Admin. October 7, 2009

Memorandum 2009-38

New Topics and Priorities

Each fall, the Commission reviews its current program of work, determines what its priorities will be for the next year, and decides whether to request that topics be added to or deleted from its legislatively enacted Calendar of Topics Authorized for Study ("Calendar of Topics").

To those ends, this memorandum summarizes the status of topics that the Legislature has directed the Commission to study, other topics that the Commission is actively studying, topics that the Commission has previously expressed an interest in studying, and new topics that have been suggested in the last year. 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 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:

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.

PREFATORY NOTE

In reviewing this memorandum, Commissioners and other persons should bear in mind that the Commission's resources are very limited, its existing workload is substantial, and it must continue to produce a valuable work-product to survive in today's economy.

The Commission has only a tiny staff, consisting of four paid attorneys, one temporary volunteer attorney, a temporary student intern, one secretary, and a half-time administrative assistant. The staff is already subject to three furlough days per month, and every possible cost-saving measure short of layoffs has already been taken. Further budget cutbacks are quite possible, and necessarily will result in a reduction of staff resources.

At the same time, it is essential that the Commission continue to demonstrate its value to the state by producing high quality reports that significantly improve the law and benefit the citizens of California. It would not be enough to pontificate, without achieving effective reform.

To accomplish what it needs to do, **the Commission must use its resources wisely, focusing on projects that serve the Legislature's needs or appear likely to lead to helpful changes in the law.** The Commission cannot afford to spend time on topics that are unlikely to produce a good result.

COMMISSION AUTHORITY

The Commission's enabling statute recognizes two types of topics the Commission is authorized to study: (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, by statute or concurrent resolution. Gov't Code § 8293.

In the past, the bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Once 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 have become much more common in recent years. Many of the Commission's recent studies were directly assigned by the Legislature, not requested by the Commission.

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. They are described below.

Donative Transfer Restrictions

In 2006, the Commission was directed by the Legislature to study the operation and effectiveness of Probate Code provisions that create a presumption of menace, duress, fraud, or undue influence when a gift is made to certain specified types of persons. 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)). The Commission completed its final report on this topic in compliance with the due date of January 1, 2009. **A bill to implement the Commission's recommendation is pending.** See SB 105 (Harman).

Deadly Weapons

Another 2006 bill directed the Commission to study the statutes relating to control of deadly weapons. 2006 Cal. Stat. res. ch. 128, (ACR 73 (McCarthy)). The objective was to propose legislation that will clean up and clarify the statutes, without making substantive changes. The Commission completed its final report on this topic in compliance with the due date of July 1, 2009. **Legislation to implement the Commission's recommendation has not yet been introduced.** The staff is seeking guidance from legislative contacts on whether to introduce a bill in 2010, or wait until 2011, when the bill could proceed as a two-year bill if needed.

Trial Court Unification

Government Code Section 70219 directs the Commission and the Judicial Council to study certain topics identified in the Commission's report on *Trial*

Court Unification: Revision of Codes, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

The Commission has completed work on all but one of the topics for which it has primary responsibility. The remaining topic is publication of legal notice in a county with a unified superior court. The Commission has been deferring work on that study until interested parties gain experience with legal publication in a unified superior court. **The topic may now be ripe for consideration, when staff resources permit.**

The Commission's report also called for a joint study with the Judicial Council reexamining the three-track system for civil cases (traditional superior court cases, traditional municipal court cases, and small claims cases) in light of unification. Under this rubric, the Commission completed two joint projects. The Commission also did extensive work on two other projects: (1) appellate and writ review under trial court unification, and (2) equitable relief in a limited civil case. For details, see Memorandum 2008-40, pp. 3-4. **Neither of these topics would be appropriate to pursue while the state budget is shaky and the Commission has no funds to hire a consultant.**

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, four substantial bills have been enacted on Commission recommendation. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43; 2008 Cal. Stat. ch. 56.

Further work is in progress, and some issues are not yet ripe for consideration. **The Commission should continue its work in this area.**

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the 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.

Code of Civil Procedure Section 703.120(a) requires the Commission to review the statutory exemptions from enforcement of money judgments, and recommend any changes in exempt amounts that appear proper, every ten years.

In 2003, the Commission completed its second decennial review of these exemptions. Legislation recommended by the Commission was enacted. See 2003 Cal. Stat. ch. 379. The third decennial review will be due in 2013.

No new action on this topic is required at this time.

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. The Commission's recommendation on *Technical and Minor Substantive Statutory Corrections: References to Recording Technology* was enacted earlier this year.

No new action on this topic is required at this time.

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 propose legislation to effectuate these recommendations.

No new action on this topic is required at this time.

NEW LEGISLATIVE ASSIGNMENTS

Charter School as a Public Entity

As passed by the Legislature, Assembly Concurrent Resolution 49 (Evans) assigns the following new topic to the Commission:

> Analysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code ....

See 2009 Cal. Stat. res. ch. 98. The Legislature did not specify a due date for this study, but presumably it would like the work to commence promptly. **The Commission should begin work on this study without delay and should give it high priority.**

CALENDAR OF TOPICS

This section of this memorandum reviews the status of matters listed in the Commission's Calendar of Topics, which currently includes 21 topics, plus the new charter school study described above. See 2009 Cal. Stat. res. ch. 98. A precise description of each topic is attached to this memorandum as Exhibit pages 1-3. On a number of the listed topics, the Commission has completed work, but the topic is retained in the Calendar in case corrective legislation is needed in the future.

Each topic in the Calendar is discussed below. The discussion indicates the status of the topic.

In a number of instances, we also describe some possible areas of future work, which have been raised in previous years and retained for further consideration. New suggestions are discussed later in this memorandum.

1. Creditor's Remedies

Beginning in 1971, the Commission has made a series of recommendations covering specific aspects of creditor's remedies. In 1982, the Commission obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of this statute, the Commission has submitted a number of narrower recommendations on this topic to the Legislature.

Possible subjects for study under this topic are discussed below.

Judicial and Nonjudicial Foreclosure of Real Property Liens

The Commission has recognized that foreclosure is a topic in need of work. Nevertheless, the Commission has consistently deferred undertaking a project on this subject, because of the magnitude, complexity, and controversy involved in that area of the law.

In recent years, the Commission has received suggestions from a number of sources regarding foreclosure procedure, including several suggestions from former Commission member Ed Regalia. See Memorandum 2006-36, pp. 21-22 & Exhibit pp. 44-60; Memorandum 2005-29, p. 20; Memorandum 2002-17, p. 5 & Exhibit p. 47; Memorandum 2001-4, Exhibit pp. 1-2.

Pursuant to a Commission directive, the staff has also been monitoring developments relating to the bad faith waste exception to the antideficiency laws (which preclude some creditors from seeking a deficiency judgment when the sale price of a foreclosed property is insufficient to fully satisfy the debt for

which the property was security). See Minutes (November 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.

Given the current economic crisis, the Legislature has been working on various foreclosure-related reforms, as has the federal government. It would be best to wait for that process to play out. **It does not appear to be a good time to commence a study of this subject, unless the Legislature directs the Commission to conduct such a study.**

Assignments for the Benefit of Creditors

In 1996, the Commission decided to study whether to codify, clarify, or change the law governing general assignments made for the benefit of creditors. The Commission indicated that such a study might also include consideration of whether or how this procedure might be applied to a reorganization or liquidation of a small to medium sized business.

A general assignment for the benefit of creditors is a largely common law cooperative procedure in which an insolvent debtor assigns all assets to an assignee, who then distributes the assets to the debtor's creditors in some pro rata fashion. It is typically used as an alternative to a bankruptcy proceeding.

In 1997, the staff recommended against a general codification of the law governing general assignments. This recommendation was based on stakeholder input, as well as a prior Commission study of this subject, which had reached the same conclusion. The stakeholder input suggested that the law was functioning well, and that there was no need for a statute. See Memorandum 1997-7 & First Supplement to Memorandum 1997-7.

The staff recommended instead that it might be possible to identify and address specific problems with the operation of the general assignment law.

With that in mind, the Commission hired attorney David Gould of Los Angeles to prepare a background study on this topic. Mr. Gould has prepared a summary of existing law, but has not yet identified any specific problems with the law. **Until Mr. Gould completes that portion of his study, action on this topic would be premature.**

2. Probate Code

The Commission drafted the current version of the Probate Code in 1990. The Commission continues to monitor experience under the code, and make occasional recommendations.

A number of possible subjects for study under this topic are discussed below.

Creditor's 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 has not addressed the treatment of a decedent's creditors in the context of other types of nonprobate transfers, such as a revocable trust.

In October 2007, the Commission accepted an offer from the Commission's former Executive Secretary, Nathaniel Sterling, to prepare a background study on this topic. Mr. Sterling has been making progress on his report and expects to complete it by next spring. **The Commission should begin work on this topic soon after he finalizes his report,** so that the report does not become stale before the Commission considers it**.**

Application of Family Protection Provisions to Nonprobate Transfers

Should the various family protections applicable to an estate in probate, 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. However, the Commission determined at that time that "the problem should be addressed globally, not in the context of an individual type of nonprobate transfer instrument." *Id*. at 185.

The background study Mr. Sterling is preparing will also address this topic.

Presumptively Disqualified Fiduciaries

Probate Code Section 21350 establishes a presumption of menace, duress, fraud, or undue influence when a donative instrument makes a gift to specified types of "disqualified persons." Probate Code Section 15642 provides for disqualification of a trustee if the trustee is a "disqualified person" for the purpose of Section 21350. In April, the Commission began studying whether the rule in Section 15642 should be expanded to apply to other types of fiduciaries who are "disqualified persons" for the purposes of Section 21350.

The Commission put its study on hold, however, because the bill to implement its recommendation on donative transfer restrictions (SB 105 (Harman)) became a two-year bill, and that bill has implications as to presumptively disqualified fiduciaries. **If desired, the Commission could reactivate this study once the fate of SB 105 becomes clear, which should occur by mid-2010.**

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, thereafter began preparing a report on how California law compares with the Uniform Trust Code.

The Commission originally funded Professor English's work, but had to cancel the contract due to budget cuts. The State Bar Trusts and Estates Section agreed to fund the research instead. We recently learned, however, that Prof. English will not be preparing the report after all, due to other commitments. The Trust and Estates Section has not been able to find anyone else to do the project.

This type of project would be difficult for the staff to do without the benefit of a background report prepared by an expert in the field. **Until such a report is prepared, we would remove this matter from further consideration.**

Uniform Custodial Trust Act

In 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.

California has not yet adopted the Uniform Custodial Trust Act, so the matter remains an appropriate topic for study.

3. Real and Personal Property

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

A few subjects under this umbrella are discussed below.

Mechanics Lien Law

In 2008, the Commission recommended a complete recodification of mechanics lien law. A bill implementing the Commission's recommendation, SB 1691 (Lowenthal), was approved by the Legislature, but was vetoed by the Governor (based on timing issues relating to the 2008 state budget). **That recommendation was reintroduced in the Legislature in 2009, and is pending as a two-year bill (SB 189 (Lowenthal)).**

In preparing its 2008 recommendation in this matter, the Commission deferred consideration of several possible substantive improvements to existing mechanics lien law. The Commission's overall view was that these proposals were better addressed after a reorganization of the existing statute had been enacted. They could then be considered in the context of the recodified statute.

These suggestions included:

- Clarify the application of mechanics lien law to "hybrid" projects (improvements to publicly owned property that are contracted for by private developers).
- Clarify the application of mechanics lien law to persons that provide work after "completion" of a work of improvement.
- Clarify the rights and responsibilities of multiple owners of a single improvement (including successive owners while construction is ongoing).
- Clarify the application of mechanics lien law to common area within a common interest development.
- Study the feasibility of a cause of action for damages or other statutory consequence to deter the recording of a false claim of lien.
- Study whether lien rights should be assignable.
- Study whether a "substantial compliance" provision should be applicable to mechanics lien notices, to excuse minor formal errors in notices.

- Study whether to allow a surety that has provided a payment bond on a project to give a stop payment notice.
- Add detail to the security requirements applicable to an owner of specified large projects.

These suggestions should be kept on hold until the fate of SB 189 is resolved. It would be unnecessarily complicated to develop new reform proposals while the recodification bill is being considered.

Marketable Title Act: Unexercised Option

The Commission is studying Civil Code Section 884.010, relating to recorded notice of an option to purchase real property. Memorandum 2009-43, scheduled for consideration at the October meeting, discusses comments on the Commission's tentative recommendation. **The Commission should be able to complete this narrow project soon, and probably seek introduction of legislation in 2010.**

4. Family Law

The Family Code was drafted by the Commission in 1992. Since then, the general topic of family law has been continued on the Commission's agenda for ongoing review.

Possible subjects for study under this topic are discussed below.

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. Yet 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.

If the Commission decided to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36. In particular, the Commission could study circumstances in which the right to support can be waived. See *In re Marriage of Pendleton and Fireman*, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).

This topic may be an appropriate matter for the Commission to study in the future. However, the Uniform Law Commission just began a study of marital

and premarital agreements. **It would be better to consider this topic after the Uniform Law Commission completes its study than to commence such work now.**

5. Discovery in Civil Cases

The Commission has been actively studying civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. A number of reforms have already been enacted, most recently the Commission's recommendation on *Deposition in Out-of-State Litigation*, 37 Cal. L. Revision Comm'n Reports 99 (2007). No new proposal is in progress at this time.

The Commission has received numerous suggestions from interested persons, and has also identified other topics to address. 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.

Due to staffing considerations, we deferred further work on this study until after completion of the deadly weapons study. The deadly weapons report is now complete, but it is unclear how time-consuming the legislative phase of that project will be. **If time permits, it might make sense to reactivate the discovery study sometime in the coming year.** At that time, we can assess which discovery topic to pursue next.

6. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for different types of public improvements. The statutes overlap, duplicate each other, and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980, with the objective that the Commission might be able to develop one or more unified statutes to replace the variety of specific statutes that now exist.

The Commission has not commenced work on this study, and since it was first authorized, has not heard of any serious problems caused by the existing multiplicity of special assessment statutes. While development of a unified statute probably would be worthwhile, it would involve mostly non-substantive recodification on a large scale. Recent experience shows that projects of that sort can take years to complete and can be unexpectedly difficult to successfully enact.

