Admin. September 29, 2010

Memorandum 2010-39

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. Absent discussion, the staff will handle the topic as recommended in this memorandum.

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.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

In preparing this memorandum, the staff had assistance from Michael Lew, who graduated from the University of Michigan Law School in June. Mr. Lew is volunteering as a law clerk for the Commission until he starts as an associate for a Palo Alto law firm in January. The staff is grateful for his assistance.

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, and its staff resources have decreased sharply in the past year. The Commission has four paid attorneys, but only two of them are full-time. All of the attorneys, as well as the Commission's secretary and half-time administrative assistant, are currently subject to four furlough days per month (three days mandated by the Governor's furlough order, plus another day to comply with the Governor's requirement of a 5% agency-wide reduction in salary expenses). That amounts to approximately a 20% reduction in pay and expected worktime per employee. In addition, visiting fellow Cindy Dole will be leaving the Commission in October to begin working for the law firm that financed her past year with the Commission. Further budget cutbacks are quite possible, and necessarily will result in further reduction of staff resources. By the time the Commission meets in October, it may be necessary to lay off the Commission's administrative assistant, despite her years of excellent, valuable, and diligent work for the Commission.

While its staff resources are shrinking, the Commission must nonetheless 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.

Charter School as a Public Entity

In 2009, the Legislature directed 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," which governs claims and actions against public entities and public employees. 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 completed promptly. The Commission has made steady progress on this topic during the past year, and is close to being able to prepare a tentative recommendation. **The Commission should continue to give the topic high priority.**

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 before the Governor.** See SB 105 (Harman).

Deadly Weapons

Another 2006 measure 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 would 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.

Earlier this year, two bills were introduced to implement the Commission's recommendation. One of those bills is pending before the Governor; the other bill has already been signed. See SB 1080 (Committee on Public Safety) and SB 1115 (Committee on Public Safety).

Assuming that the Governor approves the pending bill, the Commission will need to prepare a clean-up bill for introduction next year. See Memorandum 2010-42. The Commission should also **commence consideration of the matters identified in its report as "Minor Clean-Up Issues for Possible Future Legislative Attention."** See *Nonsubstantive Reorganization of Deadly Weapon Statutes,* 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009).

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. **Neither of those topics would be appropriate to pursue under current budgetary conditions.** See Memorandum 2008-40, pp. 3-4.

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, the Commission has done a vast amount of work. Five bills and a constitutional measure implementing revisions recommended by the Commission have become law, affecting over 1,700 sections throughout the codes. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43; 2008 Cal. Stat. ch. 56; 2010 Cal. Stat. ch. 212, §§ 2, 3, 6, 7, 8, 10, 11, 12; ACA 15, approved by the voters Nov. 5, 2002 (Prop. 48).

Further work is in progress, including circulation of the recently-approved tentative recommendation on *Rights and Responsibilities of the County as Compared to the Superior Court (Part 1)*. **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. For example, **the cross-reference corrections discussed in Memorandum 2010-50 would fall under this authority.**

Similarly, last year the Commission received a suggestion to replace "Tort Claims Act" with "Government Claims Act" throughout the codes. See Memorandum 2009-38, pp. 38-39. The latter term more accurately describes the content of the Act and is preferred by the California Supreme Court. The Commission referred the suggestion to the Office of Legislative Counsel, for possible inclusion in the annual maintenance of the codes bill. Thereafter, the Office of Legislative Counsel determined that the matter was not appropriate for inclusion in that bill. However, **the Commission could do the project pursuant to its authority to correct technical and minor substantive defects, and the project would fit nicely with the Commission's work on charter schools.**

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

The Legislature did not assign any new topics to the Commission this year.

CALENDAR OF TOPICS

The next section of this memorandum reviews the status of matters listed in the Commission's Calendar of Topics, which currently includes 22 topics. 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. Creditors' Remedies

Beginning in 1971, the Commission has made a series of recommendations covering specific aspects of creditors' 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 long 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. 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. The Commission has not pursued any of those suggestions, but has kept them on hand.

Given the current economic crisis, the Legislature has been working on numerous foreclosure-related reforms, as has the federal government. It would be best for the Commission to wait for that process to play out. **Unless the Legislature affirmatively seeks the Commission's assistance in addressing the**

topic of foreclosure, it does not appear to be a good time for the Commission to commence a study of this subject.

On a related point, several years ago the Commission specifically directed the staff to monitor developments relating to the bad faith waste exception to the antideficiency laws. See Minutes (November 2002), pp. 3-4. The antideficiency laws 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. There is an exception, however, when the debtor has engaged in bad faith waste.

In *Nippon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001), the court concluded that a debtor's failure to pay property taxes can constitute bad faith waste. Former Commission member Edmund Regalia and his firm represented the losing party. Mr. Regalia believes the result is unjust and should be overturned by statute. See Memorandum 2002-38, pp. 15-16 & Exhibit pp. 5-10; see also Miller, Starr & Regalia, California Real Estate *Deeds of Trust* § 10:217, at 720-22 (2003 update) & 15-16 (2007 Supp.).

Due to his concern, the Commission decided to watch whether significant problems developed in this area, warranting intervention. Thus far, we are not aware of much evidence along those lines. There do not appear to have been any significant new developments in the area during the past year.

Moreover, any attempt to address the matter by statute likely would be controversial, as it involves a direct clash between debtor and creditor interests. Mr. Regalia acknowledged as much when he initially sought to involve the Commission. See Memorandum 2002-38, Exhibit p. 6.

The Commission is not well-suited to address highly controversial matters involving competing policy considerations. That is more appropriately the role of the Legislature, whose members are elected by the public.

For that reason, the staff suggests discontinuing our monitoring of the bad faith waste exception to the antideficiency laws.

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 prepared a summary of existing law quite some time ago, but did not identify any specific problems with the law. In response to a follow-up inquiry about whether such problems exist, Mr. Gould recently wrote:

> The California law relating to Assignments for the Benefit of Creditors ("ABCs") has been functioning satisfactorily and the impression that I have received from speaking to a substantial number of participants in the process is "if it works, don't fix it."
>
> Naturally, there are areas which could be improved but the risk is that if what was intended to be "tweaks" turns into a significant rewrite effort more harm than good would result.
>
> The Insolvency Law Committee of the State Bar Business Law Section is considering doing a study on the subject. *Perhaps it might be best for the Commission to put this project on the back burner and let the Insolvency Law Committee see what it might propose.* The Commission could always decide that the subject merits further study.

Exhibit p. 5 (emphasis added.)

The staff recommends following Mr. Gould's advice to put this project on hold while the Insolvency Law Committee looks into the matter.

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.

A few years ago, the Commission accepted an offer from the Commission's former Executive Secretary, Nathaniel Sterling, to prepare a background study on this important topic. Mr. Sterling completed his report this spring.

The report is currently being circulated for preliminary comment, with a deadline of November 1, 2010. **The Commission should begin work on this topic soon after that deadline,** so that the report and the preliminary comments do not become stale before the Commission considers them**.** This will be a substantial undertaking, which will consume significant Commission resources in the coming year.

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.

The background study prepared by Mr. Sterling also addresses this topic. Again, **the Commission should commence consideration of this topic soon after the comment deadline, and should devote significant resources to the topic in the coming year.**

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 2009, 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. Since then, the bill has been passed by the

Legislature and is pending before the Governor. The bill's fate will be clear before the Commission meets in October.

Regardless of whether SB 105 becomes law, **the staff recommends waiting awhile before doing anything more on presumptively disqualified fiduciaries.** If the bill is enacted, it would be advisable to see how it functions before making any further changes. If the bill is vetoed, that may not bode well for a study of presumptively disqualified fiduciaries.

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 to implement the Commission's recommendation is pending before the Governor; its fate should be clear by the time the Commission meets.

In preparing the 2008 recommendation and seeking its enactment, the Commission deferred consideration of several possible substantive improvements to existing mechanics lien law. The Commission's overall view was that those proposals were better addressed after a reorganization of the existing statute had been enacted.

Assuming that the pending bill is enacted, the recodification of mechanics lien law will not become operative until July 1, 2012. **The staff recommends waiting until after the new statutory scheme is operative and people have had some time to adjust to it before doing further work on mechanics liens.**

Marketable Title Act: Unexercised Option

In October 2009, the Commission approved a recommendation on *Marketable Record Title: Notice of Option*. The staff sought to have the proposed legislation included in the Assembly Committee on Judiciary's omnibus bill, but was ultimately informed that the proposal was not a good fit for that bill. By then, it was too late to find another author to introduce the legislation in 2010. **Unless the Commission otherwise directs, the staff will seek an author to introduce the legislation in 2011.**

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 recently 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 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. Now that the Commission has essentially completed the deadly weapons assignment, **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 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, **the Commission should consider requesting that the topic be deleted from its Calendar of Topics.**

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.

The Commission has on hand an extensive background study prepared by Prof. Miguel Méndez (Stanford Law School and UC Davis School of Law), 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.

The Commission might want to turn back to the topic of attorney's fees at some time in the future. However, we have no momentum on the topic at this time, and no indication that there are pressing concerns requiring prompt attention.

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 recodification work is ongoing,** with the objective of approving a final recommendation in time for introduction in the Legislature

next year. See Memorandum 2010-46; Memorandum 2010-47; Memorandum 2010-48; Memorandum 2010-49.

The Commission is also studying application of the Davis-Stirling Act to a nonresidential CID. The Commission is close to approving a tentative recommendation, and we hope to be able to complete the study soon. See Memorandum 2010-45.

The two projects described above 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). The staff will turn to these types of issues as time permits.

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 include criminal sentencing enhancements relating to the possession or use of deadly weapons. That study has now been completed, but there will be follow-up work if the reorganization is approved by the Governor. 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.

22. Charter School as a Public Entity

See discussion of this topic under "Current Legislative Assignments," above.

CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

The Commission retained a few suggestions from previous years for reconsideration 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 Commission considered the possibility of studying the matter as narrowly framed by CSSA. The Commission also considered the possibility of conducting a broad study of issues relating to electronic submission of documents to state agencies. See Memorandum 2007-48, pp. 21-22; Memorandum 2008-40, pp. 25-26; Memorandum 2009-38, pp. 19-20.

Last fall, the Commission decided against conducting the latter type of study. That decision was based on information provided by the Office of the State Chief Information Officer. See Memorandum 2009-38, pp. 19-20, 42, 44; Minutes (Oct. 2009), p. 4.

This year, the Los Angeles County Sheriff's Department sponsored a bill that would establish procedures for sheriffs and marshals to transmit, receive, and maintain certain electronic records and documents related to civil law enforcement. See AB 2394 (Brownley). That bill, known as the Levying Officer Electronic Transaction Act, would address the same sorts of issues that CSSA suggested to the Commission. The bill is currently pending before the Governor; its fate should be known by the time the Commission meets. Regardless of the bill's fate, there does not seem to be a need for the Commission to get involved in this matter, because it has just been debated in the legislative process. **The staff recommends removing the topic from further consideration.**

Discovery for an Out-of-State Criminal Case

In 2009, 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 2029.100-2029.900, which are based in part on the Uniform Interstate Depositions and Discovery Act ("UIDDA").

Mr. Klein asked 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 the UIDDA. See email from R. Long to B. Gaal (9/29/09).

To examine this matter, the Commission would need to seek authority from the Legislature, because its current authority is limited to civil discovery. Last year, the Commission deferred decision on whether to request such authority, because it had already obtained enactment of a resolution regarding its Calendar of Topics in the 2009-2010 legislative session.

Since then, the staff has learned from Mr. Klein that virtually every state, including California, has adopted a set of rules known as the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Cases. In California, that Act is codified as Penal Code Sections 1334 to 1334.6.

Given the existence of this Act, there does not appear to be a need for the Commission to study the area.

SUGGESTED NEW TOPICS

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

Creditors' Remedies

The Commission received three new suggestions that appear to fall within the Commission's existing authority to study creditor remedies.

Foreclosure of Real Property Liens

Mark Kohn writes that Civil Code Section 2924g "is in serious need of revision and improvement." Exhibit p. 26. He explains by recounting an unfortunate situation involving a foreclosure sale of his own home.

According to Mr. Kohn,

> In October 2009, GMAC sent me a Trustee Sale (auction) notice with 11/3 indicated as the auction date.
>
> I immediately got an attorney, put the house on the market, got a buyer in one day, notified the lender, and they cancelled the 11/3 date. They refused to put anything in writing despite my attorney's request. I went to the 11/3 auction out of an abundance of caution (GMAC had dropped the ball on several occasions during loan modification review).
>
> They said no new date (at the auction). They also told my attorney the same thing.
>
> *Then they went ahead and auctioned the house on 12/3 without any notice to me at all.*

Exhibit p. 26 (emphasis added).

In other words, GMAC allegedly sold the Kohns' home on December 3, 2009, without notifying the Kohns of the sale date, and despite having been notified by the Kohns that there was a pending sale, which reportedly would have been "for a profit." J. Grover & M. Goldberg, *Could Your Home Get Sold Without Your Knowledge* (Jan. 8, 2010), http://www.nbclosangeles.com/around-town/real-estate/Could-Your-Home-Get-Sold-Without-Your-Knowledge-80940212.html. The Kohns' plight received significant media attention, including a KNBC video, which can be found at the website specified in Mr. Kohn's letter. See Exhibit p. 26.

Mr. Kohn recommends the following changes to prevent similar problems in the future:

> We would like to make sure that if a lender postpones or cancels a sale that future notice is provided ***in writing***; And, that if they call you after putting a sale date back on, they must TELL YOU ABOUT THE NEW DATE , not just leave a message to call their collections dept or leave a generic message to call them back.
>
> And, lastly, that the auctioneer should have to take a record of some kind, and/or swear under penalty of perjury, that they provided notice of the future date at the time and date of the earlier cancelled/postponed sale.

Exhibit p. 26 (emphasis in original).

Mr. Kohn's suggestions have commonsense appeal, and the circumstances he describes are compelling. As explained earlier in this memorandum, however, both the Legislature and the federal government have been working hard on numerous foreclosure-related reforms. The topic is of enormous interest to a large segment of the population, and warrants immediate attention from the elected representatives of the public. Mr. Kohn's suggestions should be considered as part of the debate in Congress or the Legislature, if that has not already occurred.

The Commission should stay out of this debate unless the Legislature specifically requests the Commission's help. The Commission's study process is slow and deliberative. Any policy decisions it makes in a study could be undone when the Legislature eventually considers the Commission's proposal. Significant and controversial policy decisions on matters of intense public interest should be made by elected representatives directly responsive to the electorate. For those reasons, the Commission probably is not the best entity to address a problem as urgent and controversial as the current foreclosure crisis.

Undertaking to Stay Enforcement of a Judgment Pending Appeal

Mike Rosen urges the Commission to study Code of Civil Procedure Sections 917.1 and 996.440, which relate to bonds and undertakings. He writes that due to the Commission's recommendation to consolidate the bond and undertaking laws in 1982, "a loophole has been inadvertently opened for those who put forth a personal surety undertaking to stay execution of a money judgment … and then choose to manipulate the system and not honor such a bond." Exhibit p. 44.

Section 917.1 provides that a judgment debtor can stay the enforcement of certain types of judgments or orders of the trial court during an appeal if an

undertaking is provided. Section 996.440 enables a judgment creditor to enforce the debtor's undertaking after entry of final judgment or final determination of the appeal by filing a motion with the court. Furthermore, judgment shall be entered for the creditor in accordance with the motion unless the debtor or sureties file affidavits opposing the motion which show

> such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such a showing is made, the issues to be tried shall be specified by the court. Trial shall be by the court and shall be set for the earliest date convenient to the court ….

Section 996.440(d).

Mr. Rosen believes that Sections 917.1 and 996.440, taken together, allow a debtor to "lose in the trial court, lose on appeal, and then be entitled to another trial on their liability for the security given in the first trial." Exhibit p. 44. This would then lead to an "endless merry go round of trials, judgments, appeals, and undertakings." *Id*. Furthermore, Mr. Rosen argues that Section 996.440 precludes Section 917.1 from achieving its intent, and cites to *Grant v. Superior Court*, 225 Cal. App. 3d 929, 934, 275 Cal. Rptr. 564 (1990), where the judge stated:

> The statute is clearly designed to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review. A successful litigant will have an assured source of funds to meet the amount of the money judgment, costs and postjudgment interest after postponing enjoyment of a trial court victory.

