

Memorandum 2014-53

New Topics and Priorities: Projected Study Completion Timeline

At its October 2014 meeting, in connection with the consideration of new topics and priorities for 2015, the Commission¹ directed the staff to prepare a memorandum projecting when the Commission's currently active studies are likely to be completed. This memorandum discusses that topic. A chart showing a projected timeline is attached as an Exhibit.

FACTORS AFFECTING STUDY PROGRESS

The staff has attempted to project the completion dates of its currently active studies. Before setting out that projection, it is worth discussing some of the factors that can affect the progress of a study. These include unanticipated complexity in the subject matter of the study or the study process, other demands on staff resources, and the partial time base of some staff.

Unanticipated Complexity

It is often difficult to estimate how long a study will take to complete because the difficulty of various aspects of the study may not be obvious at the outset.

Consider a recent example: The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") contains a single sentence providing that the term "state" contains a "federally recognized Indian tribe."² That provision, which is part of the Uniform Law Commission's definitional boilerplate, could have been easy to incorporate into the proposed law. It could have required only a trivial amount of staff resources to analyze.

But once the Commission took a harder look, it became clear that the jurisdictional relationship between tribes and states is complicated and sensitive.

1. 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. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act § 102(14).

Simply treating tribes as states for the purposes of UAGPPJA would have produced significant problems.

To avoid those problems, the Commission needed to familiarize itself with the tribal jurisdiction jurisprudence, a matter it had not previously studied. The Executive Director mostly suspended his work on other studies for four months, preparing roughly 100 pages of written research and analysis. Two additional Commission meetings were required to address the matter. Ultimately, the Commission found a good resolution of the issue, but doing so consumed far more resources than had been anticipated.

Administrative Duties

In addition to the work the staff does to advance Commission studies directly, the staff also performs a number of secondary tasks in support of the Commission's work. These include preparing administrative memoranda (e.g., New Topics and Priorities, Annual Report, Legislative Program, Open Government Laws, Meeting Schedule, Election of Officers, Handbook of Practices and Procedures), arranging meetings, preparing reports for publication and submission to the Legislature, distributing official Commission Comments to legal publishers, etc.

Although the Commission is an extremely small agency, it has the same legal status as any other independent agency of state government. This means that the staff must contend with the full weight of bureaucratic processes, to the same extent as if the Commission were a very large agency.³ Much of that work falls on the shoulders of our administrative program analyst, but some tasks necessarily require the involvement of the Executive Director or the Chief Deputy Counsel, including budget preparation (and testimony at annual budget committee hearings), accounting approvals, personnel matters, contracting, responding to inquiries from the public, and the like.

Administrative and supervisory tasks consume about 25% of the Executive Director's time. The burden on other legal staff is much smaller, but significant.

3. The Commission currently contracts with the Office of the Legislative Counsel to perform accounting work that cannot be done by the Commission's staff. We are simply too small to achieve the necessary separation of functions. The staff greatly appreciates the Legislative Counsel's willingness to provide that crucial assistance. The Commission also contracts with the Department of General Services to perform routine personnel-related tasks.

Legislative Duties

The Commission is an aid to the Legislature. The Legislature sets the Commission's agenda and (with the input of the Governor) its budget. It is therefore very important that the Commission be attentive and responsive to the Legislature's needs. In furtherance of that objective, the staff does all of the following:

- After each statewide election, the Executive Director attempts to meet briefly with all newly-elected representatives. These "meet and greets" introduce the Commission, its function, and its relationship to the legislative process. While these meetings are very time-consuming, they are important.
- From time to time, the staff receives inquiries from legislative staff regarding topics that the Commission has studied. The staff offers what assistance it can (without improperly opining on the merits of pending legislation).⁴

In addition to those more general legislative liaison duties, the staff spends a significant amount of time assisting the Legislature in its consideration of Commission-recommended reforms. This begins with the process of finding authors for Commission proposals. The staff must first determine which legislators might be a good fit for a Commission recommendation, based on their demonstrated interests, professional background, and committee assignments. Once good candidates have been identified, the staff meets with those members or their staffs.

