-3010
Phone (510) 452-0151; Fax (510) 452-0159

May 16, 2007

Mr. Brian Hebert
California Law Rev. Commission
3200 5th Avenue
Sacramento, CA 95817

Fax Letter to 1-650-494-1827

Re: Prob. Code 11603(c)

Dear Mr. Hebert:

I addressed you on the subject, Prob. Code 11603(c), in an email letter last year, on 7/3/06. It is reproduced below, pages 4/9 and 5/9, with the lines numbered for easy reference.

As you have seen from my fax letter of 5/3/07, I have a complaint regarding the published version of CCP 1430(c) on the ground that it does not express the legislative intent of SB 999 which introduced it. It should be amended, as suggested in my fax letter of 5/1/07, by replacing the phrase "named beneficiary" on the first line of subsection (c) with "legatee" and adding at the end "This subsection does not apply to intestate succession".

That would serve for the start in undoing the damage done by the various "improvements" foisted by the state controller's office on the process during the last 40 years.

I will have more commentary on CCP 1430(c) as I go along.

In this letter, I am concerned with the "improvement" in Prob. Code 11603 by the addition of subsection (c), page 3/9, below.

The process that seems to have led to the enactment of Prob. Code 11603(c) is phantastic. It stultifies the notion of due process.

It starts with the letter by Jeffrey A. Altman, dated 1/4/1990, page 6/9, below, which you provided to me in response to my email letter, pages 4/9 and 5/9, below.

Mr. Altman obviously did not know much about the subject matter. He refers to Prob. Code 1027 (now 11900) which addressed cases in which no known heirs are found and the residue of the estate is escheated, already in probate, by the order of the probate court, subject to claims during the next five years, as set out in CCP 1355.

He properly describes the procedure in, then, 1027 cases. There was, then, and there is now, no such problems with 1027/11900 cases.

Then he proceeds to outline his proposed remedy for Prob. Code, then 1064, at the time of the enactment of 11603(c), Section 11854.

The published wording of Prob.Code 11603(c), on page 3/9, below was worked out by the legislature in deliberations on AB 1491, as shown on page 7/9, below. There is an obvious error in the reference to "two years after the death of the decedent". This phrase is found in only one place in Title 10 of the Code of Civil Procedure which addresses escheats - only in CCP 1420.

The legislature is "mixing apples and pears".

It purports to improve the management of property which came into the possession of the State in connection with estates of decedents, pursuant to Chapter 3 of Title 10, as shown on page 8/9 below, with reference to the protocol in Chapter 5, which explicitly refers to property which did not come into the possession of the State in connection with estates of decedents.

CCP 1353, page 9/9, below, clearly shows the difference.

An example of property so claimed and successfully acquired by the State pursuant to CCP 1420 is found on page 800, at line 8/44, of *State of California v. Broderson*, (1967) 247 C.A.2d 797; 58 Cal.Rptr. 58. There is a chance of confusion in this instance, because the State sued to impose a constructive trust on property that had passed through the probate proceeding. The State could no longer intervene in the probate proceeding, because the Decree of Final Distribution had become "final". To a reader who is not conversant with the subject matter, it certainly appears that the property so acquired by the State was acquired "in connection with an estate of a deceased person" and that, therefore, CCP 1420 just can NOT apply to it. This is a good example of the problematic in legislating and writing opinions on appeal to which I will refer in later letters. There is much inept writing around.

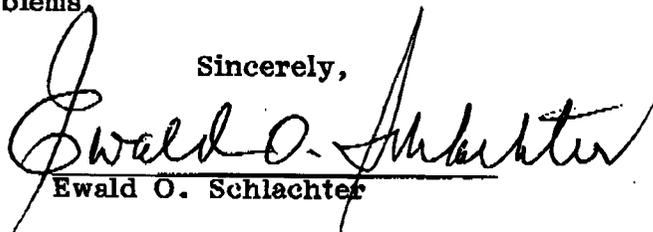
Another example of this problematic is found in *Mannheim v. Superior Court* (1970) 3 C.3d 678, 91 Cal.Rptr. 585; 478 P.2d 17, on page 689, headnote (10). Here the court refers to Prob.Code, then, 1027 (at the time of the enactment of (c) Section 11904) and (in the same breath) also to CCP 1420, without making clear that these are two different proceedings. Yet, there is a significant difference, which, in 11603(c) had and still causes, true mischief. For an example of the general thoughtfulness of the Supreme Couet in obviating misunderstanding, see its headnotes 10 and 11 on page 692 of *Mannheim*.