Exhibit p. 44.

There appears to be little case law on the procedural points raised by Mr. Rosen. Consequently, the discussion that follows includes citations to some unpublished, noncitable cases, as well as several published decisions.

In regards to Mr. Rosen's concern that Section 996.440 may lead to an "endless merry go round" of litigation, this fear appears to be unfounded. Under Section 996.440(d), for a judgment debtor to successfully contest a motion to enforce an undertaking, the debtor must first provide sufficient evidence to convince the presiding judge that there is a triable issue of fact.

Judges can, and repeatedly have, held that the debtor has failed to meet this burden. *See, e.g., Ross F. Carroll, Inc. v. JCW-Cypress Home Group*, No. C056879, 2009 WL 2172514, at *5-6 (Cal. Ct. App. Jul. 22, 2009); *Grade-Way Construction Co. v. Golden Eagle Ins. Co.*, 13 Cal. App. 4th 826, 837, 16 Cal. Rptr. 2d 649 (1993).

Importantly, the doctrine of "the law of the case" may bar any attempt to reopen the claim already adjudicated. *See, e.g., Ross F. Carroll,* 2009 WL 2172514, at *5; *Butcher v. Gray*, No. B143546, 2001 WL 1397271, at *10 n.26 (Cal. Ct. App. Nov. 9, 2001). *Hanna v. City of Los Angeles*, 212 Cal. App. 3d 363, 376, 260 Cal. Rptr. 782 (1989); B. Witkin, California Procedure *Appeal* § 459, pp. 515-17 (5th ed. 2008). "Litigants are not free to continually reinvent their position on legal issues that have been resolved against them by an appellate court." *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 312, 126 Cal. Rptr. 2d 516 (2002).

Furthermore, opposition to a motion to enforce an undertaking will sometimes be based on reasonable issues that should be heard and decided before final enforcement of the undertaking, in order to ensure an equitable result. In particular, there might be reasonable issues relating to the amount of money recoverable pursuant to the undertaking. *See Brooks v. Stearns,* No. C040040, 2004 WL 1336979, at *2, *3 (Cal. Ct. App. June 15, 2004) ("Brooks was not entitled to obtain more from the sureties than their liability on the undertaking."); *Dell v. Mohageri,* No. E034288, 2004 WL 2618034, at *2 (defendant's motion under Section 996.440 "was the correct procedure to establish the amount of her damages and to obtain an order enforcing the bond in that amount"); see also *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America*, 78 Cal. App. 4th 355, 358, 92 Cal. Rpt. 2d 709 (2000). There might also be other legitimate issues. *See Satinover v. Dean,* 202 Cal. App. 3d 1298, 1300-01, 249 Cal. Rptr. 277 (1988) ("Satinover's contention that the motion to enforce liability on the bond was premature is well taken.").

It is true that the ability to contest a motion to enforce, pursuant to Section 996.440(d), may prolong the wait and increase the costs associated with the enforcement of an undertaking. However, it does not render a judgment uncollectible. Ultimately, such expenses are part of the general costs of litigation and do not justify further study of the statute.

Mr. Rosen also believes that Section 996.440, by allowing a debtor or a surety to oppose the motion to execute on the undertaking, has altered existing law in violation of Code of Civil Procedure Section 996.475. That section states:

> 996.475. Nothing in this chapter is intended to limit the liability of a surety pursuant to any other statute. This section is declaratory of, and not a change in, existing law.

Mr. Rosen points out that historically, an undertaking to stay a money judgment could be enforced in an expeditious manner. Exhibit p. 45. Specifically, past cases

held that where an obligation is not paid within 30 days after filing of the remittitur, judgment could be summarily entered against the sureties, on motion of respondent, without notice to the sureties. This judgment, based on the prior agreement of the sureties, was considered a consent judgment and was nonappealable. *See, e.g.*, *Gray v. Cotton*, 174 Cal. 256, 258, 162 P. 1019 (1917); *Davis v. Heimbach*, 75 Cal. 261, 263, 17 P. 199 (1888). Mr. Rosen believes that the ability to challenge a motion to enforce an undertaking under Section 996.440 is a significant and unauthorized change from past law. Exhibit p. 45.

However, Section 996.475 merely provides assurance that the chapter containing it does not "*limit the liability* of a surety pursuant to any other statute." (Emphasis added.) It is one thing to eliminate or reduce a surety's liability; it is quite another to alter a procedure for establishing such liability. Contrary to Mr. Rosen's position, Section 996.475 does not appear to have been intended to preserve preexisting procedures for establishing a surety's liability.

In fact, that section and Section 996.440 were part of the bill that implemented the Law Revision Commission's recommendation on *Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1981). That bill "consolidate[d] general procedural rules applicable to all statutory bonds and undertakings in one place in the Code of Civil Procedure." *Id*. at 508. As the Commission acknowledged, "[c]onsolidation of the numerous similar statutes to create one uniform statute *necessarily involves ... a few variations from existing procedures* ...." *Id*. (emphasis added).

Section 996.475 was a late addition to the proposal, not included in the Commission's original recommendation. It directly follows a provision describing limits on a surety's liability (Code Civ. Proc. § 996.470), and appears to have been intended to alleviate concern that those limits might be interpreted to restrict or preclude liability on other bases. The Comment to Section 996.475 explains:

> Section 996.475 is added to make clear that the provisions of this chapter relating to the liability of a surety are not intended, either expressly or by implication, to repeal any other applicable statutes relating to the liability of a surety. Thus, for example, the provision in Section 996.470, that the aggregate liability of a surety for all breaches of the condition of a bond is limited to the amount of the bond, is intended only to limit the liability of a surety as security for the obligation imposed by the statute pursuant to which the bond is given. *It is not intended to immunize the surety from independent statutory liability for willful failure to satisfy the obligation of a bond after the duty to pay has been established.* See, e.g., Section

> 996.480 (voluntary payment by surety). Likewise, the provision in Section 996.480 imposing costs, interest, and a reasonable attorney's fee *is not intended to preclude any other applicable statutory provisions, such as any applicable regulations of the Insurance Code governing actions of admitted surety insurers*.

(Emphasis added.) Section 996.475 thus focuses on the extent to which a surety can be held liable, not on the procedures for establishing such liability.

In the context of an appeal bond, the enactment of Section 996.440 might have been a procedural change, but it does not contravene the intent of Section 996.475. Further, the practice of giving notice to the sureties, so they have an opportunity to raise legitimate arguments, seems to be good policy. Hence, **there is insufficient reason to launch a further study of Section 996.440 at this time.**

Default Judgment Procedure

Jaclyn White suggests a change in default judgment procedure (Code Civ. Proc. § 585). She objects to the requirement that the plaintiff apply for entry of default:

> I recently had a hearing where the judgment was made in favor of the defendant although the defendant failed to appear. Come to find out it is the claimant's responsibility if defendant does not submit Answer in 30 days to file a request for Entry of Default judgment. *The court does not disclose this in the packet like they should or even include the form*.

Exhibit p. 49 (emphasis added). She suggests that judgment for failure to answer "could be an automatic default." *Id*.

The requirements for obtaining a default judgment vary depending on the type and circumstances of a case, and have been fine-tuned over the years. See Code Civ. Proc. § 585. Among other things, the statutory requirements reflect a policy preference for deciding a case on its merits, rather than on procedural grounds. As one court explained, "the law favors the determination of an action by a trial upon the merits rather than by default." *Perkins v. Dawson*, 222 Cal. App. 2d 610, 615, 35 Cal. Rptr. 276 (1964).

A reexamination of default judgment procedure might be within the scope of the Commission's authority to study creditors' remedies. The description of that authority in the Calendar of Topics expressly refers to "default judgment procedures." See Exhibit p. 1.

However, the staff does not believe such a reexamination is warranted at this time. The long-established requirement that the plaintiff apply for entry of

default, instead of obtaining a default automatically, helps ensure that a court has adequate information before entering a default, and provides an opportunity for the defendant to show why a default should not be entered. The requirement thus promotes the policy preference for deciding a case on its merits, rather than on procedural grounds. Because the requirement serves valid purposes, **the staff is dubious that a study reexamining it would be worthwhile.**

There is, however, another step to consider. Ms. White complains that she was unaware of the requirement to apply for entry of default. Failure to understand court procedures is a risk inherent in representing oneself instead of hiring a lawyer. Oftentimes, however, hiring a lawyer is not a realistic option. To assist the growing numbers of self-represented litigants, the Judicial Council maintains a self-help website. There are also various court-based self-help centers throughout the state. Perhaps these self-help resources should better-publicize basic default judgment procedures. **Unless the Commission otherwise directs, the staff will forward Ms. White's comments to an appropriate contact at the Administrative Office of the Courts, for consideration in connection with the self-help resources provided by the court system.**

Probate Code

The Commission received three new suggestions that appear to fall within the Commission's existing authority to study the Probate Code.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Legislative Counsel Diane Boyer-Vine is a member of the California Commission on Uniform State Laws ("CCUSL"), as well as the Law Revision Commission. On behalf of the CCUSL, she requests the Law Revision Commission "undertake a study to compare existing California law with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and to make recommendations based upon that study." Exhibit p. 4. "The CCUSL thinks that this study would be a logical extension of work already undertaken by the California Law Revision Commission." *Id*.

The CCUSL is correct that this type of study would be appropriate for the Law Revision Commission. It is a duty of the Law Revision Commission to "[r]eceive and consider proposed changes in the law recommended by the ... National Conference of Commissioners on Uniform State Laws ...." Gov't Code § 8289.

Further, the Law Revision Commission has previously done extensive work on guardianship and conservatorship law. See the following recommendations, all of which were enacted: *Compensation in Guardianship and Conservatorship Proceedings,* 20 Cal. L. Revision Comm'n Reports 2837 (1990); 21 Cal. L. Revision Comm'n Reports 227 (1991); *Bonds of Guardians and Conservators,* 20 Cal. L. Revision Comm'n Reports 235 (1990); *Public Guardians and Administrators,* 19 Cal. L. Revision Comm'n Reports 707 (1988); *Notice in Guardianship and Conservatorship,* 18 Cal. L. Revision Comm'n Reports 1793 (1986); *Guardianship-Conservatorship* (technical change), 15 Cal. L. Revision Comm'n Reports 1427 (1980); *Guardianship-Conservatorship Law,* 14 Cal. L. Revision Comm'n Reports 501 (1978); 15 Cal. L. Revision Comm'n Reports 451 (1980); *Procedure for Appointing Guardians,* 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 21 (1959).

Unfortunately, none of the current staff has expertise in guardianship and conservatorship. We do, however, have ready access to Commission materials and familiarity with Commission practices and procedures.

We understand that a representative of the Alzheimer's Association is likely to attend the upcoming meeting of the Law Revision Commission, to speak in support of having the Commission study the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. That will be a good opportunity to learn more about the Act, which many states have already adopted. The Law Revision Commission **should seriously consider pursuing this matter in the coming year.**

Apparent Conflict Between Probate Code Sections 6103 and 21140

Estate planning attorney David C. Nelson draws attention to a possible conflict between Probate Code Sections 6103 and 21140. How this issue is resolved may affect whether an adoptee is included in a gift made to a class of persons (e.g., "all of my children") under certain circumstances.

Mr. Nelson explains:

> Probate Code Section 21140, which is part of Part 1 of Division 11, states that "[t]his part applies to all instruments, regardless of when they were executed." On the other hand, Probate Code Section 6103 states that various provisions of the Probate Code, including Part 1 of Division 11, "do not apply where the testator died before January 1, 1985, and the law applicable prior to January 1, 1985, continues to apply where the testator died before January 1, 1985." ….

> Part 1 of Division 11 includes Probate Code Section 21115, which governs the inclusion of adopted persons in class gifts to children, issue, descendants, etc., at least in circumstances where the donor died on or after January 1, 1985, However, *because of the apparent conflict between Sections 21140 and 6103, it is unclear whether this issue is governed by Section 21115, or instead by pre-1985 law, where the donor died before 1985*.

Exhibit p. 39 (emphasis added). Mr. Nelson has provided an article he wrote for *California Trusts and Estates Quarterly*, which describes the problem in greater detail. See Exhibit pp. 40-43.

He has a client "which is the trustee of some trusts that were created by a settlor who died before 1985." *Id.* at 39. Because there have been adoptions within the family, the trustee anticipates having to decide whether the adoptees are included in a class gift. The trustee therefore desires "legislative clarification of the apparent conflict between Sections 21140 and 6103." *Id*.

Section 21140 was added in 1994. See 1994 Cal. Stat. ch. 806, § 41; AB 3686 (Horcher). That bill was not based on a Commission recommendation. It was sponsored by the Trusts and Estates Section of the California State Bar.

The relevant effect of AB 3686 was to repeal then-existing rules of construction that applied only to wills, restate those provisions in another location in the Probate Code, and broaden their application so that they applied to all " instruments," not just wills (e.g., they now apply to trusts).

Prior to enactment of AB 3686, Probate Code Section 6103 exempted a will from the statutory rules of construction if the testator had died before 1985. AB 3686 left that will exemption in place, but added Section 21140, which applied the relocated rules of construction to all instruments, whenever executed.

The Commission later recommended a number of clean up amendments, to fix technical problems with AB 3686. See *Rules of Construction for Trusts and Other Instruments*, 31 Cal. L. Revision Comm'n Reports 167 (2001) One of those amendments corrected a cross-reference in the exemption provided by Probate Code Section 6103. The section still referred to the former location of the rules of construction (when they had only applied to wills). The Commission corrected that cross-reference, on the understanding that the section still exempted wills from the rules of construction when a testator had died before 1985.

To the extent that there is any ambiguity about the interrelationship between Section 6103 and Section 21140, it results from uncertainty about the intended effect of Section 21140. The Trusts and Estate Section is better positioned than the

Commission to know the intended purpose of Section 21140, since it sponsored the enactment of that provision.

It would thus make sense to refer this matter to the Trusts and Estate Section for consideration. It turns out, however, that this is not the first time the matter has been raised. In 2005, the Trusts and Estate Section brought the matter to the Commission's attention, hoping the Commission would address it. See Memorandum 2005-29, p. 22 & Exhibit pp. 67-68. The staff determined that the matter was "more complex than it initially appears," and advised that "it would be more appropriate for the Trusts and Estate Section to deal with this issue than for the Commission to work on it." *Id.* at 22. The Commission declined to pursue the matter. Minutes (Sept. 2005), pp. 3-4.

The staff does not know whether the Trusts and Estates Section took any further steps afterwards. **We will inquire about this and attempt to obtain a response before the upcoming meeting.** Based on our current information, it remains our view that the Trusts and Estates Section is best-situated to address the matter.

Impact of a Sham Marriage on the Probate Protection for an Omitted Spouse

Suppose a person executes a will or trust, later gets married, and eventually dies while still married to that individual. Under California law, if the will or trust does not provide for the surviving spouse, the surviving spouse is entitled to an intestate share of the decedent's estate, unless it is shown that the omission was intentional. Prob. Code §§ 21610-21611. This rule is sometimes referred to as the probate protection for an omitted spouse.

Ruby Lacourse urges the Commission to study the possibility of making this rule inapplicable when the marriage was for immigration purposes. Exhibit pp. 27-28. She describes a relationship between a 62-year-old United States citizen who was ill and in desperate need of a caregiver, and a 24-year-old Philippine woman who was eager to move to the United States. According to Ms. Lacourse, they connected with each other via email, met about eight months later in the Philippines, and got married before the man left the Philippines four weeks later. *Id.* He died soon afterwards, and his Philippine wife is seeking a share of his estate, although she "has not stepped foot on American soil, [and] was denied access to the United States …." *Id.* at 27. Ms. Lacourse is the trustee for his estate and is fighting the wife's petition to receive a share. *Id.* She writes:

> Four weeks, and she is entitled to a share of his estate. How wrong is that? I cannot believe that a marriage license can carry so much clout. This law needs to be revised and soon.

Id. at 28.