When a Commission-recommended reform has been introduced as a bill, the staff provides whatever background assistance the author's office requires. This typically includes drafting background materials (fact sheets, committee worksheets, draft committee statements, etc.), analyzing stakeholder opposition, assisting in drafting amendments, drafting staff memoranda to present possible amendments to the Commission, drafting letters to committee members and the Governor, and providing non-advocacy testimony at legislative committee hearings. If the Commission's legislative program is light and noncontroversial (as seems likely in 2015), the time required for these legislative process duties can be fairly light. But if the program is heavy or controversial (as may well be the

4. The Commission's governing statute requires it to cooperate with legislative policy committees. See Gov't Code § 8295 ("The commission shall confer and cooperate with any legislative committee on revision of the law and may contract with any committee for the rendition of service, by either for the other, in the work of revision.").

case in 2016), legislative duties can be a major burden on staff time, sometimes supplanting an attorney's ability to work on studies.

Partial Time-Base

Two of the Commission's attorneys work on a less than full-time basis. Chief Deputy Counsel Gaal works seven-eighths time. Staff Counsel Burford recently moved from half-time work to a nine-tenths time base. Our administrative program analyst works half-time.

The Executive Director, Staff Counsel Cohen, and the agency's secretary all work full time. However, each of those employees currently have leave balances that exceed the nominal maximum set by the state. To better comply with state policy, the Executive Director has implemented a leave reduction program, with each affected employee being required to take one day of vacation each month. The Executive Director attempts to do the same, when practicable.

Law Student Employees

The Commission regularly employs law students to aid in its work. During the academic year, these students are employed as externs. Externs typically work 8 hours per week. In recent years, the Commission has been able to use funds from the Sterling-King Hall Fellowship program to employ one full-time student for 10 weeks in the summer.

Because students act as research assistants to staff attorneys, rather than taking a lead on study work, student contributions are not separately identified in the projections set out below and in the attached chart.

PROJECTED STUDY COMPLETION DATES

The Commission is actively studying five topics. The projected completion dates for those studies are shown in the attached chart and are summarized below:

- **Fish and Game Law.** It is certain that the study of Fish and Game law will not be completed in 2015. The staff projects possible completion in 2018. That is a rough estimate, based on an extrapolation of the current rate of completion.
- **State and Local Government Access to Customer Records of Communication Service Providers.** This study has two components: (1) Electronic Surveillance. (2) Government Interruption of Communications. It is possible that the Electronic

Surveillance component of the study will be completed at the end of 2015. Work on the Government Interruption of Communications component will not begin until the study of Electronic Surveillance has been completed. It should then take about a year to complete.

- **Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (“Mediation Confidentiality”).** It is likely that this study will be completed in 2016.
- **Trial Court Unification: Publication of Legal Notice (“Notice Districts”).** It is very likely that this study will be completed in 2015.
- **Recognition of Tribal and Foreign Court Money Judgments (“Tribal and Foreign Judgments”).** It is likely that this study will be completed some time in 2016. By law, it *must* be completed by January 1, 2017.

The assumptions underlying those projections are discussed below.

Staffing Levels

As indicated in the attached chart and the discussion below, the staff has assigned a single attorney to work on each study. However, as discussed above, the staff also has non-study responsibilities. In addition, some staff are employed on a less than full-time basis. Thus, while it is accurate to state that one attorney has been assigned exclusively to each study, this does not mean that the attorney is able to work full time on an assigned study. For example, the Executive Director is the only attorney assigned to the Electronic Surveillance study, but he will only spend about two-thirds of his time on that study. The remainder will be spent on administrative work, supervision, and legislative duties.

Fish and Game Law

In 2012, the Legislature directed the Commission to study

Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law[.]⁵

5. 2012 Cal. Stat. res. ch. 108.

The Commission began work on the study at its April 2013 meeting and has made steady progress since. The Commission's general approach in the study has been to incrementally develop a proposed draft of a recodified Fish and Wildlife Code. In that process, the Commission will discover defects in the existing law and propose reforms to correct them.

