Admin. October 8, 2020

Memorandum 2020-52

New Topics and Priorities

Once a year, the Commission reviews its current program of work, determines what its priorities will be for the next year, and decides whether to request that topics be added to or deleted from its legislatively-enacted Calendar of Topics Authorized for Study ("Calendar of Topics").[1] The Commission generally undertakes this analysis after the Legislature has adjourned for the year.[2]

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 topic suggestions made or received in the last year. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

At the upcoming 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 communications and other materials are attached to and discussed in this memorandum:

1. The current Calendar of Topics is in 2020 Cal. Stat. res. ch. 46 (ACR 173 (Gallagher)).

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. This year, the Legislature adjourned on August 31. The last day for the Governor to act on bills was September 30. See https://www.senate.ca.gov/legdeadlines.

EXPLANATION OF TERMINOLOGY

The California Law Revision Commission ("CLRC") currently consists of two separate decision-making bodies:

(1) The Commission, which has existed since 1953 and focuses primarily on civil law.
(2) The Committee on Revision of the Penal Code, which was just added to CLRC on January 1, 2020, and focuses exclusively on criminal law and related matters.[3]

For purposes of clarity, the remainder of this memorandum uses the following nomenclature:

- "Commission" means the longstanding entity that focuses primarily on civil law.
- "Committee" means the new entity that focuses exclusively on criminal law and related matters.
- "CLRC" means the entire agency (the Commission and the Committee combined).

PREFATORY NOTE

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

The Commission's staff consists of four attorneys (the Executive Director, the Chief Deputy Director, and two staff counsel) and an administrative analyst. Due to the pandemic, one of those attorneys is presently on call to do contact-tracing for the state, so he is only available for small assignments that he could drop on short notice. Two of the other attorneys work part-time; one of them has young

3. See 2019 Cal. Stat. ch. 25 (SB 94 (Committee on Budget & Fiscal Review).

children whose school may sometimes be operating remotely. An additional constraint is that the Executive Director, the Chief Deputy Director, and the administrative analyst have significant responsibilities for the Committee, not just for the Commission.

The Commission receives some assistance with proofreading and similar matters from its former secretary, who serves as a retired annuitant. The Commission also receives assistance from externs and other law students, particularly from UC Davis School of Law. The law students are typically assigned "relatively modest and uncontroversial law reform projects, within the Commission's study authority,"[4] with the objective of providing opportunities for students to assist with implementing legislation.[5]

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 committee analysis explains the purpose of that requirement:

> Given the limited resources of the commission …, 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.[6]

SCOPE OF MEMORANDUM

The purpose of this memorandum is to help the Commission decide what it wants to work on in the coming year. The memorandum does not address the work priorities of the Committee. Those decisions will be made by the Committee, not by the Commission.

4. Minutes (Apr. 2015), p. 3.
5. *Id*.
6. 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 that 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.[7]

In the past, the bulk of the Commission's study topics came 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, the majority of the Commission's active studies are direct assignments from the Legislature.

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. The Commission did not receive any new assignments during the 2020 legislative session. All of the current legislative assignments are described below.

Recodification of Toxic Substance Statutes

In August 2018, the Legislature approved Senate Concurrent Resolution 91 (Roth).[8] That 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 to revise Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, and related provisions, to improve the organization and expression of the law. Such revisions may include, but are not limited to, grouping similar provisions together, reducing the length and complexity of sections, eliminating obsolete or redundant provisions, and correcting technical errors. The recommended revisions shall not make any substantive changes to the law. The commission's report shall also include a list of substantive issues that the commission identifies in the course of its work, for possible future study[.]

7. Gov't Code § 8293.
8. 2018 Cal. Stat. res. ch. 158; see also 2020 Cal. Stat. res. ch. 46.

This assignment does not have a specified deadline. Even so, the Commission typically gives high priority to a legislative assignment, and it has done so for this topic.

The assignment encompasses two chapters in Division 20 of the Health and Safety Code. The Commission decided to study Chapter 6.8 first and then turn to Chapter 6.5.

Work on Chapter 6.8 is in the final stages. Early this year, the Commission approved a tentative recommendation for the recodification of that chapter.[9] The Commission also approved a separate tentative recommendation for the associated conforming revisions.[10] The Commission will be considering the comments on those tentative recommendations soon.

Recently, the Commission also began to work on Chapter 6.5. It approved drafting practices and a proposed organizational outline for the recodification of that law.[11]

The staff recommends that the Commission continue to prioritize work on this study in 2021.