Still another example of the application of CCP 1420, is given by me in my email letter, page 5/9, below, at lines 19ff.

Subsection (c) of Prob. Code 11603(c) should be repealed as soon as it can be done, because it is the result of ignorance. It was not necessary and it is not only NOT useful now, but a clear nuisance. It affects the rights of possible thousands of escheat claimants in testate and intestate cases.

I will have more on more problems

Sincerely,



Ewald O. Schlachter

EOS:is
cc: RAW

EX 40

2/9

§ 11603. Hearing and order. (a) If the court determines that the requirements for distribution are satisfied, the court shall order distribution of the decedent's estate, or such portion as the court directs, to the persons entitled thereto.

(b) The order shall:

(1) Name the distributees and the share to which each is entitled.

(2) Provide that property distributed subject to a limitation or condition, including, but not limited to, an option granted under Chapter 16 (commencing with Section 9960) of Part 5, is distributed to the distributees subject to the terms of the limitation or condition.

(c) If the whereabouts of a distributee named in the order is unknown, the order shall provide for alternate distributees and the share to which each is entitled. The alternate distributees shall be the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the doctrine of cy pres. If the distributee named in the order does not claim the share to which the distributee is entitled within five years after the date of the order, the distributee is deemed to have predeceased the decedent for the purpose of this section and the alternate distributees are entitled to the share as provided in the order. Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991. Amended Stats 2000 ch 17 § 4.6 (AB 1491).

3/9

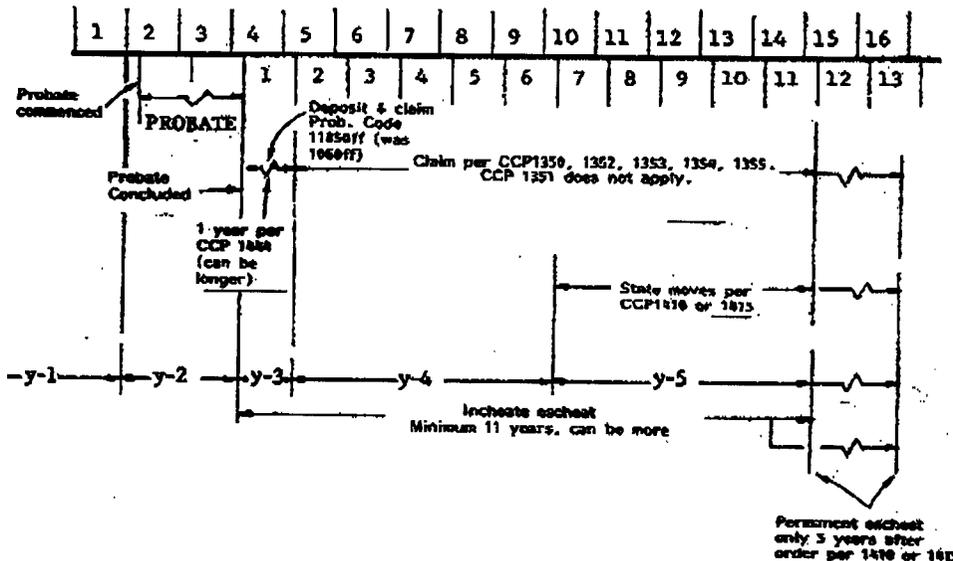
Subj: Probate Code 11603(c)
 Date: 7/3/06
 To: bhebert@clrc.ca.gov
 CC: rawalter1947@sbcglobal.net

Mr. Hebert:

I believe I have spoken with you on this problem some time ago. If I am mistaken, please refer this letter to the proper address.

