

Admin.

December 8, 2009

Memorandum 2009-47

2009-2010 Annual Report (Staff Draft)

Attached to this memorandum is a staff draft of the text of the Commission's 2009-2010 *Annual Report*. In the interest of saving photocopying and mailing costs, we have not reproduced here the various tables and appendices that are published with the Annual Report (e.g., text of Commission's governing statute, cumulative table of legislative action on Commission recommendations, revised Comments to legislation enacted during session, etc.). After approval of the text of the Annual Report, the staff will assemble the various parts and send the Annual Report to the printer.

Much of the report's content is routine and does not change significantly from year to year. A few matters requiring special attention are noted below.

New Study Authority

The most recent resolution of authority (ACR 49 (Evans)) added new authority to study the application of the Government Claims Act to charter schools. That new authority is discussed in the attached draft.

Personnel of Commission

The report identifies the members of the Commission, along with the date upon which each member's term expires. The attached draft reflects the appointment of Ali Jahangiri as a Commissioner on September 8, 2009 and his reappointment on November 20, 2009. The vacancies created by the end of the terms of Commissioners Frank Kaplan and William Weinberger are also noted.

Activities of Commission Members and Staff

The report typically notes any activities of Commission members and staff related to the Commission's work, such as speeches made and articles published during the past year. **Please notify the staff if you have any activities of this nature to report.**

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.

Commission Materials as Evidence of Legislative Intent

The Annual Report discusses the value of Commission materials in determining legislative intent:

Commission materials that have been placed before and considered by the Legislature are legislative history, are declarative of legislative intent, and are entitled to great weight in construing statutes. The materials are a key interpretive aid for practitioners as well as courts, and courts may judicially notice and rely on them. Courts at all levels of the state and federal judicial systems depend on Commission materials to construe statutes enacted on Commission recommendation. Appellate courts alone have cited Commission materials in several thousand published opinions.

Commission materials have been used as direct support for a court's interpretation of a statute, as one of several indicia of legislative intent, to explain the public policy behind a statute, and on occasion to demonstrate (by their silence) the Legislature's intention not to change the law. The Legislature's failure to adopt a Commission recommendation may be used as evidence of legislative intent to reject the proposed rule.

Commission materials are entitled to great weight, but they are not conclusive. While the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every consistent or inconsistent case is noted in the Comments, nor can it anticipate judicial conclusions as to the significance of existing case authorities. Hence, failure of the Comment to note every change the recommendation would make in prior law, or to refer to a consistent or inconsistent judicial decision, is not intended to, and should not, influence the construction of a clearly stated statutory provision.

Some types of Commission materials may not properly be relied on as evidence of legislative intent. Courts have on occasion cited preliminary Commission materials such as tentative recommendations, correspondence, and staff memoranda and drafts in support of their construction of a statute. While these materials may be indicative of the Commission's intent in proposing the legislation, only the Legislature's intent in adopting the legislation is entitled to weight in construing the statute. Unless preliminary Commission materials were placed before the Legislature during its consideration of the legislation, those materials are not legislative history and are not relevant in determining the Legislature's intention in adopting the legislation.

A Commission study prepared after enactment of a statute that analyzes the statute is not part of the legislative history of the statute. However, documents prepared by or for the Commission may be used by the courts for their analytical value, apart from their role in statutory construction.

See attached draft at pp. 17-21 (notes omitted). Substantively similar discussions have been included in the Commission's Annual Reports for many years. See, e.g., *Annual Report for 1995*, 25 Cal. L. Revision Comm'n Reports 615, 630-31 (1995).

An important principle expressed in the discussion above is that Commission materials are evidence of legislative intent to the extent that they "have been placed before and considered by the Legislature." This makes sense because it is the Legislature's intentions in enacting legislation that matter, not the Commission's. When a final recommendation is delivered to the Legislature and the Governor and provided to legislative committee members and staff, it actually informs the Legislature's intent with respect to the recommended legislation.

By contrast, pre-recommendation deliberative materials (such as staff memoranda) that are not provided to the Legislature do not actually inform the Legislature's analysis of proposed legislation. It is therefore harder to argue that they are evidence of the Legislature's intent. As explained in *Juran v. Epstein*, 23 Cal. App. 4th 882, 894 n.5, 28 Cal. Rptr. 2d 588, 594 n.5 (1994):

In addition to directing us to the Commission's comments, both parties discuss at length a document written by a Commission staff member entitled "Memorandum." Since the Memorandum was a working paper and there was no evidence it was considered or even seen by the Legislature, it is entitled to little or no weight in discerning legislative intent.

The Commission has expressed its concurrence with that view in every Annual Report since *Juran* was decided. See, e.g., *Annual Report for 1995*, 25 Cal. L. Revision Comm'n Reports 615, 631 n.15 (1995).

Jan Raymond, a California attorney and proprietor of a legislative intent research service, urges the Commission to reconsider the point. He believes that the Commission's deliberative materials should be considered evidence of legislative intent, even when they are not provided to the Legislature. His letter is attached as an Exhibit.

His main argument turns on a theory of agency. He states that it is a fiction to believe that the entirety of the Legislature considers materials relating to pending legislation. In reality, the Legislature delegates consideration of such material to the members of relevant committees and their staffs. Material considered by

those “agents” of the Legislature is evidence of legislative intent even though it is never considered by the Legislature as a whole.

He then maintains that the Commission stands in a similar sort of agency relationship to the Legislature. Therefore, knowledge of materials considered by the Commission (including staff memoranda) should also be imputed to the Legislature.

That argument makes logical sense, if one accepts the premise that the relationship between the Commission and the Legislature is sufficiently analogous to the relationship between a legislative policy committee and the Legislature as a whole.

The staff does not accept that premise. Legislative policy committees are not merely agents of the Legislature, *they are part of the Legislature itself*. Their members are legislators, who are answerable to legislative leadership. Their staff members are employees of the Legislature who are answerable to the committee’s chairs. Committees may introduce and amend legislation, and their approval is required for legislation to be enacted. The committee system is integral to the operation of the Legislature. It is therefore reasonable to treat materials considered by a committee as evidence of legislative intent. (As is acknowledged in Government Code Section 9080, which states that material in committee bill files is evidence of legislative intent.)

By contrast, the Commission is not a part of the Legislature. It is an independent entity. Seven of its 10 members are appointed by the Governor (rather than the Legislature). Gov’t Code § 8281. The statute creating the Commission is not within the body of law governing the Legislature. See Gov’t Code § 8291 *et seq.* Nor is the Commission funded as part of the Legislature’s budget. The Commission does not have the power to introduce or amend legislation. Commission approval is not required for legislation to be enacted. Appropriately, the Commission’s records are not “legislative records” for the purposes of Government Code Section 9080.

