Admin. Nov. 22, 2017

Memorandum 2017-55

New Topics and Priorities

Annually, the Commission[1] 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"). The Commission generally undertakes this analysis after the Legislature has adjourned for the year.

To assist the Commission in that process, this memorandum summarizes the status of the topics that the Legislature has directed the Commission to study, the other topics that the Commission is actively studying, the topics that the Commission has previously expressed an interest in studying, and the new topics suggestions received 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 email communications and other materials are attached to and discussed in this memorandum:

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.

PREFATORY NOTE

In reviewing this memorandum, Commissioners and other persons should bear in mind that the Commission's resources are very limited and its existing workload is substantial.

The Commission's current staff is small. The staff includes four attorneys, only two of whom are full-time. In addition, the Commission staff includes a secretary and a half-time administrative analyst.

The Commission also receives some assistance from externs and other law students, particularly from UC Davis School of Law. In accordance with a recent change in Commission practice, the law students are assigned "relatively modest and uncontroversial law reform projects, within the Commission's study authority."[2] The objective is to provide opportunities for students to assist with implementing legislation.[3]

While its staff resources are quite limited, 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. To accomplish this goal, **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.**

Similarly, the Legislature has made clear that it wants the Commission to focus its efforts on such projects. For example, it has directed the Commission to notify the judiciary committees upon commencing a new study. A 2014 bill analysis explains the purpose of that requirement:

> Given the limited resources of the commission which has suffered budget cuts in past years, early communication to the Legislature of proposed topics of study would allow legislative input on whether a particular proposed topic would likely be controversial and thus perhaps avoided by the commission so that it may devote its limited resources to other, more productive studies.[4]

2. Minutes (Apr. 2015), p. 3.
3. *Id.*
4. Assembly Committee on Judiciary Analysis of SCR 83 (Jun. 6, 2014), p. 3 (emphasis added).

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.[5]

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. Currently, all of the Commission's active studies are direct assignments from the Legislature.[6]

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. The Commission received no new assignments during the 2017 legislative session. All of the current legislative assignments are described below.

California Public Records Act

In August 2016, the Legislature approved Assembly Concurrent Resolution 148 (Chau).[7] This resolution includes the following assignment from the Legislature:

> [T]he Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation as soon as possible, considering the commission's preexisting duties and workload demands, concerning the revision of the portions of the California Public Records Act and related provisions, and that this legislation shall accomplish all of the following objectives:
>
> (1) Reduce the length and complexity of current sections.
>
> (2) Avoid unnecessary cross-references.

5. Gov't Code § 8293.
6. See discussion of "Current Legislative Assignments" *infra*.
7. 2016 Cal. Stat. res. ch. 150.

(3) Neither expand nor contract the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act.

(4) To the extent compatible with (3), use terms with common definitions.

(5) Organize the existing provisions in such a way that similar provisions are located in close proximity to one another.

(6) Eliminate duplicative provisions.

(7) Clearly express legislative intent without any change in the substantive provisions[.]

Although this study assignment does not have a specified deadline, the Legislature has requested that the Commission undertake this study "as soon as possible" given the Commission's current duties and workload demands. Typically, the Commission will accord high priority to a legislative assignment, particularly one where the Legislature itself indicates that the work should receive priority.

The staff is hopeful that this project can be completed in 2018. **The staff recommends that the Commission continue to prioritize work on this study.**

Transfer on Death Deeds

In August 2016, the Governor signed Assembly Bill 1779 (Gatto),[8] which expanded the Commission's previously-assigned[9] study on Transfer on Death Deeds. With the 2016 amendment, the Commission is directed to

> … study the effect of California's revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.
>
> … [T]he commission shall address all of the following:
>
> (1) Whether the revocable transfer on death deed is working effectively.
>
> (2) Whether the revocable transfer on death deed should be continued.
>
> (3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.
>
> (4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.
>
> (5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how

8. 2016 Cal. Stat. ch. 179.
9. 2015 Cal. Stat. ch. 293.

the law associated with the deed should be changed to minimize this abuse.

(6) Whether it is feasible and appropriate to expand the revocable transfer on death deed to include the following:

(A) The transfer of stock cooperatives or other common interest developments.

(B) Transfers to a trust or other legal entity.

This study is a direct legislative assignment with a specified deadline. Typically, the Commission gives highest priority to such a study.

In 2015, the Commission decided to delay most of the work in this study, in order to provide as much time as possible for the development of experience with the new law.[10] The staff would immediately solicit information from stakeholder groups, but analysis would not begin in earnest until 2018 or 2019.

In 2016, the Commission decided to address a narrow issue relating to the recordation requirement for a transfer on death deed.[11] The Commission completed a final recommendation, clarifying that recordation of the "Common Questions" page of the form need not be required for the deed to be valid.[12] **The staff will pursue enactment of this recommendation in 2018.**

Given the 2020 deadline, the Commission should devote some staff resources to beginning work on the broader transfer on death deed study in 2018.

Electronic Communications: State and Local Agency Access to Customer Information from Communications Service Providers & Government Interruption of Communication Services

In September 2013, Senate Concurrent Resolution 54 (Padilla) was adopted. This resolution directs the Commission to:

> … report to the Legislature recommendations to revise statutes governing access by state and local government agencies to customer information from communications service providers in order to do all of the following:
>
> (a) Update statutes to reflect 21st Century mobile and Internet-based technologies.
>
> (b) Protect customers' constitutional rights, including, but not limited to, the rights of privacy and free speech, and the freedom from unlawful searches and seizures.
>
> (c) Enable state and local government agencies to protect public safety.

10. See Memorandum 2015-53; Minutes (Dec. 2015), p. 5.
11. See Minutes (Dec. 2016), p. 3.
12. *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm'n Reports __ (2017).

> (d) Clarify the process communications service providers are required to follow in response to requests from state and local agencies for customer information or in order to take action that would affect a customer's service, with a specific description of whether a subpoena, warrant, court order, or other process or documentation is required[.][13]

In accordance with that authorization, the Commission has studied two topics: (1) Government Access to Electronic Communications and (2) Government Interruption of Communications.[14] These two topics are discussed in turn below.

In general, although SCR 54 does not set a deadline for completion of the assignment, the Legislature presumably would like the work completed promptly. **The Commission should continue to give these topics high priority, as appropriate.**

Government Access to Electronic Communications

In 2015, as the Commission was nearing the point of developing reform recommendations in this study, Senator Leno introduced Senate Bill 178. That bill addressed most of the same substance as the Commission's study. In response to the introduction of SB 178, the Commission decided to postpone the development of proposed legislation. Instead, it finalized an informational report on *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements* (Aug. 2015).[15]

Senate Bill 178 was enacted, establishing the California Electronic Communications Privacy Act ("Cal-ECPA").[16] The Commission suspended further work on the study of government access to electronic communications, to give the new law time to develop and settle.[17]

Although Senate Bill 178 addressed nearly all of the issues that the Commission identified in its study, there are several narrow issues and technical clean-up reforms that seem worthwhile for the Commission to pursue.[18]

While the Commission should return to this study soon, the staff recommends against reactivating the study of government access to electronic

13. 2013 Cal. Stat. res. ch. 115.
14. See Minutes (Feb. 2015), p. 4.
15. See generally Memorandum 2015-51.
16. 2015 Cal. Stat. ch. 651.
17. See Minutes (Dec. 2015), pp. 4-5.
18. See First Supplement to Memorandum 2015-3, pp. 5-7; Memorandum 2015-51,pp. 14-23.

communications in 2018. Cal-EPCA is still relatively new. The staff believes that it may be premature to pursue additional reforms at this point.

Government Interruption of Communications

The Commission approved a recommendation on the Government Interruption of Electronic Communications study in 2016.[19] In 2017, AB 1034 (Chau), implementing the Commission's recommendation, was enacted into law.[20]

With the enactment of AB 1034, the Commission's work on this topic is complete. At this point, the staff does not see a need for further work on this topic.

Fish and Game Law

In January 2012, the Commission received a letter jointly signed by the Chair of the Senate Natural Resources and Water Committee (now former Senator Fran Pavley) and the Chair of the Assembly Water, Parks, and Wildlife Committee (now former Assembly Member Jared Huffman), urging the Commission to conduct a comprehensive review of the Fish and Game Code.[21] The same year, the Legislature granted the necessary authority to conduct the study:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> 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 ….[22]

Although the resolution does not set a deadline for completion of the study, the Legislature presumably would like the work completed promptly.

The Commission made significant progress on this topic in 2017, including preparation of multiple lengthy tentative recommendations. The Commission temporarily postponed further work on these tentative recommendations in light of a request from the Secretary for Natural Resources and is currently proceeding

19. See *Government Interruption of Communication Service*, 44 Cal. L. Revision Comm'n Reports 681 (2016).
20. 2017 Cal. Stat. ch. 322.
21. See Memorandum 2012-5, Exhibit pp. 32-33.
22. 2012 Cal. Stat. res. ch. 108.

with an informational report on the funding specified in the Fish and Game Code.[23]

The staff is hopeful that this project can be completed in 2018. **The Commission should continue to give this topic high priority.**

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

In 2012, Assembly Member Wagner introduced a bill to create a new exception to the law governing the confidentiality of mediation communications. Under that bill as introduced, confidentiality would not apply to:

> The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.[24]

During the legislative session, the bill was amended to remove its substance and instead require the Commission to study the matter. The bill was not enacted. Instead, the resolution relating to the Commission's Calendar of Topics was amended to authorize the proposed Commission study, thus:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> (a) Analysis of the 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. Among other matters, the commission shall consider the following:
>
> (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.