In light of other demands on Commission and staff resources, **the staff does not recommend that the Commission undertake this project at this time**. Further, when the next resolution relating to the Commission's Calendar of Topics is introduced in the Legislature, **the Commission should consider requesting that the topic be deleted from its Calendar.**

7. Rights and Disabilities of Minor and Incompetent Persons

Since authorization of this study in 1979, the Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons. There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case such a proposal is presented in the future.**

8. Evidence

The Evidence Code was enacted in 1965 on recommendation of the Commission. Since then, the Commission has had continuing authority to study issues relating to the Evidence Code. The Commission has made numerous recommendations on evidence issues, most of which have been enacted.

In the past year, the Commission completed its study of the attorney-client privilege after the client's death. The recommended legislation was enacted as AB 1163 (Tran), 2009 Cal. Stat. ch. 8.

The Commission has on hand an extensive background study prepared by Prof. Miguel Méndez of Stanford Law School, which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. A number of years ago, the Commission began to examine some topics covered in the background study, but encountered resistance from within the Legislature and suspended its work in 2005.

The staff later compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial. See Memorandum 2006-36, Exhibit pp. 70-71. The Commission directed the staff to seek guidance from the judiciary committees regarding whether to pursue those issues. The staff explored this matter to some extent, without a clear resolution. **Unless the Commission otherwise directs, we will raise the matter with the judiciary committees again, when it appears appropriate.**

9. 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.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics in case such a proposal is presented in the future.**

10. 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.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case any adjustments are needed in the laws enacted on Commission recommendation.**

11. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988, pursuant to a suggestion of the California Judges Association ("CJA"). The staff did a substantial amount of preliminary work on the topic in 1990, but the work was suspended pending guidance from CJA on specific problems requiring attention, which were never identified.

In 1999, 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 other demands on staff and Commission time.

The Commission has also considered studying the possibility of standardizing various attorney's fee statutes.

This topic might be appropriate for study at some time in the future, but is not a good fit with staff resources at present. However, the Commission has received one new suggestion relating to attorney's fees, which appears to present a relatively narrow question. That suggestion is discussed later in this memorandum, along with the other suggestions received in the past year.

12. Uniform Unincorporated Nonprofit Association Act

In 1993, the Commission was authorized to study whether California should enact the Uniform Unincorporated Nonprofit Association Act. The Commission ultimately decided not to recommend enactment, but made other recommendations to clarify the status and governance of unincorporated associations, which were enacted.

There are no active proposals relating to this topic before the Commission at this time. But the Uniform Law Commission revised the Uniform Unincorporated Nonprofit Association Act in July 2008. At some point, it may be appropriate to examine the revised act and consider whether to adopt any aspect of it in California. In any event, **the Commission should retain the topic on its Calendar of Topics, in case issues arise relating to provisions enacted on its recommendation**.

13. Trial Court Unification

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

Two projects in this area have also been directly assigned by the Legislature. They are discussed under "Current Legislative Assignments," above.

14. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, which includes a study of 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, the staff has 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. However, in 2000, related federal legislation was enacted, the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). 15 U.S.C. 7001-7006, 7021, 7031.

The interrelationship of the two legislative acts is complex, but it appears E-SIGN may preempt at least some aspects of state UETA law. As yet, the courts have not resolved this complicated issue.

The staff will continue to monitor this situation, but does not recommend commencing a project in this area until the courts have offered more guidance on the preemption issue.

15. Common Interest Developments

CID law was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission has been actively engaged in a study of various aspects of this topic since that time, and has issued several recommendations.

In 2008, the Commission completed work on a proposed recodification of CID law. A bill that would have implemented the Commission's recommendation was introduced in 2008 (AB 1921 (Saldaña)), but both the bill and the Commission recommendation were withdrawn in order to allow for analysis of late-arising comment. **That work is ongoing, and will consume considerable staff resources in the coming year.**

A catalog of potential new CID topics was presented in Memorandum 2008-28. Of the topics discussed there, the Commission expressed most interest in the concept of developing simplified governance procedures for very small homeowner associations.

The Commission commenced work on that topic in early 2009, focusing on member election procedures. But the Commission quickly encountered stakeholder resistance and decided to table the project, saying it would revisit that decision in its annual review of new topics and priorities. Minutes (April 2009), p. 4.

Having now had time to reflect on the situation, **the staff recommends against reactivating this project.** The stakeholder opposition was significant, and some Commission members also expressed concerns about the approach under consideration. The staff is not optimistic about prospects for this type of reform.

Another topic discussed in Memorandum 2008-28 is clarifying the Davis-Stirling Common Interest Development Act with regard to situations where its application appears to be either inappropriate or unclear. For example, parts of the Act probably should not be applied to an association that is completely non-residential. The Commission began to study non-residential CIDs in late 2008, and is working towards a tentative recommendation. Similar issues include the application of the Act to a development with a road maintenance association but no "common area," a stock cooperative that does not have a recorded

declaration, and an association that is organized as a for-profit corporation. The staff recommends that **the Commission continue to work on these types of issues in the coming year.**

16. Statute of Limitations for Legal Malpractice

A number of years ago, the Commission did extensive work on the statute of limitations for legal malpractice. After circulating both a tentative recommendation and a revised tentative recommendation, the Commission decided that further work probably would be unproductive and discontinued the study without issuing a final recommendation. **The topic remains on the Commission's Calendar of Topics, in case future developments make it worthwhile to recommence work in this area.**

17. 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 study, we have not given it priority. **In light of current constraints on Commission and staff resources, the staff does not recommend that the Commission undertake a project of this scope and complexity at this time.**

18. 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 to work on this matter, but received negative input and the proposal was tabled.

In 2006, the Legislature directed the Commission to study and report on a nonsubstantive reorganization of the statutes governing deadly weapons, which includes criminal sentencing enhancements relating to the possession or use of deadly weapons. That study has now been completed, but the proposed legislation has not yet been introduced in the Legislature. See discussion in "Current Legislative Assignments," above. **In light of its possible relevance to**

the deadly weapons study, the existing authority to study criminal sentencing should be retained.

19. Subdivision Map Act and Mitigation Fee Act

In 2001, a study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics, at the request of the Commission. The objective of the study would be a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

This project would be a massive, mostly nonsubstantive recodification. Recent experience shows that such projects can take several years to complete and may not produce enactable legislation. **In light of current limitations on Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.**

20. Uniform Statute and Rule Construction Act

In 2003, a study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics, at the request of the Commission.

The Commission has previously indicated its intention to give this study a low priority. **The staff does not recommend that the Commission undertake this project at this time.**

21. Venue

In 2007, the Calendar of Topics was revised at the Commission's request, 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. That request was prompted by an unpublished decision in which the Second District Court of Appeal noted that Code of Civil Procedure Section 394, a venue statute, was a "mass of cumbersome phraseology," and that there was a "need for revision and clarification of the venue statutes." See Memorandum 2005-29, Exhibit p. 59. The court of appeal was sufficiently concerned about this matter to direct its clerk to send a copy of its opinion to the Office of Legislative Counsel, which in turn alerted the Commission.

The Commission should begin work in this area when its resources permit. Due to current staffing considerations, however, we are not sure whether it will be possible to commence the study during the coming year.

CARRYOVER SUGGESTION FROM 2007

The Commission retained one suggestion from 2007 for reconsideration again this year.

Electronic Submissions to Government Entities

In 2007, the Civil Committee of the California State Sheriffs' Association ("CSSA") suggested that the Commission study the possibility of amending Code of Civil Procedure Sections 262, 488.030, and 687.010 to accommodate electronic transmission of a creditor's instructions to a sheriff or marshal. See Memorandum 2007-48, 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 were 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. However, further research and analysis would be required in order to determine whether the approach proposed by CSSA's Civil Committee — simply deeming electronic transmission to constitute an electronic signature — would be 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.

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." Memorandum 2007-48, 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 and could be commenced when staff resources permit. If it was broadened into a general study of electronic transmission of documents to government agencies, it would arguably fall within the Commission's authority to study administrative law. **For a study of that magnitude, however, the staff would recommend that the Commission seek specific authority from the Legislature before commencing the work.**

Last year, the Commission expressed some tentative interest in the latter type of study. It directed the staff to "continue to examine the law and practice involved in electronic submissions to state agencies and [to] report its findings in the next memorandum on new topics and priorities." Minutes (Dec. 2008), p. 2.

In December 2008, the staff met with Christy Quinlan, Deputy to the Chief Information Officer for the State of California. The Office of the State Chief Information Officer is a cabinet-level agency with statutory authority over state IT planning, policy, and oversight. See Gov't Code § 11545. In the staff's view, the State CIO's office is the best overall authority on IT practices within state government.

The staff explained that the Commission was interested in learning whether state agencies were experiencing any problems with the laws governing electronic submission of materials. Ms. Quinlan indicated that she was not aware of any problems that would require statutory revisions. She indicated that agencies (including her own office) have been able to implement procedures for electronic submissions without encountering legal obstacles. Ms. Quinlan saw no need for the Commission to study the topic.

Although it is possible that some agencies have experienced problems that have not been reported to the State CIO's office, it seems unlikely that significant problems in this area would have escaped that office's notice. Electronic transactions are increasingly common on state websites (e.g., the DMV provides for online driver's license renewal at www.dmv.ca.gov). If legal obstacles to such systems exist, they should have surfaced by now and would be well known to the State CIO.

On the basis of the feedback from the State CIO's office, **the staff recommends against requesting authority to conduct a broad study of the topic. Instead, the Commission should decide whether to study the narrower issue raised by CSSA.**

During the past year, the Commission received a number of new topic suggestions appropriate for the Commission's consideration. These are analyzed below.

Probate Code

Attorney Cynthia Pollock makes two suggestions relating to probate, which could be studied under the Commission's existing authority.

Ability of Personal Representative to Purchase Estate Property at Auction

The Probate Code imposes special restrictions on the ability of a personal representative to purchase estate property. See Prob. Code §§ 9880-9885. Ms. Pollock believes these restrictions should be loosened with regard to a purchase made at a public auction. Exhibit p. 27.

She points out that "[m]any times the most responsible child is designated personal representative, and is also in a uniquely responsible position to purchase the property." *Id*. In her experience, however, "[m]any times personal representatives are dissuaded from purchasing the property at all, even at auction, allowing the property to go for much less than could be attained." *Id*. She also explains:

> [I]n an auction situation, Probate Code Section 9883 still applies, but should not apply. How is the personal representative to ask for prior permission to enter into a contract when he or she does not even know whether his or her bid will be successful? The result is that some courts are requiring two petitions, one confirming the sale, and one requesting the permission to enter the contract, doubling the expense to estates.

Id. She makes some specific suggestions for how to address these problems. *Id*.

This is a relatively narrow topic, and Ms. Pollock's suggestions are grounded in experience. **The staff recommends referring this topic to the State Bar Trusts and Estates Section for consideration,** because that group has both expertise in the area and interest in studying topics like this one**.**

Creditor's Claim

Ms. Pollock's second suggestion concerns creditors' claims. She notes that "[s]ometimes it is very difficult to ascertain whether a creditor's claim is reasonable." *Id*. at 28. She says that it would be "extremely helpful to have a procedure whereby a personal representative can petition for instructions to

determine the validity of a claim, [rather] than being forced to reject a claim due to inadequate information, and subject himself or herself to possible personal liability for their trouble. *Id*.

The staff appreciates Ms. Pollock's desire for guidance. We are concerned, however, that if there was a formal procedure for seeking instructions on how to handle a creditor's claim, it might be overused, generating unnecessary costs and administrative burdens. In particular, such a procedure could be a waste of judicial resources, because a creditor would not be bound by any ruling in which the creditor was not given an opportunity to be heard. Further, in some of the situations Ms. Pollock describes, it might be possible to obtain the information necessary to determine the validity of the claim through informal means. And so long as a personal representative acts reasonably and in good faith, any liability for a rejected creditor's claim should be a liability of the estate, not the personal representative. **The staff is not convinced that this topic would be an effective use of the Commission's resources.**

Real and Personal Property

One new suggestion relates to real property and could be studied under the Commission's existing authority.

Application of Mechanics Lien Law to Laborers and Express Trust Funds

San Diego attorney Kerry Fennelly and his firm represent "various multi-employer trust funds throughout the state of California." Exhibit p. 15. He raises a number of issues about how mechanics lien law, especially the deadline for recording a mechanics lien, applies to laborers and express trust funds. See *id*. at 15-16.

Like the other substantive suggestions relating to mechanics liens, **Mr. Fennelly's suggestion should be kept on hold until the fate of SB 189 is resolved**. At that time, the Commission could review all of those suggestions, and determine whether to pursue any of them.

Family Law

One new suggestion relates to family law and could be studied under our existing authority.

Child Support Under Family Code Section 3951

Liz Lawrence is "an attorney professionally involved in matters of child support." Exhibit p. 17. She offers her suggestion "as a concerned individual and not as a child support professional." *Id*.

She draws the Commission's attention to Family Code Section 3951, which provides:

> 3951. (a) A parent is not bound to compensate the other parent, or a relative, for the voluntary support of the parent's child, without an agreement for compensation.
>
> (b) A parent is not bound to compensate a stranger for the support of a child who has abandoned the parent without just cause.
>
> (c) Nothing in this section relieves a parent of the obligation to support a child during any period in which the state, county, or other governmental entity provides support for the child.

Ms. Lawrence writes that Section 3951 has

> come to mean in the lower courts that *neither parent is obligated to pay support if the minor child is residing with another relative unless that relative is receiving cash aid through the state welfare dept* (based on section 3951(c)). The lower courts in multiple counties are regularly citing FC sec 3951(a) and Plumas County Dept. of Child Support Services v. Rodriguez (2008) 161 Cal.App.4th 1021 in overturning thousands of dollars worth of child support that would have otherwise been payable to the relative caregivers of hundreds of CA minors who have been placed in situations where their own parents are not able to physically care for them. *Many of these relative caregivers are left with no choice but to seek welfare assistance.* It is not until they do so that child support can be recovered from either parent of the child and then only for the time period when the child remains active cash aid.

Id. (emphasis added).

Ms. Lawrence says that this interpretation "seems completely contrary to the public policy of holding parents accountable for supporting their children, encouraging self-sufficiency and discouraging increased applications for welfare services." *Id*. at 17-18. In her view,

> [i]t seems fair and equitable that a parent should not be made to provide compensation (absent an agreement) to a relative caregiver of their child in addition to fulfilling their statutory duty to support their child by means of a guideline child support amount. But this is not the interpretation that has been given this section. Many courts are simply denying access to support to relative caregivers who are then left with no choice but to apply for cash aid. Why

> would we as a State in financial crisis want this to be our public policy?

