

Admin.

January 5, 2012

Memorandum 2012-1

**Introductory Overview of the
California Law Revision Commission**

This memorandum provides an introductory overview of the duties and operations of the California Law Revision Commission. Persons who wish to learn more about the Commission's current workload and practices should also review the following memoranda (which have not yet been drafted, but will be released before the Commission's next meeting):

- Memorandum 2012-4. *2011-2012 Annual Report*
- Memorandum 2012-5. *New Topics and Priorities*
- Memorandum 2012-6. *2012 Legislative Program (Status Report)*

GENERAL BACKGROUND

Principal Duties

The California Law Revision Commission was formed in 1954, on the recommendation of the California Code Commission, to serve as a permanent law reform body. The Commission's principal duties are as follows:

The commission shall, within the limitations imposed by Section 8293:

(a) Examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

(d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable

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.

rules of law, and to bring the law of this state into harmony with modern conditions.

Gov't Code § 8289.

Scope of Work

As indicated in Section 8289, the scope of the Commission's work is constrained by Government Code Section 8293, which provides as follows:

The commission shall file a report at each regular session of the Legislature that shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. The commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report that have been or are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic that the Legislature, by concurrent resolution or statute, refers to it for study.

Pursuant to Section 8293, the Commission is generally limited to working on the calendar of topics that has been authorized by concurrent resolution. The most recently enacted "resolution of authority" (2009 Cal. Stat. res. ch. 98) is attached as an Exhibit.

In addition, the Commission can also be assigned individual studies directly, by statute or concurrent resolution. The Commission's current statutory assignments are as follows:

- Community redevelopment law cleanup. Health & Safety Code § 34189(b) (operative Feb. 1, 2012). See *California Redevelopment Ass'n v. Matosantos*, ___ Cal. 4th ___ (2011) (S194861).
- Decennial review of exemptions from the enforcement of money judgments. Code Civ. Proc. § 703.120. (The next decennial review is to be conducted in 2012.)
- Minor deadly weapon cleanup issues. 2010 Cal. Stat. ch. 711, § 7.
- Trial court unification. Gov't Code § 70219.
- Trial court restructuring. Gov't Code § 71674.
- Revisions to correct technical or minor substantive statutory defects. Gov't Code § 8298.

In addition to studies that are assigned to the Commission by the Legislature, the Commission receives suggestions for new study topics every year. These suggestions come from attorneys, academic experts, interest groups, the courts, the State Bar, and other persons and entities. In addition, the Commission

occasionally receives suggestions from individual legislators or legislative committees.

Each year, the staff prepares a memorandum entitled “New Topics and Priorities,” which reviews the Commission’s currently active studies and discusses possible new study topics. The Commission uses that information to decide how to allocate its resources in the coming year.

Occasionally, the Commission expresses interest in working on a topic that it has not yet been authorized to study. In that case, the Commission requests that the topic be added to the list of authorized topics in its next resolution of authority.

Currently Active Studies

The Commission is actively working on the following studies:

- Charter Schools and the Government Claims Act
- Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
- Commercial and Industrial Common Interest Developments
- Commercial and Industrial Subdivisions

For a fuller description of those studies, see pending Memorandum 2012-4 (*2011-2012 Annual Report*) and pending Memorandum 2012-5 (*New Topics and Priorities*).

In addition, the Commission will begin work on a “community redevelopment law cleanup bill,” pursuant to Health and Safety Code Section 34189 (which sets a completion deadline of January 1, 2013). For more information on this assignment, see pending Memorandum 2012-7.

Commission Membership and Staff

The Commission itself is comprised of ten members. Seven members are appointed by the governor, with the advice and consent of the Senate, to four-year terms. The terms of those appointments are staggered, with three ending on October 1, 2013 and the other four ending on October 1, 2015. See Gov’t Code § 8281.