California Public Records Act

In August 2016, the Legislature approved Assembly Concurrent Resolution 148 (Chau).[12] 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.
>
> (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.

9. See Tentative Recommendation on *Hazardous Substance Account Recodification Act* (Jan. 2020).
10. See Tentative Recommendation on *Hazardous Substanve Account Recodification Act: Conforming Revisions* (Jan. 2020).
11. See *Draft* Minutes (May 2020), p. 4.
12. 2016 Cal. Stat. res. ch. 150; see also 2018 Cal. Stat. res. ch. 158.

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

The Legislature requested that the Commission undertake this study "as soon as possible" given the Commission's current duties and workload demands.

As requested, the Commission prioritized this study. In late 2019, it approved a final recommendation proposing a nonsubstantive recodification of the California Public Records Act ("CPRA").[13] The Commission also approved a separate recommendation consisting of conforming revisions for the proposed recodification.[14]

Early this year, Assemblymember Chau introduced two bills to effectuate the Commission's recommendations on this topic.[15] At the request of a coalition of stakeholders, work on those bills was later suspended due to the pandemic.

The proposed legislation may require some updating before it is reintroduced. **The Commission should work with Assemblymember Chau and his office on reintroducing the proposed legislation.**

Transfer on Death Deeds

In August 2016, the Governor signed Assembly Bill 1779 (Gatto),[16] which expanded the Commission's previously-assigned[17] follow-up study on revocable transfer on death deeds ("RTODDs"). 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.

13. See *California Public Records Act Clean-Up*, 46 Cal. L. Revision Comm'n Reports 207 (2019).
14. See *California Public Records Act Clean-Up: Conforming Revisions*, 46 Cal. L. Revision Comm'n Reports 563 (2019).
15. AB 2138 (Chau) and AB 2438 (Chau).
16. 2016 Cal. Stat. ch. 179.
17. 2015 Cal. Stat. ch. 293.

(5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how 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. The Commission typically gives highest priority to such a study and it did so here, completing a final recommendation last November.[18]

Early this year, Senator Roth introduced a bill to enact the proposed legislation.[19] In response to the pandemic, however, he amended the bill so that it would extend the sunset date on the RTODD statute but do nothing more. The bill was enacted in that barebones form.[20]

The Commission should work with Senator Roth and his office on reintroducing legislation to implement the Commission's recommendation on RTODDs.

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.

18. See *Revocable Transfer on Death Deed: Follow-Up Study*, 46 Cal. L. Revision Comm'n Reports 135 (2019). The Commission addressed one narrow aspect of the study in an earlier recommendation, which was enacted into law in 2018. See *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm'n Reports 1 (2017); 2018 Cal. Stat. ch. 65 (AB 1739 (Chau)).
19. SB 1305 (Roth).
20. See 2020 Cal. Stat. ch. 238.

> (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[.][21]

Although SCR 54 does not set a deadline for completion of the assignment, the Commission has given it a fairly high priority.

In conducting this study, the Commission divided it into two subtopics, which were both included within the scope of the legislative mandate:

(1) Government *interruption* of communications. This was a study of the legality and standards for government action to suspend a communication service to address illegal use or emergency.
(2) Government *access* to communications. This was essentially a study of government surveillance of communications.

Work on the first subtopic (government *interruption* of communications) was completed in 2017. The Commission made a final recommendation for reform of existing law on that topic.[22] The recommendation was enacted into law.[23] **No further work is required on that matter.**

The Commission completed most of its work on the second subtopic (government access to communications) in 2015. As the Commission was about to develop its reform recommendations, however, 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 reform legislation. Instead, it finalized an informational report on *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements* (Aug. 2015).[24]

Senate Bill 178 was enacted, establishing the California Electronic Communications Privacy Act ("Cal-ECPA").[25] The enactment of that statute achieved all of the most important changes that the Commission would have recommended, had it proceeded with the development of a reform proposal at that time. However, there were a handful of significant issues that had not been

21. 2013 Cal. Stat. res. ch. 115.
22. *Government Interruption of Communication Service*, 44 Cal. L. Revision Comm'n Reports 681 (2016).
23. 2017 Cal. Stat. ch. 322.
24. See generally Memorandum 2015-51.
25. 2015 Cal. Stat. ch. 651.

addressed.[26] The Commission decided to postpone further work on those issues, to give the new law time to develop and settle.[27]

The Commission recently reactivated this study. **The Commission should continue to work on the topic in the coming year.**

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.[28] 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 ….[29]

The Commission has made significant progress on this topic:

- In 2018, the Commission released a tentative recommendation (over 1,200 pages long) that would repeal the existing Fish and Game Code and replace it with a reorganized Fish and Wildlife Code.[30] The original deadline for public comment on the tentative recommendation was January 1, 2020.