Interestingly, the staff could not find a published California decision on whether the probate protection for an omitted spouse applies to an immigration-motivated marriage. There is, however, a recent unpublished decision that discusses the matter at length. In that case, the court of appeal considered "whether an immigration-motivated marriage is void or simply voidable under California law." *Estate of Dito,* No. A116815, 2008 WL 821694, at *8 (Cal. Ct. App. March 28, 2008). A void marriage is invalid for all purposes from its inception, while a voidable marriage "is valid for all purposes until *a party entitled to assert its voidability* timely raises the issue." *Id.* at *6 (emphasis in original). The court of appeal concluded that

> [A]n immigration-motivated marriage is voidable but not void. The Legislature has not seen fit to include immigration-motivated marriages among those considered void, and the courts of this state have treated such marriages as voidable *at the election of the spouse whose consent to marry is obtained by fraud*.

Id. at *9 (emphasis added). The court ruled that the decedent's grandson lacked standing to challenge the marriage in question, because he was "not the person whose consent to marry was allegedly obtained by fraud." *Id.* Consequently, he could not assert invalidity of the marriage as a ground for denying the probate protection for an omitted spouse.

It therefore appears that under California law, as described in detail in *Estate of Dito,* an immigration-motivated marriage is valid if both spouses gave their voluntary and knowing consent and were not defrauded. Ms. Lacourse proposes instead that an immigration-motivated marriage be considered invalid, regardless of the circumstances. That would be a significant policy difference, which may be politically divisive. **We recommend that the Commission leave this matter for the elected representatives in the Legislature to resolve.**

Family Law

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

Uniformed Services Former Spouses Protection Act

Dwayne Lewis, a retired member of the U.S. Marine Corps, urges the Commission to initiate a study of the Uniformed Services Former Spouses Protection Act ("USFSPA") and "how it will be aligned with the California Family Code." Exhibit p. 30.

The USFSPA concerns how the "retired pay" of a member of the Armed Forces should be treated if the service member becomes divorced. In 1981, the United States Supreme Court held that under federal law, military retired pay could not be treated as community property; it had to be treated as the sole property of the service member. *McCarty v. McCarty*, 453 U.S. 210 (1981). This led to a public outcry on behalf of the spouses of service members. Congress quickly responded by passing the USFSPA, "which permits the states to characterize military pension benefits either as property of both spouses or as the sole and separate property of the military spouse, depending on the law of the particular jurisdiction." *In re Marriage of McDonough*, 183 Cal. App. 3d 45, 49, 227 Cal. Rptr. 872 (1986); *see* 10 U.S.C. § 1408; *see also In re Marriage of Smith*, 148 Cal. App, 4th 1115, 1121, 56 Cal. Rptr. 3d 341 (2007).

Mr. Lewis would like the California Legislature to provide guidance on how the USFSPA applies in California. He writes:

> Research of the California Family Code reveals that there is no mention of the USFSPA and how it will be applied in our state courts. For 28 years our state judges have been applying this federal law in our state divorce courts without any direction from the California Legislative Branch.

Exhibit p. 30. Mr. Lewis believes that the California courts are being too generous in awarding shares of military pension benefits to nonmilitary spouses. He suggests reforms such as:

- The court "shall provide in the divorce decree that payments of the disposable retired pay to the former spouse shall terminate upon the voluntary cohabitation or remarriage of the former spouse."
- In deciding whether to award disposable retired pay, the court should consider "the education and experience the former spouse received during the marriage," "the ability of the former spouse to provide for his/her own support," and "any criminal activity, abuse, or nonconformance to military lifestyle of the former spouse."
- "Payments of disposable retired pay to the former spouse shall not exceed the number of years of the marriage."

- In awarding retired pay to a former spouse, the court "shall use the length of service and pay grade at the time of divorce and not at the future date of retirement."

Id. at 33.

Mr. Lewis notes that legislation along these lines was recently introduced in Oklahoma. See Okla. HB 1053 (Banz); see also Exhibit pp. 34-38. He encourages a similar effort in California. Exhibit p. 30. Since Mr. Lewis submitted his comments, however, the Oklahoma bill failed. The issues proved too contentious for the bill to be enacted.

The staff thinks it would be unwise for the Commission get involved in this area. Although issues have sometimes arisen in applying the USFSPA, there is extensive California case law providing guidance on various points. *See, e.g., In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (1999); *In re Marriage of Babauta,* 66 Cal. App. 4th 784, 78 Cal. Rptr. 2d 281 (1998); *In re Marriage of Hattis,* 196 Cal. App. 3d 1162, 242 Cal. Rptr. 410 (1987). When legislative guidance was needed to resolve issues relating to retroactivity of the USFSPA, the Legislature stepped in and provided the necessary guidance. See former Civ. Code § 5124; *Mueller v. Walker,* 167 Cal. App. 3d 600, 606-09, 213 Cal. Rptr. 442 (1985). To the extent that further legislative action is needed, the Legislature is the appropriate entity to consider the matter. **The issues are likely to be too controversial for the Commission to effectively address.**

Discovery in Civil Cases

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

- A suggestion from attorney Anthony LeMaster-Farrimond to include a mileage restriction in Code of Civil Procedure Section 2025.520, similar to the mileage restriction in Code of Civil Procedure Section 2025.250. Exhibit p. 29.
- A suggestion from Prof. William Slomanson (Thomas Jefferson School of Law) to consider whether Code of Civil Procedure Section 2020.510 should require a supporting affidavit for a deposition subpoena that compels testimony and production of documents. Exhibit p. 46; see *Terry v. Slico,* 175 Cal. App. 4th 352, 95 Cal. Rptr. 3d 900 (2009).
- Two suggestions from attorney Mark Storm regarding the special rules governing discovery in a limited civil case. Exhibit pp. 47-48.

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.

The Commission also received a suggestion from attorney Stephen Johnson relating to Code of Civil Procedure Section 1987. Exhibit p. 15. Under that section, a party to a lawsuit can be compelled to appear at a trial upon written notice, without the necessity of a subpoena. Subdivision (b) requires that the notice be served "at least 10 days before the time required for attendance unless the court prescribes a shorter time." Subdivision (c) says that if the notice "is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, it may include a request that the party or person bring with him or her books, documents or other things."

Mr. Johnson recommends that the 10 day period in subdivision (b) and the 20 day period in subdivision (c) remain the same for regular civil actions, but be reduced to 5 days each for unlawful detainer actions." Exhibit p. 15. He explains:

> The Notice in Lieu of Subpoena can't be served until a trial date is set. Under CCP § 1170.5, the usual situation [in an unlawful detainer case] is that the party has less than 20 days notice of the trial date since the notice of trial is served by mail.
>
> Without the use of [CCP § 1987], the unlawful detainer party has to incur charges for service of subpoenas, which can be expensive if the landlord's records are in another county.

Id.

The point Mr. Johnson raises relates to trial procedure, not civil discovery. However, a few years ago the Commission approved a recommendation on *Time Limits for Discovery in an Unlawful Detainer Case,* 36 Cal. L. Revision Comm'n Reports 271 (2006), which was enacted. See 2007 Cal. Stat. ch. 113. Towards the end of that study and during the legislative process, the Commission received several new suggestions relating to discovery in an unlawful detainer case, which it deferred for later consideration. Those unlawful detainer suggestions are on the list of discovery-related topics the Commission might pursue when it reactivates work on civil discovery.

If the Commission decides to pursue those suggestions, Mr. Johnson's suggestion might fit nicely with them. Although his suggestion does not fall within the realm of civil discovery, it is similar in nature to the other suggestions and could perhaps be addressed pursuant to the Commission's authority to

correct technical and minor substantive defects (Gov't Code § 8298) or its authority to study real property. **The staff is inclined to retain Mr. Johnson's suggestion for consideration together with the other suggestions left over from the Commission's previous work on unlawful detainer deadlines.** If Mr. Johnson would like to pursue the matter more expeditiously, he could consider contacting a tenants' rights group, such as Western Center on Law and Poverty.

Administrative Law

Early this year, John Hsu submitted a suggestion relating to administrative law, which the Commission could study under its existing authority.

Mr. Hsu wrote that in reviewing an administrative decision by the State Personnel Board, the Alameda County Superior Court "did not enforce the minimum due process requirements under the Administrative Adjudication Bill of Rights, and … disregarded the case law in *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal. App. 4th 575 which found that [the] Administrative Adjudication Bill of Right[s] was applicable to the State Personnel Board." Exhibit p. 6. Mr. Hsu did not provide a copy of the Alameda County Superior Court's decision, nor any other evidence to support his assertions about what the court did. He says that two statutory revisions are needed: "the words 'minimum due process requirements' need to be incorporated into the language of the statute, and the Bill of Rights' applicability to administrative agencies of California Constitutional origin need also be specified." Exhibit p. 6.

The Administrative Adjudication Bill of Rights (Gov't Code §§ 11425.10-11425.60) was drafted by the Commission. It was enacted in 1995, as part of a major bill implementing the Commission's recommendation on *Administrative Adjudication by State Agencies,* 25 Cal. L. Revision Comm'n Reports 55 (1995). See 1995 Cal. Stat. ch. 938. Absent strong evidence of problems with this legislation, the Commission should leave it as is. See CLRC Handbook Rule 3.5 ("[U]nless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation."). **There does not appear to be sufficient evidence to justify a study of the Administrative Adjudication Bill of Rights at this time.**

Mr. Hsu also urges the Commission to study the statutes relating to vexatious litigants (Code Civ. Proc. §§ 391-391.7). See Exhibit pp. 6-14. He says:

> The vexatious litigant statutes were enacted to combat truly outrageous conduc[t] of litigants in pro per who "constantly file groundless actions" or "relitigate by repeated appeals or new

> actions based on the same controversy" (38 State Bar J. (1963) 663). *However, the [Alameda County Superior Court] interpreted the language of the statutes in such a way that even very well trained attorneys can not be expected to achieve such a level of performance.*

Exhibit p. 6 (emphasis added). He has provided a list of specific concerns about the statute and a list of recommended revisions, all of which are intended to make vexatious conduct more difficult to establish. See *id.* at 12-14.

The Commission is not currently authorized to study the vexatious litigant statutes. Aside from Mr. Hsu's letter, the Commission has not received any communications expressing dissatisfaction with those statutes. The staff is not aware of any widespread dissatisfaction with those statutes. At this point, we are not convinced that the vexatious litigant statutes need review, or that the Commission would be the appropriate entity to study them. **Unless more evidence surfaces, we do not think the Commission should request authority to study the vexatious litigant statutes.**

Common Interest Developments

As in other recent years, during 2010 the Commission continued to receive numerous new suggestions relating to CID law, which would be within the scope of its existing authority. The staff has presented those new suggestions in the context of the Commission's ongoing work on CIDs. See, e.g., Memorandum 2010-47; Memorandum 2010-48; Memorandum 2010-49. The staff will add the new suggestions to its list of possible CID topics for the Commission to study.

Disability Law

One new suggestion relates to disability law, which the Commission is not currently authorized to study. To undertake the suggested study, the Commission would have to request authority from the Legislature.

Disabled Parking Placard

Robert Jones, a retired attorney, urges the Commission to study Vehicle Code Section 22511.56, which relates to disabled parking placards. Exhibit pp. 16-25. Mr. Jones qualifies for a disabled parking placard and claims that his wife, who is not disabled, used his parking placard without his knowledge or consent. While Mrs. Jones was using the placard to park in a disabled spot at a local market, she was given a parking citation and the placard itself was also confiscated by law enforcement. *Id*.

Subdivision (a) of Section 22511.56 provides:

> A person using a distinguishing placard issued under Section 22511.55 or 22511.59, … for parking as permitted by Section 22511.5 shall, upon request of a peace officer or person authorized to enforce parking laws, ordinances, or regulations, present identification and evidence of the issuance of that placard ….

Subdivision (b) further provides:

> Failure to present the requested identification and evidence of the issuance of that placard … shall be a rebuttable presumption that the placard … is being misused and that the associated vehicle has been parked in violation of Section 22507.8, or has exercised a disabled person's parking privilege pursuant to Section 22511.5.

In such a situation, the officer is authorized to seize the placard under subdivision (c):

> In addition to any other applicable penalty for the misuse of a placard, the officer or parking enforcement person may confiscate a placard being used for parking purposes that benefit a person other than the person to whom the placard was issued by the Department of Motor Vehicles.

Although the law enforcement official had the authority to confiscate the parking placard under subdivision (c), Mr. Jones nevertheless argues that since he personally did not misuse his parking placard, his placard should not have been confiscated. However, even if Mr. Jones did not personally misuse his parking placard, subdivision (c) clearly states that an officer is authorized to confiscate a placard being used for parking purposes benefiting a person other than the individual to whom the placard was issued. Undoubtedly subdivision (c) was written this way to deter the misuse of parking placards. A disabled parking placard confers a privilege on its user, and Mr. Jones, like all other individuals to whom a placard is issued, had an obligation to take reasonable steps to prevent the misuse of his placard. Perhaps Mr. Jones could have been absolved of responsibility, and his placard not seized, under certain extreme circumstances. However, for Section 22511.56 to list all possible circumstances would be an unrealistic task and an unnecessary drain of resources. Furthermore, legislative history for other provisions in this chapter of the Vehicle Code shows that the Legislature recognized the persistent problem of placard misuse and the need to combat it. In light of this, a Commission study does not appear warranted, as the law advances that legislative intent.

Mr. Jones also contends that Section 22511.56 is too vague because it does not define what constitutes "misuse" of a parking placard explicitly enough to justify

confiscation of the placard. However, subdivisions (a) and (b), when taken together, provide sufficient information on that issue. Subdivision (a) states that an individual using a disabled placard for parking purposes must provide identification and evidence that the placard was issued to that individual if requested to do so by an officer. Subdivision (b) then states that a rebuttable presumption of misuse is created if such information is not provided under these circumstances. Although Mr. Jones is correct in that Section 22511.56 does not specifically define the term "misuse," it is realistically not necessary to do so.

Finally, Mr. Jones asserts that subdivision (b) should be revised because it creates a rebuttable presumption of misuse without specifying a method of rebutting the presumption. Although the text of subdivision (b) does not explicitly provide a method of rebuttal, that in itself does not necessitate statutory revision. Furthermore, as mentioned above, since the Legislature has recognized the need to combat the problem of placard misuse and Section 22511.56 was presumably passed to further that intent, **the staff does not feel it would be a good use of the Commission's time or resources to further examine this statute.**

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2011. 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.

To summarize, the Commission's traditional scheme of priorities is:

(1) Matters for the next legislative session.
(2) Matters directed by the Legislature.
(3) Matters for which the Commission has an expert consultant.
(4) Other matters that have been previously activated but not completed.
(5) New topics that appear appropriate for the Commission to study.

This priority scheme has worked well over the years. The staff recommends that the Commission continue to follow it in 2011, as detailed below.

Legislative Program for 2011

In 2011, the Commission's legislative program is likely to include legislation on the following topics:

- Statutory clarification and simplification of CID law
- Trial court restructuring: rights and responsibilities of the county as compared to the superior court
- Deadly weapons follow-up
- Marketable record title: notice of option

In addition, it might be possible to complete work on the following projects in time to incorporate them in 2011 legislation, although probably not before the bill introduction deadline:

- Trial court restructuring: appellate jurisdiction of bail forfeiture
- Trial court restructuring: writ jurisdiction in a small claims case

The technical corrections discussed in Memorandum 2010-50 might also be ready for presentation to the Legislature in 2011, perhaps as part of a judiciary committee omnibus bill.

The Legislature's Priorities

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

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 treat the study as a high priority matter. The Commission gave the study high priority in 2010, and should continue to do so next year.

In conjunction with this study, the Commission may also want to consider whether to replace "Tort Claims Act" with "Government Claims Act" throughout the codes. See discussion of "Technical and Minor Substantive Defects," above.

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.

If time permits, the Commission should perhaps also complete the last trial court unification project for which it has primary responsibility under Government Code Section 70219 (publication of legal notice in a county with a unified superior court). See discussion of "Trial Court Unification," above.

Consultant Studies

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

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

The Commission is fortunate to have Mr. Sterling's extensive background study on *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (June 2010). The background study is currently being circulated for preliminary comment, with a deadline of November 1, 2010. To take maximum advantage of Mr. Sterling's work, the Commission should commence work on this topic shortly thereafter, and should devote substantial resources to the topic in the coming year.

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. The former project may be completed in time to introduce a bill in 2011; the latter project probably will be completed by mid-2011.

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 in 2011 as time permits.