I have been studying materials on Probate Code, Section 11603(c) and it seems to me that something has gone awfully wrong here.

Consider the diagram that is coming up (may take a minute or so):



The diagram shows the procedure before 11603(c) was enacted. The claims procedure was regulated by Probate Code, Sections 11854 during the period y-3 and thereafter by various provisions of the Code of Civil Procedure, starting with CCP1352.

The total process took 11 years. Any person could claim the whole thing who would have been found entitled in probate if he/she had been the only known heir. If two or even more such persons filed copending claims, the conflict was decided according to the rules of intestate succession the way the probate court would decide such questions.

The chances of escheat for failure of claimants to appear were very small because heirfinders worked cases down to a few thousand dollars and produced claimants. Cases not touched by heirfinders were simply not good, too small or too difficult to document.

Claims were produced as quickly as possible.

So, what improvement has 11603(c) worked?

None - indeed it has delayed the settlement of the matter in most cases by 5 years. Suppose you have a total of \$5,000 that is to go to 5 alternate claimants in equal shares. Each of these people has to remember to claim. Each of the claimants must be skilled enough to do the claims work. Just try to imagine an heirfinder trying to sign up all five claimants. \$1,000 is too small for even frugal heirfinders. Under the old rule, one claimant could take the whole thing and thereby avoid the escheat.

Wednesday, May 09, 2007 America Online: Eoschlachter

49

EX 42

1 An entirely workable system which conformed to the holding of the Supreme Court in Mannheim v.
2 Superior Court has been thoroughly messed up. 11603(c) is exactly what the Supreme Court rejected on
3 the last two or three pages of Mannheim.

4
5 What particularly troubles me is the justifying argument on page 10 of the AB 1491 bill analysis. It does
6 not seem to have been written by someone who actually knows the law.
7 I read: "Existing law provides that when a court orders *distribution* to a person whose whereabouts are
8 unknown..." Just read Section 11850 and you will see that there is no talk about *distribution*. The
9 deposit with the county treasurer is specified for cases in which
10 money remains undistributed for various reasons, including the lack of information about the whereabouts
11 of the person to whom the property **would** have been *distributed* if he/she had been available to receive
12 it. This is simply a case of sloppy reading of the code.

13
14 But what really drives me up the wall is the comment: "...if the distributive share remains unclaimed after
15 **two years after the death of decedent...**", the state may petition the court to have the property escheat
16 to the state permanently. There is only one place in the Code in which **two years after the death of**
17 **decedent** is mentioned. It is **CCP1420**.

18
19 Just look at the procedure required in **CCP1420**. There is no need for that in order to
20 initiate the escheat of property coming out of a probate proceeding. That has already been done in
21 probate. That sort of thing would be necessary, for example, if two unrelated persons owned a
22 residence as tenants in common and lived together. Then one dies and the other continues to live there
23 and pay the taxes. Years later, he dies and his family starts the probate and discovers that he did not
24 own the **whole** property, only an undivided one half interest. This property is not subject to the
25 jurisdiction of the probate court. And the court would order notice to be sent to the state and the state
26 would come in and start the process by filing under **CCP1420** to establish that the conditions under which
27 the code provides that property escheats actually existed (owner died, no one claiming it). The suit would
28 be published to give notice to all the world in the same way in which the Notice of Petition to Probate is
29 published to give notice to all the world.

30
31 Who sponsored this 11603(c) thing?

32
33 Could you send me a copy of the initial statement of the need for it?

34
35 Thanks,

36
37 Ewald O. Schlachter.