In addition, the Speaker of the Assembly appoints a member of the Assembly to serve as a Commissioner (currently Assembly Member Roger Dickinson) and the Senate Committee on Rules appoints a Senator to serve as Commissioner

(currently Senator Tom Harman). Finally, the Legislative Counsel (currently Diane Boyer-Vine) is an *ex officio* member of the Commission. *Id.*

The Commission's work is supported by a small professional staff:

Brian Hebert, Executive Director
Barbara S. Gaal, Chief Deputy Counsel
Steve Cohen, Staff Counsel
Debora Larrabee, Associate Governmental Program Analyst
Victoria V. Matias, Executive Secretary

Partial Summary of Commission Accomplishments

Since its establishment, the Commission has submitted 395 recommendations to the Legislature and Governor, 361 of which have been enacted into law in whole or substantial part. Recommendations have ranged from repeal of a single section to the enactment of entire codes of law. Commission recommendations have affected more than 24,000 sections of the California codes.

Major statutory enactments that were drafted by the Commission include:

- The Evidence Code.
- The Family Code.
- The Probate Code.
- The Government Claims Act (also known as the "Tort Claims Act")
- The Enforcement of Judgments Law.
- The Trust Law.
- The Power of Attorney Law.
- The Durable Power of Attorney for Healthcare.
- The Guardianship-Conservatorship Law.
- The Marketable Title Act.
- The Eminent Domain Law.
- Implementation of Trial Court Unification and Restructuring, throughout the codes.
- Modernization of the Administrative Adjudication provisions of the Administrative Procedure Act.
- Recodification of the Deadly Weapons Law.
- Recodification of the Mechanics Lien Law.

OVERVIEW OF THE COMMISSION'S STUDY PROCESS

A Commission study generally proceeds as follows:

- (1) Review background information and decide on a general approach to follow in conducting the study.
- (2) Discuss legal and policy issues at a series of public meetings.
- (3) Prepare and distribute a “tentative recommendation” to solicit public comment on a provisional reform proposal.
- (4) Consider public comment and refine the reform proposal.
- (5) Prepare and approve a “final recommendation” for submission to the Governor and the Legislature.

Specific elements of the process are discussed more fully below.

Background Study

If a study is particularly complex and resources permit, the Commission will sometimes contract with an expert, for a nominal fee, to prepare a background study that describes the legal and policy landscape of the study topic.

Staff Memoranda

At each stage of a study, the staff will prepare memoranda that present research findings, legal and policy analysis, and informal staff recommendations. These memoranda are presented by the staff at the Commission’s meetings, and serve as a framework for discussion.

Staff memoranda generally fall into the following categories:

- **Introduction of study.** This type of memorandum describes the scope and nature of a study and provides relevant background information. The memorandum may also recommend a general approach to take in conducting the study.
- **Discussion of Issues.** This type of memorandum identifies and discusses specific issues for Commission consideration and decision. Most of the staff memoranda prepared in a study will fall into this category.
- **Draft of tentative recommendation.** Once the Commission has made provisional decisions on the issues that need to be addressed in a study, the staff will prepare a draft of a tentative recommendation to implement and explain the proposed reforms. The Commission will then decide whether to approve the draft, with or without changes, for release to the public.
- **Discussion of public comment.** The main purpose of a tentative recommendation is to solicit public comment on the Commission’s provisional decisions. Once the public comment period specified for a tentative recommendation has closed, the staff will prepare one or more memoranda presenting and analyzing public comment.

- **Draft of final recommendation.** Once the Commission has made final decisions, the staff will prepare a draft of a final recommendation to implement and explain the decisions. The Commission will then decide whether to approve the draft, with or without changes, for delivery to the Governor and Legislature and eventual publication.

All staff memoranda are posted to the Commission's website and distributed to an online mailing list that is open for anyone to join, at no cost. Ideally, a staff memorandum will be posted and distributed at least two weeks prior to the meeting at which it will be considered, but that is not always possible.