23. Minutes (Aug. 2017), p. 9.
24. AB 2025 (Wagner), as introduced Feb. 23, 2012.

> (b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.[25]

The Commission has devoted significant time to this topic in 2017 and made significant progress, including preparation of a tentative recommendation and analysis of public comments on that tentative recommendation. The Commission will be considering additional analysis and deciding whether to finalize a recommendation at its December 2017 meeting.[26]

The Commission seems to be in the final stages of this study. **The staff recommends that the Commission continue to prioritize work on this topic until the study is complete.**

Deadly Weapons

In 2006, the Legislature directed the Commission to study the statutes relating to control of deadly weapons.[27] 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. Two voluminous bills[28] and some follow-up legislation[29] have since been enacted, fully implementing the recodification.

In addition to the recodification, the 2009 report included a list of "Minor Clean-Up Issues for Possible Future Legislative Attention."[30] The Legislature authorized the Commission to study those issues.[31]

---

25. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).
26. See Minutes (Sept. 2017), p. 5; see also Memorandum 2017-61 (to be considered at Dec. 2017 meeting).
27. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)).
28. See 2010 Cal. Stat. ch. 178 (SB 1115 (Committee on Public Safety)); 2010 Cal. Stat. ch. 711 (SB 1080 (Committee on Public Safety)).
29. See 2013 Cal. Stat. ch. 76, §§ 145.5, 147.3, 153.5 (AB 383 (Wagner)); 2012 Cal. Stat. ch. 162, §§ 12-14, 203, 227 (SB 1171 (Harman)); 2011 Cal. Stat. ch. 285 (AB 1402 (Committee on Public Safety)).
30. *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009).
31. See 2010 Cal. Stat. ch. 711, § 7.

In 2014, the Legislature enacted Assembly Bill 1798, which implements a Commission recommendation addressing some of the minor clean-up issues.[32]

In 2015, the Commission approved a final recommendation addressing additional clean-up items. **The staff will seek introduction of implementing legislation in 2018.**

As time permits, the Commission should continue to consider the minor clean-up matters identified in its earlier report.

Recognition of Tribal and Foreign Court Judgments

In August 2014, the Governor signed Senate Bill 406 (Evans) into law.[33] This bill directs the Commission to:

> … 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.[34]

In addition to making this assignment, the bill establishes the Tribal Court Civil Money Judgment Act ("Tribal Court Judgment Act") to govern the process of recognizing and enforcing tribal court civil money judgments.[35]

In accordance with the legislative directive, the Commission approved a final recommendation in this study at its September 2016 meeting.[36] In 2017, AB 905 (Maienschein), which implements the Commission's recommendation, was enacted. **Work on this topic is now complete.**

Trial Court Restructuring

California's trial court system was dramatically restructured in the past quarter century. The restructuring involved three major reforms:

---

32. See *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013); 2014 Cal. Stat. ch. 103.
33. 2014 Cal. Stat. ch. 243.
34. 2014 Cal. Stat. ch. 243, § 1.
35. 2014 Cal. Stat. ch. 243, § 4.
36. *Recognition of Tribal and Foreign Court Money Judgments*, 44 Cal. L. Revision Comm'n Reports 611 (2016); see also Minutes (Sept. 2016), p. 4.

(1) **Trial court unification.** California used to have three different types of trial courts, with differing jurisdictional authority: superior courts, municipal courts, and justice courts. Now, California has a unified superior court system with broad jurisdiction. Municipal courts and justice courts no longer exist.

(2) **State funding of trial court operations.** California's trial courts used to be funded on a county-by-county basis. In 1997, California enacted the Lockyer-Isenberg Trial Court Funding Act, under which the state assumed full responsibility for funding trial court operations.

(3) **A new personnel system for the trial courts.** In 2000, California enacted the Trial Court Employment Protection and Governance Act, which established a new personnel system for the trial courts. Under this system, superior court personnel are employees of the court, instead of the state or county.[37]

Achieving these reforms required extensive statutory and constitutional revisions. In addition, hundreds of statutes became obsolete as a result of the reforms, necessitating repeals or adjustments to reflect the structural changes.

At the request of the Legislature, the Commission has been involved in trial court restructuring since late 1993. It has done a massive amount of work in the area, involving preparation of numerous reports and enactment of many bills (affecting about 1,800 code sections) and a constitutional measure. This work has ranged widely in character: The Commission has prepared a multitude of straightforward technical revisions, addressed complex and challenging sets of issues, and helped to resolve innumerable stakeholder concerns, some of which were relatively minor while others involved intense conflicts over limited resources or other sensitive matters.[38]

Nonetheless, there is still more work to do[39] and the Commission is responsible for continuing the code clean-up pursuant to Government Code Section 71674, which provides:

> 71674. The California Law Revision Commission shall determine whether any provisions of law are obsolete as a result of the enactment of [the Trial Court Employment Protection and Governance Act], the enactment of the Lockyer-Isenberg Trial Court Funding Act of 1997 (Chapter 850 of the Statutes of 1997), or the implementation of trial court unification, and shall recommend to the Legislature any amendments to remove those obsolete

37. For a more detailed discussion of these reforms, see First Supplement to Memorandum 2014-53, pp. 2-5.
38. For further discussion of the Commission's role, see *id.*
39. For a description of the remaining work, see *id.* at 7-23.

provisions. The commission shall report its recommendations to the Legislature, including any proposed statutory changes.

The Chief Deputy Counsel is well-familiar with this area, having worked on aspects of it from the beginning. **A concerted effort in the coming year might help bring closure to much of this enormous, legislatively-mandated project.**

Enforcement of Money Judgments

Code of Civil Procedure Section 681.035 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.

There are currently no active studies focusing on this topic.

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.[40] The Commission exercises this authority from time to time.

In 2015, the Commission, in conjunction with preparing a final recommendation on Fish and Game Law,[41] uncovered several cross-reference errors in a section of the Health and Safety Code.[42] The cross-reference errors were not limited to provisions that relate to fish and game. Therefore, the Commission decided to conduct a separate study to identify and correct the remaining cross-reference errors in the Health and Safety Code provision.[43]

This work has begun and is proceeding on a low priority basis.

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.[44] The Commission fulfills this directive annually in its Annual Report, identifying statutes that have been held unconstitutional or impliedly repealed and recommending that they be

40. Gov't Code § 8298.
41. See Memorandum 2015-40, pp. 8-9.
42. Health & Safety Code § 131052.
43. See Memorandum 2015-40, pp. 8-9; Minutes (Oct. 2015), p. 8.
44. Gov't Code § 8290.

repealed (to the extent that the problematic defect has not been addressed).[45] The Commission does not ordinarily propose specific legislation to effectuate that general recommendation.

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

In 2016, the Commission undertook study of a case, *Property Reserve, Inc. v. Superior Court*,[46] in which the California Supreme Court concluded that the pre-condemnation entry and testing statutes in California's Eminent Domain Law were constitutionally deficient. The status of this work is discussed under "Eminent Domain" below.

CALENDAR OF TOPICS

The Commission's Calendar of Topics currently includes 24 topics.[47] The next section of this memorandum reviews the status of each topic listed in the Calendar. 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.

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.

A possible subject for study under this topic is 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

45. See draft Annual Report attached to Memorandum 2016-52, p. 28.
46. 1 Cal. 5th 151 (2016).
47. See 2016 Cal. Stat. res. ch. 150.

project on this subject, because of the magnitude, complexity, and controversy involved in that area of the law.

Previously, the Commission has received suggestions from a number of sources regarding foreclosure procedure.[48] The Commission has not pursued any of those suggestions, but has kept them on hand.

Several years ago, the Legislature enacted a number of foreclosure-related reforms,[49] and the federal government also pursued reforms in this area.[50] More recently, in 2016, the California Supreme Court decided two cases focused on foreclosure-related issues on the merits.[51] And, in 2017, the California Supreme Court granted review in another case involving foreclosure issues.[52] **Given the changing policy landscape on this topic, unless the Legislature affirmatively seeks the Commission's assistance, it does not appear to be a good time for the Commission to commence a study of foreclosure.**

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.

The Commission has initiated or previously expressed interest in studying a number of probate-related topics, as discussed below.

Creditor Claims, Family Protections, and Nonprobate Assets

Several years ago, the Commission accepted an offer from its former Executive Secretary, Nathaniel Sterling, to prepare a background study on the

48. See, e.g., 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.

49. See, e.g., 2012 Cal. Stat. ch. 86 (AB 278 (Eng)); 2012 Cal. Stat. ch. 87 (SB 900 (Leno)); 2012 Cal. Stat. ch. 562 (AB 2610 (Skinner)); 2012 Cal. Stat. ch. 569 (AB 1950 (Davis)); 2012 Cal Stat. ch. 568 (AB 1474 (Hancock)); 2012 Cal. Stat. ch. 201 (AB 2314 (Carter)); 2013 Cal. Stat. ch. 65 (SB 426 (Corbett)); 2013 Cal. Stat. ch. 251 (SB 310 (Calderon)); 2014 Cal. Stat. ch. 198 (SB 1051(Galgiani)).

50. See, e.g., P.L. 110-289 (Secure and Fair Enforcement for Mortgage Licensing Act of 2008); P.L. 111-22 (Protecting Tenants at Foreclosure Act of 2009, law sunsetted as of Dec. 31, 2012); P.L. 111-203 (2010), P.L. 110-343 (2008); see also http://www.consumerfinance.gov/mortgage-rules-at-a-glance/ (Summary of Consumer Financial Protection Bureau Mortgage Rules).