Id. at 18 (emphasis in original).

She further states that even if the Legislature disagrees with her assessment of the proper policy, it should clarify the meaning of Section 3951. *Id*. As she puts it, "[w]hether or not in the end we all agree with the legislature's intent is far less important than securing clarification to ensure a common application based on clear direction from our state law-makers." *Id*.

She acknowledges, however, that the matter is controversial. "The camps are clearly divided and the good people of CA are getting caught in the middle with some being made to pay and others not, some receiving the benefit of arrears collected while others go to court only to be told that they are not entitled to a dime, or even worse that they have been overpaid because 3951 never entitled them to support and can now be sued by the parents who overpaid them the support while they cared for the children of those parents." *Id*.

Ms. Lawrence makes a good case for studying Section 3951, to make more clear how it is intended to apply, and perhaps to reexamine the underlying policy considerations. But child support issues are notoriously controversial, and thus tend to be inappropriate for the Commission to study. When a matter turns primarily on a gut-level policy decision, instead of drawing on the legal and drafting expertise of the Commission, elected officials in the Legislature should make the decision outright. There is no point in conducting a Commission study, because the Commission's policy decision may be overridden in the Legislature, and the Commission may invest substantial resources without having anything to show for its efforts.

Having reflected on Ms. Lawrence's suggestion, the staff does not think the Commission is the right entity to pursue the matter. We would urge her to seek out a sympathetic member of the Legislature to pursue it instead.

Discovery in Civil Cases

During the past year, the Commission received a couple of new suggestions relating to civil discovery, which the Commission could study under its existing authority. These include:

- A suggestion from former discovery commissioner Richard Best, relating to subdivisions (a) and (b) of Code of Civil Procedure Section 2017.730. He recommends deleting those provisions as

outdated, "in view of the acceptance of technology by most lawyers." Exhibit p. 12.

- A suggestion from Michol O'Connor regarding correction of a cross-reference in Code of Civil Procedure Section 1985.3. Exhibit p. 26.

In addition, a recent court decision reinforces an earlier suggestion from Michol O'Connor. See *Terry v. Slico*, 175 Cal. App. 4th 352, 95 Cal. Rptr. 3d 900 (2009); email from M. O'Connor to B. Gaal (7/3/07).

The staff will keep these new materials on hand, so that the Commission can consider them together with previously raised suggestions and ideas relating to civil discovery when staff availability permits reactivation of the Commission's study of that topic.

Discovery in Criminal Cases

In May, the staff received an oral inquiry from process server Tony Klein, who provided valuable input in the Commission's study of depositions in out-of-state litigation. That study culminated in the enactment of Code of Civil Procedure Sections 2029.010-2029.900, which are based in part on the Uniform Interstate Depositions and Discovery Act ("UIDDA").

Mr. Klein asked about what procedure would apply if a party wanted to take discovery in California for purposes of a *criminal* case pending outside the state.

That is not a matter the Commission considered, or even was authorized to consider, in its study. Likewise, it is not a matter addressed by UIDDA. See email from R. Long to B. Gaal (9/29/09).

But the question is significant and may be worth examining. To do so, the Commission would need to seek authority from the Legislature, because its current authority is limited to civil discovery. **The Commission should consider the possibility of requesting authority to study this issue,** which is closely related to its previous work on depositions in out-of-state litigation.

Alternative Dispute Resolution

One new suggestion relates to alternative dispute resolution and could be studied under the Commission's existing authority.

Binding Arbitration in Consumer Contracts

Last December, Sam Shabot sent a web feedback form requesting that the Commission "please consider studying the important topic of binding arbitration in consumer contracts of adhesion." He also faxed hundreds of pages of

materials relating to arbitration in consumer contracts, particularly in the real estate context. He asked the staff to post these materials to the Commission's website, so as to "(1) duly encourage discussion of promulgating real estate forms … that are **NOT** biased against consumers and overreach in favor of real estate agents; and (2) to **discourage** binding arbitration in real estate "consumer" contracts of adhesion." Fax from S. Shabot to B. Gaal (12/1/08 @ 12:39 a.m.); see also fax from S. Shabot to B. Gaal (12/1/08 @ 9:59 p.m.); fax from S. Shabot to B. Gaal (12/1/08 @ 11:11 p.m.); fax from S. Shabot to B. Gaal (12/2/08).

Because the Commission's website has limited space and these bulky materials did not relate to any ongoing Commission study, the staff did not post them to the website as requested. We did, however, inform Mr. Shabot that the Commission would consider his suggestion at its next annual review of new topics and priorities. The materials faxed by Mr. Shabot are available in electronic form on request.

The use of binding arbitration in consumer contracts is an important topic, which has been widely discussed and debated. **Nonetheless, the staff recommends against undertaking such a study.** As some Commissioners may recall, the Commission began a study of arbitration only a few years ago, with the benefit of a background study prepared by Prof. Roger Alford of Pepperdine Law School. The Commission quickly terminated that study, because all of the major stakeholders agreed that such a study would not be a good use of Commission resources. See Minutes (Feb. 2006), p. 3. There is no reason to believe that the stakeholders' positions on this point have changed. Moreover, arbitration is better-suited to federal legislation than to state legislation, because of the Federal Arbitration Act and the doctrine of federal preemption. In fact, federal reforms relating to consumer arbitration are currently under consideration. The staff is dubious that the Commission could productively study that topic at this time.

Attorney's Fees

One new suggestion relates to attorney's fees and could be studied under the Commission's existing authority.

Effect of Tender and Deposit Under Civil Code Section 1717

Under Civil Code Section 1717(a),

> [i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to

> enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be *the party prevailing on the contract*, whether he or she is the party specified in the contract or not, *shall be entitled to reasonable attorney's fees in addition to other costs*.

(Emphasis added.) In general, "the party prevailing on the contract" and thus entitled to attorney's fees is "the party who recovered a greater relief in the action on the contract." Civ. Code § 1717(b)(1). There are, however, certain exceptions to this rule, including an exception that applies when the defendant has complied with a tender and deposit procedure:

> Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.
>
> Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated.

Civ. Code § 1717(b)(2).

Lewis diSibio urges the Commission to make clarifications of the tender and deposit procedure under Civil Code Section 1717(b)(2). Exhibit pp. 13-14. In particular, he believes it would be helpful to make clear that the defendant is to tender payment before the commencement of the action. *Id*. He notes that such language was included in a memorandum prepared by Commission staff a number of years ago, which proposed numerous reforms relating to attorney's fees and costs. See Memorandum 2001-17.

Clarification of the tender and deposit procedure under Civil Code Section 1717(b)(2) might be useful. The staff is reluctant to commence a study focusing on this narrow issue, however, because it may interrelate with other issues pertaining to recovery of attorney's fees and costs. We recommend that the Commission **save Mr. diSibio's comments for consideration upon reactivation of the Commission's broader study of award of costs and contractual attorney's fees to the prevailing party.**

Common Interest Developments

One new suggestion relates to common interest developments and could be studied under the Commission's existing authority.

Homeowner Liability for a Judgment Against a CID

Attorney Jim Lingl has submitted a thorough, detailed message raising concerns about homeowner liability for a large monetary judgment against a CID. Exhibit pp. 19-23. He describes three different situations in which such a judgment was entered against a CID due to misconduct by one or more board members or persons hired by the board. *Id*. at 19-20. He says that what these cases have in common is:

> In each case the association's BOD made decisions over which the owner/members had no control. In each case at least some component of the judgment arose from something that the owner/members would not have benefited from under any circumstances. In each case a large percentage of owners actively discouraged or resisted the decisions of their Board of Directors. And in each case, though they were not plaintiffs, defendants, conspirators or tort-feasors, or parties of any kind, the owner/members of each association ended up being the persons obligated to pay off the judgments. They became the involuntary and unknowing "guarantors" of the debts of their community association notwithstanding the requirement that suretyships can only be created by a signed agreement pursuant to CC 2793.

Id. at 20-21. He further says that in each situation, "there have been divorces, heart attacks, returns to smoking and alcoholism, loss of home ownership, and extreme financial hardship as a result of the judgments." *Id*. at 19.

According to Mr. Lingl, in one of the three examples a court appointed a "receiver in aid of execution," who seized *all* of the homeowners' income to pay the judgment and refused to spend *any* money to operate the housing complex." *Id.* at 17. Utilities were turned off, insurance coverage was terminated, and even critical maintenance projects were left undone. *Id*. at 19-20.

The Legislature addressed that situation in 2000 by enacting Civil Code Section 1366(c), which provides:

> (c) *Regular assessments* imposed or collected to perform the obligations of an association under the governing documents or this title *shall be exempt from execution by a judgment creditor of the association only to the extent necessary for the association to perform essential services*, such as paying for utilities and insurance. In determining the appropriateness of an exemption, a court shall

> ensure that only essential services are protected under this subdivision.
>
> This exemption shall not apply to any consensual pledges, liens, or encumbrances that have been approved by the owners of an association, constituting a quorum, casting a majority of the votes at a meeting or election of the association, or to any state tax lien, or to any lien for labor or materials supplied to the common area.

(Emphasis added.) A recent case says that in enacting this provision, "the Legislature did exactly what it set out to do — it protected regular assessments to the extent necessary to insure that homeowners were not deprived of essential services, and at the same time protected the rights of judgment creditors … by allowing them to execute against an association's *special emergency assessments* and, where available, an association's *excess* (nonexempt) regular assessments." *James F. O'Toole Co., Inc. v. Los Angeles Kingsbury Court Owners Ass'n*, 126 Cal. App. 4th 549, 559, 23 Cal. Rptr. 3d 894 (2005) (emphasis in original).

Mr. Lingl does not consider the protection afforded by Section 1366(c) sufficient. Exhibit pp. 19-23. He also points out that insurance might not protect CID members from liability for a judgment, because the amount of coverage may be inadequate, or the judgment may be based on an intentional tort and thus may be excluded from coverage. *Id*. at 21. He proposes a number of possible solutions to the problems he perceives:

(1) Prohibit punitive damage awards against community associations, but allow such claims to be pursued against actual tortfeasors in the community and on the board.

(2) Revise the emergency assessment provisions of Civil Code Section 1366 such that a court could only order such assessments when necessary to protect the CID or to prevent unjust enrichment by the owners.

(3) Limit the maximum amount a homeowner could become liable for in the event of an uninsured judgment against the homeowners' association.

(4) Revise Corporations Code Section 8724 to permit bankrupt associations to dissolve.

(5) Delete Corporations Code Section 7350(c), so as to give meaning to the "corporate shield" that protects shareholders in every other type of corporate activity.

(6) Require insurers to expand "loss assessment" coverage available to owners so that it includes coverage for assessments imposed to satisfy judgments against the association.

Id. at 22. As Mr. Lingl acknowledges in his letter, some of these proposed solutions have already been introduced and defeated in the Legislature. *See id.* at 21-22. He offers to assist the Commission in pursuing such ideas. *Id.* at 23.

On the one hand, Mr. Lingl makes a good case that there is some inequity in requiring a CID member to pay a judgment based on wrongdoing that the member did not commit or support. On the other hand, it may be even more inequitable to let the burden of the wrongdoing fall on an innocent victim instead of spreading that burden among the CID members, who at least collectively bear responsibility for selecting their board members and thus any hiring decisions made by their board. Most of the solutions Mr. Lingl proposes would dilute protection for such a victim; all of them would to some extent involve shifting the burden of responsibility from CID members to someone else. As such, they are likely to be controversial, and it may be questioned whether they represent good policy. **The staff is not optimistic about prospects for developing and obtaining enactment of legislation that would improve the existing situation.** The existing statutory shield for general assessments necessary for the functioning of the community may be the best compromise that is possible.

Civil Procedure

Five of the new suggestions relate to matters of civil procedure that do not fall within any of the existing categories on the Calendar of Topics.

Obsolete Cross-Reference in Code of Civil Procedure Sections 116.820 and 116.780

Jordan Posamentier (Legislative Counsel of the California Judges Association) points out that Code of Civil Procedure Sections 116.780(b) and 116.820 refer to subdivision (d) of Code of Civil Procedure Section 116.780(d). He notes that these cross-references are obsolete, because Section 116.780 no longer has a subdivision (d). Exhibit p. 29.

When correction of a cross-reference appears absolutely straightforward, the staff normally forwards the matter to the Office of Legislative Counsel to fix in the annual bill on maintenance of the codes. Here, however, the problem is slightly more complicated.

Subdivision (d) of Section 116.780 was deleted by 2005 Cal. Stat. ch. 706, § 8. However, the act deleting that provision "appl[ies] prospectively only." See 2005 Cal. Stat. ch. 706, § 41. Some adjustment of the current language is clearly

needed, but it may not be as simple as deleting the references to now non-existent subdivision (d).

This might be a good small project for the Commission, which could perhaps be assigned to a student or volunteer working under staff supervision. Because the project involves a technical issue, it could be undertaken pursuant to the Commission's authority to study technical and minor substantive defects. Gov't Code § 8298. **No further authorization would be necessary.**

Abuse of Anti-SLAPP Statute

Attorney Kurt Berger expresses concern about how the anti-SLAPP statute (Code Civ. Proc. § 425.16) is being used. Exhibit pp. 9-11. He writes:

> As contemplated, the statute is noble. It was enacted ostensibly to allow for the prompt dismissal of non-meritorious lawsuits by way of a special motion to strike. As originally envisioned, the prototypical SLAPP suit involved a powerful plaintiff bullying a weaker defendant who was exercising her right to free speech. Unfortunately, nothing succeeds as planned. The legislative directive that the statute be broadly construed has led to interpretations that make Superior Court and subsequent Appellate decisions totally unpredictable.
>
> The use of 425.16 has devolved into the default first strike for those who defame other citizens, a sort of legal loophole. And why not? Such a defendant's first thought is "Let's file an anti-SLAPP motion and see if we get lucky."

Id. at 9. In short, Mr. Berger is concerned that "CCP § 425.16 has become the shield that people who would libel others hide behind." *Id*. at 11.

Further, he notes that the "mandatory award of attorney fees to a prevailing defendant has spawned a cottage industry of lawyers whose raison d'etre is the collection of exorbitant fees." *Id*. at 10. In his view, the fact that a defendant can use an anti-SLAPP motion to eliminate a lawsuit in its infancy "should be sufficient relief." *Id*. Due to the availability of attorney's fees, however, "[a]n arguably meritorious lawsuit risks punitive costs to the plaintiff if either the Superior or Appellate Court sides with the defendant on an anti-SLAPP motion." *Id*.

