

Admin.

December 5, 2008

Memorandum 2008-54

New Topics and Priorities

At the October 2008 meeting, the Commission made several decisions on its priorities for work in 2009. However, some decisions were postponed subject to the receipt of further information from the staff. Specifically, the Commission directed the staff to make the following inquiries:

- How common is it for an unrecorded option to cause a problem under Civil Code Section 884.010 (part of the Marketable Title Act)?
- Are there any legal impediments to the electronic submission of information to state government?

In addition, the Commission directed the staff to make informal inquiries with the Legislature to determine whether there are topics that the Commission should study on a priority basis.

This memorandum reports on the results of those inquiries. It also reports on a legislative request that the Commission study the application of the Government Claims Act to charter schools.

Unrecorded Options and the Marketable Title Act

As was explained in Memorandum 2008-40, at pages 28-29, there appears to be a defect in Civil Code Section 884.010, which was originally added on the Commission's recommendation. See *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401, 403 (1982).

Section 884.010 provides as follows:

If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:

- (a) Six months after the option expires according to its terms.

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.

(b) If the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

The problem is that the section is triggered by a recorded instrument that gives *constructive notice* of the option, which need not be the option itself. In that case, a person reviewing the title records will not know whether the option contains an expiration term. That would make it impossible to determine the expiration date under Section 884.010, unless the off-record option instrument could also be located. That appears to defeat the purpose of the section, which is to provide an expiration date that is determinable without reference to off-record documents.

In Memorandum 2008-40, the staff recommended that the Commission study this problem in 2009. However, before making a decision on that recommendation, the Commission was interested to know the extent to which this is seen as a real problem by those in the title insurance industry.

The staff informally contacted representatives of the California Land Title Association ("CLTA"). CLTA's legislative committee considered the issue and indicated that CLTA would like the Commission to study the issue: "It would be an improvement on the CLRC original act and welcomed by the industry." Email from Craig Page to Brian Hebert (November 3, 2008).

Given this confirmation that the title industry sees the existing gap in the coverage of Section 884.010 to be a problem for practitioners, **the staff renews its recommendation that the Commission study the problem in 2009.** Although the problem appears to be small in scope, the study would further the Commission's general preference to fix problems that are identified in statutes enacted on Commission recommendation.

Electronic Submissions to State Government

In Memorandum 2008-40, at pages 25-26 and 35, the staff raised the possibility of seeking legislative authority to study the law governing electronic submissions to state government. Before deciding on whether to do so, the Commission directed the staff to make further inquiries to determine whether existing law is causing any problems in this area.

The staff has scheduled a meeting with representatives of the state's Chief Information Officer. Unfortunately, that meeting will not take place until after the Commission's December 2008 meeting.

This is a complicated legal and technical issue. Electronic submissions are generally governed by California's version of the Uniform Electronic Transactions Act ("UETA"). See Civ. Code §§ 1633.1-1633.17. The authentication of electronically submitted signatures is governed by both state law (Gov't Code § 16.5) and federal law (Electronic Signatures in Global and National Commerce Act ("E-SIGN"); 15 U.S.C. §§ 7001-7006, 7021, 7031). The intersection is complex and involves potentially difficult preemption issues.

The staff will continue to study the operation of these laws, in consultation with state information technology officials, as time permits. However, the subject is too complex and important to rush. **The staff therefore recommends that the matter be revisited in next year's new topics memorandum, with a full report of the staff's findings on the issue.**

Charter Schools and the Government Claims Act

AB 1868 (Walters) would have assigned the Commission responsibility for preparing a report on the Government Claims Act and its application to charter schools. The bill was not approved by the Legislature.

Nonetheless, the staff recently received a letter from Assembly Member Dave Jones, as Chair of the Assembly Committee on Judiciary, requesting that the Commission take up the study as outlined in AB 1868.

Unfortunately, the Commission does not currently have the legal authority to study that topic. The Commission is expressly limited to studying topics that have been authorized by concurrent resolution or statute. See Gov't Code § 8293. The Government Claims Act and charter schools are not currently authorized study topics.

The staff met with committee staff to express our regrets and explain why we could not conduct the study at this time. The staff made clear that the Commission would be happy to work on the subject if a concurrent resolution or statute were enacted authorizing us to do so. That informal communication was formalized in a letter from Commission Chair Pamela L. Hemminger to Assembly Member Dave Jones. See Exhibit p. 1.

Legislative Inquiries

The staff made informal inquiries with legislative staff as to whether there are any current subjects requiring study that would be a good fit for the Commission's process and the Legislature's priorities. We have not yet received any suggestions.

If suggestions are received before the December meeting, the staff will discuss them at the meeting.

If the Legislature does not suggest any new studies for the Commission in 2009, the staff may be able to take on an additional project. If so, the staff would recommend that the Commission start work on the clarification of statutes governing the place of trial in a civil case. Authority to conduct this study was added in 2007. See 2007 Cal. Stat. res. ch. 100 (authorizing the Commission to study “[w]hether the law governing the place of trial in a civil case should be revised.”). There would be no deadline for completion of this study, so it could be worked on as resources permits, without disrupting higher priority work.

Respectfully submitted,

Brian Hebert
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

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916-739-7071



December 1, 2008

Assembly Member Dave Jones
Chair, Assembly Judiciary Committee
1020 "N" Street, Room 104
Sacramento, CA 95814

Re: Charter Schools and the Government Claims Act

Dear Assembly Member Jones:

I received a copy of your letter dated November 11, 2008, requesting that the Commission study the application of the Government Claims Act to charter schools, with the goal being the submission of a report by May 2009.

I sincerely wish that we could assist you with this project. Unfortunately, the Commission does not currently have the necessary legal authority to conduct such a study.

The statute creating the Law Revision Commission circumscribes our authority, limiting us to the study of topics that have been expressly authorized by concurrent resolution or statute. See Gov't Code § 8293. Unfortunately, there is currently no resolution or statute authorizing the Commission to study the Government Claims Act or charter schools. Before the Commission could lawfully study those topics, the Legislature would need to enact a concurrent resolution or statute authorizing us to do so.

If an authorizing resolution or statute is introduced, we would respectfully request that it permit us at least a year to complete the study. It would be possible for us to prepare a report in less time than that, but much of the benefit of the Commission's process would be lost (because of the truncated opportunity for public deliberation and consideration of stakeholder input).

If you have any questions about these matters, please contact our Executive Secretary, Brian Hebert, at 916-739-7071.

Sincerely,

A handwritten signature in black ink, appearing to read "Pamela L. Hemminger".
Pamela L. Hemminger
Chair

cc: Assembly Member Mike Feuer, Incoming Assembly Judiciary Chair
Assembly Member Mimi Walters
Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mark Redmond, Republican Counsel, Assembly Judiciary Committee

File: 2.1.7

EX 1