51. See Coker v. JP Morgan Chase Bank, N.A., 62 Cal. 4th 667, 364 P.3d 176, 197 Cal. Rptr. 3d 131 (2016); Yvanova v. New Century Mortgage Corp., 62 Cal. 4th 919, 365 P.3d 845, 199 Cal. Rptr. 3d 66 (2016); see also First Cal. Bank v. McDonald, 366 P.3d 528, 199 Cal. Rptr. 3d 561 (2016) (review dismissed and case remanded for reconsideration); Castro v. IndyMac INDX Mortgage Loan Trust 2005-AR21, 2016 Cal. LEXIS 2420 (2016) (transferring case to appellate court with directions to vacate decision and reconsider in light of *Yvanova v. New Century Mortgage Corp.*).

52. See Dr. Leevil, LLC v. Westlake Healthcare Center, 395 P.3d 697, 218 Cal. Rptr. 3d 663 (2017).

liability of nonprobate transfers for creditor claims and family protections. In other words, if a decedent's property passes outside of probate (e.g., by a trust, joint tenancy, or transfer-on-death beneficiary designation), to what extent should that property be liable to satisfy the decedent's creditors (including persons who are entitled to the "family protections" applicable in probate)? And what procedures should be used to address any such liability?

Mr. Sterling summarizes the underlying problem as follows:

> The move from a probate-based system for transfer of wealth at death to a nonprobate system has left California law in disarray. The policy of the law to require payment of a decedent's just debts and to protect a decedent's surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.[53]

In 2010, the Commission circulated the background study for a 120-day public comment period.[54] Copies of the study were sent, with a request for review and comment, to a number of interested groups and individuals. No detailed comments were received in response to that request. The Commission did not follow up at that time, because new assignments from the Legislature had pushed the matter to the back burner.

In June 2013, the Commission considered a memorandum introducing this study and approved the general approach to the study outlined in that memorandum.[55] The study was to have a very narrow scope, focusing solely on codifying the general principle that property transferred outside of probate is liable for creditor claims and family protection claims. However, further work on the topic was suspended due to other demands on staff resources.

The Commission reactivated this study in 2017 and has made significant progress. **The staff recommends that the Commission continue studying this issue in 2018.**

Presumptively Disqualified Fiduciaries

A number of years ago, the Legislature directed the Commission to study the operation and effectiveness of Probate Code provisions that establish a statutory presumption of fraud and undue influence when a person makes a gift to a "disqualified person" (i.e., the drafter of the donative instrument, a fiduciary

53. See Memorandum 2012-45, Exhibit p. 2.
54. See Memorandum 2010-27; Minutes (June 2010), p. 7.
55. Memorandum 2013-25; Minutes (June 2013), p. 14.

who transcribed the donative instrument, or the care custodian of a transferor who is a dependent adult). After studying the topic, the Commission recommended a number of improvements to those provisions.[56] Legislation to implement that recommendation was introduced as SB 105 (Harman) in 2009.

The same year, the Commission began studying a related matter — whether the statutory presumption described above should also apply to an instrument naming a fiduciary. In other words, should there be a presumption of fraud or undue influence when an instrument names a "disqualified person" as the fiduciary of the person executing the instrument?

Because of the functional interrelationship between the two studies (both would apply the same factual predicate and evidentiary rules in defining the scope and effect of the presumption), the Commission decided to table the latter study until after the Legislature decided the fate of SB 105.

In 2010, the Legislature enacted SB 105, with amendments.[57] **With that matter settled, the Commission could return to this topic at any time. However, the topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.**

Simplified Administration Procedures

The Probate Code provides several procedures authorizing heirs or devisees to receive a decedent's property without probate administration.[58] These procedures are referred to here collectively as simplified administration procedures.

In 2017, in response to a request for input on Transfer on Death Deeds ("TOD deeds"), the Commission received a letter from the Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM"). TEXCOM's letter raised concerns about the liability of a TOD deed beneficiary for a decedent's unsecured debts.[59] The governing liability provisions for TOD deed beneficiaries were very closely modeled on provisions governing liability of a recipient of the decedent's property under the simplified administration procedures.[60] Thus, TEXCOM's

56. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008).
57. 2010 Cal. Stat. ch. 620; Prob. Code §§ 21360-21392.
58. See generally Prob. Code Division 8.
59. See Memorandum 2017-35, Exhibit pp. 5-8; see also Memorandum 2017-35, pp. 4-6.
60. Compare Prob. Code §§ 5672-5676 (liability for RTODD beneficiary) with Prob. Code §§ 13109-13111 (liability of recipient of personal property of small value received without administration); 13204-13206 (liability of recipient of real property of small value received

concerns suggest that the liability provisions for the simplified administration procedures may be in need of reform.

Previously, the Commission approved the staff recommendation to take this matter up immediately, as a law student project.[61] The externs are making good progress on addressing these issues. **The staff recommends continuing work on this topic, with the help of student externs, in 2018.**

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. However, **this topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.**

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.

Two specific topics that fall within this comprehensive authority are discussed below.

Eminent Domain

In 2016, the staff identified a case, *Property Reserve, Inc. v. Superior Court*,[62] in which the California Supreme Court concluded that the pre-condemnation entry and testing statutes in California's Eminent Domain Law were constitutionally deficient. The statutes at issue were enacted on the Commission's recommendation.[63]

---

without administration); 13561-13562 (liability of surviving spouse due to reciept of decedent's property without administration).

61. See Minutes (Aug. 2017), p. 8.

62. 1 Cal. 5th 151 (2016).

63. See *Recommendation Proposing The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1741-42 (1974) (proposed Code of Civil Procedure Section 1245.060).

The Commission decided, when considering last year's New Topics memorandum, to undertake study of the constitutional issue identified by the Supreme Court. In 2017, the Commission made significant process in studying this topic, including completion of a draft recommendation. In the course of preparing the draft recommendation, the Commission received comments suggesting additional, related statutory reforms.[64] **The staff recommends continuing work on these issues, with the help of student externs, in 2018.**

Mechanics Lien Law

Several years ago, the Commission recommended a complete recodification of mechanics lien law. The laws implementing the recodification of mechanics lien law became operative on July 1, 2012.[65]

In preparing the 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 the recodification should be addressed separately from any significant substantive changes, which may be appropriate for future work by the Commission.

As discussed below, the Commission undertook work in 2016 on the application of mechanics lien law to common area property.[66]

The staff is not currently aware of any other high priority issues on this topic. The Commission may wish to return to this topic after the Commission's higher priority workload eases.

4. Family Law

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

One aspect of this topic, which the Commission has kept in mind for possible future study, is 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

64. See Memorandum 2017-43, pp. 4-5, 8-9; see also First Supplement to Memorandum 2017-43.
65. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); 2011 Cal. Stat. ch. 44 (SB 190 (Lowenthal)).
66. See discussion of "14. Common Interest Developments" *infra*.

the spouses. Yet there is no general statute governing marital agreements made during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues.

In 2012, the Uniform Law Commission ("ULC") approved the Uniform Premarital and Marital Agreements Act. Any Commission study of this topic should begin by examining the uniform act.

If the Commission decides to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements.[67] In particular, the Commission could study circumstances in which the right to support can be waived.[68]

This is an appropriate topic for Commission study, however it does not appear to be as pressing as some of the other topics awaiting the Commission's attention.

5. Discovery in Civil Cases

Some time ago, the Commission undertook a study of civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. A number of reforms were enacted, including the Commission's recommendation on *Deposition in Out-of-State Litigation*, which was enacted in 2008.[69]

While it was actively working on civil discovery, the Commission received numerous suggestions from interested persons, which the staff has kept on hand. The Commission also identified other discovery topics it might address.

In conjunction with the Commission's consideration of the New Topics memorandum last year, the staff was directed to begin work on a discovery topic suggested by Commissioner Capozzola (related to depositions) and to prepare a list of other discovery topics suggested for study.[70]

Memorandum 2017-26 initiated study of the deposition issue. Among other things, this memorandum discussed a pending bill — AB 383 (Chau) — that would expressly authorize informal discovery conferences.[71] The legislation

67. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36.
68. See In re Marriage of Pendleton & Fireman, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).
69. 37 Cal. L. Revision Comm'n Reports 99 (2007); see 2008 Cal. Stat. ch. 231.
70. See Minutes (Dec. 2016), p. 3.
71. Memorandum 2017-26, pp. 22-24.

would sunset on January 1, 2023.[72] The Commission decided to defer further consideration of discovery issues until the fate of this legislation was resolved.[73] AB 383 has since been enacted.[74]

The potential impact of AB 383 on the deposition issue raised by Commissioner Capozzola is unclear. It seems possible, however, that the option of conducting an informal discovery conference might obviate the need for other reforms to address the issue.

Memorandum 2016-26 mentions the possibility of monitoring the impact of AB 383 until the sunset date of January 1, 2023, after which the Commission could revisit the issue raised by Commissioner Capozzola. **Does the Commission want to monitor the experience under AB 383 before proceeding with that issue or other discovery issues?**

This year, attorney Ryan Meckfessel submitted a new topic suggestion relating to discovery.[75] He seeks clarification of how the law applies when a business with multiple locations responds to a subpoena requesting documents. In particular, Mr. Meckfessel suggests that a business responding to a subpoena duces tecum should be responsible for "providing [any] documents maintained by the entity within the state." Mr. Meckfessel indicates that providing clarity about the responding entity's obligations "would be considerably more useful to Californians than the right to move to compel compliance with a subpoena."

As indicated above, the staff has kept a number of suggested civil discovery topics on hand. When the Commission is ready to proceed with the civil discovery study, we can present these suggestions and the Commission can select specific issues to address. **We will keep Mr. Meckfessel's suggestion on hand for future consideration with the other suggested discovery topics.**

6. 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.**

72. See 2017 Cal. Stat. ch. 189.
73. See Minutes (Aug. 2017), p. 7.
74. 2017 Cal. Stat. ch. 189.
75. See Exhibit p. 4.

7. 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,[76] 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.[77] 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, the staff will raise the matter with the judiciary committees again, but not until the Commission's higher priority workload eases.**

8. 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.