It is true that the Commission’s work is in service of the legislative process. The Commission is tasked with studying problems in the law, as authorized by the Legislature, and recommending statutory reforms. However, the value of the Commission’s process is largely a matter of its independence from the Legislature. The Commission brings a neutral perspective to its studies, working outside of the normal pressures that bear on the legislative process.

Because of the Commission's independence from the Legislature, the staff does not see the Commission as a direct instrumentality of the Legislature, to the point where the acts and intentions of the Commission should be imputed to the Legislature. For that reason, the staff recommends that the Commission **maintain its long-held position that its materials are evidence of legislative intent only to the extent that they are actually "placed before and considered by the Legislature"** (at which point they become "legislative records" for the purposes of Government Code Section 9080).

None of the foregoing precludes judicial notice of the Commission's deliberative materials for purposes other than determining the Legislature's intent. Courts have held that Commission materials may be noticed "for their analytical value, apart from their role in statutory construction." See attached draft, p. 21 n.49.

Editorial Suggestions

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

Respectfully submitted,

Brian Hebert
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

2009-2010 Annual Report

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
www.clrc.ca.gov

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SUMMARY OF WORK OF COMMISSION

Recommendations to the 2009 Legislature

In 2009, bills effectuating four Commission recommendations were enacted, relating to the following subjects:

- Attorney-client privilege after death of the client
- Statutory references to recording technology
- No contest clause statute conforming revisions
- Donative transfer restrictions (in part)

Two bills that were introduced in 2009 were held over for further consideration by the Legislature in 2010.

Recommendations to the 2010 Legislature

In 2010, the Commission expects that the Legislature will consider new legislation recommended by the Commission, and will continue consideration of Commission-recommended legislation that was introduced in 2009, on the following subjects:

- Mechanics lien law
- Donative transfer restrictions
- Record notice of option to purchase real property
- Trial court restructuring

The Commission is also investigating whether to seek introduction of legislation to implement its recommendation on nonsubstantive reorganization of deadly weapon statutes in 2010, or delay that step until 2011, when the legislation could proceed as a two-year bill if needed.

Commission Activities Planned for 2010

During 2010, the Commission will work on the following major topics: charter schools and the Government Claims Act, nonsubstantive reorganization of common interest development law, nonresidential common interest developments, presumptively disqualified fiduciaries, and statutes made obsolete by trial court

restructuring. The Commission will also consider other subjects to the extent time permits.

CONTENTS

	<i>Page</i>
2009-2010 ANNUAL REPORT	9
Introduction	9
2010 Legislative Program	10
Major Studies in Progress	10
Charter Schools and the Government Claims Act	11
Common Interest Development Law	11
Trial Court Restructuring	11
Presumptive Disqualification of Fiduciary	11
Other Subjects	12
Calendar of Topics for Study	12
Function and Procedure of Commission	12
Background Studies	13
Recommendations	14
Official Comments	15
Commission Materials as Legislative History	16
Use of Commission Materials To Determine Legislative Intent	18
Publications	22
Electronic Publication and Internet Access	23
Electronic Mail	23
MCLE Credit	23
Personnel of Commission	24
Commission Budget	25
Other Activities	26
National Conference of Commissioners on Uniform State Laws	26
Other Staff Activities	26

Legislative History of Recommendations in the 2009
 Legislative Session 26
 Recording Technology 27
 Attorney-Client Privilege After Client’s Death..... 27
 Donative Transfer Restrictions and No Contest
 Clause Statute Conforming Revisions..... 27
 Mechanics Lien Law 27
 Resolution Authorizing Topics for Study 28
 Report on Statutes Repealed by Implication or Held
 Unconstitutional 28
 Recommendations..... 28

APPENDICES

1. Statute Governing the California Law Revision
 Commission_____
2. Calendar of Topics Authorized for Study_____
3. Legislative Action on Commission Recommendations
 (Cumulative)....._____
4. Commission Publications_____

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-2
PALO ALTO, CA 94303-4739
650-494-1335

SUSAN DUNCAN LEE, Chairperson
ASSOCIATE JUSTICE JOHN ZEBROWSKI (RET.), Vice Chairperson
DIANE F. BOYER-VINE
SENATOR ELLEN CORBETT
ASSEMBLY MEMBER NOREEN EVANS
SIDNEY GREATHOUSE
PAMELA L. HEMMINGER
ALI JAHANGIRI

December 17, 2009

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In conformity with Government Code Section 8293, the California Law Revision Commission submits this report of its activities during 2009 and its plans for 2010.

Four of five Commission recommendations introduced in the Legislature in 2009 were enacted into law, in whole or in part. Two bills implementing Commission recommendations were held over for further consideration by the Legislature in 2010.

The Commission is grateful to the members of the Legislature who carried Commission-recommended legislation in 2009:

- Assembly Member Silva (Recording Technology)
- Assembly Member Tran (Attorney-Client Privilege)
- Senator Tom Harman (Donative Transfer Restrictions; No Contest Clause Statute Conforming Revisions)
- Senator Alan Lowenthal (Mechanics Lien Law)

The Commission held six one-day meetings in 2009. Meetings were held in Los Angeles and Sacramento.

Respectfully submitted,

Susan Duncan Lee
Chairperson

2009-2010 ANNUAL REPORT

Introduction

The California Law Revision Commission was created in 1953 and commenced operation in 1954 as the permanent successor to the Code Commission,¹ with responsibility for a continuing substantive review of California statutory and decisional law.² The Commission studies the law to discover defects and anachronisms and recommends legislation to make needed reforms.

The Commission ordinarily works on major topics, assigned by the Legislature, that require detailed study and cannot easily be handled in the ordinary legislative process. The Commission's work is independent, nonpartisan, and objective.

The Commission consists of:³

- A Member of the Senate appointed by the Rules Committee
- A Member of the Assembly appointed by the Speaker
- Seven members appointed by the Governor with the advice and consent of the Senate
- The Legislative Counsel, who is an ex officio member

The Commission may study only topics that the Legislature has authorized.⁴

1. See 1953 Cal. Stat. ch. 1445, operative September 9, 1953. The first meeting of the Commission was held on February 23, 1954.

6. See Gov't Code §§ 8280-8298 (statute establishing Law Revision Commission) (Appendix 1 *infra*). See also 1955 Report [Annual Report for 1954] at 7, 1 Cal. L. Revision Comm'n Reports (1957).