Wednesday, May 09, 2007 America Online: Eoschlachter

EX 43

5/9

Memo 90-38

Exhibit 1

Study L-100

CA LAW REV. COMMISSION

REIFMAN, ALTMAN, SHERMAN & WEINER

JAN 08 1990

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

11801 WILSHIRE BOULEVARD, SUITE 1830

LOS ANGELES, CALIFORNIA 90025

TELEPHONE (213) 477-1100

FAX (213) 478-0111

IRVING REIFMAN
JEFFREY A. ALTMAN
ERNOLO S. SHERMAN
BERNARD L. WEINER
A PROFESSIONAL LAW CORPORATION

RECEIVED
OF COUNSEL
ALFRED S. GAINSBLEY

January 4, 1990

John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road - Room D-2
Palo Alto, CA 94303

RE: Unclaimed Property in Probate Proceedings

Dear Mr. DeMouilly:

It has recently come to my attention that a change from the present statutory scheme for unclaimed probate property would serve to carry out more closely the intention of deceased testators.

As I understand that present law, under Probate Code § 1027 if an heir, devisee or legatee's whereabouts are unknown, the property is to be delivered to the state treasurer for the benefit of the State of California.

Property is held for five years, unless it is claimed pursuant to § 1300 of the Code of Civil Procedure. If no claim is made within five years, the property vests in the State of California. For purposes of making a claim the Superior Court in Sacramento has jurisdiction.

I believe that it would more closely approximate a testator's intent, if a bequest to a beneficiary went unclaimed, that the property would then pass in the following priority:

1. To the taker(s) in default named with respect to the specific bequest.

In addition, a window period of 6 months to one year could be allowed for the alternate taker to make the claim to the state treasurer in the county where the probate took place and the property has been deposited. A simple form could be devised to enable the alternate taker to make his/her claim. It would probably include presenting a certified copy of the Court Order, as well proof of identification together with a declaration under penalty of perjury that they are the person entitled as the alternate taker.

This plan would seem to more closely adhere to the testator's intent. It would also have the advantage of allowing the alternate taker to make their claim in the county where the decedent's probate was held, rather than in Sacramento.

Finally, if properly drafted, I believe the statute could provide for a what would be a self-executing system for distribution of the property.

I would appreciate hearing from you as to whether you think this suggestion is meritorious, and if so what steps may be taken to implement it.

Very truly yours,

REIFMAN, ALTMAN, SHERMAN & WEINER

By: *Jeffrey A. Altman*
JEFFREY A. ALTMAN

EX 44

JAA/ms

6/9

AB 1491 (Kalsoqian)
Page 10

http://www.leginfo.ca.gov/pub/99-00/bill_b_1491_cfa_20000330_113714_sen_comm.html

4. Alternate distributees: when a missing distributee is presumed dead

Existing law provides that when a court orders distribution to a person whose whereabouts are unknown, the representative or administrator of the estate must deposit the missing distributee's share with the county treasurer and, if it is not claimed by the distributee within one year of deposit, the county treasurer must turn it over to the State Treasurer or Controller. Under the unclaimed property law, if the distributive share remains unclaimed after two years after the death of decedent, the state may petition the court to have the property escheat to the state permanently.

Found only in
CCP 1420.

This bill would instead require the court making such an order of distribution to a person whose whereabouts are unknown, to designate alternative distributee or distributees who would be entitled to property of the decedent that remains unclaimed. A "missing" distributee would be presumed dead five years after the order of distribution, at which time the property would be distributed to the designated alternate distributee.

The original recommendation of the California Law Revision Commission (CLRC) was a three-year waiting period before the alternative distributee could collect the unclaimed share. However, a five-year period is more consistent with current statutes that would presume a person dead after missing for five years, and would consider property abandoned after five years.

Regardless of the waiting period, the CLRC states that when a beneficiary cannot be found, a decedent's presumptive intent is that the property go to another beneficiary, rather than to the state through its escheat process. An order of distribution that names an alternate distributee who would take if the property is unclaimed by the primary distributee would accomplish that intent.

The bill further specifies that in the case of a charitable devise, the alternate distributees would be determined by application of the doctrine of cy pres.