Mr. Berger requests that "the Commission look at the statute as it is currently being used, and advise revision of the language that results in the wild variation of interpretation by the courts." *Id*. at 11. He also requests that "the award of attorney fees to defendants be reviewed, and either eliminated, be awarded to the prevailing party, or strictly limited in amount." *Id*.

Like child support issues, however, **the anti-SLAPP statute is notoriously controversial, and thus not a good topic for the Commission to study.** Over the years, a number of individuals have asked the Commission to get involved in the area, and the Commission has always declined because anti-SLAPP issues are divisive and not suited to resolution through the Commission's deliberative process. Mr. Berger's comments go to the core of the anti-SLAPP statute, and thus are particularly likely to generate intense debate over basic policy decisions. That debate should take place among elected officials in the Legislature, not before the Commission. To pursue his ideas, Mr. Berger could try to identify a legislator who is interested in the anti-SLAPP statute and appears to share his general sentiments, and ask that legislator to introduce a bill on the matter.

Sanctions Under Code of Civil Procedure Sections 128.5-128.7

Prof. William Slomanson of Thomas Jefferson School of Law has submitted two suggestions relating to Code of Civil Procedure Sections 128.5-128.7, which relate to the imposition of sanctions.

His first suggestion concerns a cross-reference to Section 128.5 in the anti-SLAPP statute (Code Civ. Proc. § 425.16). Specifically, subdivision (c) of the anti-SLAPP statute provides:

> (c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, *pursuant to Section 128.5*.

(Emphasis added.) Prof. Slomanson suggests replacing the cross-reference to Section 128.5 with a cross-reference to Section 128.7, which establishes a different standard for awarding sanctions. Exhibit p. 32. He explains that Section 128.5 "applies, on its face, only to actions filed *on/before* Dec. 31, 1994." *Id*. (emphasis added.)

However, the courts view the cross-reference to Section 128.5 as reflecting a deliberate legislative policy choice. In *Decker v. U.D. Registry, Inc.*, 105 Cal. App. 4th 1382, 1392, 129 Cal. Rptr. 2d 892 (2003), the court explained:

> Section 128.5 states it applies only to "actions or tactics" arising from "a complaint filed, or a proceeding initiated, on or before December 31, 1994." (§ 128.5, subd. (b)(1).) Despite that restriction, section 425.16, subdivision (c) states that attorney fees to a

> prevailing party on a special motion to strike are awarded "pursuant to Section 128.5." This passage was part of the original anti-SLAPP statute and has remained unchanged. (Stats. 1992, ch. 726, § 2.) *We do not read section 425.16, subdivision (c) as resuscitating section 128.5. Rather, we believe the reference to section 128.5 in section 425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.*

(Emphasis added.)

The California Supreme Court expressly approved this aspect of *Decker* in *Olmstead v. Arthur J. Gallagher & Co.*, 32 Cal. 4th 804, 817-18, 86 P.3d 354, 11 Cal. Rptr. 3d 298 (2004). It said:

> Defendants note that a number of statutes governing special proceedings, some enacted since the 1994 amendment of section 128.5, expressly refer to section 128.5 as the model for awarding sanctions for abusive or frivolous conduct in particular circumstances. This incorporation of section 128.5 in other statutes, defendants assert, demonstrates that section 128.5 retains vitality and that the Legislature did not intend to preclude all general application of section 128.5 to post-1994 cases.
>
> The correct response was given by the Court of Appeal in *Decker v. U.S. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 129 Cal.Rptr.2d 892 (*Decker*). As the court there noted, a cross-reference to section 128.5 in another sanction statute is not properly read "as resuscitating section 128.5. Rather, … [such] reference … [simply] means a court must *use the procedures* and *apply the substantive standards* of section 128.5 in deciding whether to award attorney fees" under the other statute. (*Decker*, *supra*, at p. 1392, 129 Cal.Rptr.2d 892, italics added.)
>
> We agree. That the Legislature has incorporated section 128.5's procedures, standards, or definitions in separate statutes which apply *in particular contexts* does not undermine the conclusion that section 128.5, invoked in its own right, is generally inapplicable to actions and proceedings commenced after 1994.

(Emphasis in original, footnote omitted.)

Thus, replacing the cross-reference to Section 128.5 with a cross-reference to Section 128.7 probably would be viewed as a substantive change to the anti-SLAPP statute, rather than as a technical correction of a legislative oversight. As such, it is likely to be controversial, not only because it involves the anti-SLAPP statute, but also because sanctions are another hotly disputed area. **The staff cautions against getting involved in this matter.**

Prof. Slomanson's second suggestion is more technical in nature than his first suggestion. He points out that although Code of Civil Procedure Section 128.6

was enacted and remains in the code, it "actually never saw the light of day …." Exhibit p. 33. As a recent case explains, Section 128.6

> is not operative. In [*Olmstead*, 32 Cal. 4th at 810-11], the California Supreme Court explained that the statute was to become operative only upon expiration of Code of Civil Procedure section 128.7. The sunset date for Code of Civil Procedure section 128.7 was extended twice, before the most recent legislation extended its operative date indefinitely. (Stats. 2005, ch. 706, (Digest Assem. Bill No. 1742) § 3 ["This bill would delete the repeal date of January 1, 2006, contained in these provisions and thereby extend indefinitely the operation of these provisions"]; see also Code Civ. Proc. § 128.6, subd. (f) ["This section shall become operative on January 1, 2003, unless a statute that becomes effective on or before this date extends or deletes the repeal date of Section 128.7"].) *Thus, Code of Civil Procedure section 128.6 has never come into effect*.

In re Marriage of Corona, 172 Cal. App. 4th 1205, 1224, 92 Cal. Rptr. 3d 17 (2009) (emphasis added).

Professor Slomanson recommends clarifying legislation. He says:

> Things are screwy enough with 128.5 still being on the books, which applies only to actions filed **before** 12/31/94. We ought to at least get 128.6 out of the CCP, b/c it has generated confusion b/c of its <u>apparent</u> (but incorrectly) stating that it went into effect in 2006.

Exhibit p. 33 (emphasis in original).

In short, Section 128.6 should be repealed because it never became operative and by its terms never will become operative. In addition, three provisions that cross-refer to Section 128.6 should be amended to delete those cross-references (Gov't Code §§ 3260, 3309.5; Health & Safety Code § 25249.7).

This matter might be straightforward enough for the Office of Legislative Counsel to handle in its annual bill on maintenance of the codes. **The staff recommends referring the matter to that office for consideration.** If the matter is too complex to include in the maintenance of the codes bill, the Commission could perhaps address it pursuant to the Commission's authority to correct technical and minor substantive statutory defects. Gov't Code § 8298.

Summary Judgment Procedure

Prof. Slomanson says that California "supposedly federalized summary judgment with the 1992/93 amendments to CCP 437c." Exhibit p. 31. However, he notes that California courts still view summary judgment as a drastic remedy, while the federal system "has warmly embraced it for some decades." *Id*. He

considers this a disconnect between the 1992-93 amendments and the resulting practice. *Id*. He wonders whether anything is being done to address this matter. *Id*.

The staff cautions against studying summary judgment procedure. It is a controversial topic involving a deep split between the plaintiffs' bar and the defense bar. Any tinkering with the procedure entails a fierce battle in the Legislature, consuming huge resources on all sides unless it dies a quick death. That is even more true of any reform that is patently pro-plaintiff or pro-defendant. **The Commission should conserve its resources for other matters.**

Other Suggestions

The Commission received three other new suggestions that do not fall within any of the existing categories on the Calendar of Topics.

Sealing of Certain Criminal Convictions and Related Issues

Under certain circumstances, Penal Code Section 1203.4 allows a court to dismiss an adult's criminal conviction without a showing of innocence. The key part of the statute provides:

> (a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code.…

Miguel Albarran considers the relief afforded by Section 1203.4 inadequate. Exhibit pp. 4-8. He explains:

> One of the reasons for this is because I believe many employers still quietly use "expunged" (judicially dismissed) convictions in employment decisions, even when they are not supposed to by law.

> … Also, as you know, most government (and some private) employers run background checks to verify answers on an application as a condition of employment, so they easily have access to criminal information, which they can in turn use to covertly discriminate against individuals. This occurs even when individuals have shown rehabilitation, which is part of the purpose of having a conviction "expunged" (judicially dismissed). Also, forever having a past arrest and conviction, whether or not "expunged," disclosed to a prospective employer is a huge burden, especially due to the inherent stigma, humiliation, and embarrassment attached to it.

Id. at 5. He notes that "denial of much merited employment because of a criminal conviction that has been expunged (dismissed) can in turn lead an individual to rely on public assistance to make ends meet, or potentially turn to further criminal activity for financial reasons." Letter from M. Albarran to CLRC (1/4/09).

Mr. Albarran believes there should be "a more extensive and proper relief, which involves the actual *sealing* of an adult arrest and resulting conviction, as opposed to just an "expungement" (judicial dismissal) of a conviction." Exhibit p. 4 (emphasis in original). He thinks this should be available for "minor criminal offenses, especially those that do not involve moral turpitude or prison time, such as a DUI, reckless driving, speed exhibition, petty theft, etc." *Id*. at 4-5. He notes that certain juvenile records are already sealed in California, and that statutes similar to what he is proposing "already exist in other states, such as Nevada and Pennsylvania." *Id*. at 5.

He also urges the Commission to study two related ideas:

(1) Providing for *destruction* of certain adult criminal records once a reasonable period of time has lapsed following the *sealing* of those records. *Id.* at 6.

(2) Revising Penal Code Section 851.8, which provides for sealing of an arrest record under specified circumstances. He says it should not be necessary to prove factual innocence to have an arrest record sealed where there is no conviction. *Id*. at 8.

Mr. Albarran's concerns center on easing the way for a person with a criminal record — particularly a person with a relatively minor criminal record — to become gainfully employed and successfully transition to a productive, law-abiding life. That area has already been the subject of legislative efforts, balancing the interest in rehabilitating criminals against the interest in affording public access to information that pertains to public safety.

For example, Section 1203.4 already represents a balancing of interests, allowing certain criminals who have served their sentences to clear their names to a certain extent under specified circumstances. Other statutes allow for sealing of an adult criminal record in certain situations (see, e.g., Health & Safety Code §§ 11361.5, 11361.7; Penal Code §§ 530.5-530.6, 851.8, 851.85, 851.90), and even Section 1203.4(d) refers in three places to "sealing" of a record.

In 2008, a bill sponsored by the California Public Defenders Association (AB 3063 (Committee on Labor & Employment)) would have prohibited an employer from asking an employment applicant to disclose a criminal conviction that has been sealed, expunged, or statutorily eradicated, or a misdemeanor conviction if probation has been successfully completed and the case has been dismissed. The bill would also have prohibited an employer from using such information in an employment-related decision. The bill passed the Legislature on a closely divided vote, but was vetoed by the Governor on the grounds that "[e]xisting regulations prohibit the practices this bill seeks to protect," "the bill may unintentionally promote legal confusion," and "[c]odifying this regulatory prohibition [will] very likely result in new private litigation …, with no demonstrated problem to actually establish a need for this new law."

The area has also been recently considered by the Uniform Law Commission, which just approved the "Uniform Collateral Consequences of Conviction Act." The staff has been told that the debates over this Act were intense, and in some instances had to be resolved by including multiple options in the Act.

This is thus an important area, but one that is contentious and is already receiving attention from other sources. The staff recommends that the Commission **examine this area only if the Legislature directs it to undertake that task.**

Welfare Reforms

Arnold McMunn raises a number of concerns regarding California's welfare statutes and how they are being administered, particularly in Los Angeles County. Exhibit pp. 24-25. His main concern related to Welfare and Institutions Code Sections 17000, 17000.5, and 17000.6.

Section 17000 provides:

> 17000. Every county and city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their

> relatives or friends, by their own means, or by state hospitals or other state or private institutions.

Section 17000.5 establishes the general rule for how much aid is a "sufficient standard of aid" for a county to provide. Section 17000.6 permits a county to provide a lower amount of aid in certain circumstances.

Mr. McMunn criticizes Section 17000.6, especially subdivision (f). Exhibit p. 24. He requests that the provision be revised to make it more difficult for a county to deviate from the general rule provided in Section 17000.5. *Id*. In other words, he is unhappy with the amount of aid currently being provided in Los Angeles County, and he would like the law revised to require the county to either (1) increase the level of aid, or (2) provide more justification for the current level of aid than the law now demands. See *id*. at 24-25.

Under current budget conditions, in which many counties are under extreme financial pressure, this type of reform is not likely to succeed, no matter how much people like Mr. McMunn may desire it. **The staff recommends against getting involved in this area.**

Statutory References to the "Tort Claims Act"

Division 3.6 of Title 1, entitled "Claims and Actions Against Public Entities and Public Employees," was added to the Government Code in 1963 on recommendation of the Commission. Over the years, it has often be referred to as the "Tort Claims Act."

Prof. Slomanson correctly points out, however, that the California Supreme Court recently rejected this nomenclature. Exhibit p. 30; see also Slomanson, California Civil Procedure in a Nutshell 1, 88 (Thomson West 2008). In *City of Stockton v. Superior Court*, 42 Cal. 4th 730, 741-42, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007), the Court stated:

> Because of the broad scope of the claim requirements, a number of Courts of Appeal have followed the suggestion in *Baines Pickwick* that "Government Claims Act" is a more appropriate short title than the traditional "Tort Claims Act." We agree that this practice is a useful way to reduce confusion over the application of the claim requirements. *Henceforth, we will refer to division 3.6, parts 1 through 7 of the Government Code (§ 810 et seq.) as the Government Claims Act*.

(Emphasis added, citation & footnote omitted.)

Prof. Slomanson notes that the phrase "Tort Claims Act" is used in Code of Civil Procedure Section 1038. Exhibit p. 30. He raises the possibility of searching

the codes for other references to "Tort Claims Act," and replacing those references with "Government Claims Act." *Id*.

The staff did such a search on Westlaw and found a total of six provisions that refer to "Tort Claims Act." See Civ. Code § 43.99; Code Civ. Proc. § 1038; Educ. Code §§ 89307, 89750.5; Gov't Code § 54956.9; Penal Code § 12076. It would be a relatively simple matter to replace these references to "Tort Claims Act" with "Government Claims Act."