3. For current membership, see "Personnel of Commission" *infra*.

4. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study. See *Calendar of Topics Authorized for Study*, Appendix 2 *infra*. However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution. Gov't Code § 8298. Additionally, a concurrent resolution or statute may directly confer authority to study a particular subject. See, e.g., 2006 Cal. Stat. res. ch. 128 [ACR 73] (nonsubstantive reorganization of weapon statutes); 2006 Cal. Stat. ch. 216 [AB 2034] (donative transfer restrictions).

The Commission has submitted 387 recommendations to the Legislature, of which 353 (more than 90%) have been enacted in whole or in substantial part.⁵ Commission recommendations have resulted in the enactment of legislation affecting 22,577 sections of California law: 4,590 sections amended, 9,512 sections added, and 8,475 sections repealed.

The Commission's recommendations, reports, and other selected materials are published in softcover and later collected in hardcover volumes. Recent materials are also available through the Internet. A list of past publications and information on obtaining printed or electronic versions are at the end of this Annual Report.⁶

2010 Legislative Program

In 2010, the Commission plans to seek the introduction or continued consideration of legislation effectuating Commission recommendations on the following subjects:

- Mechanics lien law
- Donative transfer restrictions
- Record notice of option to purchase real property
- Trial court restructuring

The Commission is also investigating whether to seek introduction of legislation to implement its recommendation on nonsubstantive reorganization of deadly weapon statutes in 2010, or delay that step until 2011, when the legislation could proceed as a two-year bill if needed.

Major Studies in Progress

During 2010, the Commission will work on the following major topics: charter schools and the Government Claims Act, nonsubstantive reorganization of common interest development law, nonresidential common interest developments, presumptively

5. See *Legislative Action on Commission Recommendations*, Appendix 3 *infra*.

6. See *Commission Publications*, Appendix 4 *infra*.

disqualified fiduciaries, and statutes made obsolete by trial court restructuring. The Commission may also consider other subjects to the extent time permits.

Charter Schools and the Government Claims Act

The Legislature has authorized the Commission to analyze “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” (i.e., the Government Claims Act).⁷ The Commission began work on this study in December 2009.

Common Interest Development Law

The Commission will continue its review of statutes affecting common interest developments (“CIDs”). The Commission is actively studying (1) the application of CID law to nonresidential developments and (2) the cleanup and reorganization of CID statutory law. Both studies should be completed in 2010.

The Commission may study other matters relating to CIDs as time permits.

Trial Court Restructuring

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

Presumptive Disqualification of Fiduciary

Pursuant to its authority to study revision of the Probate Code, the Commission will continue to study the extent to which the appointment of a fiduciary should be presumed to be the product of fraud or undue influence if the appointee is a “disqualified person” under Probate Code Section 21350.5.

7. 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

Other Subjects

The major studies in progress described above will dominate the Commission's time and resources during 2010. The Commission will consider other subjects authorized for study, as time permits.

Calendar of Topics for Study

The Commission's calendar includes 22 topics authorized by the Legislature for study.⁸

Function and Procedure of Commission

The principal duties of the Commission are to:⁹

- (1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.
- (2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,¹⁰ bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.
- (3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.¹¹

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. Under its general authority, the

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

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

10. The Legislative Counsel, an ex officio member of the Law Revision Commission, serves as a Commissioner of the Commission on Uniform State Laws. See Gov't Code § 8261.

11. Gov't Code § 8289. The Commission is also directed to recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. See "Report on Statutes Repealed by Implication or Held Unconstitutional" *infra*.

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

Background Studies

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study may be prepared by a member of the Commission's staff or by a specialist in the field who is retained as a consultant.¹⁶ Law

12. Gov't Code § 8293. Section 8293 requires a concurrent resolution authorizing the Commission to study topics contained in the calendar of topics set forth in the Commission's regular report to the Legislature. Section 8293 also requires that the Commission study any topic that the Legislature by concurrent resolution or statute refers to the Commission for study.

13. Gov't Code § 8298.

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

15. For example, Code of Civil Procedure Section 703.120(a) requires the Commission to review statutes providing for exemptions from enforcement of money judgments every 10 years and to recommend any needed revisions. The Commission also has continuing statutory authority to study enforcement of judgments pursuant to Code of Civil Procedure Section 703.120(b).

Government Code Section 70219 requires the Commission, in consultation with the Judicial Council, to perform follow-up studies taking into consideration the experience in courts that have unified. For a list of specific studies, see *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

Government Code Section 71674 requires the Commission to recommend repeal of provisions made obsolete by the Trial Court Employment Protection and Governance Act (Gov't Code § 71600 *et seq.*), Lockyer-Isenberg Trial Court Funding Act of 1997 (1997 Cal. Stat. ch. 850), and the implementation of trial court unification.

Statutory authority may be uncodified. See, e.g., 2005 Cal. Stat. ch. 422 (beneficiary deeds).

16. The following persons are presently under contract as Commission consultants, or have served in that capacity on presently active studies: James E.

professors and practicing attorneys who serve as consultants have already acquired the considerable knowledge necessary to understand the specific problems under consideration, and receive little more than an honorarium for their services. From time to time, expert consultants are also retained to advise the Commission at meetings.

Recommendations

After making its preliminary decisions on a subject, the Commission ordinarily distributes a tentative recommendation to interested persons and organizations, including the State Bar, local and specialized bar associations, public interest organizations, and business and professional associations. Notice of the availability of the tentative recommendation is mailed to interested persons on the Commission's mailing list and publicized in legal newspapers and other relevant publications. Notice is also posted on the Commission's website and emailed to interested persons.

Comments received on the tentative recommendation are considered by the Commission in determining what recommendation, if any, will be made to the Legislature.¹⁷ When the Commission has reached a conclusion on the matter,¹⁸ its

Acret, Pacific Palisades; Professor Susan F. French, UCLA Law School; David Gould, Calabasas; Prof. Edward C. Halbach, Jr., Berkeley; Keith Honda, Monterey; Gordon Hunt, Hunt Ortmann; Professor J. Clark Kelso, McGeorge School of Law; Professor Miguel A. Méndez, Stanford Law School; Nathaniel Sterling, former Executive Secretary, California Law Revision Commission, Palo Alto; Professor Gregory S. Weber, McGeorge School of Law.

17. For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A. J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965). See also Gaal, *Evidence Legislation in California*, 36 S.W.U. L. Rev. 561, 563-69 (2008); Quillinan, *The Role and Procedures of the California Law Revision Commission in Probate and Trust Law Changes*, 8 Est. Plan. & Cal. Prob. Rep. 130-31 (Cal. Cont. Ed. Bar 1987).