TITLE 10. Unclaimed Property (§ 1300)

CHAPTER 1. General Provisions (§ 1300)

- ARTICLE 1. Definitions § 1300
- ARTICLE 2. Purpose and Scope § 1305

CHAPTER 2. Receipt and Expenditure of Funds (§ 1310)

- ARTICLE 1. Deposit of Unclaimed Property § 1310
- ARTICLE 2. Appropriation § 1325

CHAPTER 3. Payment of Claims (§ 1335)

- ARTICLE 1. General § 1335
- ARTICLE 2. Refund of Erroneous Receipts § 1345
- ARTICLE 3. Claims § 1350

Only Prob. Code 1027 - 11900 or 1060 - 11850 property

CHAPTER 4. Management of Unclaimed Property (§ 1360)

- ARTICLE 1. General Provisions § 1360
- ARTICLE 2. Powers of the Controller § 1365
- ARTICLE 3. Sale or Disposal of Property § 1370
- ARTICLE 4. Disposal of Proceeds of Sale or Lease § 1390

CHAPTER 5. Escheat Proceedings (§ 1410)

- ARTICLE 1. Escheat Proceedings on Unclaimed Property § 1410
- ARTICLE 2. Escheat by Notice and Publication § 1415
- ARTICLE 3. Escheat Proceedings in Decedents' Estates § 1420
- ARTICLE 4. Permanent Escheat § 1430

Only CCP 1420 property

CHAPTER 6. Disposition of Unclaimed Property (§ 1440)

- ARTICLE 1. Estates of Deceased Persons § 1440
- ARTICLE 2. Abandoned Property § 1460
- ARTICLE 3-15. [Repealed]

CHAPTER 7. Unclaimed Property Law (§ 1500)

- ARTICLE 1. Short Title; Definitions; Application § 1500
- ARTICLE 2. Escheat of Unclaimed Personal Property § 1510
- ARTICLE 3. Identification of Escheated Property § 1530
- ARTICLE 4. Payment of Claims § 1540
- ARTICLE 5. Administration of Unclaimed Property § 1560
- ARTICLE 6. Compliance and Enforcement § 1570
- ARTICLE 7. Miscellaneous § 1580

CHAPTER 8. Property in Custody of Federal Officers, Agencies, and Departments § 1600

TITLE 10a. Revised Uniform Reciprocal Enforcement of Support Act of

DEERING'S CIVIL PROCEDURE

§ 1353. Action to determine title to property held by State; Jurisdiction and venue; Who may sue; Verification and contents of petition; Certification of court. Except as otherwise provided in Sections 401 or 1352, whenever money or other property is deposited in the State Treasury under the provisions of this title, and, except as otherwise provided by law, when there is in the possession of the State or its officers any money or other property which is to be held for third persons or the title to which has vested in the State subject to the rights of third persons, the Superior Court of the County of Sacramento shall have full and exclusive jurisdiction to determine the title to such money or other property and all claims thereto.

If the period in which such money or other property may be claimed by a person entitled thereto has not terminated, such period and person being prescribed by law, any such person may file a petition in the Superior Court of the County of Sacramento, or as provided in Section 401, showing his claim or right to the money or other property or the proceeds thereof, or any portion thereof.

The petition shall be verified, and, among other things, must, insofar as they are applicable or material to the matters at issue, state the facts required to be stated in a petition filed under Section 1355. If the money or other property at issue did not come into the possession of the State or its officers in connection with estates of deceased persons, the petition shall, in addition to the foregoing facts, state any material facts necessary to establish a prima facie right or title in the petitioner. Upon the filing of the petition, the same proceedings shall be had as are required in Section 1355.

If, upon trial of the issues, the court is satisfied of the claimant's right or title to the money or other property claimed, it shall grant him a certificate to that effect under its seal. Upon presentation of such certificate, the Controller shall draw his warrant on the Treasurer for the amount of money covered thereby, and if the certificate covers any property other than money, a certified copy of the certificate filed with the officer of the State having possession of the property shall serve as sufficient authority to the officer for the delivery of such property to the claimant. Added Stats 1951 ch 1708 § 5.

Cal Jur 3d Decedents' Estates § 714, Venue § 36.