Tentative Recommendation

Once the Commission has made provisional decisions on the various issues that need to be decided in a study, it will prepare and circulate a "tentative recommendation."

The tentative recommendation typically includes:

- A narrative "preliminary part" that explains the problem studied by the Commission and the Commission's provisionally recommended reforms.
- Statutory language to implement those reforms.
- An official "Comment" for each code section that would be affected by the proposed reforms.
- A deadline for public comment.

Final Recommendation

Pursuant to Government Code Section 8291 (as modified by Government Code Sections 9795 and 11094-11099, which limit the distribution of public reports), the Commission will deliver copies of a final recommendation to the Governor and to designated persons within the Legislature.

A final recommendation includes all of the components of a tentative recommendation, except that there is no request for further public comment.

As noted above, the Commission drafts an official Comment for each code section that would be affected by a recommendation. Those Comments serve two important purposes:

- (1) They provide guidance to legal practitioners and the public on the derivation and intended construction of a provision. (Commission Comments are routinely reproduced by legal publishers in annotated codes and some treatises.)

- (2) Commission Comments (and the narrative portion of Commission recommendations) constitute an important source of legislative history. Courts have cited the Commission's materials in more than a thousand published opinions. (This use of Comments is discussed more fully in the Commission's *Annual Report*. See the draft report that will be attached to pending Memorandum 2012-4.)

LEGISLATIVE PROCESS

Once the Commission has issued a final recommendation, the staff will contact legislators who might have an interest in introducing legislation to implement the Commission's recommended reforms. If a legislator chooses to author a Commission-recommended bill, the staff will provide support to the legislator, as described below.

Explanatory Materials

The staff will provide copies of the recommendation to the legislative author as background. The staff may also assist in preparing other explanatory materials (e.g., a brief fact sheet or other summary).

Committee Hearing Participation

When a bill to implement a Commission recommendation is heard by a legislative policy committee, the staff will do the following:

- Send copies of the Commission's recommendation to committee members, with a brief cover letter that explains, in very abbreviated form, the purpose and effect of the bill. This provides useful background information to the committee members. It is also important in establishing the basis for judicial recognition of the Commission's recommendation as cognizable legislative history.
- Appear as a witness at the committee hearing, to help explain the proposal and answer any questions that the committee members may have.

In conducting these duties, the staff is careful to avoid advocating for the passage of the bill. (Such advocacy is prohibited by Government Code Section 8288.)

Opposition

If there is opposition to a Commission-recommended bill, the staff will sometimes assist the author by talking with the opponent in order to better understand the exact nature of the opponent's concerns.

Sometimes a clear explanation of the purpose and effect of the bill is sufficient to address an opponent's concern.

In other cases, it might be possible to address a concern by adjusting the Commission's Comment language. This is especially common where the concern is that the statutory language might be misconstrued. In these cases, the staff will present revised Comment language to the Commission for a decision on whether to make the change.

Alternatively, the author may decide to amend the bill in order to address the opponent's concern.

Legislative Amendments

If an author proposes a substantive amendment to a Commission-recommended bill, the staff will consult with the Commission's Chair as soon as possible to explain and discuss the proposed amendment.

As soon as the Commission's meeting schedule permits, the staff will brief the full Commission on any substantive amendment. The Commission can then decide whether to accept the amendment as compatible with the main thrust of its recommendation, or disclaim the amendment as incompatible with the recommendation.

Even if the Commission disclaims a particular amendment, it is typical for the staff to continue to work with the author with respect to the portions of the bill that would implement Commission-recommended reforms. In doing so, the staff will make clear that the Commission does not take any position on the portions of the bill that have been disclaimed, pro or con. They are simply not Commission-recommended reforms.

An amendment to a Commission-recommended bill may necessitate revisions to the Commission's official Comments, to avoid inconsistency between the provision as enacted, and the description of that provision in the Comment. Once approved, revised Comments are collected in a supplemental report that is eventually published as an appendix to the Commission's next Annual Report. (A revised comment report is provided as a supplement to the Commission's

recommendation, whenever the recommendation is provided to a Legislator or the Governor.)