18. Occasionally, one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. Dissents are noted in the minutes of the meeting at which the recommendation is approved.

recommendation to the Legislature (including a draft of any necessary legislation) is published and distributed in printed form and on the Internet. If a background study has been prepared in connection with the recommendation, it may be published by the Commission or in a law review.¹⁹

Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends for enactment, amendment, or repeal. The Comments are included in the Commission's published recommendations. A Comment indicates the derivation

19. For recent background studies published in law reviews, see Méndez, *California Evidence Code — Federal Rules of Evidence, VIII. Judicial Notice*, 44 U.S.F. L. Rev. 141 (2009); Méndez, *California Evidence Code — Federal Rules of Evidence, VII. Relevance: Definitions and Limitations*, 42 U.S.F. L. Rev. 329 (2007); Méndez, *California Evidence Code — Federal Rules of Evidence, VI. Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. Rev. 1 (2006); Méndez, *California Evidence Code - Federal Rules of Evidence, V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence*, 39 U.S.F. L. Rev. 455 (2005); Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 Pepp. Disp. Resol. L.J. 1 (2004); Méndez, *California Evidence Code - Federal Rules of Evidence, IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. Rev. 139 (2004); Méndez, *California Evidence Code - Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003); Méndez, *California Evidence Code - Federal Rules of Evidence, II. Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 411 (2003); Méndez, *California Evidence Code - Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003 (2003); Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 Hastings L.J. 885 (2002); Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001).

For a list of background studies published in law reviews before 2000, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971); 11 Cal. L. Revision Comm'n Reports 1008 n.5, 1108 n.5 (1973); 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976); 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982); 17 Cal. L. Revision Comm'n Reports 819 n.6 (1984); 18 Cal. L. Revision Comm'n Reports 212 n.17, 1713 n.20 (1986); 19 Cal. L. Revision Comm'n Reports 513 n.22 (1988); 20 Cal. L. Revision Comm'n Reports 198 n.16 (1990); 32 Cal. L. Revision Comm'n Reports 585 n.14 (2002).

of a section and often explains its purpose, its relation to other law, and potential issues concerning its meaning or application.²⁰

Commission Materials as Legislative History

Commission recommendations are printed and sent to both houses of the Legislature, as well as to the Legislative Counsel and Governor.²¹ Receipt of a recommendation by the Legislature is noted in the legislative journals, and the recommendation is referred to the appropriate policy committee.²²

The bill introduced to effectuate a Commission recommendation is assigned to legislative committees charged with study of the matter in depth.²³ A copy of the recommendation is provided to legislative committee members and staff before the bill is heard and throughout the legislative process. The legislative committees rely on the recommendation in analyzing the bill and making recommendations to the Legislature concerning it.²⁴

20. Commission Comments are published by LexisNexis and Thomson/West in their print and CD-ROM editions of the annotated codes, and printed in selected codes prepared by other publishers. Comments are also available on Westlaw and LexisNexis.

21. See Gov't Code §§ 8291, 9795, 11094-11099; see also *Reynolds v. Superior Court*, 12 Cal. 3d 834, 847 n.18, 528 P.2d 45, 53 n.18, 117 Cal. Rptr. 437, 445 n.18 (1974) (Commission "submitted to the Governor and the Legislature an elaborate and thoroughly researched study").

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

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

24. The Commission does not concur with the suggestion of the court in *Conservatorship of Wendland*, 26 Cal. 4th 519, 542, 28 P.3d 151, 166, 110 Cal. Rptr. 2d 412, 430 (2001), that a Commission Comment might be entitled to less weight based on speculation that the Legislature may not have read and endorsed every statement in the Commission's report. That suggestion belies the operation of the committee system in the Legislature. See White, *Sources of Legislative Intent in California*, 3 Pac. L.J. 63, 85 (1972) ("The best evidence of legislative intent must surely be the records of the legislature itself and the reports which the committees relied on in recommending passage of the legislation.").

If an amendment is made to the bill that renders one of the Commission's original Comments inconsistent, the Commission generally will adopt a revised Comment and provide it to the committee. The Commission also provides this material to the Governor's office once the bill has passed the Legislature and is before the Governor for action. These materials are a matter of public record.

Until the mid-1980s, a legislative committee, on approving a bill implementing a Commission recommendation, would adopt the Commission's recommendation as indicative of the committee's intent in approving the bill.²⁵ If a Comment required revision, the revised Comment would be adopted as a legislative committee Comment. The committee's report would be printed in the journal of the relevant house.²⁶

The Legislature has discontinued the former practice due to increased committee workloads and an effort to decrease the volume of material reprinted in the legislative journals. Under current practice, a legislative committee relies on Commission materials in its analysis of a bill, but does not separately adopt the materials. Instead, the Commission makes a report detailing the legislative history of the bill, including any revised Comments. Bill reports are published as appendices to the Commission's annual reports.²⁷

25. See, e.g., *Baldwin v. State*, 6 Cal. 3d 424, 433, 491 P.2d 1121, 1126, 99 Cal. Rptr. 145, 150 (1972). For a description of legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App. 3d 877, 884, 109 Cal. Rptr. 421, 426 (1973).

26. For an example of such a report, see *Report of Senate Committee on Judiciary on Assembly Bill 3472*, Senate J. June 14, 1984, reprinted in 18 Cal. L. Revision Comm'n Reports 1, 115 (1986).

27. Commission reports have in the past been published as well in the legislative journals. See, e.g., *In re Marriage of Neal*, 153 Cal. App. 3d 117, 124, 200 Cal. Rptr. 341, 345 (1984) (noting that Chairman of Senate Judiciary Committee, when reporting on AB 26 on Senate floor, moved that revised Commission report be printed in Senate Journal as evidence of legislative intent).

Use of Commission Materials To Determine Legislative Intent

Commission materials that have been placed before and considered by the Legislature are legislative history, are declarative of legislative intent,²⁸ and are entitled to great weight in construing statutes.²⁹ The materials are a key interpretive aid for practitioners as well as courts,³⁰ and courts may judicially notice and rely on them.³¹ Courts at all levels of the state³² and federal³³

28. See, e.g., *Fair v. Bakhtiari*, 40 Cal. 4th 189, 195, 147 P.3d 653, 657, 51 Cal. Rptr. 3d 871, 875 (2006) (“The Commission’s official comments are deemed to express the Legislature’s intent.”); *People v. Williams*, 16 Cal. 3d 663, 667-68, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976) (“The official comments of the California Law Revision Commission on the various sections of the Evidence Code are declarative of the intent not only of the draft[ers] of the code but also of the legislators who subsequently enacted it.”).