  The Commission later twice extended that deadline at the request of the Department of Fish and Wildlife. Comments on the "notes" included throughout the proposed legislation are now due on January 1, 2021. Comments on how the proposed Fish and Wildlife Code would reorganize the existing Fish and Game Code are due on January 1, 2022.[31]

26. See First Supplement to Memorandum 2015-3, pp. 5-7; Memorandum 2015-51, pp. 14-23.
27. See Minutes (Dec. 2015), pp. 4-5.
28. See Memorandum 2012-5, Exhibit pp. 32-33.
29. 2012 Cal. Stat. res. ch. 108.
30. See Tentative Recommendation on *Fish and Wildlife Code* (Dec. 2018).
31. See Memorandum 2019-44, pp. 8-10 & Exhibit pp. 1-2; Second Supplement to Memorandum 2020-19, p. 3 & Exhibit p. 1; Minutes (Sept. 2019), p. 4; *Draft* Minutes (May 2020), p. 3.

- In 2019, the Commission released a tentative recommendation (over 300 pages long) comprised of conforming revisions that would be necessary if the Fish and Game Code were repealed and recodified, as proposed.[32] The original deadline for public comment on the tentative recommendation was January 1, 2020. The Commission later twice extended that deadline at the request of the Department of Fish and Wildlife, in the same manner as for the tentative recommendation proposing to recodify the Fish and Game Code.[33]

Public comment on the two tentative recommendations described above is likely to be voluminous. **If the first round of comments arrives in January as expected, the Commission should give this topic priority in the coming year and it will consume a significant amount of the Commission's resources.**

One component of this legislative assignment is to "clarify program authority and funding sources."[34] At the request of the Secretary of the Resources Agency, the Commission temporarily prioritized that matter in 2017-2018.[35]

Specifically, to assist in ongoing work being done by the Department of Finance and other entities, the Commission prepared a discussion draft that examined the funding provisions of the existing Fish and Game Code and sought to identify programs that lacked funding sources.[36] The deadline for public comment was April 30, 2018. No comments were received. **The Commission should follow-up on the funding issues when it considers the comments on the two tentative recommendations discussed above.**

Deadly Weapons

In 2006, the Legislature directed the Commission to study the statutes relating to control of deadly weapons.[37] The objective was to make the statutory scheme more clear and readily understandable, without making substantive changes. The Commission completed its final report on this topic in compliance with the due

32. See Tentative Recommendation on *Fish and Wildlife Code: Conforming Revisions* (Feb. 2019).
33. See Memorandum 2019-44, pp. 8-10 & Exhibit pp. 1-2; Second Supplement to Memorandum 2020-19, p. 3 & Exhibit p. 1; Minutes (Sept. 2019), p. 4; *Draft* Minutes (May 2020), p. 3.

In addition to the tentative recommendations described in the text, the Commission prepared two other tentative recommendations. See *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 1),* 44 Cal. L. Revision Comm'n Reports 115 (2015); *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 2),* 44 Cal. L. Revision Comm'n Reports 349 (2015). The proposed legislation in those tentative recommendations was enacted. See 2015 Cal. Stat. ch. 154; 2016 Cal. Stat. ch. 546.
34. 2012 Cal. Stat. res. ch. 108.
35. See First Supplement to Memorandum 2017-38; Minutes (Aug. 2017), p. 9.
36. See Discussion Draft on *Fish and Game Code: Funding Provisions* (Feb. 26, 2018).
37. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)).

date of July 1, 2009. Two voluminous bills[38] and some follow-up legislation[39] 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."[40] The Legislature authorized the Commission to study those issues.[41]

In 2014 and 2018, the Legislature enacted bills to implement Commission recommendations addressing some of the "Minor Clean-Up Issues for Possible Future Legislative Attention."[42] **The Commission should treat the remainder of the list as a low-priority matter, as the name of the list implies.**