Letter to the Governor

When a bill to implement a Commission recommendation is enrolled and sent to the Governor for consideration, the staff will deliver a copy of the recommendation to the Governor, along with a transmittal letter that very briefly summarizes the purpose and the effect of the recommendation. The letter does not advocate for the Governor to sign the bill.

Legislative Program Memoranda

At most meetings, the staff will present a memorandum providing a status report on the Commission's legislative program for the year. The memorandum will describe the progress of each pending Commission-recommended bill.

If necessary, the memorandum will also discuss any bill amendments or proposed Comment revisions.

See, e.g., pending Memorandum 2012-6.

PUBLICATIONS

Commission reports are published, both in hard copy and on the Internet, as indicated below.

Annual Report

Each year, the Commission prepares an Annual Report to the Governor and the Legislature that describes the Commission's work during the reporting period and provides other background information. For the most recent example, see pending Memorandum 2012-4.

Bound Volumes

The Commission publishes its various reports and recommendations in a hard-bound volume, on an approximately annual schedule. These bound volumes are distributed to state government depository libraries and sold to private libraries and individuals.

Website and Paperless Distribution

The Commission maintains a website at clrc.ca.gov. Every staff memorandum and every final recommendation is available for download as a pdf file. Many

(but not all) tentative recommendations and background studies are also available for download.

The website provides a separate page for each Commission study. These study pages aggregate all materials relating to a study, including staff memoranda, meeting minutes, tentative recommendations, and final recommendations.

In addition, the website supports an online subscription service that the public can use, at no cost, to receive emailed notice whenever material relating to a particular topic has been uploaded to the website. Nearly all of the materials distributed by the Commission to the public are provided electronically using this notice service and the website.

OPEN GOVERNMENT LAWS

As an agency of state government, the Commission is subject to statutes that regulate government operations. Commissioners should be familiar with the relevant features of the following statutes, which directly affect the Commission's operations.

Bagley-Keene Open Meeting Act

The Commission's meetings are governed by the Bagley-Keene Open Meeting Act. See Gov't Code §§ 11120-11132. Accordingly, all Commission meetings must be open to the public. Gov't Code § 11123(a).

Commissioners are barred from conducting Commission business outside of an open meeting:

A majority of the members of a state body shall not, outside of a meeting authorized by [the Bagley-Keene Act], use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.

Gov't Code § 11122.5(b)(1). Commissioners are generally free to communicate with the staff, so long as those contacts are not used as a conduit for indirect communication between a majority of Commissioners, in violation of Section 11122.5.

At a meeting, members of the public must be provided a reasonable opportunity to directly address the Commission on each matter described in the agenda. Gov't Code § 11125.7(a).

Meetings must be accessible to persons with disabilities. Gov't Code § 11123.1.

No member of the public attending a meeting shall be required to provide any information, or fulfill any condition, as a prerequisite to attendance. (A sign-in sheet may be distributed at the meeting, but it must state clearly that signing or providing any information is voluntary, and is not a prerequisite to attendance.) Gov't Code § 11124.

Any person attending a meeting may make an audio or video recording of the proceedings, in the absence of a finding by the state body that such recording would constitute a "persistent disruption" of the proceedings. Gov't Code § 11124.1(a). The staff routinely records audio of Commission meetings, for the purpose of preparing meeting minutes. Those recordings are public records.

The Commission is required to publish a notice containing a meeting agenda, at least 10 days prior to a meeting. Gov't Code § 11125(a). The agenda must include a "brief general description" of each item that is to be discussed at the meeting. Gov't Code § 11125(b). At a meeting, the Commission may not make a collective decision, commit or promise to make a decision, or vote on any matter that is not described in the published agenda for that meeting (except in specified exigent circumstances). Gov't Code §§ 11122, 11125.3(a), 11125.5(b).