At this time, the Commission is not actively working on any proposal pursuant to that grant of authority. **However, the topic should be retained on the Calendar of Topics, in case such work appears appropriate in the future.**

9. 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.

---

76. The background study consists of a series of reports prepared by Prof. Méndez. See http://www.clrc.ca.gov/Menu3_reports/bkstudies.html.

At the time the reports were prepared, Prof. Méndez served as a Professor of Law at Stanford Law School and UC Davis School of Law.

77. See Memorandum 2006-36, Exhibit pp. 70-71.

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.**

10. 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 in 2001 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, after its higher priority workload eases.

11. 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.

In 2008, the ULC revised the Uniform Unincorporated Nonprofit Association Act. 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**.

12. 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.

The Commission should retain this topic on its Calendar of Topics as further work still needs to be done (see discussion above under "Trial Court Restructuring").

13. 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, for the past decade or so the staff has been lightly monitoring developments relating to the Uniform Electronic Transactions Act ("UETA"), including possible preemption of California's version of UETA by the federal Electronic Signatures in Global and National Commerce Act.[78] **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.**

14. Common Interest Developments

Common interest development ("CID") law was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission studied various aspects of this topic since that time, and has issued several recommendations, most of which have been enacted.

In 2013, the Legislature enacted Commission recommendations to (1) recodify the Davis-Stirling Common Interest Development Act,[79] and (2) create a new and separate act for commercial and industrial common interest developments.[80]

In 2016, the Commission completed a recommendation related to the application of mechanics lien law to common area property.[81] In 2017, AB 534 (Gallagher), which implements the Commission's recommendation, was enacted.

The Commission has a long list of possible future CID study topics.[82] For example, the Commission previously decided to address miscellaneous other

78. See Memorandum 2014-41, p. 19.

79. See 2012 Cal. Stat. ch. 180 (AB 805 (Torres)); 2012 Cal. Stat. ch. 181 (AB 806 (Torres)); see also 2013 Cal. Stat. ch. 183 (clean-up legislation) (SB 745 (Committee on Transportation and Housing)).

80. 2013 Cal. Stat. ch. 605 (SB 752 (Roth)).

81. See *Mechanics Liens in Common Interest Developments*, 44 Cal. L. Revision Comm'n Reports 739 (2016).

82. The staff has added suggestions received in the last year to this list. See Letter from Pih-Hsien Ho to California Law Revision Commission (Nov. 14, 2016) (on file with Commission).

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.[83]

Given our extensive work in this area of law, it would make sense to return to such matters eventually. However, this topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.

15. 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.**

16. 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.**

17. 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.

---

83. See Minutes (Oct. 2008).

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 follow-up work is still in progress.[84] **In light of its possible relevance to the deadly weapons study, the existing authority to study criminal sentencing should be retained.**

18. 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 the results may be difficult to enact. **In light of current limitations on Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.**

19. 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. **For this reason, the staff does not recommend that the Commission undertake this project at this time.**

20. 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."[85] 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

84. See discussion of "Deadly Weapons" *supra*.
85. 2007 Cal. Stat. res. ch. 100.

there was a "need for revision and clarification of the venue statutes."[86] 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 may wish to begin work in this area, as time permits, in 2018.

21. 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.[87] The Commission issued its final report on that topic in 2012.[88] No further work on this topic is currently pending. **Nonetheless, it would be prudent to preserve our existing authority, in case any future questions arise that the Commission needs to address**.

22. Fish and Game Law

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

23. Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

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

24. California Public Records Act

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

CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

When it considered last year's memorandum on new topics, the Commission retained several suggestions for future reconsideration. Those carryover suggestions are briefly described below; further detail is available in the sources cited. Given the Commission's current slate of assignments, **the staff expects that**

86. See Memorandum 2005-29, Exhibit p. 59.
87. See 2009 Cal. Stat. res. ch. 98.
88. See *Charter Schools and the Government Claims Act*, 42 Cal. L. Revision Comm'n Reports 225 (2012).

the Commission will lack the staff resources to undertake work on any of these carryover suggestions.

Generally, the carryover topics appear to be issues that the Commission is well-suited to address. **The staff recommends that these issues be retained for future consideration as staff-directed student work, as appropriate, or as staff projects once the Commission's higher priority workload eases.**

Intestate Inheritance by a Half-Sibling[89]

Marlynne Stoddard of Newport Beach asked the Commission to study intestate inheritance by a half-sibling who lacks a familial relationship with the decedent.[90] Currently, California's law on intestate succession provides that "relatives of the halfblood inherit the same share they would inherit if they were of the whole blood."[91] Ms. Stoddard provides the example of the estate of her brother, who died intestate; Ms. Stoddard, who "had a very close relationship" with her brother, and two estranged half-siblings each received a one-third share of her brother's estate.[92] Ms. Stoddard indicated that "the current half-blood statute … produces grossly unfair and irrational results in cases like mine."[93]

Homestead Exemption — Challenge to Existence of a Dwelling[94]

Attorney John Schaller, of Chico, raised the issue of the lack of "procedure in the Code for a creditor who levies on real property to get rid of falsely recorded homestead filings in the situation where there is no dwelling on the property."[95] Based on the staff's preliminary research, Mr. Schaller appears to be correct that the Code of Civil Procedure does not provide clear guidance on what procedure to follow when there is a dispute over the existence of a dwelling on the debtor's property (as opposed to a dispute regarding whether a dwelling is the debtor's homestead, and thus qualifies for the homestead exemption).

In 2017, the study work on this topic was undertaken by a law student extern working with the staff.[96] The Commission approved a final recommendation on this topic.[97] **The staff will seek implementing legislation in 2018.**

---

89. See full analysis in Memorandum 2013-54, pp. 22-23.
90. See Memorandum 2012-5, Exhibit pp. 48-51.
91. Prob. Code § 6406.
92. See Memorandum 2012-5, Exhibit pp. 48-51.
93. *Id.* at 50.
94. See full analysis in Memorandum 2013-54, pp. 23-24.
95. *Id.*
96. See Memorandum 2017-13.
97. See Minutes (Sept. 2017), p. 4.

Civil Procedure: Stay of Trial Court Proceeding During Appeal[98]

Attorney H. Thomas Watson suggested that the Commission consider a proposed amendment[99] of Code of Civil Procedure Section 916 that "seeks to resolve the anomalous split of authority" on whether a trial court retains jurisdiction to resolve a motion for judgment NOV while a case is stayed during an appeal.[100] His proposed amendment was offered to ensure the trial court "retain[s] jurisdiction to rule on all post-trial motions regardless of whether a notice of appeal is perfected."[101]

Uniform Trust Code[102]

Nathaniel Sterling, the Commission's former Executive Secretary, wrote on behalf of the California Commission on Uniform State Laws, to request that the Law Revision Commission "make a study to determine whether the Uniform Trust Code should be enacted in California, in whole or in part."[103]

Social Security Number Disclosure Requirement in Probate Code[104]

Attorneys Peter Stern and Jennifer Wilkerson shared a concern about Probate Code Section 1841, which requires that the conservatorship petition include the social security number of the proposed conservatee if that person is an absentee. Mr. Stern further indicated that social security numbers are generally not used in any non-confidential pleadings or filings. The staff, in reviewing the issue, found another section of the Probate Code (Section 3703), which requires a social security number of an absentee to be included in a court filing.

Revocability of Trusts by Surviving Co-Trustee & Disposition of Trust Assets[105]

Attorney Beverley Pellegrini wrote to request statutory clarification as to the meaning of the "joint lifetimes of the trustors" when that phrase is used in trust documents.[106] In particular, Ms. Pellegrini believes that the phrase is ambiguous

98. See full analysis in Memorandum 2013-54, p. 27.
99. First Supplement to Memorandum 2012-5, Exhibit p. 12.
100. *Id.* at 12-13.
101. *Id.* at 13.
102. See full analysis in Memorandum 2013-54, pp. 32-33.
103. *Id.* at Exhibit p. 36.
104. See full analysis in Memorandum 2014-41, pp. 26-29.
105. See full analysis in Memorandum 2015-47, pp. 27-29; see also First Supplement to Memorandum 2015-47, p. 2.
106. Memorandum 2015-47, Exhibit pp. 28-29; see also Email from Beverly Pellegrini to Kristin Burford and Brian Hebert (Nov. 2, 2016) (on file with Commission)..

as it could mean either the time period when *all* trustors are alive (i.e., until the first trustor dies) or the time period when *any* trustor is alive (i.e., until all trustors are deceased).[107]

Ms. Pellegrini's concern relates to the ability of co-Trustors to achieve their intended result during the survivorship period (i.e., after the first Trustor is deceased) with respect to both the revocation and disposition of trust property. For instance, should a marital trust that provides for revocability during the "joint lifetimes" of the Trustors permit the surviving spouse to revoke as to the entire property or only that spouse's share of the property?[108] To the extent that the surviving spouse has the power to revoke the entire trust corpus, does that spouse also control the disposition of that property?[109]

Bond and Undertaking Law[110]

Attorney Frank Coats raised concerns that recent changes to California's Bond and Undertaking Law do not adequately account for the operation of the

---

107. *Id*. at Exhibit p. 28.