Trial Court Restructuring

California's trial court system was dramatically restructured in the past quarter century. The restructuring involved three major reforms: (1) trial court unification, (2) state funding of trial court operations, and (3) a new personnel system for the trial courts.[43] Achieving those 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 2,000 code sections) and a constitutional measure.[44]

Most recently, Assemblymember Maienschein introduced a bill to implement several of the Commission's recommendations on trial court restructuring:

- *Statutes Made Obsolete by Trial Court Restructuring (Part 6): Court Facilities*.[45]

38. See 2010 Cal. Stat. ch. 178 (SB 1115 (Committee on Public Safety)); 2010 Cal. Stat. ch. 711 (SB 1080 (Committee on Public Safety)).
39. 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)).
40. *Nonsubstantive Reorganization of Deadly Weapon Statutes,* 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009).
41. See 2010 Cal. Stat. ch. 711, § 7.
42. See 2014 Cal. Stat. ch. 103 (AB 1798), implementing *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013); 2018 Cal. Stat. ch. 185 (AB 2176), implementing *Deadly Weapons: Minor Clean-Up Issues (Part 2)*, 44 Cal. L. Revision Comm'n Reports 471 (2015).
43. For a more detailed discussion of these reforms, see First Supplement to Memorandum 2014-53, pp. 2-5.
44. For further discussion of the Commission's role, see *id.*
45. 46 Cal. L. Revision Comm'n Reports 25 (2019).

- *Trial Court Restructuring Clean-Up: Task Force on Trial Court Employees*.[46]
- *Trial Court Restructuring Clean-Up: Obsolete "Constable" References*.[47]
- *Trial Court Restructuring Clean-Up: Obsolete References to Marshals*.[48]

The bill was just enacted.[49]

Another recommendation (*Trial Court Restructuring Clean-Up: Regional Justice Facilities Acts*) is ready for introduction in 2021. In addition, the Commission might approve a final recommendation on *Trial Court Restructuring Clean-Up: Completion of Studies Under Government Code Section 70219* at its upcoming meeting. If so, it would be logical to combine the proposed legislation from these two recommendations into a single bill.

Although the Commission has been making good progress on trial court restructuring, there is still substantial work left to do. A list of the remaining projects is attached as Exhibit pages 43-44.

Pursuant to Government Code Section 71674, the Commission is responsible for continuing the code clean-up. **The staff recommends that the Commission continue to work on this topic in 2021.**

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. A suggested new project relating to enforcement of judgments is discussed later in this memorandum.

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.[50] The Commission exercises this authority from time to time,

46. 46 Cal. L. Revision Comm'n Reports 1 (2019).
47. 45 Cal. L. Revision Comm'n Reports 441 (2018). This recommendation proposed to amend three code sections, but only one of the proposed amendments (the amendment of Corp. Code § 14502) was included in the bill. The other two amendments were omitted because they might require an initiative measure. See *id.* at 448.
48. 46 Cal. L. Revision Comm'n Reports 105 (2019).
49. See 2020 Cal. Stat. ch. 210.
50. Gov't Code § 8298.

particularly when a student extern is available to pursue a useful, educationally-valuable project of reasonable scope.

Recent developments include:

- In the new topics memorandum for 2018, the staff described an issue relating to discrepancies between (1) statutory forms for property transactions and (2) the statutorily required format for a certificate of acknowledgment (see Civil Code Section 1189(a)). The Commission decided to study this issue "as resources permit, in the coming year."[51] The staff has not yet undertaken that study.
- In the new topics memorandum for 2019, the staff discussed the possibility of reviewing the codes for additional provisions to include in the index of exemptions that is located at the end of the CPRA.[52] The staff also raised the possibility of studying whether to repeal Government Code Section 25539.10 (relating to certain property in San Joaquin County) as obsolete.[53] The Commission did not specifically address either of those possibilities in deciding its 2019-2020 work priorities, but adopted the staff's recommendation to "study one or more technical or minor substantive issues on a low priority basis, if time permits (probably as a student project)."[54] The staff has not yet undertaken either of the technical projects just described.

It might be possible to undertake one or more of the above projects in the coming year, 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.[55] 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 repealed (to the extent that the problematic defect has not been addressed). The Commission does not ordinarily propose specific legislation to effectuate its general recommendation on this matter.

The staff has not yet presented such research for 2020. We will do so in connection with the Annual Report, which we will prepare for consideration in

51. See Memorandum 2018-57, pp. 1, 38; Minutes (Dec. 2018), p. 3.
52. See Memorandum 2019-44, pp. 40-41.
53. See *id.* at 41-42.
54. See *id.* at 48; Minutes (Oct. 2019), p. 4.
55. Gov't Code § 8290.