The staff recommends referring this matter to the Office of Legislative Counsel for possible inclusion in the next maintenance of the codes bill. If the matter cannot be included in that bill, the Commission could perhaps address it pursuant to the Commission's authority to correct technical and minor substantive statutory defects. Gov't Code § 8298. It might fit nicely with the Commission's new study on charter schools and the Government Claims Act.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2010. Completion of 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 2010

In 2010, the Commission's legislative program will include two bills that are already pending:

- SB 105 (Harman), relating to donative transfer restrictions.
- SB 189 (Lowenthal), relating to mechanics liens.

The Commission's recommendation on *Nonsubstantive Reorganization of Deadly Weapon Statutes* is ready to be introduced, but might be delayed until 2011 to allow it to proceed as a two-year bill if needed.

In addition, two other studies may be completed in time to introduce legislation in 2010:

- Marketable Title Act: Unexercised Option.
- Statutes Made Obsolete by Trial Court Restructuring: Part 5.

The Legislature's Priorities

The following studies assigned by the Legislature should receive priority in the coming year.

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, several more bills have been enacted on Commission recommendation. The Commission's work on this topic should continue to receive high priority.

Charter School as a Public Entity

The Legislature did not specify a due date for this study. It is best to assume, however, that the Legislature wants the Commission to begin the study right away and to treat it as a high priority matter.

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 received a long list of proposed reforms to CID law.

The Commission is presently working on (1) statutory clarification and simplification of CID law, and (2) application of the Davis-Stirling Act to a nonresidential CID. These projects will consume significant resources in the coming year.

In addition, the Commission previously decided to address miscellaneous other areas of CID law in which the application of the Davis-Stirling Act appears inappropriate or unclear — e.g., a stock cooperative without a declaration, a homeowner association organized as a for-profit association, or a subdivision with a mandatory road maintenance association that is not technically a CID. See Minutes (Oct. 29, 2008). Unless the Commission otherwise directs, the staff will proceed with these matters as time permits.

Discovery Improvements From Other Jurisdictions

The Commission has made progress on civil discovery, but there are many suggestions it has not yet examined and other issues it may want to study. Staff resource priorities might prevent any work on this study in 2010, but the study should remain a priority and be reactivated when possible.

Review of the California Evidence Code

Prof. Méndez (now teaching at UC Davis School of Law) is available to assist the Commission in studying the evidence issues discussed in the articles he prepared for the Commission. As discussed above, the staff has compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial. See Memorandum 2006-36, Exhibit pp. 70-71. The staff will seek further guidance from the judiciary committees regarding whether to pursue those issues.

Creditors' Rights Against Nonprobate Assets; Application of Family Protection Provisions to Nonprobate Transfers

The Commission's former Executive Secretary expects to complete his background study of this topic in the spring of 2010. The Commission should commence work on the topic shortly thereafter, while Mr. Sterling is available and his research and analysis are current.

Assignments for the Benefit of Creditors

If Mr. Gould completes his background study in the coming year, the Commission should promptly review his report and determine whether further work on this topic is warranted.

Other Activated Topics

Apart from the 2010 legislative program, legislatively set priorities, and projects for which the Commission has the assistance of a consultant, the

Commission has also commenced work on presumptively disqualified fiduciaries. The Commission put that work on hold pending the outcome of the bill to implement the Commission's recommendation on donative transfer restrictions (SB 105 (Harman)). The Commission might want to recommence that work once the bill's fate becomes clear.

Attorney's fees is another topic that the Commission began studying but had to interrupt. That study has been on hold for so long that it may no longer deserve priority over other possible topics of study.

Finally, the Commission has also done considerable work on mechanics lien law, and has identified further topics that might be studied. Because the recommendation to completely recodify mechanics lien law is pending in the Legislature, it would not be a good time to begin new substantive work on this topic.

CONCLUSION

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.

Those priority matters will consume much, if not all, of the Commission's time and resources in 2010. If budget cutbacks require any staff layoffs, there almost certainly will not be sufficient resources to undertake any new studies.

If there are no staff cuts, there is a possibility (by no means a sure thing) that some further work could be done. **If that possibility materializes, it might be appropriate to commence consideration of one or more of the following topics:**

- The study of venue in a civil case, which would respond to a request from the Second District Court of Appeal. The Commission's Calendar was recently revised to include this topic.
- CSSA's suggestions regarding electronic transmission of a creditor's instructions to a sheriff or marshal. This study would fall within the Commission's authority to study creditor's remedies.

- Correction of obsolete cross-references to former subdivision (d) of Section 116.780. This project might provide valuable experience for a student or volunteer. It would fall within the Commission's authority to correct technical or minor substantive statutory defects.

Of these possibilities, the staff is inclined to give the venue study highest priority, because the Commission already expressed interest in that area and the Legislature responded to the Commission's request by authorizing the study. **The Commission should consider whether it has any interest in the other projects,** which are smaller in scope and thus might be easier to squeeze into the agenda if only limited staff time is available.

Changes to the Calendar of Topics

Because a resolution relating to the Commission's Calendar of Topics was passed this year (ACR 49 (Evans), 2009 Cal. Stat. res. ch. 98), it is not necessary for another such resolution to be introduced in 2010. **The staff recommends waiting until the start of the 2011-2012 legislative session to seek enactment of another resolution.**

At that time, the Commission may want to take the following steps:

- *Request removal of its authority to study special assessments for public improvements*. Such a study would be time-consuming, yet there is no clear indication of a need for it.
- *Request authority to study discovery conducted in California for purposes of an out-of-state criminal case*. This study would relate closely to work the Commission has already done in the civil context.

The Commission should consider whether to approve these steps in advance, or revisit these matters next fall.

Recap of Recommended Program of Work for 2010

The staff has recommended that the Commission work on the following matters in 2010 and the remainder of 2009:

- Manage the Commission's legislative program for 2010, including the major bill on mechanics liens and perhaps the major bill on deadly weapons.
- Continue to work on trial court restructuring.
- Begin to work on the study of charter schools and the Government Claims Act.
- Continue to work on the recodification of the Davis-Stirling Act.

- Continue to work on application of the Davis-Stirling Act to a nonresidential CID.
- If time permits, begin to work on miscellaneous other areas of CID law in which the application of the Davis-Stirling Act appears inappropriate or unclear.
- If staff resources are available, recommence work on civil discovery.
- Seek guidance from the judiciary committees regarding evidence law, and perhaps proceed with some issues if that appears advisable and staff resources permit.
- After Mr. Sterling completes his background study, commence work on creditors' rights against nonprobate assets and application of family protection provisions to nonprobate transfers.
- If Mr. Gould completes his background study on assignments for the benefit of creditors, review his report and determine whether further work on this topic is warranted.
- Possibly recommence work on presumptively disqualified fiduciaries after the fate of SB 105 (Harman) becomes clear.
- If staff resources permit, possibly work on (1) the study of venue in a civil case, (2) CSSA's suggestions regarding electronic transmission of a creditor's instructions to a sheriff or marshal, or (3) correction of obsolete cross-references to former subdivision (d) of Section 116.780.

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 49 (Evans), enacted as 2009 Cal. Stat. res. ch. 98.

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

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

7. 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.

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

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

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

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

12. 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.

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

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

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

22. Charter School as a Public Entity. Analysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

MEMO

To: California Law Revision Commission

From: Miguel Albarran

Date: February 23, 2009

Re: California Penal Code 1203.4

Message:

Dear Mr. Steve Cohen and California Law Revision Commission. Thank you for your prompt and kind response to my recently submitted letter regarding a proposed revision to California Penal Code 1203.4, an utterly needed change. Please find enclosed a copy of respective letter for your reference. As you know, such letter is on behalf of myself and many deserving and hard working Californians. The sole intent of this memo is to reiterate the urgent and dire need to prioritize this law for revision purposes, to provide additional guidance and input, and to show further justification for such request. Such pro-action on the Commission's part will undoubtedly be extremely beneficial to the entire society as a whole, as previously explained in the aforementioned letter.

As you know, Penal Code 1203.4 provides for the "expungement" of a criminal conviction. In California, this in turn results in the notation that says "Conviction Dismissed in the Interest of Justice" being entered in an adult's California DOJ rap sheep. As such, the fact that somebody has been previously arrested and convicted still remains subject to public disclosure if a background check is conducted. In addition, the arrest and conviction remains available for disclosure with local law enforcement, whenever a background check is conducted. As such the criminal information remains in the "regular database" of the FBI, DOJ, and local law enforcement, therefore open to its personnel as well. This can prove detrimental to individuals' prospects for employment, despite the fact that they are simply seeking to live and decent, upright and honest life.

My particular goal is to provide for a more extensive and proper relief, which involves the actual sealing of an adult arrest and resulting conviction, as opposed to just an "expungement" (judicial dismissal) of a conviction. I am especially aiming at minor criminal offenses, especially those that do not involve moral turpitude or prison time, such as a DUI, reckless driving, speed

exhibition, petty theft, etc. The sealing of such records would, for example, result in the complete removal of an arrest and conviction from the FBI and DOJ rap sheet, as well as from local law enforcement files. In such scenarios, if a criminal background check is to be conducted, absolutely no trace of such record will come back and law enforcement will not have access to it as well. Minor exceptions to this may exist, such as if local law enforcement or prosecutors petition the court for such records and they can show a legitimate and valid reason for requesting such records.

I am looking for something similar to the provisions of Penal Code 1203.45, which involves certain juvenile arrests and resulting convictions, which will be discussed more in detail shortly. One of the reasons for this is because I believe many employers still quietly use "expunged" (judicially dismissed) convictions in employment decisions, even when they are not supposed to by law. This includes public employment, which is the sector I work in. Moreover, such misconduct by an employer is difficult to prove. Also, as you know, most government (and some private) employers run background checks to verify answers on an application as a condition of employment, so they easily have access to criminal information, which they can in turn use to covertly discriminate against individuals. This occurs even when individuals have shown rehabilitation, which is part of the purpose of having a conviction "expunged" (judicially dismissed). Also, forever having a past arrest and conviction, whether or not "expunged," disclosed to a prospective employer is a huge burden, especially due to the inherent stigma, humiliation, and embarrassment attached to it. Having such blemish gives many people the feeling of being an outcast and inferior, regardless of many other positive qualities they may possess. It undermines morale. In other words, having a "record" shuts many doors. This is unwarranted, unnecessary, and unmerited.

As you may know, there is already a California statute in place which allows for the sealing of adult arrests which did not result in a conviction. The statute I am referring to is Penal Code 851.8.

Allowing for the sealing of certain adult criminal arrests and resulting convictions, along with the pertinent court proceedings, will not only restore certain rights and privileges, as currently allowed through "expungement," but is will also more fully protect the right to privacy of individuals, extending the benefits that have been intended all along through PC 1203.4.

Similar statutes to the one I am proposing to seal certain records already exist in other states, such as Nevada and Pennsylvania.

Also, as you may know, California Penal Code 1203.45 in part states the following:

"1203.45. (a) In a case in which a person was under the age of 18 years at the time of commission of a misdemeanor and is eligible for, or has previously received, the relief provided by Section 1203.4 or

1203.4a, that person, in a proceeding under Section **1203.4** or **1203.4a**, or a separate proceeding, may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceeding and records relating to other offenses charged in the accusatory pleading, whether defendant was acquitted or charges were dismissed. If the court finds that the person was under the age of 18 at the time of the commission of the misdemeanor, and is eligible for relief under Section **1203.4** or **1203.4a** or has previously received that relief, it may issue its order granting the relief prayed for. Thereafter the conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

(b) This section applies to convictions that occurred before, as well as those that occur after, the effective date of this section."

The above relief is quite similar to a provision I am looking for with reference to adult criminal arrests and resulting convictions. One option would be to simply supplement the existing California Penal Code 1203.4 with a new statute that will allow for the sealing of certain adult criminal convictions, provided that the provisions of 1203.4 have been met. This would be a more feasible alternative, rather than entirely revamping PC 1203.4. A Court of law will have the final say, dependant on the individuals' background, thereby determining if the granting of such sealing is justified.

As a side note, I did notice, however, that a subdivision under 1203.45 does not allow for the sealing of juvenile DUI misdemeanors and other traffic misdemeanor violations. In my opinion, this is too extreme of a measure, partly due to the fact that a DUI and other traffic misdemeanors are considered a minor criminal offense. Nevertheless, they are being treated as serious crimes. Therefore, I think that it would be reasonable to revise PC 1203.45 with regards to this. This will, of course, have an effect of the current California Vehicle Code state law, where a DUI remains on an individual's DMV driving record for a period of 10 years following conviction. As such, the statutory provisions I am seeking would allow for an exception to such Vehicle Code law. The unsealing of such record would only be allowed for very limited purposes, such as for the use of a repeat DUI offense prosecution, for punishment purposes.

Besides having certain adult criminal records sealed, I believe that they should also be allowed to get destroyed after a reasonable period of time has lapsed, following the sealing of such record. Such is currently the case with respect to juvenile arrests/convictions, where such records are automatically and completely erased after the passage of 5 years following the sealing of such records.

As a last note, I would like to reemphasize the commendable work that the Commission does and trust that it will do what is in the best interest of justice and Californian's. Thank you again for your time and attention. I will patiently await an update from the Commission.

Memo

To: California Law Revision Commission

Attn: Barbara Gaal

From: Miguel Albarran

Date: 4/25/09

Re: California Penal Code 851.8

Dear Ms. Barbara Gaal. I recently sent you and the rest of the Commission members a letter and subsequent memo regarding an important issue surrounding California Penal Code 1203.4. This additional and brief memorandum is to address another California law, PC 851.8, which has relevance to PC 1203.4, and which I overlooked to address in my previous letter/memo as well. As suggested by you, a single copy of this memo is being provided to you, although it is directed to the entire Commission.

It is necessary and vital to mention that PC 851.8, which involves sealing adult arrests that did not lead to a conviction, has an enormous flawed and senseless particular provision. That is, despite the fact that by Constitutional standards one is presumed innocent until proven guilty, PC 851.8 requires that one establish "factual innocence" in Court in order to get an entire no-conviction arrest record sealed when a respective petition is filed. This is paradoxical to our Constitutional principle regarding the presumption of innocence since conviction did not result from the arrest. As such, it would be fair and logical that *the burden to prove "factual innocence"* requirement in order to get an arrest record sealed be deleted from this law. Such requisite makes no sense and makes it all the more difficult to for individuals to get rid of a blemish that is of no use and that, although not as legally serious as a conviction, it can also serve as a disastrous hindrance in obtaining employment. This is especially true for individuals who have been wrongfully arrested, particularly due to the abuse of authority by law enforcement. Please incorporate this additional information to my previous letter/memo for the Commission's consideration. Thank you.