108. Generally, the answer to this question would be determined according to Probate Code Section 15401. In relevant part, that section reads:

> (b) (1) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in Section 761 of the Family Code [which permits either spouse to unilaterally revoke the trust as to community property while both spouses are living].
> (2) Notwithstanding paragraph (1), a settlor may grant to another person, including, but not limited to, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.

109. Generally, the answer to this question would be determined according to Probate Code Section 15410. In relevant part, that section reads:

> At the termination of a trust, the trust property shall be disposed of as follows:
> (a) In the case of a trust that is revoked by the settlor, the trust property shall be disposed of in the following order of priority:
> (1) As directed by the settlor.
> (2) As provided in the trust instrument.
> (3) To the extent that there is no direction by the settlor or in the trust instrument, to the settlor, or his or her estate, as the case may be.
> (b) In the case of a trust that is revoked by any person holding a power of revocation other than the settlor, the trust property shall be disposed of in the following order of priority:
> (1) As provided in the trust instrument.
> (2) As directed by the person exercising the power of revocation.
> (3) To the extent that there is no direction in the trust instrument or by the person exercising the power of revocation, to the person exercising the power of revocation, or his or her estate, as the case may be.
> ….

110. See full analysis in Memorandum 2015-47, pp. 30-31; see also First Supplement to Memorandum 2015-47, p. 1.

law in non-litigation matters.[111] Perhaps the most troubling issue raised by Mr. Coats is that the recent amendments could be read to only permit the use of bonds or notes as a deposit in lieu of an appeal bond and, thus, to preclude the deposit of bonds or notes in lieu of a bond required as a condition of a permit or contract.[112]

If Mr. Coats wants to pursue this matter more expeditiously, perhaps the California Conference of Bar Associations, the sponsor of the recent legislation, would be in a position to address the issue.

In addition, Mr. Coats identifies a few provisions in the current law that may cause confusion.[113] These issues may be appropriate to address if the Commission undertakes a study of the issue discussed above.

Timing Rules for Service by Mail and Email[114]

Attorney Joshua Merliss expressed concern about differing judicial interpretations of the rules governing the timing of service by mail (Code Civ. Proc. § 1013) and service by email (Code Civ. Proc. § 1010.6(a)(4)).[115] Each provision extends litigation deadlines, notice periods, and the like for a certain number of days after service occurring by the specified means (mail or email).

However, the statutes do not expressly say who can take advantage of the extension of time. With respect to whether a person other than a recipient of the service is entitled to the extension of time, Mr. Merliss indicated that two appellate courts have reached differing conclusions.[116]

Given the similarities between Sections 1010.6 and 1013, the differing interpretations as to who is entitled to a time extension seem problematic and potentially confusing. Addressing this issue would clarify the applicable deadlines and help to avoid inadvertent late filings, which could have significant legal consequences.

---

111. Memorandum 2015-47, Exhibit pp. 1-2.
112. See Code Civ. Proc. § 995.710(a)(2).
113. See Memorandum 2015-47, Exhibit pp. 1-2; see also First Supplement to Memorandum 2015-47, Email from Frank Coats to Brian Hebert (Sept. 16, 2015) (on file with Commission).
114. See full analysis in Memorandum 2015-47, pp. 31-32.
115. *Id.* at Exhibit pp. 6-27.
116. *Id.* at Exhibit pp. 6-7. The cases are *Westrec Marina Management v. Jardine Ins. Brokers Orange County*, 85 Cal. App. 4th 1042, 102 Cal. Rptr. 2d 673 (2000), and *Kahn v. The Dewey Group*, 240 Cal. App. 4th 227, 192 Cal. Rptr. 3d 679 (2015); see also Memorandum 2015-47, Exhibit pp. 8-27.

During the past year, the Commission received a few new topic suggestions from various sources. Three of those suggestions are discussed below. A few suggestions do not warrant discussion in this memorandum, because they clearly are a poor fit for the Commission's expertise, or obviously should be resolved by elected representatives rather than Commission appointees.

Creditors' Remedies

The Commission has received one new topic suggestion that appears to fall within the Commission's existing authority to study creditors' remedies.

Attachment of Limited Liability Company Property

Attorney Dana Cisneros writes with concern that the prejudgment attachment statutes make no provision for limited liability company property.[117] However, Ms. Cisneros indicates that, in practice, "courts are issuing attachments for LLCs."[118]

In particular, Ms. Cisneros raises concerns about Code of Civil Procedure Section 487.010, which identifies the property that is subject to attachment. This section is organized based on the identity of the defendant. Specifically, Section 487.010 authorizes attachment of specified property for defendants who are corporations, partnerships, or other unincorporated associations, and natural persons. Section 487.010 does not mention limited liability companies.

For partnerships or other incorporated associations, Section 487.010 provides that "all partnership or association property for which a method of levy is provided by Article 2 (commencing with Section 488.300) of Chapter 8" is subject to attachment.[119] Corporate property is subject to attachment under a parallel rule.[120]

As a general matter, the staff does not see an apparent policy reason that an LLC would be subject to different rules than other legal entities regarding the availability of the entity's property for prejudgment attachment. An LLC organized under California law has, among other powers, the power to sue and

117. Exhibit p. 1.
118. *Id*.
119. Code Civ. Proc. § 487.010(b).
120. Code Civ. Proc. § 487.010(a) ("Where the defendant is a corporation, all corporate property for which a method of levy is provided by Article 2 (commencing with Section 488.300) of Chapter 8" is subject to attachment.).

be sued, as well as the power to acquire, own, and hold any interest in real or personal property.[121]

The staff considered whether LLCs might fall within the class of "other unincorporated associations." The Corporations Code[122] defines an unincorporated association as "an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not."[123] This broad definition might encompass many LLCs.[124]

It appears, however, that the failure to address LLCs in the prejudgment attachment statute was an oversight.[125] The prejudgment attachment statute predates and was last amended prior to the statutory authorization for LLCs. When the law authorizing LLCs was enacted, the definitions of "person" throughout the codes (including in the attachment law) were amended to specifically include "a limited liability company," where that term was meant to encompass legal entities (e.g., corporation, partnership, unincorporated association).[126]

In the staff's view, this issue would benefit from a clarifying reform that specifies that LLCs are subject to the same rules for prejudgment attachment as other legal entities. **This reform appears to be a straight-forward clarification. The staff would recommend that the Commission address this issue as time permits in 2018, possibly as a staff-directed student project.**

Real Property

The Commission has received one new topic suggestion that appears to fall within the Commission's existing authority to study real property issues.

---

121. Corp. Code § 17701.05 (b), (f).

122. The Corporations Code contains separate titles governing partnerships (Title 2), limited liability companies (Title 2.6), and unincorporated associations (Title 3).

123. See Corp. Code § 18035(a). This section also specifies that certain forms of property tenure, marriages, and domestic partnerships do not by themselves establish an unincorporated association.

124. But see Corp. Code §§ 17702.01(a), 17704.01(a) (limited liability company can have only one member).

125. See 1994 Cal. Stat. ch. 1010 (SB 2053 (Killea)); 1994 Cal. Stat. ch. 469 (SB 469 (Beverly)).

126. Code Civ. Proc. § 481.170. The legislation that added "limited liability company" to this definition amended a number of definitions throughout the codes to separately include "limited liability company." See, e.g., 1994 Cal. Stat. ch. 1010 (SB 2053 (Killea)), §§ 1-11, 13-21, 28-34, 57-66; see also Assembly Committee on Judiciary Analysis of SB 2053 (July 6, 1994), p. 1 ("This bill … [m]akes technical clean up changes to SB 469, the limited liability company bill, the primary change of which is to add the expression 'limited liability company' to the definition of 'person' wherever the word 'person' appears in the codes.").

Application of Marketable Record Title Act to Oil & Gas Leases

Attorney Jack Quirk writes to identify ambiguities regarding the application of certain provisions in the Marketable Record Title Act ("MRTA") to oil and gas leases.[127] In particular, Mr. Quirk is concerned that it is not sufficiently clear whether the MRTA's abolition of possibilities of reverter applies to such interests in oil and gas leases.[128]

Mr. Quirk notes that a typical oil and gas lease includes an initial, defined term of years and a secondary, indefinite term (often, contingent upon continued production).[129] California case law construes such leases as creating a fee simple determinable interest held by the lessee and a complementary possibility of reverter in favor of the lessor.[130] Essentially, this treatment means that the lease automatically terminates when the specified condition occurs (e.g., failure to produce paying quantities of oil and gas).[131] Mr. Quirk notes that the parties may not be aware that the condition has occurred and the lease has terminated.[132]

As a general matter, fee simple determinable interests and possibilities of reverter can complicate the title record for real property. For this reason, the Commission addressed these interests in its recommendation of the MRTA.[133] The proposed legislation included a chapter that would effectively convert a fee simple determinable with possibility of reverter to a fee simple subject to condition subsequent with power of termination.[134]

---

127. Exhibit pp. 5-8. Mr. Quirk's emails refer to several cases that he provided as attachments. Those attachments are not reproduced in the Exhibit, but are on file with the Conmmission.

128. See Civ. Code § 885.020 ("Fees simple determinable and possibilities of reverter are abolished. Every estate that would be at common law a fee simple determinable is deemed to be a fee simple subject to a restriction in the form of a condition subsequent. Every interest that would be at common law a possibility of reverter is deemed to be and is enforceable as a power of termination.").

129. See Exhibit p. 5.

130. See *id*.; see also, e.g., Dabney v. Edwards, 5 Cal. 2d 1, 11-13, 53 P.2d 962 (1935), Lough v. Coal Oil, Inc., 217 Cal. App. 3d 1518, 1526, 266 Cal. Rptr. 611 (1990) ("In California, an oil and gas lease with a 'so long thereafter' habendum clause creates a determinable fee interest in the nature of *profit a prendre*, an interest that terminates upon the happening of the specified event with no notice required.").