This applies to property coming out of probate. Probate Code 1027, 11900; 1060/11850

This applies to property not coming out of probate, CCP1420

See the "not" criterion

SCHAEFER-NEVADA, INC.

J. Michael Schaefer, Secretary-Treasurer
1101 Saint Paul St. #712
Baltimore, Md. 21202

Tel.&Fax (443)708-4710
Cell (410)302-5005
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October 29, 2007

Law Revision Commission
RECEIVED

NOV -2 2007

California. Law Revision Commission
4000 Middlefield Rd. Room D-1
Palo Alto, Ca. 94303-4739

File: _____

Re: Requirement for non-party signature on **post-summons-service** services

For over a decade I have contacted Cal. State Bar presidents and the Cal. Judicial Council about what I find as a horrible inconsistency between state and federal practice, and state v. state practice, and in exasperation come to your office upon referral of Francisco Gomez, office of the State Bar Executive Director.

1. There is a big difference between proof-of-service of a Summons(creating jurisdiction over the parties) and the multitude of subsequent pleadings—notice of motions, opposition, change of address, offer of compromise, requests for extension, declarations, etc. etc. etc. Cal. CCP does not recognize this!!
2. **In federal practice, in Nevada practice, in Maryland practice**, jurisdictions where I do a lot of Pro Se business, it MATTERS NOT who signs proof of service, so long as they are of legal age. Nevada used to require citizenship but US v. SULLIVAN put that issue to rest, voiding a citizenship requirement for one to take the Connecticut Bar. A party, a non-party, can sign under penalty of perjury. As to the post-summons-service cascade of pleadings only(service of a summons still requires a nonparty). Strangely, the Subpoena forms approved by CJC appear to let anyone, even a party, sign proof of service, and I do.
3. Some big firms ignore the requirement, once Luce Forward Hamilton & Scripps served me with pleadings at a stale address(I got them), when I called the employee signing, was told she had left the firm six months prior, they were using her pre-signed. I end up getting neighbors, Kinko's employees, man on the street, to sign proof-of-service on a motion, address change, etc. when dealing with California Courts. We should be consistent with Federal practice. Will I live long enough to see it? Am 70 and this is a constant problem as I manage millions in assets that provoke small claims Pro Se litigation. Please evaluate.



EX 48

Brenton N. Ver Ploeg
R. Hugh Lumpkin
Stephen A. Marino, Jr.
Eileen L. Parsons
Jason S. Mazer

Christine A. Gudaitis
Meghan C. Moore
Meredith A. McCardle
Michael F. Huber
Cristina M. Lopez
Jacqueline C. Ledón

Andrew L. Gordon, Of Counsel

LAW OFFICES OF

VER PLOEG &
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website www.vpl-law.com

June 27, 2007

Law Revision Commission
RECEIVED

JUL -2 2007

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

File: 2,3,1

Re: **Linda Nee**
Our File No.: I500-251

Dear Sirs:

Pursuant to the suggestion of the Department of Insurance, I am enclosing herewith a package of self-explanatory documents concerning the constitutionality of the non-resident prohibition in California Insurance Code § 1833. This letter is not a request for action, however, as none is required unless Ms. Nee is not sent a license application, in which our resort would be to the courts rather than the legislature.

Just the same, the residency requirement contained in this provision is obviously an anachronism and should be removed.

Sincerely yours,



Brenton N. Ver Ploeg
California Bar No. 58534

Encls.

Cc: Linda Nee
66342_1.DOC

Brenton N. Ver Ploeg
R. Hugh Lumpkin
Stephen A. Marino, Jr.
Eileen L. Parsons
Jason S. Mazer

Christine A. Gudaitis
Meghan C. Moore
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e-mail vpl-law@vpl-law.com
website www.vpl-law.com

May 15, 2007

Barbara Love
Senior Insurance Compliance Officer
State of California
Department of Insurance
Consumer Services and Market Conduct Branch
Claims Services Bureau
300 South Spring Street
Los Angeles, CA 90013

Re: **Linda Nee**

Dear Ms. Love:

I represent Ms. Linda Nee in connection with your letter to her of September 8, 2006, concerning the above-named insured, as well as the letter of Richard Clemson of your department dated February 9, 2007. Collectively, the department has taken the position that Ms. Nee may not advise California claimants concerning disability claim issues because she does not have a license issued pursuant to California Insurance Code §1844.