To date, approximately 16 months of attorney time have been dedicated to this study. With that effort, the Commission has completed initial work on roughly one quarter of the sections in the Fish and Game Code. If that rate of progress were to hold true throughout the remainder of the study, simple extrapolation suggests that the Commission would require another 48 attorney-months to complete the study. **Under that model, if we continue to assign a one attorney to the study, it would be complete in 2018.**

That is not a surprising duration for a study of this type and magnitude. Nonsubstantive recodification requires a great deal of painstaking staff work. By comparison, the Commission's recodification of the deadly weapon provisions of the Penal Code, which affected less than an entire code, required three years of attorney time to complete.

Government Access to Customer Information from Communication Service Providers: Electronic Surveillance

In 2013, the Legislature directed the Commission to study state and local agency access to customer information from communication service providers.⁶

The issues in this study are important and complex. They involve both federal and state constitutional and statutory law on electronic surveillance (a topic that the Commission has not previously studied). Extensive and careful research is required to familiarize the Commission with the controlling law.

The Commission began the research phase of the study at its February 2014 meeting. The staff expects to complete that phase at the December 2014 meeting. During that one-year period, the staff assigned one attorney to the study.

The second phase of the study will begin in 2015. Having established the existing constitutional and statutory landscape, the Commission will begin the process of developing a comprehensive electronic surveillance statute for California. This will entail legal and policy deliberation about what standards to apply for government access to different types of communications, what procedures should control government access, and what remedies should exist

6. 2013 Cal. Stat. res. ch. 115.

for a violation of law (including any defenses to liability available to those who act pursuant to lawful process). All of the decisions on these matters will then need to be translated into draft legislation.

This second phase of the study will consume a significant amount of staff time and Commission meeting time. The staff intends to assign one attorney to the study. **With that level of staffing, it is possible that the study will be completed by the end of 2015.** To meet that projection, the study would need to proceed as follows in 2015:

- **February 2015.** Make decisions on policy direction.
- **April 2015.** Present draft legislation.
- **June 2015.** Approve tentative recommendation.
- **August 2015.** Further analysis.
- **October 2015.** Consider public comment and adjust proposal.
- **December 2015.** Approve final recommendation.

That is a *best-case* projection that could be derailed by difficulty in reaching consensus about policy direction, unexpected drafting difficulties, difficulty resolving objections raised by stakeholders, or unanticipated circumstances affecting staff resources.

Government Access to Customer Information from Communication Service Providers: Government Interruption of Communications

The Legislature has also directed the Commission to study the law on government interruption of communication services. This was discussed at the September 2014 meeting⁷ and the Commission decided that commencement of this study should be deferred until after the completion of the electronic surveillance study.⁸

The staff has not yet familiarized itself with the law in this area. However, it seems likely that the topic will be fairly narrow. If so, the study could perhaps be completed in a year or less. It is difficult to make a more accurate projection at this time.

Mediation Confidentiality

In 2012, the Legislature directed the Commission to study the

7. Memorandum 2014-31, pp. 14-15.

8. Minutes (Sept. 2014), p. 3.

relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant.⁹

The Legislature went on to prescribe specific background that the Commission should consider as part of its study:

(1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, *Porter v. Wyner* (2010) 183 Cal.App.4th 949, and *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137.

(2) The availability and propriety of contractual waivers.

(3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.¹⁰

Because of the breadth of the statutorily-mandated research and the difficulty of the policy issues presented, this study requires a significant investment of staff resources and Commission meeting time. In 2014, the staff has assigned one attorney to the study. **If that level of staffing is continued, it is likely that the study will be concluded some time in 2016.** To meet that projection, the study would need to proceed along the following lines:

- **February & April 2015.** Complete presentation of background law and policy.
- **June & August 2015.** Discuss alternative reforms.
- **October 2015.** Present draft legislation.
- **December 2015.** Approve tentative recommendation.
- **February 2016.** Further analysis.
- **April 2016.** Consider public comment and adjust proposal.
- **June 2016.** Approve final recommendation.

That plan could be derailed by unexpected issues in the background material, difficulty in reaching consensus about policy direction, unexpected drafting

9. 2012 Cal. Stat. res. ch. 108.

10. *Id.*

difficulties, difficulty resolving objections raised by stakeholders, or unexpected circumstances affecting staff resources.