KURT H. BERGER

ATTORNEY AT LAW LICENSE 210642

200 S. 13TH ST., #107, GROVER BEACH, CA. 93433

PHONE; (805) 473-1600

FAX: (805) 473-1624

TO: CALIFORNIA LAW REVISION COMMISSION

File:_____

DATE: JANUARY 21, 2009

RE: CCP § 425.16

DEAR COMMISSION MEMBERS;

THIS LETTER IS IN REFERENCE TO CCP § 425.16, AKA THE CALIFORNIA ANTI-SLAPP STATUTE. AS CONTEMPLATED, THE STATUTE IS NOBLE. IT WAS ENACTED OSTENSIBLY TO ALLOW FOR THE PROMPT DISMISSAL OF NON-MERITORIOUS LAWSUITS BY WAY OF A SPECIAL MOTION TO STRIKE. AS ORIGINALLY ENVISIONED, THE PROTOTYPICAL SLAPP SUIT INVOLVED A POWERFUL PLAINTIFF BULLYING A WEAKER DEFENDANT WHO WAS EXERCISING HER RIGHT TO FREE SPEECH. UNFORTUNATELY, NOTHING SUCCEEDS AS PLANNED. THE LEGISLATIVE DIRECTIVE THAT THE STATUTE BE BROADLY CONSTRUED HAS LED TO INTERPRETATIONS THAT MAKE SUPERIOR COURT AND SUBSEQUENT APPELLATE DECISIONS TOTALLY UNPREDICTABLE.

THE USE OF 425.16 HAS DEVOLVED INTO THE DEFAULT FIRST STRIKE FOR THOSE WHO DEFAME OTHER CITIZENS, A SORT OF LEGAL LOOPHOLE. AND WHY NOT? SUCH A DEFENDANT'S FIRST THOUGHT IS "LET'S FILE AN ANTI-SLAPP MOTION AND SEE IF WE GET LUCKY". I AM CURRENTLY INVOLVED IN A DEFAMATION CASE THAT HAS SHOWN ME THE FLAWS AND VAGARIES OF 425.16. (THE FACTS I RELATE ARE TRUE AS I SEE THEM, BUT IF THEY ARE VIEWED SIMPLY AS A HYPOTHETICAL, THEY ILLUSTRATE MANY OF THE PROBLEMS AND INEQUITIES PRESENTED WHEN A 425.16 MOTION IS FILED).

THE PLAINTIFF'S NAME WAS POSTED ON A BLOG THAT GENERALLY DISCUSSED REAL ESTATE ON CALIFORNIA'S CENTRAL COAST. THE POSTINGS WERE MADE BY THREE PERSONS THAT HAD PREVIOUS CONFLICT WITH THE PLAINTIFF. THE FALSE POSTINGS ACCUSED THE PLAINTIFF OF CRIMES OF MONEY LAUNDERING, TAX EVASION, AND ASSISTING ANOTHER PERSON OF DEFRAUDING A REAL ESTATE LENDER. THE PLAINTIFF IS NOT A PUBLIC FIGURE. THE DEFENDANT'S LEGAL REPRESENTATIONS ARE PROVIDED BY THREE LARGE INSURANCE COMPANIES. THE PLAINTIFF PAYS HIS OWN LEGAL BILLS.

THE PROBLEMS FACING A JUDGE WHEN PRESENTED WITH THIS FACT PATTERN ARE HOW TO DETERMINE IF THE POSTINGS BY THE THREE DEFENDANTS ARE CONNECTED TO AN ISSUE OF PUBLIC INTEREST, AND IF SO, CAN THE PLAINTIFF MAKE A PRIMA FACIE CASE FOR LIBEL. THERE IS AMPLE CASE LAW TO INDICATE THAT ACCUSATIONS OF CRIME ARE NOT CONNECTED TO AN ISSUE OF PUBLIC INTEREST IF THEY ARE MADE AS PART OF AN ONGOING ANIMUS BETWEEN PARTIES. HOWEVER, THE LEGISLATIVE INTENT THAT THE STATUTE BE CONSTRUED BROADLY MAKES THE PUBLIC INTEREST QUESTION A CRAP SHOOT WHICH RESULTS IN TOTALLY UNPREDICTABLE DECISIONS. IF IT IS FOUND THAT THE STATEMENTS ARE IN CONNECTION TO AN ISSUE OF PUBLIC INTEREST, THE BURDEN IS THEN ON THE PLAINTIFF TO MAKE THE REQUIRED PRIMA FACIE SHOWING. AGAIN, THIS DETERMINATION IS ONE THAT JUDGES STRUGGLE WITH, AND THE RESULTS ARE UNPREDICTABLE. IF ONE IS ACCUSED OF CRIMINAL WRONGDOING, HOW DOES ONE PROVE FALSITY BUT BY DENYING THE ACCUSATION? WHAT PROOF CAN ONE PROFFER TO SHOW THAT HE IS NOT A MONEY LAUNDERER OR TAX EVADER? SOME CASES HAVE FOUND THAT DENIALS IN THE FORM OF DECLARATIONS ARE AN INSUFFICIENT PRIMA FACIE SHOWING.

AT THE 425.16 MOTION HEARING IN THE CASE I AM INVOLVED WITH, I POSED THE FOLLOWING QUESTION; IF THE DEFENDANTS ARE CORRECT, AND 1) THE STATEMENTS COMPLAINED OF ARE NOT LIBEL BECAUSE THEY ARE CONNECTED TO AN ISSUE OF PUBLIC INTEREST AND 2) THE PRIMA FACIE CASE CANNOT BE MADE THROUGH THE PLAINTIFF'S SUPPORTING DECLARATIONS DENYING OF THE ACCUSATIONS, THEN THE FOLLOWING MUST ALSO BE TRUE...THE PLAINTIFF CAN GO ON A SIMILAR BLOG AND ACCUSE THE DEFENDANTS OF CHILD MOLESTATION, SPOUSAL ABUSE, OR MAKE ANY NUMBER OF DEFAMATORY STATEMENTS AND NOT BE HELD TO ANSWER. COUNSEL FOR ONE OF THE DEFENDANT'S ANSWERED THAT I WAS CORRECT; THAT IS IN FACT THE LAW ACCORDING TO CCP § 425.16.

IF SHE IS CORRECT, THEN HOW DOES ONE ENFORCE CIVIL CODE § 45? HOW CAN THE FACTS BE EXAMINED AS DESCRIBED AND THE RESULT BE THAT NO LIBEL HAS OCCURRED? HOW CAN SUCH A STATEMENT BE MADE IN GOOD FAITH BY A MEMBER OF THE BAR? THE PROBLEM IS THAT CCP 425.16 HAS LED TO THIS SET OF CIRCUMSTANCES BEING POSSIBLY VIEWED AS THE LAW IN CALIFORNIA.

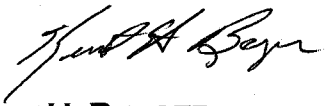
THE MANDATORY AWARD OF ATTORNEY FEES TO A PREVAILING DEFENDANT HAS SPAWNED A COTTAGE INDUSTRY OF LAWYERS WHOSE RAISON D'ÊTRE IS THE COLLECTION OF EXORBITANT FEES. THE FACT THAT A DEFENDANT CAN ELIMINATE A SUIT AT THE INFANCY STAGE SHOULD BE SUFFICIENT RELIEF. AN ARGUABLY MERITORIOUS LAWSUIT RISKS PUNITIVE COSTS TO THE PLAINTIFF IF EITHER THE SUPERIOR OR APPELLATE COURT SIDES WITH THE DEFENDANT ON AN ANTI-SLAPP MOTION. THIS IS PATENTLY UNFAIR. A REVIEW OF SOME OF THE ATTORNEY FEES AWARDED SHOULD BE EVIDENCE OF THE NEED FOR REEVALUATION. IN *TENDLER V. WWW.JEWISHSURVIORS* THE PREVAILING ATTORNEYS ASKED FOR OVER $40,000 FOR FILING A MOTION TO STRIKE AT THE INCIPIENT STAGE OF LITIGATION. $40,000 IS JUST BELOW THE MEDIAN FAMILY INCOME FOR THE COUNTY IN WHICH I LIVE!

How is this state of affairs reasonable? How does one explain to a client whose reputation is damaged that those who are libeling him are acting in the public interest, that his denial of the accusations that he has committed a crime are not sufficient proof of falsity, and that if he files a suit asking for the courts to assist him, he may have to pay the bills of the other side?

The internet and the inherent problems it brings are upon us now. CCP § 425.16 has become the shield that people who would libel others hide behind. This cannot be the intent of the legislature when they originally enacted this section to protect people who were being bullied. In fact, it has now been turned on its head and is the weapon used by bullies. I am requesting that the Commission look at the statute as it is currently being used, and advise revision of the language that results in the wild variation of interpretation by the courts. Also, I request that the award of attorney fees to defendants be reviewed, and either eliminated, be awarded to the prevailing party, or strictly limited in amount.

Thanks for the kind attention to this issue. If there are any questions or comments to this letter, please feel free to call or write.

Cordially,



Kurt H. Berger

EMAIL FROM RICHARD BEST TO BARBARA GAAL
(SEPT. 5, 2009)

Re: Discovery Act revision

When I was chair of the discovery committee for the Judicial Council rules advisory committee, we caused the enactment of what is now CCP2017.710 et seq re use of technology. The legislation was to empower the court to make such orders. A simple example might be to enter an order authorizing service by e-mail. I worked on the legislative side in dealing with possible opposition groups. As you can see the court reporters wanted 2017.720. The trial lawyers were concerned that judges might impose complex technology on lawyers handling simple PI cases and who might not be expected to be on top of such technology. To satisfy them we added restrictions on the types of cases in which the court might issue orders which are now set forth in CCP2017.730(a)(1)-(4). It is almost 10 years later and such restrictions seem out of date in view of the acceptance of technology by most lawyers. I suggest that provisions (a) & (b) be eliminated.

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California Law Revision Commission
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24 August 2009

Re: Memorandum 2001-17 **Award of Costs and Contractual Attorney's Fees to Prevailing Party (Staff Draft Tentative Recommendation)**

Dear Ms. Gaal:

Thanks for taking my call concerning the above item. My focus here is on the changes to paragraph (d) of Civil Code section 1717. "**Comment**" re the proposed amendment makes clear that "Subdivision (d) continues without substantive change material that was formerly in the second and third paragraphs of ...1717(b)(2)."

The addition of the first phrase "*before* the commencement of the action" would itself (even without the language added at the end of paragraph (d)) eliminate ambiguity in the statute – ambiguity that more frequently than not gets interpreted after a plaintiff has expended significant attorney fees and costs to bring an action on a contract for payment of sums rightly owed.

My understanding is that the language was struck with the intent to somehow benefit defendants who are (presumably) at a financial disadvantage compared with (also presumably) wealthier plaintiffs. However, doing so has worked against lower-net- worth plaintiffs who have meritorious claims against well-heeled defendants.

The parties' individual net worth, whether disparate or equal, should make no difference under a statute that affects plaintiffs and defendants alike.

The fundamental problem with the current language is that it presumes the defendant is always the poorer party. Obviously that is not the case. Staff's proposed amendment makes sense; the proposal is party-neutral. Something about equal protection probably fits somewhere in here.

Both plaintiffs and defendants would benefit from this amendment., as will attorneys and the judicial system -- particularly at the appellate level. As currently worded, either party can abuse the system.

I believe the little known case I mentioned, *Joseph Magnin v. Schmidt* 89 Cal.App.3d Supp.7 (1978), foresaw the need for staff's proposal. The Alameda County superior court's appellate division interpreted the current iteration according to the pre-existing wording "before the commencement of the action" as though the phrase were the correct construction of 1717(d). The *Magnin* case is not

a complete orphan, however; it has been "harmonized" by a 2007 decision: *Hart v. Autowest Dodge*, 147 Cal.App.4th 1258.

Even though *Magnin* was decided in the Alameda County superior court's appellate section, I participated as a plaintiff pro per in a case decided in that county's superior court law and motion department against a partnership defendant having superior financial resources, and being represented by an insurer and its team of attorneys. Therein, defendant denied any and all liability; demurred (affirmed as to an equitable indemnity cause of action; denied with leave to amend on our fiduciary duty claim). Subsequently, defendant submitted its answer, still denying liability. Answer was accompanied by evidence of tender to me of payment for funds that in its answer and demurrer papers it denied owing. Also accompanying its answer was a motion for summary judgment and dismissal. Its motion was grounded on the fact that it had tendered a sum (***after* the commencement of the adtion**) of which it then was admitting liability.

The court ignored the fact that my wife and I had to sue to get even that partial payment. Because of the language in 1717, however, the court, acting upon the conclusion (erroneous under *Magnin*, a more realistic construction of the statute, and the commission staff's recommended revision wording), granted defendant's motion, dismissed our complaint, and granted attorney fees to defendant as "prevailing party." Unfortunately, my consulting attorney and I were unaware of *Magnin* at the time of our action. As a result, we could cite no authority to convince the court of appeal that the law and motion court had been wrong as a matter of law. The appellate court affirmed, including as to attorney fees/costs.

Please let me know if any of this needs clarification, or if you need more detail. About our situation In any event, please advise me as to whether you received this note. E-mail is fine.

Sincerely,

Lew diSibio

Lew diSibio

EMAIL FROM KERRY FENNELLY TO STEVE COHEN (7/10/09)

Mr. Cohen:

Thank you for taking the time to speak with me the other day. As you may recall, my office represents various multi-employer trust funds throughout the state of California, which collects funds and administers fringe benefits on the behalf of union employees mostly within the construction trades. I contacted you because I found on-line that the California Law Revision Commission is currently engaged in a comprehensive revision of the mechanics lien law and you are its contact person. As we discussed, my office feels there is an issue with the current mechanics lien statutes with respect to express trust funds, such as our clients, and their deadlines to record liens that perhaps could be resolved during the revision by the Commission.

Under current California law, a lien claimant, except an original contractor, has ninety days after a completion of a work of improvement to record his claim of lien if no notice of cessation or completion has been recorded or thirty days if a notice of cessation or completion is recorded. Cal. Civ. Code § 3116. In the 2003 revisions to the mechanics lien law by the California legislature, Cal. Civ. Code § 3259.5 was added which requires that if a property owner records a notice of cessation or completion of a project so as to accelerate the deadline with which claimants must record their lien, then, within ten days of such recording, the property owner must notify "the original contractor, and any claimant other than the original contractor who has provided a preliminary 20-day notice in accordance with Section 3097" that such notice has been recorded. However, Cal. Civ. Code § 3097(a) provides that express trust funds, along with original contractors and laborers are not required to provide preliminary 20-day notices. Thus, the current statutory scheme seems to lead to this curious result of laborers and express trusts funds potentially having their deadline in which to preserve their lien rights accelerated without them being made aware of it.

