

First Supplement to Memorandum 2020-19

Pandemic Response: Possible Actions

In Memorandum 2020-19, the staff raised the possibility of the Commission¹ devoting part of its resources to working on statutory reforms to address pandemic-related problems. The suggestion was that the Commission work within its existing authority, on topics that would be uncontroversial and unlikely to be addressed by other stakeholder groups. The memorandum gave examples of reforms that might meet those criteria.

After consulting with the Chair, the staff sent notice of that memorandum to all of its mailing lists. The hope was that our greater stakeholder community might comment on the examples given, suggest other possible reforms, and share their thoughts on the value of the Commission conducting that kind of work.

The Commission has received email responding to the memorandum. In addition, one of the Commissioners put the staff in touch with an attorney (Valerie Kushel) who had written an opinion column advocating for a reform similar to one of the examples given in the memorandum. She gave permission to reproduce her article. Those materials are attached in the Exhibit as follows:

Exhibit p.

- Letter from Mark Poochigian to Secretary of State Padilla (4/13/20).....1
- Adrian Adams, Adams & Stirling (4/17/20).....5
- Valerie Kushel, *California Needs to Revamp In-Person Notary Rules Amid Coronavirus Crisis* (Marin Voice, 4/18/20)6
- Ron Kelly, Berkeley (4/22/20)8

In addition to those materials, the staff received informal communications on possible reforms.

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.

The public comment is discussed briefly below. The memorandum also discusses a few further points that have occurred to the staff.

PUBLIC COMMENT

The public comment was uniformly positive. Most of the comment focused on specific reform possibilities, rather than on the general question of whether the Commission should use its resources on this kind of work.

An exception was the letter from Ron Kelly. Mr. Kelly is a mediator and a long-time contributor to Commission work on that subject. In addition to expressing support on the issue of remote notarization, he supports the general idea of the Commission working on pandemic-related reforms.²

Comment on specific reforms is discussed below.

Teleconference Meetings for Common Interest Developments

Comment on the possibility of authorizing all-teleconference meetings for CIDs was uniformly positive.³ Some suggestions were received on how to improve the proposed reform. Those suggestions focused on the triggering condition that would make the proposed rule operative. Suggestions included:

- Be clearer about what types of health controls would trigger the provision.
- Make the provision operative during any declared emergency, not just infectious disease emergencies.
- Make the provision operative without limiting it to emergencies.
- Allow members to vote electronically, not just officers.

Remote Notarization

The Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”) is promoting the idea of allowing remote notarization. The Exhibit includes a letter that TEXCOM wrote Secretary of State Padilla on that topic.⁴ TEXCOM notes that the Secretary of State has issued guidance suggesting that those who wish to use remote notarization may do so with a notary located in one of the handful of states that authorize remote notarization. TEXCOM argues that this is an inadequate solution.

2. See Exhibit pp. 8-9.

3. See, e.g., Exhibit p. 5.

4. See Exhibit p. 1.

Valerie Kushel, an estate planning attorney from San Rafael, wrote an opinion column in the *Marin Voice* advocating for allowing remote notarization.⁵ Ms. Kushel writes that 13 states have adopted some form of emergency rule allowing remote notarization.

Ron Kelly also writes in strong support of the concept of allowing remote notarization.⁶

FURTHER STAFF THOUGHTS

The staff had two further thoughts about the general topic of studying pandemic-related reforms.

Authority

The concept outlined in Memorandum 2020-19 is that the Commission might do pandemic-related work that falls within the scope of its existing study authority.

There is another possibility. The Commission's resolution of authority is currently pending before the Legislature, as Assembly Concurrent Resolution 173 (Gallagher). If the Commission were to request it, that resolution could perhaps be amended to grant additional authority to the Commission, to study any emergency-related reform. Such a grant would avoid the Commission needing to set aside good reform ideas that come before it, on the ground that the subject matter falls outside of its authority.

Memorandum 2020-19 provides an actual example of this problem. In discussing the possibility of authorizing teleconference meetings for CIDs, the memorandum notes that a similar reform might be useful for all corporate entities.⁷ Regardless of the merits of that idea, the Commission currently lacks authority to study and make recommendations regarding corporations law.

If the Commission wishes to request an expansion of its authority, the staff could ask that a grant of study authority along the following lines be added to ACR 173:

Whether the law should be revised to accommodate response to an epidemic or other declared emergency.

5. See Exhibit pp. 6-7.

6. See Exhibit pp. 8-9.

7. See Memorandum 2020-19, pp. 4-5.

Timing and Deliberative Procedure

As discussed in Memorandum 2020-21, the use of videoconferencing to conduct Commission meetings could allow for more frequent meetings. Another argument in favor of that approach is that it would allow the Commission to move faster on emergency reform proposals.

If the Commission is interested in working on such reforms, it might also consider shortening its usual deliberative process.

For example, a pandemic reform that the Commission decides to approve could follow this process:

- **Meeting 1.** The Commission provisionally approves a reform proposal.
- **Gap between Meeting 1 and Meeting 2.** Staff drafts a tentative recommendation with review and approval of the chair. It is circulated for a short period of public comment.
- **Meeting 2.** The Commission considers public comment, makes any necessary revisions to the proposal, and approves it as a final recommendation.
- **Period after Meeting 2.** Staff drafts a final recommendation with review and approval of the chair. It is provided to the appropriate legislator or legislative committee for possible introduction.

That would allow for the consideration and approval of a final recommendation in two to three months. The biggest time constraint would be the public comment period. But that could perhaps be shortened without loss of essential information, through active canvassing of stakeholder groups.

It seems likely to the staff that pandemic-related reforms of the type that the Commission might study would probably be narrow and fairly straightforward (like the examples given in Memorandum 2020-19) and might not require deep and lengthy analysis. **The Commission should give this some thought.**

Respectfully submitted,

Brian Hebert
Executive Director