29. See, e.g., *Dep’t of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal. 4th 1, 12-13 n.9, 145 P.3d 462, 469 n.9, 50 Cal. Rptr. 3d 585, 593 n.9 (2006) (Commission’s official comments are persuasive evidence of Legislature’s intent); *Hale v. S. Cal. IPA Med. Group, Inc.*, 86 Cal. App. 4th 919, 927, 103 Cal. Rptr. 2d 773, 778 (2001):

In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute. (*Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 400, fn. 8 [276 Cal. Rptr. 524]; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 535, fn. 7 [260 Cal. Rptr. 713].) In particular, reports and interpretive opinions of the Law Revision Commission are entitled to great weight. (*Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal.App.4th 23, 30, fn. 10 [17 Cal. Rptr. 2d 340].)

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

31. See, e.g., *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005) (providing overview of materials that may be judicially noticed in determining legislative intent); *Hale*, 86 Cal. App. 4th at 927; *Barkley v. City of Blue Lake*, 18 Cal. App. 4th 1745, 1751 n.3, 23 Cal. Rptr. 2d 315, 318-19 n.3 (1993).

32. See, e.g., *Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 298, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997) (California Supreme Court); *Admin. Mgmt Services, Inc. v. Fid. Deposit Co. of Md.*, 129 Cal. App. 3d 484, 488, 181 Cal. Rptr. 141 (1982) (court of appeal); *Rossetto v. Barross*, 90 Cal. App. 4th Supp. 1, 110 Cal. Rptr. 2d 255 (2001) (appellate division of superior court).

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

Commission materials have been used as direct support for a court's interpretation of a statute,³⁶ as one of several indicia of legislative intent,³⁷ to explain the public policy behind a statute,³⁸

33. See, e.g., *California v. Green*, 399 U.S. 149, 154 n.3 (1970) (United States Supreme Court); *S. Cal. Bank v. Zimmerman (In re Hilde)*, 120 F.3d 950, 953 (9th Cir. 1997) (federal court of appeals); *Williams v. Townsend*, 283 F. Supp. 580, 582 (C.D. Cal. 1968) (federal district court); *Ford Consumer Fin. Co. v. McDonell (In re McDonell)*, 204 B.R. 976, 978-79 (B.A.P. 9th Cir. 1996) (bankruptcy appellate panel); *In re Garrido*, 43 B.R. 289, 292-93 (Bankr. S.D. Cal. 1984) (bankruptcy court).

34. See, e.g., *Jevne v. Superior Court*, 35 Cal. 4th 935, 947, 111 P.3d 954, 962, 28 Cal. Rptr. 3d 685, 694-95 (2005) (Commission report entitled to substantial weight in construing statute); *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 308 & n.6, 6 P.3d 713, 718 & n.6, 99 Cal. Rptr. 2d 792, 797 & n.6 (2000) (Comments to reenacted statute reiterate the clear understanding and intent of original enactment); *Brian W. v. Superior Court*, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 720 (1978) (Comments persuasive evidence of Legislature's intent); *Volkswagen Pac., Inc. v. City of Los Angeles*, 7 Cal. 3d 48, 61-63, 496 P.2d 1237, 1247-48, 101 Cal. Rptr. 869, 879-80 (1972) (Comments evidence clear legislative intent of law); *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968) (Comments entitled to substantial weight), overruled on other grounds by *Privette v. Superior Court*, 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993); *County of Los Angeles v. Superior Court*, 62 Cal. 2d 839, 843-44, 402 P.2d 868, 870-71, 44 Cal. Rptr. 796, 798-99 (1965) (statutes reflect policy recommended by Commission).

35. In this connection it should be noted that the Law Revision Commission should not be cited as the "Law Revision Committee" or as the "Law Review Commission." See, e.g., *Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1132 (E.D. Cal. 2002) (Law Revision "Committee"); *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1010 n.2, 33 Cal. Rptr. 2d 158, 160 n.2 (1994) (Law "Review" Commission).

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

37. See, e.g., *Heieck & Moran v. City of Modesto*, 64 Cal. 2d 229, 233 n.3, 411 P.2d 105, 108 n.3, 49 Cal. Rptr. 377, 380 n.3 (1966).

and on occasion to demonstrate (by their silence) the Legislature's intention not to change the law.³⁹ The Legislature's failure to adopt a Commission recommendation may be used as evidence of legislative intent to reject the proposed rule.⁴⁰

Commission materials are entitled to great weight, but they are not conclusive.⁴¹ While the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every consistent or inconsistent case is noted in the Comments,⁴² nor can it anticipate judicial conclusions as to the significance of existing case authorities.⁴³ Hence, failure of the Comment to note every change the recommendation would make in prior law, or to refer to a consistent or inconsistent judicial decision, is not intended to, and

38. See, e.g., *Southern Cal. Gas Co. v. Public Utils. Comm'n*, 50 Cal. 3d 31, 38 n.8, 784 P.2d 1373, 1376 n.8, 265 Cal. Rptr. 801, 804 n.8 (1990).

39. See, e.g., *State ex rel. State Pub. Works Bd. v. Stevenson*, 5 Cal. App. 3d 60, 64-65, 84 Cal. Rptr. 742, 745-46 (1970) (finding that Legislature had no intention of changing existing law where "not a word" in Commission's reports indicated intent to abolish or emasculate well-settled rule).

40. See, e.g., *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 935-36, 496 P.2d 480, 490, 101 Cal. Rptr. 568, 578 (1972).

41. See, e.g., *Redevelopment Agency v. Metropolitan Theatres Corp.*, 215 Cal. App. 3d 808, 812, 263 Cal. Rptr. 637, 639 (1989) (Comment does not override clear and unambiguous statute). Commission materials are but one indicium of legislative intent. See, e.g., *Estate of Joseph*, 17 Cal. 4th 203, 216, 949 P.2d 472, 480, 70 Cal. Rptr. 2d 619, 627 (1998). The accuracy of a Comment may also be questioned. See, e.g., *Buzgheia v. Leasco Sierra Grove*, 30 Cal. App. 4th 766, 774, 36 Cal. Rptr. 2d 144, 149 (1994); *In re Thomas*, 102 B.R. 199, 202 (Bankr. E.D. Cal. 1989).

42. *Cf. People v. Coleman*, 8 Cal. App. 3d 722, 731, 87 Cal. Rptr. 554, 559 (1970) (Comments make clear intent to reflect existing law even if not all supporting cases are cited).