The current mechanics lien laws appear to work against laborers and express trusts, which historically, the statues were aimed to protect. See Connolly Development, Inc. v. Superior Court of Merced County, 17 Cal.3d 803, 826 (Cal. 1976). The California legislature exempted certain classes of potential lien claimants from the preliminary 20-day notice requirement in Section 3097, presuming that these classes of potential lien claimants are already known to the owner. See Borchers Bros. v. Buckeye Incubator Co., 59 Cal.2d 234, 240 (Cal. 1963). However, leaving laborers and express trust funds out of the scheme that ensures other claimants are provided notice that their deadline to record their claim has been accelerated simply because the laborers and express trust funds do not record preliminary 20-day notices has the effect of putting them at a disadvantage and is contrary to the policy reasons behind the Section 3097 exemption.

It is our belief that the current scheme is out of balance and needs some revision. We recognize that revising the statutes to also require that owners provide notice of the recording of the notice of cessation or completion to laborers and express trust funds is probably too big a shift and places too heavy a burden on owners. Theoretically laborers and trust funds should be known to the owners simply by the presence of the laborers on

the project, however, their actual names and contact information are often likely not known to the owners and the practicality of providing these potential lien claimants notice would be very difficult. Further we recognize that owners should be able to cut-off the time period in which a project is subject to liens in order to move ahead with delivering a clean title. Thus, we do not advocate for the claims of labors and trust funds to be exempt from the effects a notice of cessation or completion.

Our request is simply that consideration be given to placing things in a better balance by providing the laborers and trust funds with a similar opportunity as the other claimants to record their lien. One solution would be to revise the statues to at least provide that labors and express trust funds get sixty days rather than only thirty days to record their lien after a notice of cessation or completion has been recorded. This time table of sixty days is the same that is provided to original contractors. This revision is logical and reasonable in that laborers and express trusts are similarly situated to original contractors with respect to their relationship with the project owners as they are all thought to be known to the owners by their presence on the project and are all exempt under 3097 from providing preliminary 20-day notices. Thus, rather than treating laborers and express trust funds like claimants who are required to provide preliminary 20-day notices, the revision would allow laborers and express trusts to be treated similar to original contractors.

Additionally, other revisions should be made so that it is clear that although exempt from having to provide preliminary 20-day notices, in order to receive notice by the owner of the notice of cessation or completion, laborers and trust funds do need to provide such notices and further, the remedies available to other claimants under Section 3259.5 are not available to laborers and express trust funds unless they provide preliminary 20-day notices. Under the current scheme, the deadlines for laborers and express trust funds to record their liens and the effect of the notices of cessation and completion on them appear to be unclear. For example, in the section 3.17 of the CEB's California Mechanic's Liens and Related Construction Remedies, the chart reflecting deadlines effecting laborers erroneously states laborers have 30 days to record their lien, "unless notice of completion or cessation is defective or not served" and mistakenly cites Section 3259.5.

Again, thank you for taking the time to speak with me and to listening to our concerns regarding the disparate treatment of labors and express trust funds under the current mechanics law liens. If you should have any questions, concerns or comments regarding the above, please let me know.

Very Truly Yours,

Kerry K. Fennelly

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EMAIL FROM LIZ LAWRENCE
(7/24/09)

Dear Members of the Law Revision Commission:

I am an attorney professionally involved in matters of child support. I write this request as a concerned individual and not as a child support professional. My comments and requests are submitted of my own desire and not at the direction of any branch of CA child support services.

It is my understanding that the primary public policy interest in all matters pertaining to child support within the CA Family Code is the "best interest of the minor child." In addition, the clear intent of the legislature within the Family Code is for all parents to uphold their duty to support their minor children. An important purpose of the child support division is to assist CA families in self-sufficiency and to recuperate funds expended on cash aid. In light of all of these things it seems to me that further legislative review and/or comment and clarification is needed with regard to CA Family Code Section 3951 which reads as follows:

> 3951. (a) A parent is not bound to compensate the other parent, or a relative, for the voluntary support of the parent's child, without an agreement for compensation.
>
> (b) A parent is not bound to compensate a stranger for the support of a child who has abandoned the parent without just cause.
>
> (c) Nothing in this section relieves a parent of the obligation to support a child during any period in which the state, county, or other governmental entity provides support for the child.

A literal reading of section 3951(a) means that a parent has a duty to support their child unless that child resides with the "other parent" or a "relative" caregiver. Clearly that is not what could have been intended since statutory guideline child support is premised upon the child residing with only one parent. So, section 3951(a) has instead come to mean in the lower courts that neither parent is obligated to pay support if the minor child is residing with another relative unless that relative is receiving cash aid through the state welfare dept (based on section 3951(c)). The lower courts in multiple counties are regularly citing FC sec 3951(a) and Plumas County Dept. of Child Support Services v. Rodriguez (2008) 161 Cal.App.4th 1021 in overturning thousands of dollars worth of child support that would have otherwise been payable to the relative caregivers of hundreds of CA minors who have been placed in situations where their own parents are not able to physically care for them. Many of these relative caregivers are left with no choice but to seek welfare assistance. It is not until they do so that child support can be recovered from either parent of the child and then only for the time period when the child remains active cash aid.

As a child support professional, a mother and a CA taxpayer this interpretation not only frustrates me but seems completely contrary to the public policy of holding parents

accountable for supporting their children, encouraging self-sufficiency and discouraging increased applications for welfare services. Out of curiosity I did a computer search in the Family Code for the the word "compensate" as used in 3951(a). I was surprised to find that this section is the only section in the entire family code that uses the word "compensate," which is indisputably different than "support." It seems fair and equitable that a parent should not be made to provide compensation (absent an agreement) to a relative caregiver of their child in addition to fulfilling their statutory duty to support their child by means of a guideline child support amount. But this is not the interpretation that has been given this section. Many courts are simply denying access to support to relative caregivers who are then left with no choice but to apply for cash aid. Why would we as a State in financial crisis want this to be our public policy? All of that being said, I cannot deny that my colleagues' interpretation is logical and difficult to dispute. The camps are clearly divided and the good people of CA are getting caught in the middle with some being made to pay and others not, some receiving the benefit of arrears collected while others go to court only to be told that they are not entitled to a dime, or even worse that they have been overpaid because 3951 never entitled them to support and can now be sued by the parents who overpaid them the support while they cared for the children of those parents.

Regardless of whether or not my belief is correct, I raise this issue to your attention and respectfully request your commission consider determining the intent of the legislature in passing FC 3951. Please take steps to clarify this intent for the masses. Whether or not in the end we all agree with the legislature's intent is far less important than securing clarification to ensure a common application based on clear direction from our state law-makers.

Your time and consideration are greatly appreciated

Very truly yours,

E. Lawrence

EMAIL FROM JIM LINGL TO BRIAN HEBERT
(SEPT. 22, 2009)

Hello Mr. Hebert.

It is requested that you forward to the Members of the Law Revision Commission this message which outlines concerns about HOA owner liability for judgments against their associations.

Background:

I have been directly involved with three community associations after large monetary judgments were entered against them. I did not represent any of them in the events that led to the judgments. But in each case I was retained to try to deal with the after effects of the judgments. In each situations there have been divorces, heart attacks, returns to smoking and alcoholism, loss of home ownership, and extreme financial hardship as a result of the judgments.

Le Parc:

A judgment of $6.7 MM was entered against the Simi Valley Le Parc HOA in 1998, after a binding arbitration proceeding. The judgment included an award for lost profits after breach of contract, trade disparagement [business libel] and attorney fees. The Association's insurance carrier denied coverage and liability for the claims.

Briefly, the BOD was unhappy with the general contractor the association hired to do reconstruction after the Northridge Earthquake. It hired a construction supervisor to assist in managing the contract. When things didn't improve as desired by the Board a decision was made to terminate the contract and hire a new general contractor. In the process of preparing for transition between the first general and the one subsequently hired, the construction supervisor was alleged to have made disparaging statements about the first general to the subcontractors working on site. The arbitration began with a set of breach of contract cross actions between the association and the contractor; during discovery the alleged defamatory statements were uncovered and the action was amended to include a cause of action for the tort. Obviously, the contractor won. The arbitration award was subsequently confirmed as a judgment by the court, and a 'receiver in aid of execution' was appointed by the court to begin collection of the judgment. The receiver [commonly referred to as a 'keeper'] seized ALL income of the association, including all assessment income paid by the owners, while refusing to do anything to operate the complex. During the year that followed, the gas was turned off to parts of the Le Parc complex, the electricity was turned off to parts of the complex, the liability and fire insurance for the complex was allowed to lapse and the water to the complex was threatened to be turned off. During that time NO repairs or maintenance was done to the complex - including repairs to a boiler that provided heat and hot water to one of the buildings - except for some minimal self help work funded by donations from owners. The units became unsalable, owners simply walked away rather than deal with the

consequences, lenders refused to foreclose on defaulted mortgages, and the County Tax Board reduced the value of the entire complex to zero for property tax purposes.

After being sued for bad faith the insurance carrier discovered that it did, in fact, have coverage for the claims and settled with everyone by satisfying the remainder of the judgment, less amounts paid by the association, and paying to the association a small sum in 'compensation'.

The worst parts of that scenario were rectified in 2000 by passage of AB 1859 [now found at CC 1366(c)], which immunizes from attachment by a judgment creditor the portion of an association's regular assessment stream that is necessary for the association to carry out its essential functions.

Oak Park:

The Oak Park Calabassas condominium complex also became engaged in litigation with its general contractor over disputes relating to Northridge reconstruction. In this 2002 case, in addition to cross claims of breach of contract, it was alleged that the board committed fraud by inducing the contractor to continue working even as the board was planning a construction defect suit against the contractor. When a supplemental insurance payment was received by the association - the one that had been promised to the contractor as an inducement to continue working - it is alleged that the board gave the money to its attorney to fund the defect suit instead. During the subsequent litigation it was alleged that the association's attorney hid evidence and suborned perjury, which led to a judgment against the association for $7.5 MM. The judgment included an award for lost profits after the breach of contract, fraud, unpaid retentions, attorney fees, and punitive damages. Post judgment mediation allowed the value of the judgment with accrued interest to be reduced to an amount that the owners finally agreed to pay by way of an average $15,000 per unit assessment.

Northshore:

Also involving the Northridge Earthquake, but in a different way, the Northshore Property Owners Association eventually ended up with a judgment of $3.8 MM against it. Northshore is primarily a senior citizen community and was one of those insurance claimants who were permitted to reopen their earthquake claim after an earlier denial under the provisions of CCP 340.9. The insurance carrier made a CCP 998 offer that was not accepted, then put up a vigorous defense because it wanted to 'make an example' of what it felt was an overreaching claimant, and was eventually victorious at trial. The trial judge thereafter entered an award to reimburse the carrier for its 'costs of suit' [not attorney fees] in defending itself. Post judgment mediation allowed the value of the judgment with accrued interest to be reduced to an amount that the association was able to borrow, but with the owners becoming obligated to pay approximately $13,000 each over 7 years.

What do these individual cases have in common [other than some connection to the Northridge Earthquake]? In each case the association's BOD made decisions over which the owner/members had no control. In each case at least some component of the judgment arose from something that the owner/members would not have benefited from under any circumstances. In each case a large percentage of owners actively discouraged

or resisted the decisions of their Board of Directors. And in each case, though they were not plaintiffs, defendants, conspirators or tort-feasors, or parties of any kind, the owner/members of each association ended up being the persons obligated to pay off the judgments. They became the involuntary and unknowing 'guarantors' of the debts of their community association notwithstanding the requirement that suretyships can only be created by a signed agreement pursuant to CC 2793.

You are undoubtedly aware of the LA Kingsbury (2005) judgment and subsequent appeal, in which the courts recognized that a judgment creditor may have an unlimited emergency assessment imposed against each unit in a community association if necessary to satisfy an outstanding judgment. See decision at 126 Cal. App. 4th 549. The decision in that case appears to be absolutely correct, as any other outcome would have permitted the owners to be unjustly enriched at the expense of the plaintiff. We need to find a way to permit such egregious behavior to be dealt with even while protecting consumers from situations such as those described above.

In my own law practice I have had to deal with numerous situations in which a board member intentionally did something reprehensible, such as: threw paint on the car of an owner after a disagreement at a meeting, 'punched out' a tenant who failed to move his truck from a no parking zone quickly enough, poisoned trees on a private lot to improve a view, and slandered an owner during a hotly contested election. Because they were all intentional torts, they were not covered by insurance. In each of these matters we were able to resolve the conflict at a very low level, but in each instance the individual action of the board member could just as well have been attributed to the association on an agency theory, and an uninsured judgment could have been entered against the association. The other serious threat of uninsured judgments against associations arises in the situation where the amount of insurance carried by an association is inadequate. For instance I have dealt with more than one wrongful death claim that far exceeded the total amount of insurance carried by an association. Although this threat is partially dealt with by CC 1365.9 for condominiums, it does nothing to eliminate the threat in planned developments where the common areas are owned by the association itself.

Past Legislation:

See AB 2610 from the 2003 - 2004 Legislative Session, which would have limited circumstances in which emergency assessments could be ordered by a court and would have permitted dissolution of bankrupt associations by amending the current language of Corp C 8724. In the Assembly Committee Analysis of the bill, the analyst posed the following observation:

> Policy Question :
>
> The Le Parc Community Association case shows that through their obligation to pay emergency assessments individual homeowners are ultimately liable for the actions of the HOAs and their Board of Directors. The committee may want to consider referring this issue to the California Law Revision Commission for further consideration.

The full effect of existing law had not yet been understood, as the Oak Park matter was still pending and the Northshore trial had not even begun.

Another bill was drafted in 2005, but never introduced, that would have merely prohibited the entry of punitive damage awards against community associations. The proposed bill was opposed by the Consumer Attorneys.