Notice Districts

The Law Revision Commission is responsible for determining whether any provisions of law are obsolete as a result of (1) the enactment of the Trial Court Employment Protection and Governance Act,¹¹ (2) the enactment of the Lockyer-Isenberg Trial Court Funding Act of 1997,¹² or (3) the implementation of trial court unification, and “shall recommend to the Legislature any amendments to remove those obsolete provisions.”¹³ The Commission is also responsible for conducting several specific studies that were identified in its 1998 report on trial court unification.¹⁴

One of the matters identified for Commission study in the 1998 report is the “[p]ublication of legal notice in a county with a unified superior court.”¹⁵ That study was activated at the Commission’s February 2014 meeting. A tentative recommendation was circulated for public comment in September 2014. It was hoped that the study might be completed in 2014. However, public comment presented at the October 2014 meeting raised new concerns that require further staff attention.

It seems very likely that the study will be completed in 2015, but it is not certain how much more time and resources will be required to do so.

At the October 2014 meeting, the Commission directed staff to research the practical difficulty of determining the historical district boundaries that are currently designated for the publication of notices in “judicial districts.” Once that inquiry is complete, the Commission will be in a position to decide how to proceed in completing this study. The direction taken will determine the work that remains to be done. The staff intends to commit one attorney to the project until it is completed.

11. See 2000 Cal. Stat. ch. 1010; Gov’t Code §§ 71600-71675.

12. 1997 Cal. Stat. ch. 850.

13. Gov’t Code § 71674.

14. See Gov’t Code § 70219; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 82-86 (1998) (hereafter, “*TCU: Revision of Codes*”).

15. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 86.

Tribal and Foreign Judgments

In 2014, the Legislature directed the Commission to study the law governing the recognition of certain tribal and foreign money judgments, with a deadline for completion of the study by January 1, 2017:

The California Law Revision Commission shall, within existing resources, conduct a study of the standards for recognition of a tribal court or a foreign court judgment, under the Tribal Court Civil Money Judgment Act (Title 11.5 (commencing with Section 1730) of Part 3 of the Code of Civil Procedure) and the Uniform Foreign-Country Money Judgments Recognition Act (Chapter 2 (commencing with Section 1713) of Title 11 of Part 3 of the Code of Civil Procedure). On or before January 1, 2017, the California Law Revision Commission shall report its findings, along with any recommendations for improvement of those standards, to the Legislature and the Governor.¹⁶

Although the Commission has considered a memorandum briefly introducing the study,¹⁷ it has not yet begun work in earnest. The staff intends to assign one attorney to the study once the study of notice districts has been completed. **That should provide the resources necessary to complete the study in 2016, in advance of the January 1, 2017 deadline.**

The study is expected to follow a typical arc — background research, analysis of the legal and policy issues, formulation of a proposal, drafting, tentative recommendation, discussion of public comment, and approval of a final recommendation. The staff is not ready to speculate how long each part of the process will take to complete, because the subject is new to us and could include unexpected policy complications (as was the case in examining tribal law in connection with UAGPPJA). Nonetheless, the staff is confident that the Commission can meet the statutory deadline if the study is staffed as proposed.

OUTLOOK

If the projections discussed above and shown in the attached chart are correct, the currently active studies will consume the available staff resources through all of 2015 and most of 2016.

16. 2014 Cal. Stat. ch. 243, § 1.

17. Memorandum 2014-47.

Things should loosen up significantly at the beginning of 2017 — all of the active studies other than the Fish and Game recodification are likely to have been completed by then.

However, based on recent history, it is possible that the Legislature will assign the Commission more new work before then. **In the last four years, the Commission has received five direct statutory assignments.**¹⁸

Moreover, the Commission has a significant backlog of pending work that could be undertaken when resources permit. Some of those projects were legislatively assigned, some have been commenced but not completed, and one was undertaken in response to a massive background report that was prepared, gratis, by the Commission's former director, Nathaniel Sterling.

For a full run-down of the Commission's pending backlog of work, see Memorandum 2014-41. Details on a few of the higher priority items are provided below.