43. See, e.g., *Arellano v. Moreno*, 33 Cal. App. 3d 877, 885, 109 Cal. Rptr. 421, 426-27 (1973) (noting that decisional law cited in Comment was distinguished by the California Supreme Court in a case decided after enactment of the Commission recommendation).

should not, influence the construction of a clearly stated statutory provision.⁴⁴

Some types of Commission materials may not properly be relied on as evidence of legislative intent. Courts have on occasion cited preliminary Commission materials such as tentative recommendations, correspondence, and staff memoranda and drafts in support of their construction of a statute.⁴⁵ While these materials may be indicative of the Commission's intent in proposing the legislation, only the Legislature's intent in adopting the legislation is entitled to weight in construing the statute.⁴⁶ Unless preliminary Commission materials were placed before the Legislature during its consideration of the legislation, those materials are not legislative history and are not relevant in determining the Legislature's intention in adopting the legislation.⁴⁷

44. The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973); 1974 Cal. Stat. ch. 227.

45. See, e.g., *Rojas v. Superior Court*, 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2005) (tentative recommendation, correspondence, and staff memorandum and draft); *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12-13, 960 P.2d 1031, 1037, 78 Cal. Rptr. 2d 1, 7 (1998) (tentative recommendation). However, in some cases, proposed legislation will be based on a tentative, rather than final, Commission recommendation. See, e.g., *Estate of Archer*, 193 Cal. App. 3d 238, 243, 239 Cal. Rptr. 137, 140 (1987). In that event, reliance on the tentative recommendation is proper.

See also *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 406, 45 Cal. Rptr. 2d 766, 772-73 (1995) (letter responding to tentative recommendation); D. Henke, *California Legal Research Handbook* § 3.51 (1971) (background studies).

46. *Cf. Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1589, 1 Cal. Rptr. 2d 595, 598 (1991) (linking Commission's intent and Legislature's intent); *Guthman v. Moss*, 150 Cal. App. 3d 501, 508, 198 Cal. Rptr. 54, 58 (1984) (determination of Commission's intent used to infer Legislature's intent).

47. The Commission concurs with the opinion of the court in *Juran v. Epstein*, 23 Cal. App. 4th 882, 894 n.5, 28 Cal. Rptr. 2d 588, 594 n.5 (1994), that staff memoranda to the Commission should not be considered as legislative history.

A Commission study prepared after enactment of a statute that analyzes the statute is not part of the legislative history of the statute.⁴⁸ However, documents prepared by or for the Commission may be used by the courts for their analytical value, apart from their role in statutory construction.⁴⁹

Publications

Commission publications are distributed to the Governor, the Secretary of the Senate, the Chief Clerk of the Assembly, and the Legislative Counsel.⁵⁰ Commission materials are also distributed to interest groups, lawyers, law professors, courts, district attorneys, law libraries, and other individuals requesting materials.

The Commission's reports, recommendations, and studies are republished in hardcover volumes that serve as a permanent record of the Commission's work and, it is believed, are a valuable contribution to the legal literature of California. These volumes are available at many county law libraries and at some other libraries. About half of the hardcover volumes are out of print, but others are available for purchase.⁵¹ Publications that are out of print are available as electronic files.⁵²

48. See, e.g., *Duarte v. Chino Community Hosp.*, 72 Cal. App. 4th 849, 856 n.3, 85 Cal. Rptr. 2d 521, 525 n.3 (1999).

49. See, e.g., *Sierra Club v. San Joaquin Local Agency Formation Comm'n*, 21 Cal. 4th 489, 502-03, 981 P.2d 543, 551-52, 87 Cal. Rptr. 2d 702, 712 (1999) (unenacted Commission recommendation useful as "opinion of a learned panel"); *Hall v. Hall*, 222 Cal. App. 3d 578, 585, 271 Cal. Rptr. 773, 777 (1990) (Commission staff report most detailed analysis of statute available); *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 309-10, 160 Cal. Rptr. 862, 866 (1979) (law review article prepared for Commission provides insight into development of law); *Schonfeld v. City of Vallejo*, 50 Cal. App. 3d 401, 407 n.4, 123 Cal. Rptr. 669, 673 n.4 (1975) (court indebted to many studies of Commission for analytical materials).

50. See Gov't Code § 8291. For limitations on Section 8291, see Gov't Code §§ 9795, 11094-11099.

51. See *Commission Publications*, Appendix 4 *infra*.

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

Electronic Publication and Internet Access

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

Since 2002, all Commission publications and staff memoranda are available as electronic files. Recent publications and memoranda may be downloaded from the Commission's website. Files that are not on the website are available on request.⁵⁴

Electronic Mail

Email commenting on Commission proposals or suggesting issues for study is given the same consideration as letter correspondence, if the email message includes the name and regular mailing address of the sender. Email to the Commission may be sent to *commission@clrc.ca.gov*.

The Commission distributes the majority of its meeting agendas, staff memoranda, and other written materials electronically, by means of its website and email distribution lists. The Commission encourages use of email as an inexpensive and expedient means of communication with the Commission.

MCLE Credit

The Commission is approved by the State Bar of California as a minimum continuing legal education provider. Participants and attendees at Commission meetings may be eligible to receive MCLE credit. To receive credit for participation or attendance at a meeting, a person must register at the meeting. Meeting materials are available free of charge on the Internet⁵⁵ or may be purchased in advance from the Commission.

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

54. See *Commission Publications*, Appendix 4 *infra*.

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

Personnel of Commission

As of December 17, 2009, the following persons were members of the Law Revision Commission:

Legislative Members⁵⁶

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

Members Appointed by Governor⁵⁷

	<i>Term Expires</i>
Susan Duncan Lee, San Francisco <i>Chairperson</i>	October 1, 2011
Justice John Zebrowski (ret.), Glendale <i>Vice Chairperson</i>	October 1, 2011
Sidney Greathouse, Calabasas Hills	October 1, 2011
Pamela L. Hemminger, Los Angeles	October 1, 2011
Ali Jahangiri, Irvine	October 1, 2013
<i>Vacant</i>	October 1, 2013
<i>Vacant</i>	October 1, 2013

Legislative Counsel⁵⁸

Diane F. Boyer-Vine, Sacramento

Effective September 1, 2009, the Commission elected Susan Duncan Lee as Chairperson (succeeding Pamela L. Hemminger), and Justice John Zebrowski (ret.) as Vice Chairperson (succeeding Susan Duncan Lee). The terms of the new officers end August 31, 2010.

56. The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov't Code § 8281.

57. Seven Commission members are appointed by the Governor with the advice and consent of the Senate. Gov't Code § 8281. These Commissioners serve staggered four-year terms. *Id.* The provision in Government Code Section 8281 to the effect that Commission members appointed by the Governor hold office until the appointment and qualification of their successors has been superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

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

On September 8, 2009, the Governor appointed Ali Jahangiri of Irvine as a Commissioner, filling the vacant seat of former Commissioner Edmund L. Regalia. Commissioner Jahangiri was appointed to a second term on November 20, 2009. That second term will end on October 1, 2013.