Discovery Improvements From Other Jurisdictions

Prof. Gregory Weber of McGeorge School of Law prepared a background study on civil discovery a number of years ago. The Commission has made progress on the topic, but there are many suggestions it has not yet examined and other issues it may want to study.

In 2008, the Commission suspended work on civil discovery, due to the demands of the deadly weapons assignment from the Legislature. Now that the deadly weapons assignment has been completed in compliance with the legislative deadline, it may be appropriate to recommence work on civil discovery, when staff resources permit.

Review of the California Evidence Code

Prof. Méndez is available to assist the Commission in studying the evidence issues discussed in the articles he prepared for the Commission. He is now teaching at UC Davis School of Law, and has an office in the same building as the Commission's new offices. That proximity may facilitate collaboration with him.

As mentioned in the discussion of "Evidence," 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. When we have a good opportunity, the staff will seek further guidance from the judiciary committees regarding whether to pursue those issues.

Other Activated Topics

In addition to the priorities described above, there is one other activated topic that may warrant priority in the coming year.

Deadly Weapons

In preparing its recommendation on nonsubstantive reorganization of the deadly weapon statutes, the Commission compiled a list of "Minor Clean-Up Issues for Possible Future Legislative Attention." See *Nonsubstantive Reorganization of Deadly Weapon Statutes,* 38 Cal. L. Revision Comm'n Reports 217, 265-280 (2009). The deadly weapons recodification bill (SB 1080) would authorize the Commission to study those issues. If the Governor signs that bill, the Commission should begin work on the issues, so as not to lose momentum in this area.

New Topics

As previously explained, the Commission's tiny staff has been hit hard by budget cutbacks. Nonetheless, it might be possible for the Commission to commence a new study or two in the coming year, at least if there are no further cutbacks. The staff recommends that the Commission pursue one or both of the following topics, if staff resources permit:

- The study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which would respond to a request from the California Commission on Uniform State Laws.
- The study of venue in a civil case, which would respond to a request from the Second District Court of Appeal.

SUMMARY

The staff recommends that the Commission work on the following matters in 2011 and the remainder of 2010:

- Manage the Commission's legislative program for 2011, probably including a major bill on statutory clarification and simplification of CID law.
- Continue to work on the study of charter schools and the Government Claims Act. Possibly also revise statutory references to the "Tort Claims Act."
- Continue to work on trial court restructuring.
- Commence work on creditors' rights against nonprobate assets and application of family protection provisions to nonprobate transfers.
- 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.
- If the deadly weapons recodification bill is enacted, begin work on the Commission's list of "Minor Clean-Up Issues for Possible Future Legislative Attention."
- If staff resources permit, begin work on (1) the study of venue in a civil case, and/or (2) the study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

All of these topics are already authorized for study in the Commission's Calendar of Topics. Thus, the Commission will not need to request any new authority from the Legislature if it decides to follow the staff's recommendations.

In accordance with Government Code Section 8293, however, the Commission routinely seeks enactment of a resolution relating to its Calendar of Topics once each legislative session, regardless of whether it seeks any new authority. The Commission could either do that in 2011, or wait to do it in 2012. An advantage of waiting until 2012 is that the resolution could reflect whatever decisions are made at next year's new topics discussion. For that reason, **the staff is inclined to wait until 2012 to seek enactment of a resolution relating to the Commission's Calendar of Topics.**

Whenever such a resolution is introduced, the Commission may want to request removal of its authority to study special assessments for public improvements. As previously discussed, such a study would be time-consuming, yet there is no clear indication of a need for it.

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.

California Commission on Uniform State Laws

November 2, 2009

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission
3200 Fifth Avenue
Sacramento, California 95817

Dear ~~Mr. Hebert~~ Brian:

On behalf of the California Commission on Uniform State Laws (CCUSL), I am requesting that the California Law Revision Commission undertake a study to compare existing California law with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and to make recommendations based upon that study. The CCUSL thinks that this study would be a logical extension of work already undertaken by the California Law Revision Commission.

Given the current workload of the California Law Revision Commission for the 2010 calendar year, as presented at the commission's last meeting held in Sacramento on October 22, 2009, I am requesting that this study be undertaken during the 2011 calendar year.

If you have any questions, please do not hesitate to contact me at 341-8200.

Very truly yours,

Diane Boyer-Vine

Diane Boyer-Vine
Member

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September 15, 2010

Brian Hebert, Esq
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive, Room 1126
Davis, CA 95616

Re: Assignments for the Benefit of Creditors

Dear Brian:

The California law relating to Assignments for the Benefit of Creditors ("ABCs") has been functioning satisfactorily and the impression that I have received from speaking to a substantial number of participants in the process is "if it works, don't fix it."

Naturally there are areas which could be improved but the risk is that if what was intended to be "tweaks" turns into a significant rewrite effort more harm than good would result.

The Insolvency Law Committee of the State Bar Business Law Section is considering doing a study on the subject. Perhaps it might be best for the Commission to put this project on the back burner and let the Insolvency Law Committee see what it might propose. The Commission could always decide that the subject merits further study.

If you wish to discuss the matter further, please feel free to give me a call.

Sincerely,

David Gould

February 25, 2010

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Dear Mr. Hebert:

This is a suggestion for amendment of two very important statutes. Recent rulings by the Alameda County Superior Court in two recent cases have created strongly negative effect which was apparently not foreseen by the Legislature.

The two statues are:

1. Administrative Adjudication Bill of Rights (Gov. Code, §§ 11425.10-11425.60).

2. Vexatious Litigants statutes (Code Civ. Proc., §§ 391-391.7).

When reviewing an administrative decision by the State Personnel Board, the court did not enforce the minimum due process requirements under the Administrative Adjudication Bill of Rights, and the court disregarded the case law in *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575 which found that Administrative Adjudication Bill of Right was applicable to the State Personnel Board. Instead, the court applied the outmoded "isolation approach" in *Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753 predating the Administrative Adjudication Bill of Rights of 1995, operative 7/1/97.

> It appears then that the words "minimum due process requirements" need to be incorporated into the language of the statute, and the Bill of Rights' applicability to administrative agencies of California Constitutional origin need also be specified.

The vexatious litigants statutes were enacted to combat truly outrageous conducts of litigants in pro per who "constantly file groundless actions" or "relitigate by repeated appeals or new actions based on the same controversy" (38 State Bar J. (1963) 663). However, the court interpreted the language of the statutes in such a way that even very well trained attorneys can not be expected to achieve such a level of performance. The questions are:

1. Under section 391, subdivision (b)(1), in reference to "litigation" that is "finally determined," whether the Legislature has intended to count each trial court and appellate decision issued in the process of exhausting all avenues for review as "finally determined" within the meaning of subdivision (b)(1). If so, the filing of one case in the trial court may end up also qualifying the litigant as "vexatious" under subdivision (b)(2) for repeatedly relitigating finally determined claims.

2. Under subdivision (b)(3) for determining repeated filing of unmeritorious motions and pleadings "in any litigation," whether the Legislature has meant for the court to review *past* cases for merits but without adequate records from the cases, or to review the merits of cases *pending* in other courts. If so, the court will be proceeding in excess of its jurisdiction.

3. Under subdivision (b)(4), as to having "previously been declared to be a vexatious litigant," whether the Legislature has meant to include a previous "declaration" that is not yet appealable, thus not final. If so, the litigant's due process rights appear to have been violated.

4. Under subdivision (b)(4), by "based upon the same or substantially similar facts," whether the Legislature has meant that the filing of a petition for writ of administrative mandamus, and an employment discrimination complaint, based *in part* on the same facts, is "vexatious." Because a writ and a complaint can not be combined into a single lawsuit, the Legislature could not have taken what is normal as "vexatious."

The court's refusal to honor the Administrative Adjudication Bill of Rights, and the court's taking as "vexatious" conducts which are not of the type of "vexatiousness" contemplated by the Legislature, have the *combined* effect to:

1. Grant the State Personnel Board permission not to conduct a fair trial, thus making the State civil service's merit system (Cal. Const., art. VII, §§ 1-3) a fiction.

2. Saddle parties who can not afford the services of an attorney with extraordinary financial liability (under Code Civ. Proc., § 391, subd. (c)) for attorney fees and non-taxable costs which are not generally recoverable by the opposing party. This immediately pushes the complaining parties, and their families, to the brinks.

3. Encourage employers to engage in a multitude of unlawful employment practices to overwhelm and crush the complaining employees.

4. Frustrate the legislative intent of the Fair Employment and Housing Act, which, in

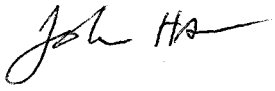
encouraging good-faith reporting of unlawful activities, has specifically excluded recovery of attorney fees by defendants when the plaintiff has acted in good faith.

5. Exert an immense chilling effect on the general population for participating in any protected activities. Complain at your own peril!

A recommendation for clarification of the statutes, by your Commission to the Legislature, is urgently needed and would serve the true needs of the State and its citizens.

Thank you very much for your considerations.

Sincerely,



John Hsu
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4 Witkin Cal. Proc. 5th Pleading § 216, Other Procedures Compared.

Title 3A

VEXATIOUS LITIGANTS

Section
391. Definitions.
391.1. Motion for order requiring security; grounds.
391.2. Scope of hearing; ruling not deemed determination of issues.
391.3. Order to furnish security; amount.
391.4. Dismissal for failure to furnish security.
391.6. Stay of proceedings.
391.7. Prefiling order prohibiting the filing of new litigation; contempt; conditions.

§ 391. Definitions

As used in this title, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

(b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(c) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained. *(Added by Stats.1963, c. 1471, p. 3088, § 1. Amended by Stats.1982, c. 517, p. 2335, § 98; Stats.1990, c. 621 (S.B.2675), § 1; Stats.1994, c. 587 (A.B.3600), § 3.5.)*

Law Revision Commission Comments

Section 391 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Section 995.710 (deposit in lieu of undertaking). The other changes in Section 391 are technical. (16 Cal.L.Rev. Comm. Reports 501).

Research References

Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 2-C, C. Nonappealable Orders.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 5-B, B. Types of Motions, Applications and Requests.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 11-E, E. Appellate Costs and Sanctions.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 15-B, B. Common Law Writs.
Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 1-G, G. Prior Court Order Required for Certain Pleadings.
Rutter, Cal. Practice Guide: Family Law Ch. 1-I, I. Liability Concerns in Handling Client's Case.
Rutter, Cal. Practice Guide: Family Law Ch. 16-B, B. Challenge by Appeal.
Rutter, Cal. Practice Guide: Insurance Litigation Ch. 6I-B, B. Particular Surety Bond Coverages.
3 Witkin Cal. Proc. 5th Actions § 365, (S 365) in General.
3 Witkin Cal. Proc. 5th Actions § 366, Statutory Definition.
3 Witkin Cal. Proc. 5th Actions § 367, Litigant Acting in Pro. Per.
3 Witkin Cal. Proc. 5th Actions § 369, Hearing, Determination, and Security.
3 Witkin Cal. Proc. 5th Actions § 370, Order Prohibiting Filing of New Litigation.
11 Witkin, California Summary 10th Husband and Wife § 5, Generally Applicable Procedures.
8 Witkin, California Summary 10th Constitutional Law § 792, Vexatious Litigant in Pro. Per.
14 Witkin, California Summary 10th Wills and Probate § 931, (S 931) Vexatious Litigants.

§ 391.1. Motion for order requiring security; grounds

In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant. *(Added by Stats.1963, c. 1471, p. 3038, § 1. Amended by Stats.1975, c. 381, p. 855, § 1; Stats.1990, c. 621 (S.B.2675), § 2.)*

Research References

Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 1-G, G. Prior Court Order Required for Certain Pleadings.
3 Witkin Cal. Proc. 5th Actions § 368, Motion and Grounds.
3 Witkin Cal. Proc. 5th Actions § 370, Order Prohibiting Filing of New Litigation.

§ 391.2. Scope of hearing; ruling not deemed determination of issues

At the hearing upon such motion the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof. *(Added by Stats.1963, c. 1471, p. 3038, § 1.)*

Research References

3 Witkin Cal. Proc. 5th Actions § 369, Hearing, Determination, and Security.

7 Witkin Cal. Proc. 5th Judgment § 433, Issue was Not Properly Triable.

§ 391.3. Order to furnish security; amount

If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix. *(Added by Stats.1963, c. 1471, p. 3038, § 1. Amended by Stats.1982, c. 517, p. 2335, § 99.)*

Law Revision Commission Comments

Section 391.3 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Sections 996.010 (undertaking in action or proceeding) and 996.030 (reduced undertaking). (16 Cal.L.Rev.Comm. Reports 501).

Research References

Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 2-D, D. Standing to Appeal.
Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 11-B, B. Involuntary Dismissals.
Rutter, Cal. Practice Guide: Family Law Ch. 1-I, I. Liability Concerns in Handling Client's Case.
3 Witkin Cal. Proc. 5th Actions § 369, Hearing, Determination, and Security.

§ 391.4. Dismissal for failure to furnish security

When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished. *(Added by Stats.1963, c. 1471, p. 3038, § 1.)*

Research References

Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 2-C, C. Nonappealable Orders.
Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 11-B, B. Involuntary Dismissals.
3 Witkin Cal. Proc. 5th Actions § 369, Hearing, Determination, and Security.

§ 391.6. Stay of proceedings

When a motion pursuant to Section 391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Section 391.1 is made at any time thereafter, the litigation shall be stayed for such period after the denial of the motion or the furnishing of the required security as the court shall determine. *(Added by Stats.1963, c. 1471, p. 3038, § 1. Amended by Stats.1975, c. 381, p. 855, § 2.)*

Research References

3 Witkin Cal. Proc. 5th Actions § 368, Motion and Grounds.

§ 391.7. Prefiling order prohibiting the filing of new litigation; contempt; conditions

(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

(d) For purposes of this section, "litigation" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(e) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state. *(Added by Stats.1990, c. 621 (S.B.2675), § 3. Amended by Stats.2002, c. 1118 (A.B.1938), § 1.)*

Research References

Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 2-D, D. Standing to Appeal.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 5-B, B. Types of Motions, Applications and Requests.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 8-C, C. Standards of Appellate Review.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Ch. 11-E, E. Appellate Costs and Sanctions.
Rutter, Cal. Practice Guide: Civil Appeals & Writs Gen. Matls., Highlights.
Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 1-G, G. Prior Court Order Required for Certain Pleadings.
Rutter, Cal. Practice Guide: Civil Trials & Evidence Ch. 1-K, K. Continuance Motions.
Rutter, Cal. Practice Guide: Family Law Ch. 1-I, I. Liability Concerns in Handling Client's Case.
Rutter, Cal. Practice Guide: Family Law Ch. 16-B, B. Challenge by Appeal.
3 Witkin Cal. Proc. 5th Actions § 368, Motion and Grounds.
3 Witkin Cal. Proc. 5th Actions § 370, Order Prohibiting Filing of New Litigation.

Title 4

OF THE PLACE OF TRIAL, RECLASSIFICATION, AND COORDINATION OF CIVIL ACTIONS

THE VEXATIOUS LITIGANT STATUTES

(Code Civ. Proc., §§ 391-391.7)

AND PROPOSED AMENDMENT

Legislative Purpose

The vexatious litigants statutes came about because of the unreasonable burden placed upon the courts by litigants appearing in pro per who "constantly file groundless actions" or "relitigate by repeated appeals or new actions based on the same controversy" (38 State Bar J. (1963) 663). For addressing such truly outrageous litigation conduct, the penalty is severe, in creating liability for attorney fees and nontaxable costs (Code Civ. Proc., § 391, subd. (c)) not[1] otherwise recoverable by the defendants.

Definition of "vexatious litigant"

Under the statutes, the pro per litigant is qualified as "vexatious" (1) for having received five adverse final determinations in seven years (§ 391, subd. (b)(1)); (2) for repeatedly relitigating finally determined claims (subd. (b)(2)); (3) for repeatedly filing unmeritorious or frivolous motions or pleadings in any litigation (subd. (b)(3)); and (4) when after having been declared a vexatious litigant in a previous action, brings another action based on substantially similar facts (subd. (b)(4)).

Judicial interpretations

In applying the vexatious litigant statutes, the courts have interpreted the "finally determined" in **subdivisions (b)(1) and (b)(2)** as after having exhausted all avenues for direct review (through the California Supreme Court) (*First Western development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 864; see also *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 993; *Holcomb v. U. S. Bank National Assn.* (2005) 129 Cal.App.4th 1494, 1502).