131. See *supra* note 130; see also Renner v. Huntington-Hawthorne Oil and Gas Co., 39 Cal. 2d 93, 244 P.2d 895 (1952) ("A determinable fee terminates upon the happening of the event named in the terms of the instrument which created the estate; no notice is required for, and no forfeiture results from, such termination.").

132. Exhibit p. 7.

133. Recommendation Relating to *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1981).

134. *Id*. at 441-446; see also *id*. at 416-17.

"The critical difference between the [power of termination] and the possibility of reverter is that a [power of termination] requires an act of the holder of the right in order to terminate the

During the legislative process, however, the MRTA bill was amended to exclude from the chapter "[a] reversionary interest conditioned upon the continued production or removal of oil or gas or other minerals."[135] The corresponding Legislative Committee Comment provides, in part:

> Section 885.015 makes clear that this chapter applies only to classical possibilities of reverter and rights of entry. It does not affect the characterization, duration, or manner of enforcement of such contemporary hybrids as a reversionary interest in mineral rights retained by the owner of property subject to an oil and gas lease ….[136]

Thus, in the original enactment of the MRTA, it seems clear that the Legislature did not intend to modify the treatment of oil and gas leases (i.e., convert the possibility of reverter to a power of termination).

Several years later, the Commission recommended expanding the types of interests that would be treated as "powers of termination" under the MRTA.[137] Based on the Commission's recommendation, Section 885.015 was amended to refer to a "power of termination," rather than a "reversionary interest."[138] The Commission comment explains:

> Section 885.015 is amended to refer to powers of termination, for consistency with the broadened scope of this chapter. … This revision makes the exception provided in this section coextensive with the interests covered by this chapter.

While the intended effect of this terminology change seems clear from the comment, this change introduced a circular reference problem in the statutory language. As Mr. Quirk writes "the lessor's interest under a conventional oil and gas lease is not a power of termination, unless [it has] been converted by the MRTA…."[139]

This problem does not appear to be causing confusion in practice. In practice, Mr. Quirk indicates that "now virtually all of the thousands of oil and gas leases in force throughout the State of California are assumed to be in effect a grant of

---

preceding fee estate, whereas a possibility of reverter terminates the preceding fee estate automatically." *Id*. at 414-415.

135. See Civ. Code § 885.015, as enacted by 1982 Cal. Stat. ch. 1268 § 1.

136. See *Report of Senate Committee on Judiciary on Assembly Bill 2416*, 16 Cal. L. Revision Comm'n Reports 2001 (1982).

137. *Application of Marketable Title Statute to Executory Interests*, 21 Cal. L. Revision Comm'n Reports 53 (1991). This recommendation was enacted. 1991 Cal. Stat. ch. 156 (AB 1577).

138. See Civ. Code 885.015; see also 21 Cal. L. Revision Comm'n Reports at 62.

139. Exhibit p. 8.

oil and gas rights in determinable fee, subject to possibility of reverter."[140] This appears to be consistent with the legislative intent, based on the history.

The Commission's practice is not to recommend changes in laws that have been enacted on Commission recommendation, absent cause for concern.[141] While the current understanding in practice is in accord with legislative intent, the statutory language itself is somewhat troubling. Conforming the statutory language to the legislative intent would seem to be a relatively straight-forward change. **Therefore, the staff would recommend addressing this minor, technical issue on a low priority basis, as time permits, possibly as a staff-directed student project.**

Other Suggestion

The Commission has received one new topic suggestion that does not appear to fall within the Commission's existing study authority. This suggestion is discussed below.

Worker's Compensation Law

Attorney David Kestner writes with concerns about the Worker's Compensation provisions of the Labor Code.[142] Mr. Kestner states that the Labor Code "needs attention" and provides several examples of specific concerns he has with the worker's compensation statutes.[143] Overall, Mr. Kestner seems to suggest that worker's compensation law as a whole needs to be recodified and reformed.[144]

To the extent that the worker's compensation provisions of the Labor Code need reorganization and recodification, the Commission is well-suited to this type of work and has a great deal of experience in recodifying bodies of law. The Commission is currently working on two recodification projects (Fish and Game and California Public Records Act).

Although this type of project would be appropriate for the Commission to study, the scope and complexity of recodification projects typically require a substantial dedication of staff resources. The Commission previously sought and was granted authority to pursue another recodification project, but has not yet

140. *Id*. at 7.
141. Cal. L. Revision Comm'n, Handbook of Practices and Procedures Rule 3.5.
142. Exhibit pp. 2-3. Mr. Kestner uses some abbreviations relating to worker's compensation. To help readers understand his email, the staff added some definitions in brackets.
143. See *id*.
144. *Id*. at 2.

proceeded with that project.[145] **The staff recommends against seeking new authority for an additional recodification project when the Commission is unlikely to have the staff resources to devote to that project in the near term.**

In addition to raising broad concerns about worker's compensation law, Mr. Kestner describes some specific issues as examples of the types of problems that exist. Some of those specific issues might be technical concerns that could easily be resolved. However, the staff lacks experience in this area, and is concerned that resolving the specific issues may be more complicated than it initially appears, particularly if the law as a whole is in need of recodification.

Given the Commission's lack of authority and lack of available resources to undertake a project of this scope, the staff recommends against pursuing this project.

AVAILABLE RESOURCES

A chart attached to this memorandum shows the staff's best estimates as to the projected completion of our currently active studies.[146]

The chart makes the following assumptions about the allocation of staff time in 2018:

- The Commission will allocate three-quarters of an attorney to the ongoing study of Fish and Game Law.
- The Commission will allocate one-quarter of an attorney to the study of Transfer on Death Deeds.
- The Commission will continue to allocate one attorney to the ongoing study of Nonprobate Transfer Liability.
- The Commission will continue to allocate one attorney to the ongoing study of the Public Records Act.

For 2018, the work allocated to the remaining attorney will depend on the decisions made in this memorandum.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2018. Traditionally, the Commission's highest priority has been assisting with legislation to implement recently-completed Commission recommendations.

145. See discussion of "18. Subdivision Map Act and Mitigation Fee Act" *supra*.
146. Exhibit p. 9.

That activity typically consumes substantial staff resources, but requires little of the Commission's time. The staff anticipates that the legislative work in 2018 may require more staff time than usual.

Aside from the legislative work, the Commission's highest priority has been 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 studies for which a consultant has delivered a background report, 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 traditional scheme of priorities for Commission work is:

(1) Managing the Commission's legislative program.
(2) Studies assigned by the Legislature and other matters the Commission has concluded deserve immediate attention.
(3) Studies for which the Commission has an expert consultant.
(4) Studies that have been previously activated but not completed.
(5) New topics that appear appropriate for the Commission to study.

In addition, the Commission staff and student employees[147] typically address technical and minor substantive issues within the Commission's authority as resources permit.

This priority scheme has worked well over the years. Generally, the staff recommends that the Commission continue to follow it in 2018, as detailed below.

Legislative Program for 2018

In 2018, the **Commission's legislative program will likely include legislation on all of the following topics**:

- Deadly Weapons: Minor Clean-Up Issues
- Revocable Transfer on Death Deed: Recordation
- Homestead Exemption: Dwelling
- Resolution of Authority

147. Minutes (Apr. 2015), p. 3.

In addition, the Commission will be considering approval of a final recommendation at the December 2017 meeting. If that recommendation is approved, the **Commission's legislative program would also include legislation on the following topic:**

- Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Managing this legislative program could consume significant staff resources in 2018, but should not require much attention from the Commission.

Legislative Assignments and Other Matters Deserving Immediate Attention

The Commission has not received any new legislative assignments in 2017. The staff recommends activating the legislatively-assigned study on Transfer on Death Deeds. The Legislature established a January 1, 2020 deadline for completion of this study. In light of that deadline, **the staff recommends dedicating one-quarter of an attorney position to the Transfer on Death Deed study in 2018.**

The Commission should also continue its work on the legislatively-assigned studies for which work is ongoing: (1) Fish and Game Law and (2) the California Public Records Act Clean-Up. Conducting these studies, plus the Transfer on Death Deed study, would fully occupy two of the Commission's four attorneys in 2018.

There is also one pending legislatively-assigned study that may be completed in December: the Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct. **If that study is not completed this year, the Commission should devote the needed staff resources to complete it in 2018.**

In addition, **the Commission should give high priority to completing the legislatively-mandated work on trial court restructuring.** It has made steady progress on that massive project over the years, but it has not done anything in the area since its recommendation on *Trial Court Unification: Publication of Legal Notice* was enacted in 2016. If the Commission makes a concentrated effort, it may be possible to bring some closure to much of the remaining work in the coming year.

Consultant Studies

For some studies, the Commission has the benefit of a consultant's assistance. In particular, 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 Commission recommenced work on this topic in 2017 and made significant progress. **The staff recommends that the Commission devote one attorney position to this study in 2018.**

In addition, the Commission has background studies on the following topics, which it has already studied to some extent:

- Common interest development law (background study prepared by Prof. Susan French of UCLA Law School).
- Civil discovery (background study prepared by Prof. Gregory Weber of McGeorge School of Law).
- Review of the California Evidence Code (background study prepared by Prof. Miguel Méndez of Stanford Law School and UC Davis School of Law).

The issues addressed by these background studies do not appear to be pressing at this time, but should be addressed when resources permit.

Other Activated Studies

In 2017, the Commission activated a study on civil discovery. As discussed previously, it might be appropriate to postpone some or all of this work in light of the new legislation expressly authorizing informal discovery conferences.