The Commission can conduct a portion of a meeting in closed session to consider certain specified matters, but only after disclosing in both the agenda and in open session the general nature of the matter to be discussed, and citing authority for the closed session. Gov't Code §§ 11125(b), 11126(a)(1), 11126.3(a), 11128, 11132.

Statutory Disqualification from Decision Making

Government Code Section 87100 provides that

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

The term "public official" includes both Commissioners and the staff of the Commission. Gov't Code §§ 82003, 82048.

Whether or not a public official has a disqualifying financial interest in a governmental decision is a complex subject, generally addressed by Government Code Section 87103. The application of Sections 87100 and 87103 to specific fact

patterns is beyond the scope of this memorandum. A Commissioner who is concerned about a possible disqualifying conflict should contact the Fair Political Practices Commission at 1-866-ASK-FPPC (1-866-275-3772).

Common Law Doctrine Against Conflicts of Interest

Independent of the statutory conflict of interest provisions, there is also a common law public official conflict of interest doctrine: "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public" *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1170, 56 Cal. Rptr. 2d 223 (1996). Said another way, the doctrine requires public officers "to avoid placing themselves in a position in which personal interest may come into conflict with their duty to the public." 70 Ops. Cal. Att'y Gen. 45, 47 (1987).

California Public Records Act

As a state agency, the Commission is subject to the California Public Records Act. Gov't Code §§ 6252(e),6252(f). As a result, members of the public are generally entitled to inspect and copy Commission records, to the extent and in the manner provided by the Public Records Act.

CONCLUSION

If any Commissioner has questions about any of the content of this memorandum or about an issue that is not covered by the memorandum, please feel free to contact any member of the staff.

Respectfully submitted,

Brian Hebert
Executive Director

Assembly Concurrent Resolution No. 49 (2009)

**RELATIVE TO THE CALIFORNIA LAW REVISION
COMMISSION.**

WHEREAS, The California Law Revision Commission is authorized to study topics set forth in the calendar contained in its report to the Governor and the Legislature that have been or are thereafter approved for study by concurrent resolution of the Legislature, and topics that have been referred to the commission for study by concurrent resolution of the Legislature or by statute; and

WHEREAS, The commission, in its annual report covering its activities for 2008 and 2009, recommends continued study of 21 topics, all of which the Legislature has previously authorized or directed the commission to study, and further recommends the addition of one new topic to its calendar and the removal of one previously authorized topic from its calendar; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature approves for continued study by the California Law Revision Commission the topics listed below, all of which the Legislature has previously authorized or directed the commission to study:

(1) 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) 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) 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 restrictions 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) 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) Whether the law relating to discovery in civil cases should be revised.
- (6) Whether the acts governing special assessments for public improvement should be simplified and unified.
- (7) Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.
- (8) Whether the Evidence Code should be revised.
- (9) Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.
- (10) Whether there should be changes to administrative law.
- (11) Whether the law relating to the payment and the shifting of attorney's fees between litigants should be revised.
- (12) Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.
- (13) Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.
- (14) 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) 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) 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) 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) 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) 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, and clarify and rationalize provisions, and related matters.

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

(21) Whether the law governing the place of trial in a civil case should be revised; and be it further

Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:

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; and be it further

Resolved, That the Legislature approves removal from the calendar of the California Law Revision Commission the topic listed below:

Whether the law relating to offers of compromise should be revised; and be it further

Resolved, That before commencing work on any project within the calendar of topics the Legislature has authorized or directed the commission to study, the commission shall submit a detailed description of the scope of work to the chairs and vice chairs of the Committees on Judiciary of the Senate and Assembly, and if during the course of the project there is a major change to the scope of work, submit a description of the change; and be it further

Resolved, That the Chief Clerk of the Assembly transmit a copy of this resolution to the California Law Revision Commission; and be it further

Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the author for appropriate distribution.