In *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216-1217, however, the court stated a "broad definition" for "litigation" to take each appeal or writ petition as a "litigation" within the meaning of the vexatious litigant statutes (Code Civ. Proc., §§ 391-391.7).

Under **subdivision (b)(3)**, the court in *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12

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[1]See, e.g., 16 Cal.Jur.3d (2003) Costs, § 111, p. 150 ["Ordinarily, attorney fees are not recoverable as costs, damages, or otherwise, either at law or in equity, absent express statutory or contractual authority."]

Cal.App.4th 838, 842 interpreted the "in any litigation" in the subdivision as referencing the very proceeding in which security is sought, and indeed the court in *Holcomb* (at p. 1506) has found it nearly impossible to assess the merit of the pleadings in a prior case when the pleadings are not in front of the court. As to what constitutes "repeatedly" under subdivision (b)(3), the court in *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 972 has noted that "most cases affirming the vexatious litigant designation involve situations where litigants have filed dozens of motions either during the pendency of an action or relating to the same judgment." The court also noted that "[n]ot all failed motions can support a vexatious litigant designation," such as when the motions are "not the 'unmeritorious' or 'frivolous' types of motions contemplated by the vexatious litigant statute." (*Id.*)

Subdivision (b)(4) was applied by the court in *In re Shieh* (1993) 17 Cal.App.4th 1154, 1166, where the "party had been declared vexatious litigant in federal court and by two state court judges in three distinct cases, all involving similar facts and claims" (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 366, p. 473).

Problems arising from interpretation of the statutory language

1. Under section 391, subdivision (b)(1), in reference to "litigation" that is "finally determined," whether the Legislature has intended to count each trial court and appellate decision issued in the process of exhausting all avenues for review as "finally determined" within the meaning of subdivision (b)(1). If so, the filing of one case in the trial court may end up also qualifying the litigant as "vexatious" under subdivision (b)(2) for repeatedly relitigating "finally determined" claims.

   This result would be particularly harsh for litigants who can not afford the services of an attorney. Litigants not formally trained in law are naturally more prone to make mistakes in court.

2. Under subdivision (b)(1), whether the Legislature has meant that an "*adverse*" final determination necessarily implies lack of merit. However, " 'Free access to the courts is an important and valuable aspect of an effective system of jurisprudence, and a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than that typically imposed on defeated parties.' (*Young v. Redman* (1976) 55 Cal.App.3d 827, 838.)" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648.) "As a matter of common experience even many meritorious suits fail, due to the vagaries of the trial process if nothing else." (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 58.) Thus, "adverse" final determination does not necessarily reflect the type of "vexatious" conduct the Legislature is concerned about.

3. Under subdivision (b)(3) for determining repeated filing of unmeritorious motions and pleadings "in any litigation," whether the Legislature has meant for the court to review, in addition to the current litigation in front of the court, also *past* cases for merits but

without adequate records from those cases, or to review the merits of cases *pending* in other courts. If so, the court is proceeding in excess of its jurisdiction.

Such broad language (e.g., "in any litigation") of the statute also encourages the court to act arbitrarily.

4. Under subdivision (b)(3), whether the Legislature has meant that unsuccessful motions are necessarily lacking in merit. The court in *Morton*, *supra*, has pointed out that unfavorable outcome does not necessarily imply lack of merit.

5. Under subdivision (b)(3) by "repeatedly" and "in any litigation," whether the Legislature has meant for the court to make a lifetime tally of the litigant's filings from all cases ever filed. If so, the conduct of a pro per litigant in one past litigation can lead to attachment of the "vexatious litigant" label for life. Making such a designation, not erasable, is fundamentally unfair. (*PBA, LLC, v. KPOD, Ltc.* (2003) 112 Cal.App.4th 965, 975-976.)

6. Under subdivision (b)(4), about having "previously been *declared* to be a vexatious litigant," whether the Legislature has meant to include a previous "declaration" that is not yet appealable, thus not final. If so, the litigant's due process rights have been violated.

7. Under subdivision (b)(4), by "based upon the same or substantially similar facts," whether the Legislature has meant that the filing of a petition for writ of administrative mandamus, and an employment discrimination complaint, based *in part* on the same facts, represents "vexatious" conduct on the part of the litigant. Because the writ and the complaint can not be combined into a single lawsuit, the Legislature could not have taken a normal conduct as "vexatious."

8. Under section 391, subdivision (c), the "security" required includes attorney fees and non-taxable costs not normally recoverable by the defendants, thus exerting an immensely strong chilling effect on the citizens' participation in protected activities, such as whistle-blowing or complaining about discrimination and retaliation. Subdivision (c) then effectively defeats the legislative intent under the Fair Employment and Housing Act which has specifically denied defendants' recovery for attorney fees when the plaintiff has acted in good faith. The effect is especially devastating to litigants who cannot afford the services of an attorney.

9. Under section 391.7, the presiding judge may deny the new filing summarily without clearly stating the factual and legal basis of his or her decision. This may also encourage the presiding judge to act arbitrarily or unduly harshly. The prefiling order must therefore be immediately appealable, or otherwise it assumes a res judicata effect, in deprivation of the litigant's due process rights.

CCP § 391, subd. (b)(4)

Original text: declared

Change to: finally determined (after exhausting all avenues for appellate review)

Original text: based upon the same or substantially similar facts, transaction, or occurrence.

Change to: brings another action based upon the same or substantially similar facts, and transaction, or occurrence from the same time period, raising new claims which could have been raised in the previous litigation.

CCP § 391, subd. (c)

Add: The "security" provisions in this subdivision and in sections 391.1, 391.3, 391.4, 391.6 and 391.7, subd. (b) do not apply to litigants who in good faith participate in protected activities such as under the Fair Employment and Housing Act.

CCP § 391.2

Add between the first and the second sentence:

Summary judgment or adjudication is the preferred process.

(Adopting the recommendation of 54 Cal. Law Review 1769, 1783-1787 on *The Vexatious Litigant*)

CCP § 391.7, subd. (b)

Add: The presiding judge must state in writing the factual and legal basis of his or her decision.

The decision of the presiding judge shall be immediately appealable.

STEPHEN D. JOHNSON
ATTORNEY AT LAW
CALIFORNIA BAR NO. 55128

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EMAIL: sjohlaw@aol.com

File:_____

Revised

May 11, 2010

California Law Revision Commission
4000 Middlefield Rd., Room D-2
Palo Alto, Ca. 94303-4739

Re: Revision of Code of Civil Procedure §1987

Dear Commission.

I recommend the 10 day period in CCP §1987b and the **20** day period in CCP §1987c remain the same for regular civil actions, but be reduced to 5 days each for unlawful detainer actions.

The Notice in Lieu of Subpoena can't be served until a trial date is set. Under CCP §1170.5, the usual situation is that the party has less than 20 days notice of the trial date since the notice of trial is served by mail.

Without the use of this section, the unlawful detainer party has to incur charges for service of subpoenas, which can be expensive if the landlord's records are in another county.

Thank you for your courtesy and cooperation.

Stephen D. Johnson

Robert E. Jones
1007 Ocean Avenue, #202
Santa Monica, CA 90403
(310) 394-5425
Fax (310) 451-5471

March 31, 2010

Fran Pavley
2716 Ocean Park Blvd.
Santa Monica, CA 94248-0001

Mike Feuer
9200 Sunset Blvd.
Suite 1212
West Hollywood, CA 94249-0042

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-1439

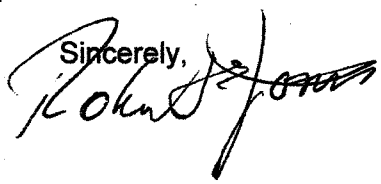
Re: California Vehicle Code Section 22511.56
Disabled Parking Placards

Gentlemen:

I am writing to you as a last resort. Since you are my State representatives, perhaps you have some suggestions or comments regarding my adventures with the enforcement of the Disabled Parking Placard legislation. I am enclosing copies of my correspondence with the DMV which, I hope, explains and describes my dilemma. I am sending a copy to the California Law Revision Commission, though I am not fully aware if its function, but this law really needs revision, in my opinion.

Thank you for your anticipated assistance.

Sincerely,



Robert E. Jones
1007 Ocean Avenue, #202
Santa Monica, CA 90403
(310) 394-5425
Fax (310) 451-5471

July 23, 2009

Office of the Director
Department of Motor Vehicles
2415 1st Avenue Mail Station F101
Sacramento, CA 95818

Re: Confiscation of Disabled Person Placard

Dear Sir:

I am an 83 year old retired attorney and a disabled person within the definition contained in the California Vehicle Code.

On the advice of my doctor, I applied for and obtained a disabled person parking placard. The placard was kept in our one family automobile and used by me when necessary. I specifically requested my wife to not use the placard.

Contrary to my request, my wife, who was alone, used the placard to park in a disabled parking area at the local market. She was given a parking citation, the placard was confiscated by the officer and she paid a fine of $396. I understand that I can obtain a replacement placard with an appropriate doctor's certification of disability and I will do so.

The reason for this letter is my problem (probably because I am a lawyer) with the confiscation of my placard by the officer who cited my wife for misusing my disabled placard.

First **I did not misuse the placard**. I did not authorize my wife to do so and was not aware she was doing so. Consequently, I do not believe that confiscation of the placard was justified or authorized by the California Vehicle Code.

Under Vehicle Code Section 22511.56. an officer may request evidence that a person using the placard is the person to whom it was issued. This was done. It also provides that the failure to provide such evidence creates a rebuttable presumption that the placard is being misused. It was being misused but not by me. I am the card holder and owner and I did not misuse the card. So I seriously question the right of the citing officer to confiscate my disabled parking placard because my wife misused it. I am disabled and need the card. Why am I being punished for something over which I had

no control and did not authorize? I am not responsible for my wife's misuse of the placard. She was cited and she paid the fine. But the placard belongs to me and I did nothing to justify confiscation.

Please advise the basis for the confiscation under the facts presented above. Is there an Attorney General's Opinion? A code section I did not locate?

Thanks for your consideration of this matter and I look forward to your early reply.

Sincerely

DEPARTMENT OF MOTOR VEHICLES
P.O. BOX 932345
SACRAMENTO, CA 94232-3450

November 3, 2009

Mr. Robert E. Jones
1007 Ocean Avenue #202
Santa Monica, CA 90403

Dear Mr. Jones,

This is in response to your correspondence dated August 10, 2009, requesting information regarding the confiscation of Disabled Parking Placards. I apologize on behalf of the department for the delayed response.

Vehicle Code Section 22511.56(b) describes the situation which constitutes a rebuttable presumption that the Disabled Parking Placard is being misused. Subsequently, CVC Section 22511.56(c) directs law enforcement officers to confiscate any Disabled Parking Placard that is being misused.

The cancellation of misused parking placard is without prejudice, and the Disabled Parking Placard holder may immediately reapply for a new parking placard without payment of any additional fees. The replacement application does not require a doctor's certification.

If you have any additional questions, please contact me at (916) 657-6560.

Sincerely,

Gary Oliver, Manager
Customer Communications Section

EX 19

August 10, 2009

Department of Motor Vehicles
Registration operations
P.O. Box 825393
Sacramento, CA 94232-5393

Attn: Kitty Kramer, Program Manager

Dear Ms. Kramer:

Thank you for your letter of August 3, 2009 regarding my Disabled Person placard and its confiscation.

I much appreciate your personal letter. Usually, when I write to a governmental agency (which is rarely) I receive a pre-printed reply entitled "Response #23A2" or the like.

As an attorney, I first read all of the applicable Vehicle Code sections, including Section 22511.56 (c).

My problem is with the absence of any code provision specifically defining "misuse" and by whom misuse can authorize confiscation. Does the DMV interpret this Code Section to authorize confiscation regardless of by whom and regardless of the circumstances under which the placard is misused? If the placard is stolen and misused by the thief, is confiscation authorized? If lost and misused, is confiscation authorized, under the DMV interpretation of the Code Section? If a friend borrows your car and misuses the placard, can it be confiscated? What about the Fifth Amendment? Where is there due process if the placard is misused without the knowledge of consent of the placard holder and thereupon confiscated?

I realize that this is a tempest in a teacup, but these facts are a red flag to a lawyer. Something just isn't right here. The statute is vague and the "crime" ill-defined. In short, why should I lose my placard (which I really need) because of the misuse by another person?

Thanks for your early attention to this matter.

Sincerely,

DEPARTMENT OF MOTOR VEHICLES
P.O. BOX 932345
SACRAMENTO, CA 94232-3450

November 3, 2009

Mr. Robert E. Jones
1007 Ocean Avenue #202
Santa Monica, CA 90403

Dear Mr. Jones,

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If you have any additional questions, please contact me at (916) 657-6560.

Sincerely,

Gary Oliver, Manager
Customer Communications Section

EX 21

August 10, 2009

Department of Motor Vehicles
Registration operations
P.O. Box 825393
Sacramento, CA 94232-5393

Attn: Kitty Kramer, Program Manager

Dear Ms. Kramer:

Thank you for your letter of August 3, 2009 regarding my Disabled Person placard and its confiscation.

I much appreciate your personal letter. Usually, when I write to a governmental agency (which is rarely) I receive a pre-printed reply entitled "Response #23A2" or the like.

As an attorney, I first read all of the applicable Vehicle Code sections, including Section 22511.56 (c).

My problem is with the absence of any code provision specifically defining "misuse" and by whom misuse can authorize confiscation. Does the DMV interpret this Code Section to authorize confiscation regardless of by whom and regardless of the circumstances under which the placard is misused? If the placard is stolen and misused by the thief, is confiscation authorized? If lost and misused, is confiscation authorized, under the DMV interpretation of the Code Section? If a friend borrows your car and misuses the placard, can it be confiscated? What about the Fifth Amendment? Where is there due process if the placard is misused without the knowledge of consent of the placard holder and thereupon confiscated?

I realize that this is a tempest in a teacup, but these facts are a red flag to a lawyer. Something just isn't right here. The statute is vague and the "crime" ill-defined. In short, why should I lose my placard (which I really need) because of the misuse by another person?

Thanks for your early attention to this matter.

Sincerely,

January 18, 2010

Department of Motor Vehicles
Registration operations
P.O. Box 825393
Sacramento, CA 94232-5393

Attn: Kitty Kramer, Program Manager

Dear Ms. Kramer:

I am attaching copies of previous correspondence with your office for reference.

While I now have my disabled placard (after a 3 hour wait at DMV) I still cannot let go of the Vehicle Code provisions dealing with the "misuse" of a disabled parking placard. I find these code sections to be self-serving and grossly unfair. And possibly unconstitutional. I have read and studied thousands of statutes and code sections over my legal career, but somehow these Vehicle Code provisions activate my sense of fairness (or unfairness) and dislike of governmental overreaching. I will try to be brief.

These code provisions deal with the "misuse" of a disabled parking placard. The code provides a rebuttable presumption of misuse if the person using the placard cannot produce evidence that he or she is the person to whom the placard was issued. As a penalty, the officer may confiscate the card. The officer did in fact confiscate my placard. It was being misused **by my wife** without my knowledge of consent. She was given a citation and paid a $396 fine. I was required to obtain another certificate from my doctor and obtain a new placard from the DMV office.

Those are the facts. I did not misuse the placard but was penalized by confiscation for the misuse by someone else. Misuse was presumed. Query: why should I be penalized because someone else, without my consent, misused the placard? And if the presumption of misuse is rebuttable, how do I rebut it? I no longer have the placard and I did not receive the citation. Where and how do I rebut this presumption? The code contains no provision for a hearing wherein I can rebut the presumption. My placard is gone and I have no recourse, no forum for a hearing. Constitutionally, this just isn't right. You can't take my property without giving me the opportunity for a hearing on your right to do so. Please explain how one can rebut the presumption set forth in Section 22511.56 (b). This whole legislative scheme, while making it easier for forfeiture of the placard, seems wrong. Again, I didn't' do anything wrong. Why should I be penalized?

OK, I will shut up. My sense of outrage is almost past and I have my disabled placard. My wife says "drop it". But I could not resist one last objection to these code provisions. Thanks for your patient understanding.