Up to this point, we agree. My difficulty with the department's position is its refusal to offer Ms. Nee, who has a lifetime of considerable experience in the disability insurance industry, and who presumably could easily qualify for a license, with the opportunity to qualify. Although we are obviously aware that the statute facially restricts licensure to California residents, the unconstitutional nature of this statute seems so obvious that enforcement of that provision in the face of a qualified potential applicant is confusing. If the statute barred African Americans from licensure, would the Department comply?

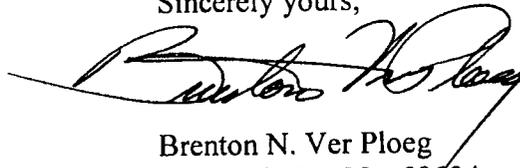
Since I don't believe Ms. Nee is in a special classification, the constitutional requirement seems to require that California have a rational basis for restricting licensure solely to California residents. *Warden v. State Bar of Cal.*, 982 P.2d 154, 163 (Cal. 1999). My purpose in writing is accordingly to request that your department either act to license qualified non-residents or, in the alternative, provide us with a written explanation for what you believe the rational basis is for this restriction so that the issue may be crystallized for further resolution.

Barbara Love
May 15, 2007
Page 2 of 2

Residency requirements for professional licenses have, as far as I know, been found unconstitutional on a virtually universal basis, and California law going back to 1935 has voided such requirements, albeit in a different context. *Abe v. Fish & Game Comm'n of Cal.*, 49 P.2d 608, 610-11 (Cal. Dist. Ct. App. 1935) (finding requirement of a commercial fishing license "void and ineffective in so far as it discriminates between residents and nonresidents of this state," and noting that the "discrimination thus attempted is much more onerous than a mere inequality in taxation, amounting, as it does, to an absolute prohibition"). Some time ago, of course, the United States Supreme Court found residency restrictions on bar licensure to be unconstitutional, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985), and California appellate and 9th Circuit decisions have essentially expressed identical skepticism towards the residency requirement you now seek to enforce against Ms. Nee.

I very much thank you for your attention to this matter, and look forward to your response.

Sincerely yours,



Brenton N. Ver Ploeg
California Bar No. 58534

Cc: Linda Nee
62992_1.DOC

CALIFORNIA LAW REVISION COMMISSION

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



December 22, 2006

Ron Diedrich, Director
Office of Administrative Hearings
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231

Re: Scheduling of an Administrative Hearing

Dear Director Diedrich:

The California Law Revision Commission has recently been contacted regarding the procedure that the Office of Administrative Hearings uses in scheduling an administrative hearing. Our understanding is that OAH often schedules a hearing based solely on input from the agency, without contacting the respondent. Apparently, an agency is only required to contact the respondent about available dates if the agency makes a request for preferred hearing dates. See Cal. Code Regs., tit. 1, § 1018(a)(6). As discussed in the enclosed materials, this procedure may be both inefficient and unfair to the respondent.

In its annual review of new topics and priorities, the Commission considered whether to study this matter in 2007 and possibly develop legislation on it. The Commission instead decided to contact you and suggest that OAH reexamine the existing method of scheduling an administrative hearing.

I trust that you will look into this matter and handle it appropriately. I would appreciate hearing what OAH decides to do.

Sincerely,

A handwritten signature in black ink, appearing to read "David Huebner".

David Huebner, Chair
California Law Revision Commission

File: 2.3.1

Enc. MM06-36, pp. 1-2, 28-30 & Ex. pp. 11-14; MM06-36s1, pp. 1-3 & Ex. pp. 6-10

cc (w/enc.): Prof. Michael Asimow

Thomas Lasken

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