Possible solutions:

1. Prohibit punitive damage awards against community associations; but allow such claims to be pursued against actual tortfeasors in the community and on the board. Such collective punishment of an entire community for the actions of a few individuals is universally recognized as being unreasonable. For example, collective punishment is specifically prohibited by Article 33 of the Geneva Convention, of which the United States is a signatory.
2. Revise the emergency assessment provisions of CC 1366 to only permit a court to order such assessments when necessary to protect the common interest development or to prevent unjust enrichment by the owners.
3. Limit the maximum amount a homeowner could become liable for in the event of an uninsured judgment against his/her association, such as one percent [1%] of the assessed value of the home. Such a provision is particularly needed in view of the fact that, if any segment of homeowners in a development fails or refuses to pay their proportional part of a judgment, or is discharged in bankruptcy from payment of their share, then that unpaid portion ends up being reassessed against the remaining owners.
4. Revise Corp C 8724 to permit bankrupt associations to dissolve. In any other corporate setting a bankrupt business is permitted to either dissolve or simply cease operation, even if there are outstanding judgments against the business. Take Enron, for instance. In such circumstances the shareholders are not liable for the debts of the corporation, with only very few exceptions that could be replicated in such an HOA dissolution setting.
5. Delete subsection (c) of Corp C. 7350, giving meaning to the 'corporate shield' that protects shareholders in every other type of corporate activity.
6. Require insurers to expand "loss assessment" coverage available to owners so that it includes coverage for assessments imposed to satisfy judgments against the association.

Summary

The principles that need to be kept in mind as the Commission looks at this matter include the following:

A. Common interest communities now make up something approaching one-third of all housing options available to California residents, and most of the low end housing; homeowners largely do not have any choice about whether they will become involuntary 'members' of a homeowner association.

B. No one should be liable for the wrongdoing of another, and involuntary members of common interest communities ought not be liable for decisions in which they have neither participation nor control, except to the extent that they would be unjustly enriched by immunizing them from liability.

C. Unsatisfied judgments are a fact of life. Community associations should not be singled out as the only entity that cannot avoid an unsatisfied judgment under appropriate circumstances. And the complaint that if associations are permitted to avoid judgments no one will want to do business with them is simply a red herring. Representing, as they do, a mega-billion dollar industry in California, vendors will continue to actively pursue business opportunities with associations though such vendors may be a little more careful to create assurances that their bills will be paid.

This is a problem that I have been deeply concerned about for more than 10 years, since I first became involved with the Le Parc situation. It is a problem that will not go away, and a problem that virtually no one who buys into a common interest community is aware of. I will be more than happy to provide more information about anything contained in this message, and to appear at Commission meetings to testify about these matters.

Thank you in advance for your attention to this critically important consumer protection problem that exists in community association living.

Jim Lingl

FEEDBACK FORM SUBMITTED BY ARNOLD MCMUNN (DEC. 15, 2008)

Message: Hello,

Welfare & Institutions Code Sec. 17000.6 (f) provides a permanent "grace period" for Counties in financial distress.

The County of Los Angeles is still using the decision by the State Commission of Mandates which the County applied for in 1995. This Section provides for a renewal of County application filed with the State Commission for determination of financial distress, and then voids it with paragraph (f).

Please set a limit for the grace period or eliminate it.

W & I Code Sec. 17000.6 sets the minimum amount of County aid at 40% of the 1991 Federal Official Poverty Line which results in a "substandard of aid" in conflict with Civil Code Section 4 to effect the Object of Law which is to provide A Sufficient Standard of Aid". I request consideration to increase the minimum in 2008-9.

W & I Code Sec. 17000.5 establishes 62% of the 1991 federal official poverty line with annual adjustments as "A Sufficient Standard of Aid" and in paragraph (b) declares that "The adoption of a standard of aid pursuant to this section shall constitute a sufficient standard of aid.", yet in Sec. 17000.6 which allows a financially distressed County to reduce the amount of aid to 40% of the 1991 poverty line states in Paragraph (e) "Any standard of aid adopted pursuant to this section shall constitute a sufficient standard of aid.".

Now, 62% of 1991 vs. 40% of 1991 cannot constitute the same standard, can it? Sec. 17000.6 (e) should instead say something like "Any standard of aid adopted pursuant to this section shall constitute an emergency reduction of the standard of aid as established by Section 17000.5 and shall be permitted only in accordance with the terms of this Section. This is a sore point because the County of Los Angeles is passing off the 40% amount as 'a Basic Budget Table' and 'a standard of aid' while the DPSS employees are mostly ignorant of the State-granted reduction in the amount in the first place. I wish for honesty in government.

The State W & I Code Sec. 10500 and 10501 provide Privileges and Immunities for indigents on "public assistance programs" by the authority of the State Legislature not extended by the same Legislature to General Relief/General Assistance programs in conflict with State Constitution Article 1 (b)

http://www.leginfo.ca.gov/cgi-bin/displaycode?section+wic&group=10001-11000&file=10500-10507

http://www.leginfo.ca.gov/.const/.article 1

This is an absurdity as recipients of CALWORKS have this protection even though they have Children to consider while General Relief/General Assistance is GENERAL ASSISTANCE given to Single Adults mostly. I still feel that the Sec(s) are otherwise in line with Civil Code Sec. 4 and the Object of the Law (Sec. 17000 Code) and should be extended to all recipients, particularly as Los Angeles is currently using pre-emptive

dictation in order to unlawfully reduce recipient benefits below the State authorized minimum which is already a sub 1991 minimum.

W & I Code Sec. 10605 states "10605. If the director believes that a county is substantially failing to comply WITH ANY PROVISION OF THIS CODE or any regulation pertaining to any program administered by the department, and the director determines that formal action may be necessary to secure compliance, he or she shall inform the county welfare director and the board of supervisors of that failure."

The State DPSS will not take complaints regarding non-compliance with State W & I Code by the Counties in administering County-funded General Relief/Assistance programs. If I am not mistaken, the Section states "THIS CODE" as "the entire W & I Code". It doesn't say THIS SECTION or THIS PARAGRAPH. Yet when I've complained to the State DPSS about Los Angeles non-compliance I receive the response that "the State does not take those complaints; that the authority for the State Code and the County DPSS has been remanded to the individual Counties by a court decision and that because the General Relief/Assistance programs are exclusively funded by the Counties, that they are the only authority with the jurisdiction to enforce State Code. I don't think the Rule of Law would agree with this.

Regards,

Arnold McMunn

EMAIL FROM MICHOL O'CONNOR TO BARBARA GAAL (JAN. 25, 2009)

Re: Error in CCP 1985.3

Ms. Gaal –

I would like to report what I think is another error in CCP §1985.3, dealing with notice to consumer of privacy rights.

CCP §1985.3(f) (paragraph 4) states that a subpoenaing party can bring a motion to enforce under §1987.1. However, §1987.1 does not deal with motions to enforce; it deals with motions to compel. The correct cross-reference is to §1987(c). CCP §1985.6, which is a parallel provision dealing with employee records, contains the correct cross-reference to §1987(c).

Below, I have provided the two provisions and underlined their differences.

CCP §1985.3(f), ¶4—

> 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.

CCP §1985.6(f)(4)—

> (4) 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.

I would also like to suggest that all the paragraphs in §1985.3 be numbered, as are those in §1985.6, which makes citation to the correct paragraph easier and more accurate.

Thank you for your attention.

Please note that my email address has changed since our last communication.

Michol O'Connor
micholoc@comcast.net

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January 8, 2009

California Law Revision Commission
4000 Middlefield Road, Room D-12
Palo Alto, California 94303-4739

Re: Proposed Changes in the Law

Dear Gentlepersons:

I have an idea for two changes in the law which might be beneficial and make sense in the probate area.

The first is with regard to personal representatives purchasing estate property by auction. Many times the most responsible child is designated personal representative, and is also in a uniquely responsible position to purchase the property. Current law requires a petition to be filed prior to the contract to purchase the property by the personal representative (Probate Code Section 9883) as long as Probate Code 9881 is complied with.

However, I believe the personal representative should be able to purchase the property at public auction, without complying with Probate Code Sections 9881 et seq. so long as:

(1) Court confirmation is required;

(2) Publication is required and a chance for overbid;

(3) Report of Sale and Petition for Order Confirming Sale of Real Property indicates the buyer is the personal representative; and

(4) The facts supporting the nature of the arms length transaction (i.e. how many other bidders were present, marketing efforts by auctioneer, etc.) are included in the Report of Sale.

Many times personal representatives are dissuaded from purchasing the property at all, even at auction, allowing the property to go for much less than could be attained. Also, in an auction situation, Probate Code Section 9883 still applies, but should not apply. How is the personal representative to ask for prior permission to enter into a contract when he or she does not even know whether his or her bid will be successful? The result is that some courts are requiring two petitions, one confirming the sale, and one requesting the permission to enter into the contract, doubling the expense to estates.

The second idea has to do with creditor's claims. Sometimes it is very difficult to ascertain whether a creditor's claim is reasonable. It was be extremely helpful to have a procedure whereby a personal representative can petition for instructions to determine the validity of a claim, whether than being forced to reject a claim due to inadequate information, and subject himself or herself to possible personal liability for their trouble.

Thank you for your hard work.

Very truly yours,

LAW OFFICE OF CYNTHIA R. POLLOCK

By: _____
Cynthia R. Pollock

CRP:tim

EMAIL FROM JORDAN POSAMENTIER TO BRIAN HEBERT (SEPT. 15, 2009)

Re: Fixing CCP 116.820

Dear Brian,

I'm wondering if the following is something the LRC would take up. Judge Wiss, our immediate past president, pointed out that CCP Section 116.820 section refers to subdivision (d) of 116.780, but that section no longer exists. I would also note that 116.780(b) also refers to that now-defunct code section. I include the relevant code sections below for your convenience.

Best,

Jordan

CODE OF CIVIL PROCEDURE

116.820.

(a) The judgment of a small claims court may be enforced as provided in Title 9 (commencing with Section 680.010) of Part 2 and in Sections 674 and 1174 on the enforcement of judgments of other courts. A judgment of the superior court after a hearing on appeal, and after transfer to the small claims court under subdivision (d) of

Section 116.780, may be enforced like other judgments of the small claims court, as provided in Title 9 (commencing with Section 680.010) of Part 2 and in Sections 674 and 1174 on the enforcement of judgments of other courts.

**

116.780.

(a) The judgment of the superior court after a hearing on appeal is final and not appealable.

(b) Article 6 (commencing with Section 116.610) on judgments of the small claims court applies to judgments of the superior court after a hearing on appeal, except as provided in subdivisions (c) and (d).

(c) For good cause and where necessary to achieve substantial justice between the parties, the superior court may award a party to an appeal reimbursement of (1) attorney's fees actually and reasonably incurred in connection with the appeal, not exceeding one hundred fifty dollars ($150), and (2) actual loss of earnings and expenses of transportation and lodging actually and reasonably incurred in connection with the appeal, not exceeding one hundred fifty dollars ($150).

EMAIL FROM PROF. WILLIAM SLOMANSON TO BARBARA GAAL AND JANET GROVE (DEC. 17, 2008)

Hi Barbara & Janet:

Happy Holidays!

A non-earth-shaking suggestion, but nevertheless sought by the CA SCt last year. The Court directed all lower courts to refrain from using words like "tort" and "contract" in re Gov't Claims Act litigation. See para. one on p. 88 of the CCP Nutshell I sent you for the relevant para. & citation.

I recalled this judicial request when exploring one of the relevant statutes in updating my CCP casebook---CCP 1038(a) "In any civil proceeding under the California **Tort** Claims Act or for express or implied indemnity or for contribution in any civil action, the court, upon motion ...." I can track down the others, but am hoping my "job description" protects me from that level of detail.

Best,

Bill

EMAIL FROM PROF. WILLIAM SLOMANSON TO BARBARA GAAL AND JANET GROVE (FEB. 10, 2009)

CA supposedly federalized summary judgment with the 1992/93 amendments to CCP 437c. Federal law openly embraces summary judgment as a key ingredient of fed practice. However, legislative provisions still deem summ jmt to be a "drastic" measure. I can provide more details, but thought I'd run this by, to see if you might be considering this disconnect b/t the 92/93 amendments and resulting practice — eg, just abt every CA app opinion referring to summ jmt as "drastic," while fed has warmly embraced it for some decades.

I could submit something more formal (preferably after mid-April when I have a book manuscript due), in e-mail or Word format.

Regards,
Bill

EMAIL FROM PROF. WILLIAM SLOMANSON TO BARBARA GAAL AND JANET GROVE (APRIL 4, 2009)

Re: Proposed Anti-SLAPP Amendment

I recommend a mini-legislative substitution of CCP 128.7 for 128.5 (just) in the basic anti-SLAPP statute. The latter was recognized as effectively repealed in Clark v. Optical Coating, 80 Cal.Rptr.3d 812 (2008). Sec. 425.16(c) should now refer to "128.7." You may recall that 128.5 applies, on its face, only to actions filed *on/before* Dec. 31, 1994. (It's always intriguing, trying to explain to my students why a statute — with that express time limitation — applies to some but not all subsequently-filed civil cases.) I've been presuming that when counsel apply for sanctions under the anti-SLAPP statute, trial judges are not "dissing" their choice of statutes, as long as the sanction sought is within the somewhat more limited scope of Sec. 128.7.

CCP 425.16(c): "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

CCP 128.7(i): "This section shall apply to a complaint or petition filed on or after January 1, 1995, and *any other* pleading, *written notice of motion, or other similar paper* filed in that matter" (italics added).

Regards & Happy Holidays (or what's left of them),

Bill

EMAIL FROM PROF. WILLIAM SLOMANSON TO BARBARA GAAL (MAY 26, 2009)

§ 128.6. Frivolous actions or delaying tactics; order for payment of expenses; punitive damages

* * *

(f) This section shall become operative on January 1, 2003, unless a statute that becomes effective on or before this date extends or deletes the repeal date of Section 128.7.

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§ 128.7. Signature requirement for court papers; certification that specified conditions met; violations; sanctions; punitive damages

* * *

(i) This section shall apply to a complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter.

Stats.2005, c. 706 (A.B.1742), deleted subd. (j) of 128.7, which read:

"(j) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2006, deletes or extends that date."

128.7 has been extended a couple of times, the last being the above 2005 removal of 128.7's "(j)." I've now seen a couple of cases that dissed an atty's attempted use of 128.6 — which actually never saw the light of day b/c of the 2005 "(j)"-dump.

Recommend clarifying legislation. Things are screwy enough with 128.5 still being on the books, which applies only to actions filed **before** 12/31/94. We ought to at least get 128.6 out of the CCP, b/c it has generated confusion b/c of its <u>apparent</u> (but incorrectly) stating that it went into effect in 2006.

Regards,
Bill