Sincerely,

January 18, 2010

Department of Motor Vehicles
Registration operations
P.O. Box 825393
Sacramento, CA 94232-5393

Attn: Kitty Kramer, Program Manager

Dear Ms. Kramer:

I am attaching copies of previous correspondence with your office for reference.

While I now have my disabled placard (after a 3 hour wait at DMV) I still cannot let go of the Vehicle Code provisions dealing with the "misuse" of a disabled parking placard. I find these code sections to be self-serving and grossly unfair. And possibly unconstitutional. I have read and studied thousands of statutes and code sections over my legal career, but somehow these Vehicle Code provisions activate my sense of fairness (or unfairness) and dislike of governmental overreaching. I will try to be brief.

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EMAIL FROM MARK KOHN (JAN. 12, 2010)

I believe civil code 2924g is in serious need of revision and improvement

In October 2009, GMAC sent me a Trustee Sale (auction) notice with 11/3 indicated as the auction date.

I immediately got an attorney, put the house on the market, got a buyer in one day, Notified the lender, and they cancelled the 11/3 date. They refused to put anything in writing despite my attorney's request. I went to the 11/3 auction out of an abundance of caution (GMAC had dropped the ball on several occasions during loan modification review)

They said no new date (at the auction). They also told my attorney the same thing.

Then they went ahead and auctioned the house on 12/3 without any notice to me at all.

And they claim these actions are legal.

Regrettably, the oversight in civil code 2924g resulted in my home being sold in a Trustee Auction sale while we were in the middle of an escrow to sell the property (with a projected profit). For these reasons, I am requesting the recommendations below. This story was carried by Los Angeles channel KNBC and I am attaching below a link for you to review it.

Here are some specifics: when there's a foreclosure date and it doesn't go forward (e.g. because of agreement with lender), the lender is only obligated to orally announce a new date at the date and time of old date(the auction date). I went to the 11/3 auction, and they told me no new date (and they told my attorney the same thing).

GMAC subsequently auctioned my house on 12/3 without notification, and now its my word against theirs. If they had to tell me in writing, then at least there would be some sort of proof, especially if they had used certified mail.

Recommendations

We would like to make sure that if a lender postpones or cancels a sale that future notice is provided ***in writing***; And, that if they call you after putting a sale date back on, they must TELL YOU ABOUT THE NEW DATE , not just leave a message to call their collections dept or leave a generic message to call them back.

And, lastly, that the auctioneer should have to take a record of some kind, and/or swear under penalty of perjury, that they provided notice of the future date at the time and date of the earlier cancelled/postponed sale.

Here's link to KNBC Foreclosurs video

http://www.nbclosangeles.com/news/local-beat/GMAC_Mortage_Foreclosure_Los_Angeles.html

Please help protect other unsuspecting homeowners from this fate,

Mark Kohn

EMAIL FROM RUBY LACOURSE (JAN. 6, 2010)

Dear Mr. Hebert

I would really like consideration be made to a revision of the Probate Law regarding the omitted spouse clause to exclude 'marriages committed as shams to circumvent U.S. Immigration'.

Let me explain further. This gentleman who at the time was 62 years of age, was introduced to a Philippine woman, age 24 at the time, via e-mail, where they began corresponding and within ten days were planning to be married. He was in desperate need of a caregiver, being very ill, and she was in desperate need to come to the United States to hopefully live a better life, and to bring her family here eventually. We all know how internet fraud can be very persuasive. Why else would a 24-y/o woman want to marry such a sick man who was almost 40 years older than her.

This correspondence continued for approximately eight months at which time he then flew to the Philippines at the recommendations of her family that it would be easier for him to get her back here into the United States. However, that was not the case. He returned without his bride (wife), and was working through the immigration papers to try to get her here. However, he became very ill with his sickness (COPD, congestive heart failure, pulmonary function problems, sepsis, etc.) He was a very sick man. He ended up in the hospital and had a very rocky course, in and out of consciousness, being intubated and sedated, and finally could not fight the infection any longer and succumbed to his failure.

Before he went into his last state of unconsciousness he had tried to get his estate in order and have her written out of his estate (i.e. he had a codicil drawn up, but was never able to sign it as he was not conscious). She now is suing for her share of his estate.

He had one daughter from a previous marriage who is 30, even older than his new bride.

I was appointed trustee for his estate and am fighting (bride's) her petition to receive a share. To date, we have spent close to $50,000 regarding this, and what I would like to know is how can a person who commits fraud against the United States (and I have not met one person who cannot see that this was a fraudulent marriage) benefit through the laws of the State of California by receiving a share of a man's estate to which she contributed not one cent, has not stepped foot on American soil, was denied access to the United States, and allowed this man to lay in an unconscious state in the hospital while his family was by his side wandering when the time would come. His daughter begged her to allow him to be put on compassionate support, but she refused, and what finally happened was the tracheal tube for his breathing rotted inside his chest cutting off his airway, suffocating him.

I have found articles on probate law, re: Uniform Probate Code - 2-301 where it states if there is a child from a previous marriage then all property that was devised to that child is exempt from the estate that the pretermitted spouse would take an intestate share

of. This is also in the Family Code of the Philippines. He did not want this woman to have anything. He had left everything to his daughter.

Why has the State of California not adopted these codes? The only ones getting rich in this instance are the lawyers. We will soon be out of money and there will be nothing left even for his daughter. Why should we have to offer her any money to settle this case???

Why does the State of California want to reward a person who commits fraud? I do not believe that anyone who commits a crime against the United States should be rewarded. I thought crime did not pay, but in this case it looks like it does.

This law has to be defined more, there has to be some exclusions, and if this is not changed what message are you sending out to foreigners who are preying on the weak and elderly of your state via the internet? This very well could happen to any elderly man or woman.

Believe me, immigration fraud is high and marriage is the easist to commit. If she is allowed to receive any share, do you not think this will be shared with other Filipinos. They research the laws, and they are smart, they know what states to look for men/women in, and they know how to get them to be dependent on their attention that they give them. I believe this will only exponentiate to other countries too.

Please, please look into this and please make some recommendations to change this law. This has been a nightmare. This man's daughter has not even had a chance to grieve for her father because of this horrendous court case.

All I see is a lawyer (her's) looking to make a dollar off a man who was desperate, sick, and lonely. I strongly believe her lawyer took this case as a contigency, and is hoping for a payday.

I look forward to hearing from you and I have many documents (e-mails from her to him, vice versa), and would really like to see something done soon. I want to save any other families out there the headache, and difficulties that we have gone through. I would also like to mention that this man spent only a total of four weeks in the Philippines where they were married and spent time together. Four weeks, and she is entitled to a share of his estate. How wrong is that? I cannot believe that a marriage license can carry so much clout. This law needs to be revised and soon.

Thank you for taking the time to read this.

Ruby Lacourse

LAW OFFICES OF
PAPP & LeMASTER-FARRIMOND
495 EAST RINCON STREET, SUITE 125
CORONA, CALIFORNIA 92879
TELEPHONE:(951) 279-6700
FACSIMILE: (951) 279-6716

September 8, 2010

California Law Revision Commission
c/o UC Davis Law School
400 Mrak Hall Drive
Davis, CA 95616

Re: California Code of Civil Procedure Sections 2025.250 & 2025.520 - Miles

Dear California Law Revision Commission:

I am writing regarding the lack of coordination between Code of Civil Procedure section 2025.250 and section 2025.520. While section 2025.250 has mileage requirements, setting depositions within 75 miles of the deponent's residence, etc., no such mileage limitation is found in section 2025.520. Thus, while a non-party deponent's deposition is typically restricted to a location within 75 miles of his or her residence, the miles to the location for transcript review and correction is limitless. It seems like there should be mileage restrictions in section 2025.520 mirroring those in section 2025.250.

Just a thought.

Very truly yours,

ANTHONY J. LEMASTER-FARRIMOND

EX 29

January 26, 2010

Diane Boyer-Vine
State Capitol
Suite 3021
Sacramento, Ca 95814

Dear Diane Boyer-Vine,

File: 2.3.1

This letter is sent to you because you are the Legislative Counsel for the California Law Revision Commission. The purpose of my letter is to bring to your attention the failure of our state to align the Uniformed Services Former Spouses Protection Act (USFSPA), a federal divorce law, with the California Family Code. The USFSPA was passed by Congress in 1982. Research of the California Family Code reveals that there is no mention of the USFSPA and how it will be applied in our state courts. For 28 years our state judges have been applying this federal law in our state divorce courts without any direction from the California Legislative Branch.

The USFSPA gives state courts the option to treat uniformed services retainer pay as SOLE property of the service member or joint marital property with restrictions placed on the member and not the former spouse. The courts are choosing to automatically award the former spouse half of the service member's retainer pay for life. No divorce settlement should require the payment to an ex spouse for life.

One state, Oklahoma, has already stepped up to align the USFSPA with the divorce laws. Oklahoma Bill Number 1053 is now in the Oklahoma Legislature to revise their state divorce laws to direct how the application of the USFSPA will be applied during divorce cases in their state. A copy of the bill is provided.

Family Law is topic number 4 on the current calendar of topics authorized for study by the California Law Revision Commission. I request that you initiate a study on the USFSPA and how it will be aligned with the California Family Code. I have compiled a lot of information on the USFSPA and will provide all information I have upon request. I have enclosed a presentation that explains the USFSPA. I'm also available to meet with you and discuss the USFSPA. The favor of a response is requested. Thank you for your time and service to our great state.

Respectfully,

Dwayne G. Lewis

Dwayne G. Lewis
CWO5 United States Marine Corps (Ret)
22810 Wimpole Street
Moreno Valley, California 92553-1850
(951) 656-1252

Uniformed Services Former Spouses Protection Act (USFSPA)

(A flawed legislation from the start from which many active duty and retired service members need immediate relief)

California Senate Bill 285

- **Aligns state law with the federal law in protecting service related disability compensation payments paid to veterans from creditors' claims.**
- **Passed 37-0 in the Senate. Major victory for all veterans in protecting the monies they earned for their service to our country.**
- **The USFSPA, a federal divorce law, needs to be aligned with the California divorce law.**

USFSPA

- **Passed by Congress in 1982. Introduced as amendment to appropriation bill at 11th hour by Representative Patricia Schroeder, CO.**
- **USFSPA is codified at 10 U. S. C. 1408.**
- **Intended as response to U. S. Supreme Court decision of McCarty v. McCarty 1981, which previously held that military retainer pay (MRP) is sole property of the service member.**
- **Allows states to consider MRP to be property for the purpose of division of marital property in a divorce.**

USFSPA

- **Only Federal Divorce Law in existence. (Discriminates against the uniformed services)**
- **Congress had good intentions. Potential major problems were pointed out during initial hearings, but were ignored.**
- **Inherently unfair to service members. Designed originally to "protect" women who had purportedly dedicated a portion of their lives to support their military spouses.**

Problems

- **Inserts the Federal government into a legal process-divorce-historically reserved to the states.**
- **Cannot be challenged at the Federal level. Congress refuses to take any steps to correct the problems stating that divorce laws are up to each individual state. If that is a true statement then why the need for the USFSPA (A Federal divorce law)?**
- **DoD refuses to brief active duty personnel at time of recruitment or retirement on USFSPA impact in case of divorce. A career dis-incentive!**

Problems

- **To date, multiple problems have not been successfully addressed at Federal level. District and Supreme Courts have failed to act.**
- **There is no floor for challenging the law. When challenged through the state courts the court states it is up to Congress. Yet Congress refuses to address constituents requests. Affected constituents are stymied at every venue.**

Problems

- Creates a legal fiction in that MRP is considered property for division of the marital estate, but then becomes income for taxation, alimony and child support purposes.
- Amount awarded is based on the service member's rank and years of service at the time of retirement rather than the time of divorce. Former spouse given the benefit of advancement and service time after the divorce.

Problems

- No provisions to offset the former spouse's share of MRP for required child support in the divorce decree. Custodial parent retirees are severely hurt financially.
- Compels retired service member to share retirement, for life, with a spouse who is remarried/cohabitating, has a lucrative career, obtains a large inheritance. It is for life regardless of the circumstances. Usually state law allows for payments up to 5 years.

Problems

- Does not contain a remarriage/cohabitation clause. Service member is required to support the former spouse and the former's new spouse for life. Alimony usually ends upon remarriage. Social Security stops at remarriage.
- Divorce lawyers and judges routinely assume entitlements in favor of spouse are mandatory and award in favor of spouse regardless of federal law that states "may". This provision is widely abused making it difficult to get the law changed.

Oklahoma House Bill No. 1053

- Addresses the USFSPA.
- Courts can treat MRP as either sole property or property of the member and the spouse of the member.
- Retired pay to former spouse terminates upon voluntary cohabitation or remarriage of the former spouse.
- Grandfathers divorce decrees that became final after June 26, 1981.

Oklahoma House Bill No. 1053

- Oklahoma Representative Gary Banz is willing to answer any questions on Bill 1053 from other state representatives.
- Contact information:

Representative Gary Banz

Capitol Office: (405) 557-7395

District Office: (405) 769-5722

Determining Classification As Marital or Separate Property

- Ability of former spouse to provide for own support.
- Length of service and pay grade at the time of divorce and not at the future date of retirement.
- Education and experience the former spouse received during the marriage.
- Any criminal activity, abuse, or nonconformance to military lifestyle of the former spouse.

Required Action

- Congress initiated action but left the interpretation and application of USFSPA to each individual state.
- Proposal of bill in the California State Legislature, similar to Oklahoma Bill No. 1053 (see attached copy), that will make the application of the USFSPA in California divorces more equitable to the service member.

Recommendations

- Incorporate the USFSPA and how it will be applied into the California Divorce Law.
- Allow court to treat disposable retired or retainer pay payable to a military member either as property solely of the member or as property of the member and the spouse of the member.
- Court should consider the ability of the former spouse to provide for his/her own support.

Recommendations

- Court should consider the education and experience the former spouse received during the marriage.
- Court should consider any criminal activity, abuse, or nonconformance to military lifestyle of the former spouse.
- Disability compensation received by the service member from the Veterans Affairs shall not be considered.

Recommendations

- Court shall not offset any disability income with other assets of the military member.
- Court shall provide in the divorce decree that payments of the disposable retired pay to the former spouse shall terminate upon the voluntary cohabitation or remarriage of the former spouse.
- Court shall use the length of service and pay grade at the time of divorce and not at the future date of retirement.

Recommendations

- Payments of disposable retired pay to the former spouse shall not exceed the number of years of the marriage. (No divorce ordered payment should be for life)
- Court shall consider the number of years the married couple maintained a joint domicile for determining the number of years for payments of disposable pay. (This protects the service member whose spouse refused to accompany him/her on a PCS move)

Recommendations

- The Adjutant General shall ensure that all California Army National Guard and Air National Guard are briefed annually on the possible division of military retirement or retainer pay in a divorce action.

STATE OF OKLAHOMA

2nd Session of the 52nd Legislature (2010)

PROPOSED CONFERENCE COMMITTEE
SUBSTITUTE FOR
HOUSE BILL NO. 1053

By: Banz and Tibbs of the House

and

Anderson of the Senate

PROPOSED CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to marriage; amending 43 O.S. 2001, Section 134, as amended by Section 11, Chapter 407, O.S.L. 2008 (43 O.S. Supp. 2009, Section 134), which relates to payments pertaining to support and division of property; providing considerations for a state court to review when determining classification of certain pay; excluding certain compensation from consideration; providing for termination of certain payments upon proof of certain cohabitation or remarriage; requiring certain briefings; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 43 O.S. 2001, Section 134, as amended by Section 11, Chapter 407, O.S.L. 2008 (43 O.S. Supp. 2009, Section 134), is amended to read as follows:

Section 134. A. In any divorce decree which provides for periodic alimony payments, the court shall plainly state, at the time of entering the original decree, the dollar amount of all or a

portion of each payment which is designated as support and the dollar amount of all or a portion of the payment which is a payment pertaining to a division of property. The court shall specify in the decree that the payments pertaining to a division of property shall continue until completed. Payments pertaining to a division of property are irrevocable and not subject to subsequent modification by the court making the award, except as provided in subsection H of this section. An order for the payment of money pursuant to a divorce decree, whether designated as support or designated as pertaining to a division of property shall not be a lien against the real property of the person ordered to make such payments unless the court order specifically provides for a lien on real property. An arrearage in payments of support reduced to a judgment may be a lien against the real property of the person ordered to make such payments.