The Commission has previously activated studies on two topics: attorney's fees and presumptively disqualified fiduciaries. Those studies are currently on hold. They should be addressed when resources permit, but they do not appear to be particularly pressing at this time.

New Topics

Given the Commission's traditional priority scheme and the number of outstanding, active and higher priority issues, the Commission almost certainly will not be able to commence any new studies this year.

The staff does not recommend seeking any new authority at this time.

Summary

If the Commission approves the staff recommendations made in this memorandum, the Commission's priorities for 2018 would include:

- Manage the 2018 legislative program.
- Begin the main study on transfer on death deeds.
- Continue the study on fish and game law.

- Continue the study on the California Public Records Act and related laws.
- Complete the study on the relationship between mediation confidentiality and attorney malpractice and other misconduct, if work remains.
- Devote substantial resources to the remaining legislatively-mandated work on trial court restructuring.
- Continue the study on the liability of nonprobate transfers for creditor claims and family protections.
- Possibly continue some work in the area of civil discovery.

Does the Commission approve these staff recommendations?

If the Commission approves this priority scheme, three of the Commission's attorneys would be allocated as follows:

- **Transfer on death deeds:** One-quarter attorney.
- **Fish and game law:** Three-quarters attorney.
- **California Public Records Act:** One attorney.
- **Liability of nonprobate transfers for creditor claims and family protections:** One attorney.

The remaining attorney's time would be devoted primarily to mediation confidentiality, trial court restructuring, and/or civil discovery, with the allocation depending on the Commission's decisions at the upcoming meeting.

Respectfully submitted,

Kristin Burford
Staff Counsel

EMAIL FROM DANA CISNEROS
(3/14/17)

Dear Law Revision Commission,

I have recently discovered an anomaly in the prejudgment attachment statutes. CCP 487.010 sets forth the property subject to attachment and classifies it base on the legal form of the defendant holding title (i.e. corporation, partnership, unincorporated association or natural person). There is no provision for limited liability companies.

Instinctively, I thought there should be a statute somewhere that says a limited liability is treated the same as a partnership, but after spending 2 hours searching, I am not able to locate any such statute.

I am not entirely sure who to direct this concern to, but I know courts are issuing attachments for LLCs.

Could you bring this up to the powers that be so LLCs are treated the same in the CCP 487.010.

Thanks in advance.

EMAILS FROM DAVID KESTNER
(3/22/17, 3/23/17)

Hi,

I practice worker's compensation law. I started practicing civil litigation and have some understanding how organized statutes can be.

The labor code needs attention. For example; LC section 5501,5(c)

If the venue site where the application is to be filed is the county where the employee s attorney maintains his or her principal place of business, the attorney for the employee shall indicate that venue site when forwarding the information request form required by Section **5401.5**. The employer shall have 30 days from receipt of the **information request form** to object to the selected venue site. Where there is an employer objection to a venue site under paragraph (3) of subdivision (a), then the application shall be filed pursuant to either paragraph (1) or (2) of subdivision (a).

Neither LC 5401.5 nor information request form exist, nor have they existed for years.

And the issue continue. It is as if someone has tried to make the code unapproachable.

Statutes for TTD [temporary total disability] are all over the place.

4061 falls into the section for the basis for a QME [qualified medical evaluator] examination but it includes the defendant's obligation to pay PDA's [permanent disability advance] (4061(a)).

This turns the concept of statutory scheme on its head. I am thinking of a specific case where the appeals court attempted to apply the statutory scheme analysis to this code, turn out to be a mess and no one wants to touch it.

If you need me I am here for you.

Sincerely,

David Kestner

I don't want to over burden you with things that are not within your control, but there is some serious work that needs to be done to the material aspects of the labor code.

For example and to return to LC 4061 subsection (i), it is not clear what type of medical evaluation has to be done to put permanent disability (PD) before a judge.

To me it is clearer than for others, there has to be a PD report from the primary treating physician (PTP) and a QME/AME [agreed medical evaluator], but the code does not make this clear.

If I am right, then there is a problem because some PTP's will not provide a report concerning PD, because, I assume, of the income generated by a non-MMI or maximum medically improved condition.

In late 2015 this became an issue as to the QME/AME evaluation. Defendants claimed the case could not go forward because there was no QME/AME evaluation even though the defendant sat on its hands.

If there was a QME report that did not find the applicant MMI discovery was still open and you could not, in most cases, argue PD.

I am testing the statue, via petition for reconsideration, as it concerns whether or not a PTP MMI report is needed. It should work both ways as the intent of the statute is to provide the judge with two views. However, many judges think a medical evaluation that does not discuss PD by the PTP is sufficient. (It is about a 50/50 split among judges that I have talked to.)

EMAIL FROM RYAN MECKFESSEL
(10/24/17)

Dear Ms. Burford,

I would like to propose a revision to the law to clarify an entities responsibility to respond to a subpoena duces tecum by providing documents maintained by the entity within the state. Kaiser, for example, has internal policies and procedures that it will not produce information from one location in response to a subpoena to another location. So, if you normally see a physician at one location, but then have an appointment at another location, Kaiser, at least theoretically, would not produce documents relating to the second location in response to a subpoena addressed to the custodian of records at the first facility. While I disagree that this is a proper or even good faith reading of the current law, it does beg the question whether the law could and should be updated to end this kind of abusive practice. Clarity would be considerably more useful to Californians than the right to move to compel compliance with a subpoena.

Thank you,

Ryan J. Meckfessel

EMAILS FROM JACK QUIRK
(10/20/17, 11/14/17)

Dear Mr. Hebert,

I hope this finds you well -- and I suppose I am assuming this finds you still with the Commission.

You may recall previous communications between us concerning the Uniform Statutory Rule Against Perpetuities (Probate Code section 21200, et seq.) Those communications focuses on Article 1, section 21201, of the act which provides that the act "supersedes the common law rule against perpetuities," on one hand, and Article 5, section 212225, of the which as initially enacted excepted a variety of interests, specifically non-donative interests, from the act (i.e., from "This chapter....") A 1996 amendment, thanks to your involvement, substituted the phrase "Article 2 (commencing with Section 21205)" for the original "This chapter" removing uncertainty as to whether the act had in fact superseded the common law rule with respect to non-donative transfers.

A textual difficulty of a similar nature has been presented to me in regard to the Marketable Record Title Act (MRTA)--which seemingly has more potential to present significant practical difficulty. The difficulty concerns whether Chapter 5 of the MRTA ("Powers of Termination," section 885.010, et seq.) is intended to alter the common law classification of the interest created by the conventional oil and gas lease. You may know (though I suppose there is no reason to assume so) that a conventional oil and gas lease is made for a term consisting of an initial or "Primary" term of fixed duration (2 years, 10 years, 20 years, etc.) following by a "Secondary" term of indefinite duration, e.g., "for so long thereafter as the lessee obtains production in paying quantities" under the lease. The seminal decision in *Dabney v. Edwards* (1935) 5 Cal.2 1 (attached) established that such oil and gas "leases" actually create interests which are *in duration* a determinable fee interest. The qualifying phrase "in duration" is significant here, since *Callahan v. Martin* (1935) 3 Cal.2d 110 and *Gerhard v. Stephens* (1968) 68 Cal.2d 864 (the latter attached) make clear that oil and gas rights interests may be severed from "fee simple" title and separately held (as discussed in *Callahan*), and may then be described as "fee" interests--using 'fee' solely as descriptive of their duration and not in description of the fundamental character of the interest--which was established in *Callahan* and confirmed in *Gerhard* to be essentially indistinguishable from an easement. This, is entirely consistent with *Dabney v. Edwards*, since if oil and gas rights may be held in "fee" there is no reason they cannot also, as by the conventional oil and gas lease, be held in "determinable fee"--as a description of their duration, without loosing sight of their essential character. In the same way, it may be correct to refer to an access easement as being granted in "fee" or for a "term of years" of, indeed, "in determinable fee."

Sorry for the length of that introduction, but I hope you will find it pertinent.

The basic thrust of the MRTA provisions in question is to convert determinable fee interests (automatically terminating without further act upon the occurrence of specified

limiting conditions) into fee interests on condition subsequent (interests that may be terminated by act of the grantor on the occurrence of specified limiting conditions). This is provided in section 885.020, as follows:

> "Fees simple determinable and possibilities of reverter are abolished. Every estate that would be at common law a fee simple determinable is deemed to be a fee simple subject to a restriction in the form of a condition subsequent. Every interest that would be at common law a possibility of reverter is deemed to be and is enforceable as a power of termination."

With nothing more, it would seem that the MRTA has the effect of converting the lessee's interest under a conventional oil and gas lease from a determinable fee (e.g., automatic termination upon cessation of production in paying quantities) into a fee interest on condition subsequent (e.g., optionally terminable by act of the lessor upon cessation of production in paying quantities). Such a change would have major implications in the context of oil and gas leases and operations since, for one thing, it is often unclear prior to litigation whether in fact there has been uninterrupted production in paying quantities (see. e.g., Lough v. Coal Oil (1990) 217 Cal.App.3d 1518), determination of production in paying quantities can be extremely complex or very simple in different circumstances and, consequently, so long as considered "determinable fee" interests, oil and gas leases may often terminate for lack of production in paying quantities without either the lessor of the lessee being aware of that termination until a dispute arises between them at a later date.

It might be possible to avoid any suggestion that the MRTA has any such affect on the interests created by a conventional oil and gas lease, by concluding that the legislation was enacted without any understanding or consideration of its potential implications in the relatively arcane oil and gas context. But that conclusion seems unavailable given the language of section 885.015(a) excluding from the application of the chapter "a power of termination conditioned upon the continued production or removal of oil or gas or other minerals." Actually, the breadth of that exclusion (this chapter) and the limitation of the exclusion to described "powers of termination" combine to present a language anomaly similar to that which initially existed in regard to the statutory rule against perpetuities (discussed above).