On October 1, 2009, the terms of Commissioners Frank Kaplan and William Weinberger expired. Commissioners Kaplan and Weinberger had each served with distinction for eight years, including serving terms as Chairperson and Vice Chairperson.

The following persons are on the Commission's staff:

Legal

BRIAN HEBERT
Executive Secretary

BARBARA S. GAAL
Chief Deputy Counsel

CATHERINE BIDART
Staff Counsel

STEVE COHEN
Staff Counsel

CINDY DOLE
Visiting Fellow

Administrative-Secretarial

DEBORA LARRABEE
*Associate Governmental
Program Analyst*

VICTORIA V. MATIAS
Secretary

Lucinda Calvo, Nicole Rapier, and Anne Shiau, all students at the University of California, Davis, School of Law, worked for the Commission during 2009.

Commission Budget

The Commission's operations are funded from the state general fund. The amount appropriated to the Commission for the 2009-10 fiscal year from the general fund is \$667,000.00.

The Commission's general fund allocation is supplemented by \$15,000.00 budgeted for income generated from sale of documents to the public, representing reimbursement for the production and shipping cost of the documents.

The Commission also receives substantial donations of necessary library materials from the legal publishing community,

especially California Continuing Education of the Bar, LexisNexis, and Thomson/West. In addition, the Commission receives benchbooks from the California Center for Judicial Education and Research (CJER). The Commission receives additional library materials from other legal publishers and from other law reform agencies on an exchange basis, and has full access to the Stanford University Law Library and the McGeorge Law School Library. The Commission is grateful for these contributions.

Other Activities

The Commission is directed by statute to cooperate with bar associations and other learned, professional, or scientific associations, institutions, or foundations in any manner suitable for the fulfillment of the purposes of the Commission.⁵⁹

National Conference of Commissioners on Uniform State Laws

The Commission is directed by statute to receive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws.⁶⁰ Legislative Counsel and Commission member Diane F. Boyer-Vine is a member of the California Commission on Uniform State Laws and the National Conference. The Commission's Executive Secretary, Brian Hebert, is an associate member of the National Conference.

Other Staff Activities

In 2009, the Chief Deputy Counsel participated in meetings of the Judicial Council's Small Civil Cases Working Group (as the California Law Revision Commission Liaison to that group).

Legislative History of Recommendations in the 2009 Legislative Session

In 2009, bills to effectuate five Commission recommendations were introduced. Four of the recommendations were enacted, in

59. Gov't Code § 8296.

60. Gov't Code § 8289.

whole or in part. A resolution relating to the Commission's calendar of topics was also passed by the Legislature in the 2009-2010 legislative session.

Recording Technology

Assembly Bill 176 (2009 Cal. Stat. ch. 88) was introduced by Assembly Member Jim Silva to effectuate the Commission's recommendation on *Technical and Minor Substantive Statutory Corrections: References to Recording Technology*, 37 Cal. L. Revision Comm'n Reports 211 (2007). The measure was enacted.

Attorney-Client Privilege After Client's Death

Assembly Bill 1163 (2009 Cal. Stat. ch. 8) was introduced by Assembly Member Van Tran to effectuate the Commission's recommendation on *Attorney-Client Privilege After Client's Death*, 38 Cal. L. Revision Comm'n Reports 163 (2008). The measure was enacted.

Donative Transfer Restrictions and No Contest Clause Statute Conforming Revisions

Senate Bill 105 was introduced by Senator Tom Harman to effectuate two of the Commission's recommendations: *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008), and *Revision of No Contest Clause Statute: Conforming Revisions*, 38 Cal. L. Revision Comm'n Reports 203 (2008). The measure was held for further consideration in 2010.

However, Senate Bill 308 was then amended by Senator Tom Harman to include one provision of the *Donative Transfer Restrictions* recommendation (proposed Probate Code Section 13), and all of the amendments recommended in *Revision of No Contest Clause Statute: Conforming Revisions*. The amended measure was enacted. See 2009 Cal. Stat. ch. 348, §§ 2-6.

Mechanics Lien Law

Senate Bill 189 was introduced by Senator Alan Lowenthal to effectuate the Commission's recommendation on *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007). The measure was held for further consideration in 2010.

Resolution Authorizing Topics for Study

Assembly Concurrent Resolution 49 (2009 Cal. Stat. res. ch. 98) was introduced by Assembly Member Noreen Evans. It authorizes the Commission's continued study of 21 previously authorized topics, removes the Commission's authority to study offers of compromise, and authorizes the Commission to study the new topic of charter schools and the Government Claims Act.

**Report on Statutes Repealed by Implication
or Held Unconstitutional**

Government Code Section 8290 provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared⁶¹ and has the following to report:

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

Recommendations

The Commission respectfully recommends that the Legislature authorize the Commission to continue its study of the topics previously authorized.⁶²

61. This study has been carried through opinions published on or before November 5, 2009.

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

I was surprised and dismayed to find the CLRC taking the position staff drafts, tentative recommendations and memoranda (hereafter generically memos) should not be considered to be potential legislative intent material. The standard the CLRC position relies upon, that in order to be considered as a tool for interpreting legislative intent an individual document must have been “placed before and considered by the legislature” is a giant step backwards in the evolution of the law.

I request the CLRC reconsider this decision on the following grounds:

1. The CLRC position is inconsistent with CCP Section 1859.

CCP Section 1859 states:

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

The California Legislature has made seeking legislative intent a priority "if possible" and explicitly links the same process to interpret legislative intent as we use to find the intent of an “instrument”. If a will, a deed or contract is ambiguous we don't ignore the reasoning of the agent(s) who actually drafted the instrument.

2. The legislature has explicitly authorized a broader standard for interpretation of their intent in Government Code Section 9080.

Government Code Section 9080 provides in part:

"(a) The Legislature finds and declares that legislative records relating to bills, resolutions, or proposed constitutional amendments before the Legislature provide evidence of legislative intent that may be important in the subsequent interpretation of laws enacted in the Legislature..."

.....

(d) "Legislative records," for purposes of this section, means records contained in an official committee file, including, but not limited to, all of the following:

- (1) Committee staff analyses.*
- (2) Written testimony.*
- (3) Background material submitted to the committee.*
- (4) Press releases.*

- (5) *Written commentary submitted to the committee on a bill, resolution, or proposed constitutional amendment. For purposes of this paragraph, "written commentary" does not include the following:*
 - (A) *Material not utilized by the staff of a fiscal committee in the preparation of any analysis for the members of that committee.*
 - (B) *Communications determined by the committee or its staff to be confidential.*
- (6) *Versions of bills, resolutions, or proposed constitutional amendments assigned to the committee.*
- (7) *Relevant interim hearing materials, studies, case materials, and articles.*

The legislators who voted to approve Section 9080 rarely actually see these file documents they are acknowledging as valuable tools for interpreting legislative intent. The file documents are tools legislative staff use to develop summaries of legislation for the legislators. They are “placed before and considered” by the legislature only in the sense the legislator’s are relying upon staff and the process in making decisions. In Section 9080 the legislature is effectively acknowledging their confidence in and reliance on delegating authority to agents.