B. The court shall also provide in the divorce decree that upon the death or remarriage of the recipient, the payments for support, if not already accrued, shall terminate. The court shall order the judgment for the payment of support to be terminated, and the lien released upon the presentation of proper proof of death of the recipient unless a proper claim is made for any amount of past-due support payments by an executor, administrator, or heir within ninety (90) days from the date of death of the recipient. Upon proper application the court shall order payment of support

terminated and the lien discharged after remarriage of the recipient, unless the recipient can make a proper showing that some amount of support is still needed and that circumstances have not rendered payment of the same inequitable, provided the recipient commences an action for such determination, within ninety (90) days of the date of such remarriage.

C. The voluntary cohabitation of a former spouse with a member of the opposite sex shall be a ground to modify provisions of a final judgment or order for alimony as support. If voluntary cohabitation is alleged in a motion to modify the payment of support, the court shall have jurisdiction to reduce or terminate future support payments upon proof of substantial change of circumstances of either party to the divorce relating to need for support or ability to support. As used in this subsection, the term cohabitation means the dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship not solemnized as a marriage according to law, or not necessarily meeting all the standards of a common-law marriage. The petitioner shall make application for modification and shall follow notification procedures used in other divorce decree modification actions. The court that entered the divorce decree shall have jurisdiction over the modification application.

D. Except as otherwise provided in subsection C of this section, the provisions of any divorce decree pertaining to the

payment of alimony as support may be modified upon proof of changed circumstances relating to the need for support or ability to support which are substantial and continuing so as to make the terms of the decree unreasonable to either party. Modification by the court of any divorce decree pertaining to the payment of alimony as support, pursuant to the provisions of this subsection, may extend to the terms of the payments and to the total amount awarded; provided however, such modification shall only have prospective application.

E. Pursuant to the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C., Section 1408, a court may treat disposable retired or retainer pay payable to a military member either as property solely of the member or as property of the member and the spouse of the member as follows: if the duration of the marriage coincided with less than ten (10) years of the military service, the court shall consider the retirement or retainer pay the property solely of the member. If the duration of the marriage coincided with ten (10) or more years of the military service, the court may treat the retirement or retainer pay as marital or separate property. If a state court determines that the disposable retired or retainer pay ~~of a military member~~ is marital property, the court shall award an amount consistent with the rank, pay grade, and time of service of the member at the ~~time of separation~~ end of the marriage.

F. The provisions of subsection D of this section shall have retrospective and prospective application with regards to modifications for the purpose of obtaining support or payments pertaining to a division of property on divorce decrees which become final after June 26, 1981. There shall be a two-year statute of limitations, beginning on the date of the final divorce decree, for a party to apply to the district court for division of disposable retired or retainer pay, if any.

G. The court shall not consider disability compensation received by a party from the United States Department of Veterans Affairs for service-related injuries for any purpose. In addition, the court shall not offset any disability income with other assets of the military member.

H. 1. The court shall provide in the divorce decree that payments of disposable retired pay to the former spouse shall terminate upon:

a. the voluntary cohabitation, as defined in subsection C of this section, with a member of the opposite sex, or

b. remarriage of the former spouse.

2. Upon application and proof of voluntary cohabitation or remarriage, the court shall modify the provisions of the final order or judgment to terminate payments as provided for in paragraph 1 of this subsection.

EMAIL FROM DAVID C. NELSON (NOV. 12, 2009)

Re: Conflicting Probate Code Sections

Hi Brian:

I hope that this email finds you well. I don't think we have communicated since our work on the new no contest clause statutes. I am looking forward -- admittedly with some mixed feelings -- to those statutes taking effect in a little over a month.

On a different subject, I wrote an article for the *California Trusts and Estates Quarterly* a little over three years ago. Among other things, that article points to provisions of the Probate Code that potentially are in direct conflict -- and at a minimum create significant uncertainty -- regarding the applicability of Part 1 of Division 11 of the Probate Code. Specifically, Probate Code Section 21140, which is part of Part 1 of Division 11, states that "[t]his part applies to all instruments, regardless of when they were executed." On the other hand, Probate Code Section 6103 states that various provisions of the Probate Code, including Part 1 of Division 11, "do not apply where the testator died before January 1, 1985, and the law applicable prior to January 1, 1985, continues to apply where the testator died before January 1, 1985." A copy of my article, which is cited in the commentary to Section 21140 in West's *California Probate Code Annotated*, is attached.

Part 1 of Division 11 includes Probate Code Section 21115, which governs the inclusion of adopted persons in class gifts to children, issue, descendants, etc., at least in circumstances where the donor died on or after January 1, 1985. However, because of the apparent conflict between Sections 21140 and 6103, it is unclear whether this issue is governed by Section 21115, or instead by pre-1985 law, where the donor died before 1985.

I have a client which is the trustee of some trusts that were created by a settlor who died before 1985. There have been adoptions within the family and, looking forward, the trustee anticipates that it could be confronted with the question of whether the inclusion of the adopted persons in a class gift is governed by Section 21115, or instead by pre-1985 law. The trustee therefore has asked me whether it would be possible to obtain legislative clarification of the apparent conflict between Sections 21140 and 6103.

As you probably have guessed, my question to you is whether obtaining such clarification is a project that the CLRC can and would be willing to undertake.

I will look forward to hearing from you, and thank you in advance for your consideration.

David

David C. Nelson
Loeb & Loeb LLP
10100 Santa Monica Boulevard, 22nd Floor
Los Angeles, California 90067-4164
Telephone: 310-282-2000
Facsimile: 310-282-2200

INCLUSION OF ADOPTEES IN CLASS GIFTS TO ISSUE: THE UNCERTAINTIES AND INCONGRUITIES OF PROBATE CODE SECTION 21115

*David C. Nelson**

I. INTRODUCTION

Testamentary instruments sometimes provide for a gift to a class comprised of the issue either of the transferor or of another person such as a child of the transferor. This type of class gift can take a variety of forms, including an immediate outright disposition, an immediate or subsequent income interest, an eventual remainder interest, or a gift over in default of lapsed or failed gifts. Where the instrument does not afford express guidance, a question can arise as to whether adoptees are included in such a class gift to issue.

Subject to an exception not relevant here, California's intestate succession laws provide that any part of an intestate estate not passing to the decedent's surviving spouse passes to "the issue of the decedent," if any.[1] At least in this context, "issue" includes a "child," and "child" means someone who takes as a child under the laws of intestacy.[2] In turn, a parent-child relationship is deemed to exist for this purpose between an adopted person and that person's adoptive parent or parents.[3] Thus, under California's current intestate succession laws, "issue" includes adoptees.[4] This uniform rule is clear, easy to apply, and, although some might disagree, at least arguably is rationally based on what a transferor presumably would intend.

One might think that an equally clear, uniform rule would apply to the inclusion of adoptees in class gifts to issue under testamentary instruments. One would be mistaken. Instead, the question is—or at least may be—governed by a statute the applicability of which is uncertain and which in application can be ambiguous or lead to questionable results. That statute is Probate Code Section 21115, which provides in relevant part:

> (a) Except as provided in subdivision (b), . . . adopted persons . . . and the issue of these persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.
>
> (b) . . . In construing a transfer by a transferor who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.[5]

II. A PRELIMINARY QUESTION: WAS THERE AN ADOPTION?

Before even reaching either the applicability or the application of Section 21115 to the inclusion of adoptees in class gifts to issue, a preliminary question always should be considered: Was there, in fact, an adoption? This seems like a rudimentary question answerable simply with a copy of an adoption decree. Indeed, leaving aside any issues as to whether the decree might be void or voidable for some reason, nothing more is probably necessary in cases involving California adoptions. However, another level of inquiry is warranted in cases involving non-California adoptions.

The reason for this second level of inquiry is that what one jurisdiction calls an "adoption" may not, in fact, have the same characteristics and effects as a California adoption. California adoptions create a legal parent-child relationship between the adoptive parent and the adoptee and sever the parent-child relationship between the adoptee and his or her natural parents.[6] That may not be the case with adoptions in other jurisdictions. In that event, the adoptee may not qualify as issue under California law.[7]

In one recent case, a trust provided a life interest for the deceased settlor's daughter and, upon the daughter's death, became distributable to the daughter's "then living lawful issue . . . ."[8] The daughter was survived by two natural children, as well as two individuals she had adopted as adults in Colorado.[9] The issue in the case was whether the adoptees were entitled to participate in the trust as "issue" of the daughter.[10] The Court held that the adoptees did not qualify as "issue" because the Colorado adult adoption statute under which they were adopted neither created a legal parent-child relationship between the daughter and the adoptees nor severed the parent-child relationship between the adoptees and their natural parents.[11] In reaching this conclusion, the Court explained:

> The existence of a parent-child relationship is the sine qua non for an adopted person to qualify as 'issue' under California law. The simple incantation that a person was 'adopted' does not suffice.[12]
>
> * * *
>
> Unless the legal relationship between an adopted person and an adopting person embraces all of the mutual rights and duties of a parent and child, it cannot be said that the adopted person is the 'issue' of the adopting person, at least insofar as that word is construed under California law.[13]

In cases involving non-California adoptions, it therefore is important to ascertain whether, under the laws of the jurisdiction where the adoption occurred, the adoption created a parent-child relationship comparable to that which is the "sine qua non for an adopted person to qualify as 'issue' under California law."[14] If not, then the adoptee does not qualify as issue of the adoptive parent.

EX 40

III. THE UNCERTAIN APPLICABILITY OF SECTION 21115

In some cases, the most frustrating aspect of Section 21115 can be determining whether it even applies. Two separate statutes may bear on this issue, and potentially dictate contrary results.

One of those statutes is Probate Code Section 21140. Both Section 21115 and Section 21140 are found in Part 1 of Division 11 of the Probate Code. In seemingly unequivocal language, Section 21140 provides that "[t]his part applies to all instruments, regardless of when they were executed."[15] Standing alone, Section 21140 therefore appears to dictate that Section 21115 is applicable in all instances.

In fact, that may not be the case. A second statute, Probate Code Section 6103, provides in relevant part that, "[e]xcept as otherwise specifically provided, . . . Part 1 (commencing with Section 21101) of Division 11, do[es] not apply where the testator died before January 1, 1985, and the law in effect prior to January 1, 1985, continues to apply where the testator died before January 1, 1985."[16] Section 6103 thus appears to limit the applicability of Section 21115 to circumstances where a testator dies on or after January 1, 1985.

There are several ways to attempt to reconcile the apparent inconsistency between Section 21140 and Section 6103, but no clear answers.

One possible answer is that these provisions really are not inconsistent at all. Read carefully, Section 21115 speaks in terms of when the instrument is executed, while Section 6103 speaks in terms of when the testator died.[17] Taken together, then, these provisions could mean that Part 1 of Division 11 (including Section 21115) applies (1) to all instruments regardless of when executed, but (2) only in cases where the transferor died on or after January 1, 1985. This interpretation does succeed in harmonizing the two statutes, and so may be correct. However, the piecemeal statement of such a standard in two distinct and otherwise unrelated provisions of the Probate Code—rather than simply in Section 21140, for example—makes little sense and certainly is confusing.

A similar but slightly different possible answer lies in the fact that Section 6103 speaks only in terms of the date of death of a "testator" and is found in Part 1 of Division 6 of the Probate Code, which Part deals exclusively with wills.[18] Thus, it may be that Section 6103 limits the applicability of Section 21115 only in cases involving wills—and then only where the "testator" died before January 1, 1985—but not in cases involving other testamentary instruments. This interpretation also harmonizes Sections 6103 and 21140. But, again, why state this standard in two unrelated provisions? And, why apply the Section 6103 limitation only to wills and not to other testamentary instruments?

Yet another possible answer is that Section 21140 prevails over Section 6103 because the applicability of Section 6103 is limited by its introductory language, "[e]xcept as otherwise specifically provided . . . ."[19] At least one commentator supports this theory, explaining that "[t]here is a conflict between [Section 6103] . . . and Section 21140 . . . . Presumably the latter Section controls, since [Section 6103] is qualified by the opening clause 'Except as otherwise specifically provided . . . .'"[20]

However, there are two problems with this interpretation. First, as noted above, Sections 21140 and 6103 talk about two different things—date of execution and date of death, respectively.[21] Therefore, does Section 21140 really "otherwise specifically provide" from Section 6103?[22] And, second, both Section 21140 and the relevant language of Section 6103 purport to apply to the entirety of Part 1 of Division 11.[23] If Section 21140 controls, it therefore would render that language of Section 6103 superfluous.

One recent case, *Estate of DeLoreto*, purports to address the applicability of Section 21115.[24] However, its analysis is incomplete and potentially wrong, and therefore could, in fact, further confuse the question.

DeLoreto involved the 1964 will and codicil of a testator who died in 1966.[25] In accordance with the will and codicil, a testamentary trust had been established that provided for distribution of income to the testator's children and the children of any deceased child (i.e., grandchildren of the testator).[26] One of the testator's children died, survived by two individuals he had adopted.[27] The adoptees claimed they qualified as grandchildren of the testator and therefore were entitled to income distributions from the trust.[28] However, the adoptees did not satisfy the requirements for inclusion in class gifts under Section 21115(b), quoted above and discussed further below.[29]

A central question on appeal in *DeLoreto* thus was the applicability of Section 21115. The adoptees argued that Section 21115 should not apply because it was enacted after the testator died.[30] However, it does not appear that they relied on Section 6103, which is never once mentioned in the Court's decision. The Court rejected the adoptees' argument based in part on Section 21140, which it described as providing "that section 21115 applies to all instruments, regardless of when executed."[31]

On its face, then, *DeLoreto* arguably stands for the proposition that, under Section 21140, Section 21115 applies to all testamentary instruments. The problem with the case is that the Court does not appear to have considered or decided the effect of Section 6103's potentially conflicting limitation on Section 21115's applicability. Indeed, if Section 6103 does limit the applicability of Section 21115, *DeLoreto* may have been wrongly decided because it involved a testator who died before January 1, 1985 and thus falls squarely within the Section 6103 limitation. Accordingly, the question of Section 6103's applicability to Section 21115 remains unresolved and reliance on *DeLoreto* could be misplaced.[32]

IV. APPLICATION OF SECTION 21115

Where Section 21115 is applicable, Section 21115(a) provides that, subject to Section 21115(b), "adopted persons . . . are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of

intestate succession."[33] This simple rule adopts the laws of intestacy discussed above, under which adoptees are treated as issue.[34]

In many instances where Section 21115 is applicable, however, in order for the Section 21115(a) rule of inclusion of adoptees to apply, the adoptee must satisfy the requirements of Section 21115(b), which provides in relevant part:

> In construing a transfer by a transferor who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.[35]

The public policy underlying this limitation on Section 21115(a)'s rule of inclusion of adoptees is to "preclude[ ] the adoption of a person (often an adult) solely for the purpose of permitting the adoptee to take under the testamentary instrument of another."[36]

The first important thing to note about Section 21115(b) is that it applies only to "a transfer by a transferor who is not the adoptive parent . . . ."[37] Thus, Section 21115(b) does not limit the Section 21115(a) rule of inclusion where the transferor is the adoptive parent—i.e., where the adoptee was adopted by the transferor himself or herself. In such cases, the adoptee need not satisfy Section 21115(b)'s requirements to be considered issue of the transferor under Section 21115(a).

But in cases where the transferor is not the adoptive parent – for example, where the adoptee was adopted by a child of the transferor – Section 21115(b) dictates that the adoptee is not to be considered the child of the adoptive parent, and thus not issue of that parent, unless the adoptee:

- Lived while a minor;
- As a regular member of the household;
- Of the adoptive parent or of the adoptive parent's parent, sibling, or surviving spouse.[38]

Application of this test in at least most cases should involve reasonably straightforward questions of fact. However, it can give rise to uncertainties and/or incongruous results.

For example, in the second prong of the test, what constitutes one's "household," and what makes one a "regular member" of that "household?" To illustrate, consider the following hypothetical.