Trial Court Unification and Restructuring

As discussed above, the Commission has been charged by the Legislature with responsibility to recommend reforms to address statutes that have become obsolete as a consequence of trial court unification and restructuring. While much of that work has been completed, significant work remains to be done. Some of these topics were postponed because it made sense to wait for practical issues to sort themselves out. Other work in this area was postponed because of supervening legislative assignments, which appeared to be of higher immediate priority. However, all of the remaining trial court restructuring work must eventually be done, and the sooner the better. It could be a serious problem if further delay in addressing these assigned tasks were to cause problems for the courts.

At the October 10, 2014 meeting, the Commission directed the staff to provide a detailed memorandum describing the history of the Commission's work in this area and the work that remains to be completed. **That information will be provided as a supplement to this memorandum.**

18. 2011 Cal. Stat. ch. 5 (Redevelopment Clean-Up), 2012 Cal. Stat. res. ch. 108 (Fish and Game Law), 2012 Cal. Stat. res. ch. 108 (Mediation Confidentiality), 2013 Cal. Stat. res. ch. 115 (Electronic Surveillance), 2014 Cal. Stat. ch. 243, § 1 (Tribal and Foreign Judgment Recognition).

Creditor Claims, Family Protections, and Nonprobate Transfers

In 2007, the Commission's former Executive Secretary, Nathaniel Sterling, offered to prepare a comprehensive background study on the enforcement of creditor claims and family protections against a decedent's assets that transfer outside of probate. The report would be prepared at no cost to the Commission. The Commission accepted the offer and the study was presented in 2010.¹⁹

The Commission began active work on the study at its June 2013 meeting.²⁰ At the August 2013 meeting, the Commission learned that the electronic surveillance study was likely to be assigned soon, with immediate effect. Given the high priority of work that is assigned directly by the Legislature and the magnitude of the electronic surveillance topic, the Commission tabled the nonprobate transfer study to free up staff resources. In doing so, the Commission indicated its intention to "return to this topic as soon as its resources permit."²¹ While that decision does not bind the Commission, it does reflect the value in returning quickly to an open item, to avoid having staff work and Mr. Sterling's background study go stale.

Civil Venue Statutes

In 2006, the Legislative Counsel pointed out an opinion of the Second District Court of Appeal complaining that Code of Civil Procedure Section 394 is a "mass of cumbersome phraseology" and that there is a "need for revision and clarification of the venue statutes."²² The Commission decided to request legislative authority to conduct such a study, "when its resources permit."²³ The matter was included in the Commission's next resolution of authority.²⁴

The Commission has not yet had a good opportunity to conduct this study, due to other intervening assignments and priorities. That is unfortunate. It is awkward for the Commission to have expressly requested authority to conduct a study and then not act on the authority after it has been granted by the Legislature.

19. Memorandum 2010-27.

20. Memorandum 2013-25.

21. Memorandum 2013-52, p. 52; Minutes (Dec. 2013), p. 3.

22. Memorandum 2006-36, p. 19.

23. Minutes (Oct. 2006), p. 4.

24. 2006 Cal. Stat. res. ch. 100.

CONCLUSION

The staff hopes that this memorandum will be helpful to the Commission in assessing its available resources. After considering the content of this memorandum, the Commission will need to decide on its priorities for 2015. **A clean copy of Memorandum 2014-41 will be provided to Commissioners in connection with this memorandum.**

Respectfully submitted,

Brian Hebert
Executive Director

Projected Completion of Active Studies — 2015 / 2016

Fish and Game Recodification 2012 Cal. Stat. res. ch. 108 Completion 2018 One Attorney (SC)												2018 
Electronic Surveillance 2013 Cal. Stat. res. ch. 115 Completion 2015? One Attorney (BH)						Government Interruption of Communications 2013 Cal. Stat. res. ch. 115 Completion 2016? One Attorney (BH)						
Mediation Confidentiality 2012 Cal. Stat. res. ch. 108 Completion 2016 One Attorney (BG)												
Notice Publication Gov't Code § 70219 Completion 2015 One Attorney (KB)				Foreign and Tribal Judgment Recognition 2014 Cal. Stat. ch 243, § 1 Completion 2016 (statutory Deadline January 1, 2017) One Attorney (KB)								

2015

2016

Feb. April June Aug. Oct. Dec. Feb. April June Aug. Oct. Dec.