The "placed before and considered by the legislature" standard the CLRC relies upon is particularly inappropriate in the context of the CLRC, an organization the legislature created for itself for the sole purpose of studying the law in depth and making recommendations for change. If the legislature had time to study and understand all the nuances they wouldn't need the CLRC. The legislature recognizes the value of delegating and is willing to take the responsibility for the actions of their staff and agents, why isn't the CLRC willing to accept the responsibility that flows from the position?

3. The “placed before and considered by the legislature” standard is bad policy.

Lawyers and Judges don't turn to legislative intent just for the fun of it. They are trying to resolve real problems that have an ambiguity other sources do not resolve. I've been in the business of doing legislative intent research for 25 years or so, and have researched hundreds of Code Sections enacted based on a CLRC recommendation. Attorneys typically hire us because they have a real world issue that the CLRC comment published in the Annotated Codes does not resolve. They often expect legislative documents will resolve the issue but the reality is the legislature actually addresses only a tiny percentage of the Code sections in any particular CLRC proposal they adopt. With CLRC sponsored legislation most of the nuances are not explored by the legislature, they are explored in the memos and summarized in the Recommendation. The simple creation of the CLRC is a statement by the legislature they operate on the assumption the process they have set up is reliable. Sometimes the memos are

the only source for the underlying rationale for some language the legislature has adopted.

In these circumstances the "placed before and considered by the legislature" standard that the CLRC has adopted is effectively arguing interpretation in a vacuum is superior to interpretation in a context. It is plain and simple bad thinking. Data is generally better than no data, even if you have to weigh the value of the data. Certainly sometimes you can have too much information. But you cannot make a determination in advance of how much is too much - it depends on the circumstances.

Each of us has a particular outlook on life based on our particular biology and life experiences. We essentially develop default beliefs so we don't have to endlessly analyze every little nuance of every little thought that pops into our head. But one result of this human characteristic is well intentioned judges can vary widely in their perceptions of a single set of circumstances. Experienced litigators often consider which judge hears a matter to be one of the most important determinants in a matters outcome. One of the primary goals of the law is to smooth out these interpretive differences by substituting data for default responses when possible. The CLRC approach turns this goal on its head – data is disregarded in favor of leaving the decision to default responses.

4. The rationale of Juran v. Epstein, which the CLRC cites, is repudiated by Government Code Section 9080.

Juran v. Epstein was decided in 1994. Putting aside the questions about the validity of Epstein on this point when it was decided, the 1996 enactment of Government Code Section 9080 completely undermines the rational Epstein used to ignore the CLRC memo.

Epstein follows the line of (mostly very old) cases that ascribe almost scriptural characteristics to "Legislative Intent". Certain documents are always "legislative intent" and others are never "Legislative Intent". As discussed in greater detail below that view is grounded in fictions that do not reflect reality. It may work for something like a Federal committee report, which is explicitly legislative intent, but in the absence of explicit statements of intent on point we look to create a context that allows us to impute intent. That process is a balancing process that hinges on weighing relevance, not creating categories.

Factually it appears the Epstein may have simply found the particular memo was superfluous because the court found an answer in the CLRC Recommendation, a more probative document. What if the Epstein court didn't find a satisfactory answer in the language and logic of the recommendation? Would it have tossed

the memo aside so readily?

5. The CLRC position is based on a fictitious view of how the legislature works.

We pride ourselves on being a nation of laws, that we are all equal under the law. But Epstein and the logic it follows is rooted in the notion that the legislature and legislators are somehow different than the rest of us, that they don't make decisions the same way the rest of us do. That view in its extreme form assumes nothing can be considered legislative intent if the document wasn't actually scanned by every legislator's eyeballs. It's based on the fiction the legislature sits around deliberating every little nuance of every bill they pass, so they actually have a specific intent on every little nuance. I can understand when a Judge with no experience with the legislature fails to recognize how divorced from reality that concept is but the CLRC should know better. The legislature operates like every other big human organization (including probably the CLRC). It delegates to agents so it can accomplish more.

Much of our civil law is built around the broad concepts of the law of agency. Agency law has developed in response to the human tendency to increase productivity by delegating. The crucial component in Agency law links authority with responsibility to counter the human tendency to seek authority and avoid responsibility. The CLRC is unquestionably an agent of the legislature - the statute is out there for the entire world to see. To argue that memos are not a part of the legislative deliberations repudiates the fundamental truths about human behavior that make agency law work and indulges the fiction that the legislature is something other than what it is - a big organization that delegates and relies on the processes it sets up to insure that they do the right thing.

Conclusion

Life would be much easier for me and my staff if we didn't have to deal with memo's. Memos pertinent to any particular problem are very labor intensive to identify and locate. But our clients need the real reasons the language they care about was developed and often the memo's are the only source of discussion that goes into enough depth to help the client resolve ambiguities.

Bottom line - memos help attorney's advise clients, as well as make more cogent arguments to courts, and will help courts make decisions that reflect the real reason particular language was adopted. It is a practical and pragmatic tool for finding the actual reason a statute was enacted. What is wrong with that? As a practical matter, what bad thing will happen if courts look at memo's? As in Epstein, if a memo isn't necessary for the court to make a decision, they can

JAN RAYMOND

LEGISLATIVE | HISTORY & INTENT

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ignore it. It is a much more rational approach to have the option of looking at the memos to supplement the formal recommendations and legislative documents when needed than it is to try to divine an answer from a legislative history or recommendation devoid of any comment on a particular point.

Some years ago one of your staff mentioned to me in a phone conversation that they were concerned about being required to testify about their memos. Is that the problem? It seems like the solution to that problem isn't pretending like the memos aren't important, it is precluding staff testimony - let the documents speak for themselves. That would be entirely consistent with the realities of human memory, normally many years will have passed and the staff memories may be unreliable in any event.

I urge the CLRC to reconsider this position. Surely whatever problem caused you to take the position can be resolved in a manner that does not require casting aside the law of agency and sensible modes of legal thinking to indulge in fictions. It is disconcerting for that kind of behavior to come from a Law Revision Commission whose mission is to forward the sensible evolution of the law.

Jan Raymond

P.O. Box 74005
Davis, CA 95617

Phone: 888.676.1947
Fax: 530.750.0190