A and B, an unmarried couple, live together in an apartment in Southern California. While A is pregnant with B's child, they travel to Colorado to visit A's parents. A experiences complications with her pregnancy while in Colorado and is required to remain there until the child his born. After the child is born, A, B and the child live together for three months with A's parents in A's parents' home in Colorado. B then leaves and has no further contact with child until child is an adult. In the intervening years, A marries another man, C, who adopts child, severing the parent-child relationship between B and child and making C child's legal "father." C subsequently dies. B initiates contact with child after she is an adult, develops a close relationship with her, holds her out as a member of his family, and eventually adopts her because he is not her legal "father" due to the previous adoption by C. B then dies. Upon B's death, B's issue become entitled to distributions from trusts created by B's parents.

Child never lived with B in A's and B's apartment in Southern California. Nor did she ever live with B's parents, siblings or surviving spouse. However, she did live with A and B for the first three months of her life in A's parents' home. Did child live as a "regular member" of B's "household" as required by Section 21115(b) such that she is entitled under Section 21115(a) to participate as B's issue in B's parents' trusts? If not, is her resulting exclusion from the trusts under these circumstances sensible and consistent with what the settlors presumably would have intended?[39]

The third prong of the Section 21115(b) test also can lead to incongruous results. Consider the following hypothetical.

Mother A and father B have a child and then subsequently divorce. While child is still a minor, A marries another man, C. C thus becomes child's stepfather, but does not adopt child. Accordingly, there is no legal parent-child relationship between C and child.[40] A and C also eventually divorce, terminating the stepfather-stepchild relationship between C and child.[41] Many years later, after child is an adult, he is adopted by D, who is not related to any of A, B or C. Thereafter, C and D meet and marry. D dies while still married to C. Upon D's death, D's father's trust becomes distributable to D's issue.

Is child entitled to participate in the trust as issue of D? Under Section 21115(b), the answer amazingly would seem to be "yes." Child did not live while a minor with D or any of D's parents or siblings. However, he did live while a minor with C, D's surviving spouse, when, years earlier, C was married to child's mother and was child's stepfather. Thus, child did not become D's issue when D adopted him. Instead, child subsequently became D's issue only when and because (1) D later married C (with whom child had no familial relationship but who formerly was married to child's mother) and (2) C survived D. It is inconceivable that D's father, the settlor of the trust, could have contemplated such a bizarre result.[42]

V. CONCLUSION

A default statutory rule of interpretation regarding the inclusion of adoptees in class gifts to issue is necessary. And, the adoption of a person for the purpose of attempting to make that person a beneficiary under the testamentary instrument of another should not be permitted. In seeking to accomplish these goals, however, Section 21115 is fraught with problems. Its applicability is unclear, at least in cases where the transferor died before January 1, 1985. And, where applicable, its ambiguities and absolute terms can lead to questionable results.

EX 42

At a minimum, the Legislature should clarify the uncertainties created by the potentially conflicting provisions of Sections 6103 and 21140. This could be done simply by eliminating from Section 6103 the reference to Part 1 of Division 11 and, to whatever extent intended, including in Section 21140 the date of death limitation now set forth in Section 6103.

Consideration also should be given to modifying the rule currently set forth in Section 21115. A better statutory rule might be one that includes adoptees in class gifts to issue unless they were adopted for improper purposes. The statute would define improper purposes as including, without limitation, either to permit the adoptee to inherit under the testamentary instrument of another or to dilute or defeat the interests of other beneficiaries under such a testamentary instrument. In turn, the statute also would create a rebuttable presumption (rather than an absolute rule) that the adoption was for an improper purpose if the adoptee did not live while a minor either with the adoptive parent or with a member of the adoptive parent's family with which family member the adoptee had a legal parent-child relationship. Such a rule would avoid the questionable results that may be dictated by Section 21115's absolute and ambiguous terms by giving courts more flexibility in determining inclusion of adoptees on the unique facts of a given case.

Fortunately, there also is another and even better solution to the problems posed by Section 21115, at least on a going-forward basis—drafting around those problems. The paramount rule in interpreting a testamentary instrument is that "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."[43] Other statutory rules of interpretation like Section 21115 only come into play, if at all, "where the intention of the transferor is not indicated by the instrument."[44] Carefully drafted testamentary instruments therefore should always include a provision plainly expressing the transferor's intent regarding the inclusion of adoptees in class gifts. In this way, the transferor's intent will be clear and Section 21115 can be avoided entirely.

* *Loeb & Loeb LLP, Los Angeles, California*

ENDNOTES

1. Prob. Code § 6402(a).
2. Prob. Code §§ 26, 50.
3. Prob. Code § 6450(b).
4. This rule does not apply, and the law in effect prior to January 1, 1985 continues to apply, where the decedent died before January 1, 1985. Prob. Code § 6414(a).
5. Prob. Code. § 21115(a), (b).
6. *Ehrenclou v. MacDonald* (2004) 117 Cal.App.4th 364, 372-374.
7. *Id*. at 372-377.
8. *Ehrenclou, supra*, 117 Cal.App.4th at p.377.
9. *Ibid*.
10. *Ibid*.
11. *Id*. at 373-374, 377.
12. *Id*. at 376.
13. *Id*. at 372-373.
14. *Ehrenclou, supra*, 117 Cal.App.4th at 376.
15. Prob. Code § 21140.
16. Prob. Code § 6103 (omitting other provisions of the Probate Code to which Section 6103 also applies).
17. Prob. Code §§ 6103, 21140.
18. Prob. Code § 6103.
19. Prob. Code § 6103.
20. California Probate Code Annotated (Thomsen West, 2006 Desktop Edition), Commentary to Probate Code Section 6103.
21. Prob. Code §§ 6103, 21140.
22. Prob. Code § 6103.
23. Prob. Code §§ 6103, 21140.
24. *Estate of DeLoreto* (2004) 118 Cal.App.4th 1048.
25. *DeLoreto, supra*, 118 Cal.App.4th at 1051.
26. *Ibid*.
27. *Ibid*.
28. *Ibid*.
29. *Id*. at 1052.
30. *DeLoreto, supra*, 118 Cal.App.4th at 1053.
31. *Ibid*.
32. It should be noted here that the question in *DeLoreto* was whether the adoptees qualified as grandchildren, not as issue. *DeLoreto* thus illustrates that the problems with Section 21115 extend beyond the inclusion of adoptees in class gifts to issue, the subject of this article, to the inclusion of adoptees in gifts to other classes such as children, grandchildren and descendants. In addition, the uncertainty created by Sections 21140 and 6103 is not limited to the applicability of Section 21115, but rather extends to the applicability of the entirety of Part 1 of Division 11.
33. Prob. Code § 21115(a).
34. Prob. Code §§ 26, 50, 6402(a), 6450(b).
35. Prob. Code § 21115(b) (omitting the first sentence of Section 21115(b), which applies to a different subject matter).
36. Law Revision Commission Comment to Prob. C. § 21115.
37. Prob. Code § 21115(b).
38. Prob. Code § 21115(b).
39. Truth really can be stranger than fiction. While this hypothetical may seem far-fetched, it is based on the facts of an actual case handled by the author. The case settled.
40. *See* Prob. Code § 6450 (a parent-child relationship only exists between a person and his or her natural or adoptive parents).
41. *See Clevenger v. Clevenger* (1961) 189 Cal.App.2d 658, 666 (the stepparent-stepchild relationship "'is not a continuing one . . . and ordinarily ceases with the divorce of the stepparent'").
42. Once again, truth is stranger than fiction. This hypothetical is drawn from the underlying facts in *Ehrenclou, supra*, in which the author represented one of the successful natural children.
43. Prob. Code § 21102(a).
44. Prob. Code § 21102(b).

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Dear California law Revision Commission,

Attention: Barbara

Re: Law Revisions recommendation of 1982, consolidating California's Bond and Undertaking Laws.

It appears that with the CLRC recommendations of 1982 in consolidating the Bond and Undertaking laws a loophole has been inadvertently opened for those who put forth a personal surety undertaking to stay execution of a money judgment per Code Civil. Proc. §917.1 and then choose to manipulate the system and not honor such a bond.

In the enactment of the"Bond and Undertaking laws" it is stated that the procedure to enforce a bond or undertaking per Code Civil. Proc. §917.1 is now Code Civil. Proc. §996.440, which is the successor statute to Code Civil. Proc. §535 that governed preliminary injunctions and temporary restraining orders and such. In other words situations were liability had not already been established.

Code Civil. Proc. §996.440 appears to group all bonds and undertakings together even though a parties rights differ dramatically depending on the reason for the bond. When this statute is applied to Code Civil. Proc. §917.1 this allows for the principle or sureties to show a triable issue of fact and if so would entitle them to another trial (However, it is clear that a principle is not even a party to an undertaking) This would allow a debtor to lose in the trial court, lose on appeal and then be entitled to another trial on their liability for the security given in the first trial, in which is questionably appealable itself. With this scenario, the litigation process would be an endless merry go round of trials, judgments, appeals and undertakings. I should also point out that there is no enforcement procedure given to enforce a bond or undertaking per Code Civil. Proc. §917.1

Applying Code Civil. Proc. §996.440 to enforce an appeal bond, given per Code Civil. Proc. §917.1 also prevents it from assuring its intended purpose as described in Grant v. Superior Court 1990,below.

> " This section governing undertakings is designed to protect judgment won in trial court from becoming uncollectible when judgment is subjected to appellate review; it assures that successful litigant will have source of funds to meet amount of money judgment, costs, and prejudgment interest after postponing enjoyment of trial court victory"

Grant v. Superior Court (App. 5 Dist. 1990) 275 Cal.Rptr. 564, 225 cal.App.3d 929

LAW REVISION COMMISSION COMMENTS

1981 Amendment

Section 917.1 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Sections 996.440 (motion to enforce liability), 996.470 (limitation on liability of surety); see also Section 995.120 ("admitted surety insurer" defined). Subdivision (c) continues the substance of former Section 1059 (16 Cal.L.Rev.Comm. Reports 501).

As shown above, in the very recommendations of this commission it is stated Code Civil. Proc. §996.440 is now the process to enforce liability on an appeal bond/ undertaking. This of course would be a substantial change in the existing law that did not seem to have been intended with it having enacted Code Civil. Proc. §996.475 in 1984.

Applying Code Civil. Proc. §996.440 as the enforcement procedure to Code Civil. Proc. §917.1, would contradict "Code Civil. Proc. §996.475 which was enacted making clear that there was no change intended in the existing law of inferred by the enacting of the 1982 enacting of the new Bond and Undertaking Laws".

Since at least the late 1800's see (Meredith v. Santa Clara Min. Ass'n of Baltimore (1882) 60 Cal. 617, 9 P.C.L.J. 609.) and until at least 1968 when CCP 942 was repealed and replaced with CCP 917.1 a judgment against a personal surety staying the execution of a money judgment could be entered *ex-parte* without objection after 30 days of the remittitur or dismissal of an appeal, it being a consent judgment that there were no objections available as liability had already been established

I have included here only a brief summary of my research regarding this issue and have been unfortunate enough to experience its effects .I have hundreds of hours of research on this issue that I would be glad to share with those interested. If by chance I have missed an important issue on this subject of law, then the law at least needs to be clarified, as I have consulted with no less that 10 licensed California attorney's whom are just as baffled as I on these issues, and I could easily cite 20 cases baffled by the inconsistencies in these statues. I have also experienced a few judges whom by following your recommendations, is powering the merry go round.

Thank you for your time,

Mike Rosen

EMAIL FROM PROF. WILLIAM SLOMANSON (JAN. 4, 2010)

The absence of any reference in CCP 2020.510 of a requirement for a depo subpoena declaration---which is required for a trial subpoena---has been described by the CA Court of Appeal as legislative "inadvertence," although the court goes on to explain the reasons why the difference arguably makes sense. See Terry v. SLICO, 95 Cal.Rptr.3d 900, at 904 2d para. (2009).

Given the apparent unanimity of the commentators whom acquiesce in this distinction, one might conclude that y'all have more important things to do. But FWIW, at least one app court has noted what it deemed to be legislative oversight.

Regards,

Bill

EMAIL FROM MARK STORM (JUNE 11, 2010)

Greetings,

I am writing to provide some thoughts on discovery in limited civil cases (amount in controversy under $25,000). (CCP section 90 *et seq*.)

GENERAL WRITTEN DISCOVERY LIMITS IN LIMITED CIVIL CASES

In regular civil cases, a party is limited to 35 special interrogatories and 35 requests for admission of facts and issues. There is no limit on the permissible number of form interrogatories, requests for admission of genuineness of documents, or requests for production of documents. A party may exceed these caps by serving a declaration, along with the discovery requests, indicating, essentially, that the complexity of the case warrants additional written discovery. The burden is then on the responding party to object or file a motion for a protective order.

In limited civil cases, a party is limited to 35 combined interrogatories, requests for admissions, and requests for production of documents. Notably, the limited civil caps include form interrogatories and requests for admission of genuineness of documents. A party may exceed these caps only by motion for leave of court.

I believe the limited civil caps are too restrictive. Just because a case has a smaller amount in controversy does not mean issues of liability or damages are any less complex. However, I also understand the need to promote economic litigation and prevent litigation costs from swallowing the amount in controversy. I believe the balance struck by the legislature is off, and I am in favor of permitting more written discovery in limited civil cases.

In many of my limited civil cases, I struggle to stay within the caps and may be forced to leave a few fairly important questions out. Then, to fill in the gaps, I am torn between filing a motion for leave to exceed the caps, scheduling an oral deposition, or taking the case to trial because I do not have the discovery questions answered in advance of trial. These do not seem to be efficient alternatives to being able to ask an opposing party to answer a few more written questions when they have to answer the other written questions anyway.

A simple way to reasonably expand written discovery in limited civil cases, without going overboard, may be to simply raise the cap from 35 total requests to perhaps 45 or 50.

Another means is to exempt form interrogatories and/or requests for admission as to genuineness of documents from the cap, as in general civil cases.

LIMITED CIVIL CASE QUESTIONNAIRE

A plaintiff has an option in limited civil cases to serve a defendant with a limited civil case questionnaire along with the service of the summons. The plaintiff must respond to the questionnaire first and serve the written responses to the defendant along with a blank questionnaire, along with the summons, so the defendant may respond in kind. The defendant must then serve its questionnaire responses to the plaintiff along with the

service of its answer to the summons. The limited civil case questionnaire does not count toward the written discovery cap, above.

I find it odd that the questionnaire may be initiated only by a plaintiff. This give the plaintiff an advantage in controlling the amount of permissible written discovery in limited civil cases. If a plaintiff anticipates needing a lot of written discovery, then it will serve a limited civil case questionnaire to help avoid the limitation of the written discovery cap, above. The defendant has no such option.

I believe it would be prudent to make the questionnaire a simple written discovery tool, just like any other discovery tool. The law should provide that any party may use a questionnaire at any time in the course of litigation, and it will not count toward any discovery cap. The rule should still require the asking party to respond to the questionnaire first and serve its responses, which then triggers the responding party to provide responses its own in kind.

If there is fear of discovery abuse by use of the questionnaire, then perhaps restrict the timing of its use to say something to the effect that if a party initiates any discovery before that party employs the limited civil case questionnaire, then that party waives its right to employ the limited civil case questionnaire.

Another problem with the questionnaire is enforcement. It is too easy for a responding party to simply fail to respond, forcing the asking party to file a motion to compel responses. Sanctions may be awarded at the discretion of the court. This is wasteful in limited civil cases. Similar to a request for admission, monetary sanctions for failure to provide any response to each question asked should be mandatory if a motion to compel is required. Also, similar to a bill of particulars, please consider a provision saying that, upon motion, a failure to fully respond to a questionnaire question will bar the responding party's introduction of evidence on those matters at trial.

Otherwise, I believe the limited civil case questionnaire could use some more questions in it, but I do not believe that is within your purview.

Thank you for your time and consideration.

-Mark

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EMAIL FROM JACLYN WHITE (AUG. 26, 2010)

I recently had a hearing where the judgment was made in favor of the defendant although the defendant failed to appear. Come to find out it is the claimant's responsibility if defendant does not submit Answer in 30 days to file a request for Entry of Default judgment. The court does not disclose this in the packet like they should or even include the form. Now I have to file for municipal liability but I feel like I did something wrong when it is the defendant who chose to be contemptful. I referring to Civ 585. Judgment for failure answer could be an automatic default. Perhaps if a letter was issued, then the plaintiff would not have to waste time driving down to the courthouse twice more especially for a hearing that in my case I lost. I could have stayed home and then maybe the case would have been dismissed. Thank you.