Section 885.010(a)(1) defines the phrase "power of termination" as used in the chapter to include "a possibility of reverter that is deemed to be and is enforceable as a power of termination pursuant to section 885.020." However, the exclusion in section 885.015(a)(1) only excludes from conversion (ie., from the chapter as a whole) a "power of termination conditioned upon the continued production or removal of oil or gas or other minerals." A literal reading is that only such described automatically terminable interest as are subject to conversion under the act are excluded from the operation of the act. Certainly we can agree that this is not the intent.

It seems to me that the reasonable conclusions are twofold. Either the introductory language to subsection 885.010(a)(1) should be "a possibility of reverter conditioned upon the continued production or removal of oil or gas or other minerals," or the introductory phrase at the beginning of the section should be changed to include only

specific portions of the chapter in question rather than the entire chapter (reminiscent of the initially difficulty with the statutory rule against perpetuities).

In the event that any interest you might have had in the subject has survived the foregoing, I am available to pursue this with you further.

Best regards,
Jack Quirk

Ms. Buford,

Thank you for the reminder. I have been trying to find time for a more comprehensive response.

There is a potential for a substantial practical problem. Right now virtually all of the thousands of oil and gas leases in force throughout the State of California are assumed to be in effect a grant of oil and gas rights in determinable fee, subject to possibility of reverter, under the decision in *Dabney v. Edwards*. (1935) 5 Cal.2d 1, 11-12. As there noted in the Dabney decision, this is so whether the limiting condition or event is expressed in terms of continued production or some other matter the occurrence of which is uncertain at the time of entry into the oil and gas lease.

The direct consequence of this classification of the interests created by a contemporary oil and gas lease (determinable fee/lessee and possibility of reverter/lessor) is that an oil and gas lease ends upon the occurrence of the limiting event or condition without action on the part of either party (or anyone else) AND WHETHER OR NOT THE PARTIES ARE AWARE THAT THE LIMITING EVENT OR CONDITION HAS OCCURED. (*Renner v. Huntington-Hawthorne Oil and Gas Company* (1952) 39 Cal.2d 93, 98. See, also, *Montana-Fresno v. Powell* (1963) 219 Cal.App.2d 653, 669-670.) The difference between a determinable fee interest and one subject to condition subsequent is stark. ("The difference is a distinct one, and in the case of a determinable fee which terminates upon the happening of the contingency the estate is at an end without any further act on the part of the defendant; while in the case of a vested estate subject to defeasance upon condition broken-a condition subsequent-the defendant, upon the happening of the contingency, is entitled only to the right to terminate the estate, or a right of reentry. *Henck v. Lake Hemet Water Company*, 9 Cal.2d 136, 140.)

The practical difficulty created by this state of affairs is not merely that the limiting event or condition may occur without the knowledge of either party, but that the occurrence of the limiting event or condition may be unclear even to someone who is paying close attention. Indeed, litigation in this area is not typically about when--but whether--the limiting condition or event has occurred. (See, *Renner*, *Montana-Fresno*, *Lough v. Coal Oil* and *San Mateo Community College District*, all attached.) As illustrated in those decisions, the most common oil and gas lease habendum provision continues the lease in force "so long thereafter as oil and gas are produced in paying quantities." As straightforward as that may seem, what follows is that production in paying quantities

may "cease" and the lease terminate without either party intending or being aware of that event. This is so, *first*, because "production in paying quantities" is an accounting question, and, more critically, because the period of time over which "paying quantities" is evaluated is left to the sound discretion of a trial court. (*Lough v. Coal Oil, Inc.* (1990) 217 Cal.App.3d 1518, 528-1529.)

The intended effect, if any, of the Powers of Termination provision in chapter 5 of the Marketable Record Title Act upon the lessor and lessee interests in conventional oil and gas leases is unclear. Sec. 885.015 excludes from operation of "this chapter" certain interests conditioned on continued production of oil or gas or other minerals. However, the interest thus excluded is limited to "a power of termination...." Of course, the lessor's interest under a conventional oil and gas lease is not a power of termination, unless the lessee's interest have been converted by the MRTA to a fee on condition subsequent. (Sec. 885.010(a)(1): "'Power of termination' means...and includes a possibility of reverter that is deemed to be and is enforceable as a power of termination pursuant to Section 885.020."

If the Commission intended to convert the oil and gas lessee's interest from one in determinable fee to a fee on condition subsequent (whether or not also excluding them from the application of specific provisions, such as the expiration provisions of Sec. 885.030, etc.), then this is certainly not clear. On the other hand, if the Commission intended to outright exclude such leases from operation of the entire chapter, then limitation of the exclusion in Sec. 885.015 to "a power of termination...," etc., certainly does not make that clear either.

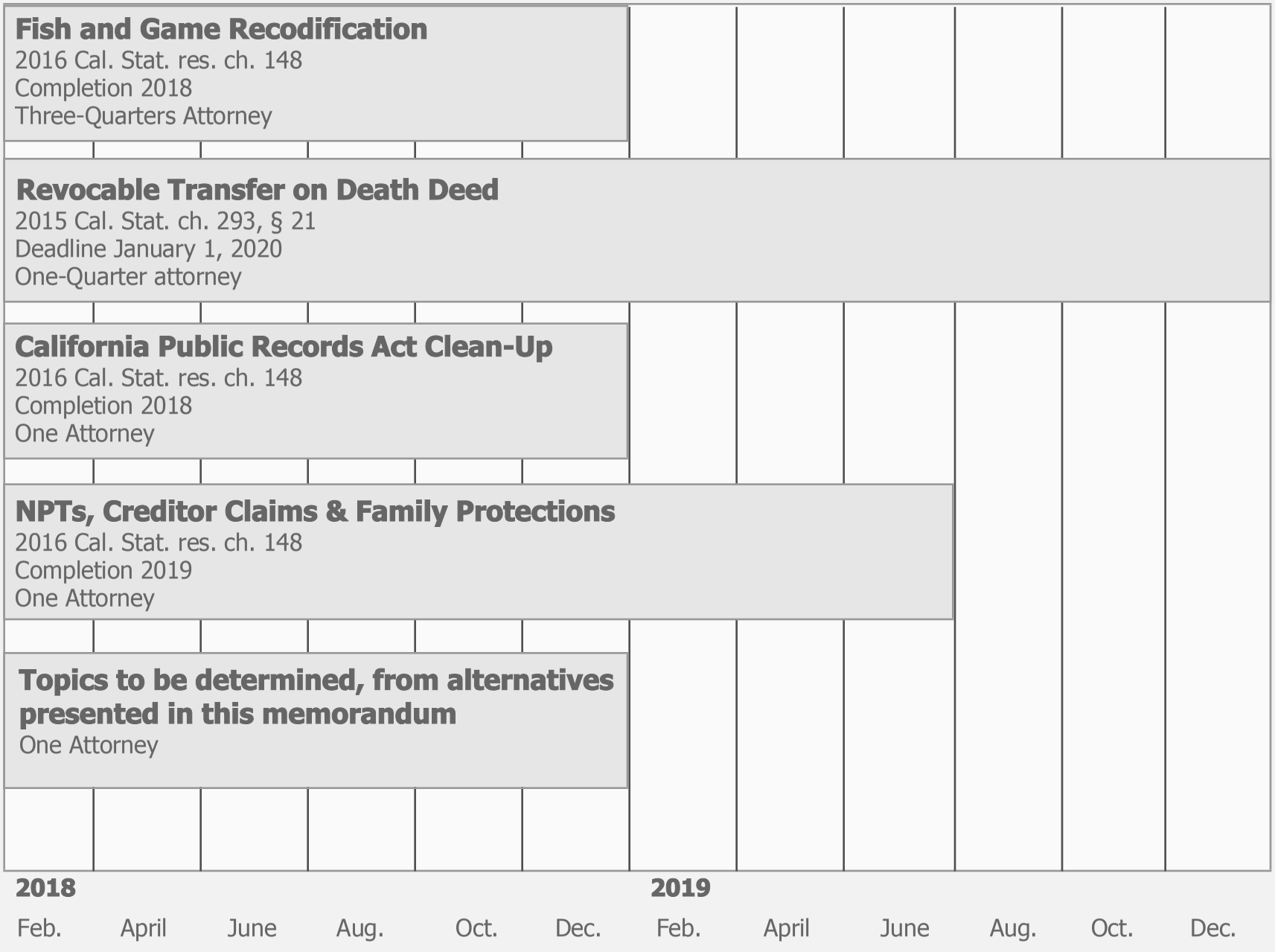
Furthermore, the legislative committee/law revision commission comment in the annotated West's Civil Code for Sec. 885 suggests a intent to make it "clear that this chapter applies only to classical possibilities of reverter." But that is not at all clear, since the two specific exceptions (for conventionally worded oil and gas leases and ground leases) do not remotely cover all possible varieties of contemporary determinable fee interests.

Finally, if the desire were to exclude all contemporary oil and gas leases, then thought should be given to such typical habendum clause variables as "so long there after as the lessee conducts production or drilling operations hereunder or is excused therefrom by any provision of this lease." Is that an excluded possibility of reverter (or power of termination, in the language of Sec. 885.015(a)), "conditioned on the continued production or removal of oil or gas or other minerals"?

If this is a topic considered worthy of consideration by the Commission, then I am sure there are other oil and gas attorneys in the State who would be interested to weigh-in on it.

Thank you, again, and best regards,
Jack Quirk

Projected Completion of Active Studies — 2018 / 2019



EX 9