November or December. **If the staff's research uncovers an issue that warrants Commission study, the Commission could consider that point at that time.**

CALENDAR OF TOPICS

The Commission's Calendar of Topics currently includes 13 topics.[56] The next section of this memorandum reviews the status of each topic listed in the Calendar.

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.

There are currently no active studies focusing on this topic. **The topic should still be retained in the Calendar, in case corrective legislation is needed in the future.**

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 undertaken work on, 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 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

56. See 2020 Cal. Stat. res. ch. 46.

"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.[57]

In 2010, the Commission circulated the background study for a 120-day public comment period.[58] No detailed comments were received in response to that request. The Commission tabled this topic, having received new, higher priority assignments from the Legislature.

The Commission briefly reactivated this study in June 2013.[59] However, further work on the topic had to be suspended due to other demands on staff resources.

The Commission reactivated this study again in 2017. In 2018, the Commission, based on stakeholder input, decided to suspend work on a general reform of the law on nonprobate transfer liability.[60] The Commission decided to proceed with work on two narrower issues:

(1) Scope of the surviving spouse liability rule in Probate Code Sections 13550 and 13551.
(2) Application of probate family protections to nonprobate transfers.[61]

The Commission completed a final recommendation on the first issue in 2019,[62] but the proposed legislation has not yet been introduced in a bill. **The Commission should seek an author to introduce that legislation in 2021.**

The Commission began studying the second issue this year. After considering stakeholder input, the Commission decided to discontinue work on the issue.[63] **No further action on it is contemplated.**

57. See Memorandum 2012-45, Exhibit p. 2.
58. See Memorandum 2010-27; Minutes (June 2010), p. 7.
59. Memorandum 2013-25; Minutes (June 2013), p. 14.
60. Minutes (May 2018), p. 6.
61. *Id*. at 7.
62. See *Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551,* 46 Cal. L. Revision Comm'n Reports 11 (2019).
63. See Minutes (Aug. 2020), p. 4.

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 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.[64] Legislation to implement that recommendation was introduced as Senate Bill 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.[65] 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.[66]

With the resolution of SB 105 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.[67] Those procedures are referred to here collectively as simplified administration procedures.

In 2017, in response to a request for input on RTODDs, 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 an RTODD beneficiary for a decedent's unsecured debts.[68] The governing

64. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008).
65. See generally Memorandum 2009-22.
66. See 2010 Cal. Stat. ch. 620; Prob. Code §§ 21360-21392; see also 2017 Cal. Stat. ch. 56 (amending Probate Code Section 21380).
67. See generally Division 8 of the Probate Code.
68. See Memorandum 2017-35, Exhibit pp. 5-8; see also Memorandum 2017-35, pp. 4-6.

liability provisions for RTODD beneficiaries were very closely modeled on provisions governing liability of a recipient of the decedent's property under the simplified administration procedures.[69] Thus, TEXCOM's concerns suggested that the liability provisions for the simplified administration procedures may be in need of reform.

At the time that TEXCOM's letter was presented, the Commission approved the staff recommendation to study the simplified administration procedures.[70]

In 2018, the staff, building on the work of student externs, completed two recommendations related to the simplified administration procedures.[71] Those recommendations were enacted into law in 2019.[72]

This year, the Commission completed a recommendation related to liability rules for the simplified administration procedures.[73] **The proposed legislation is ready for introduction in 2021.**

Use of Uniform TOD Security Registration Act to Transfer Share of Ownership in Stock Cooperative

In its RTODD follow-up study, the Commission concluded that a deed is not the right kind of instrument to transfer ownership of a share in a stock cooperative. For that reason, the Commission recommended that stock cooperatives be excluded from the definition of "real property" that can be conveyed by an RTODD.[74]

However, the Commission also decided to study whether "existing law allowing the transfer of securities by TOD registration could be adapted to provide a means of transferring an ownership interest in a stock cooperative."[75]

The Commission began working on that topic in 2020. **It should continue to study the topic in 2021, as time permits.**

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

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

71. *Disposition of Estate Without Administration: Dollar Amounts*, 45 Cal. L. Revision Comm'n Reports 387 (2018); *Disposition of Estate Without Administration: Interest Rate*, 45 Cal. L. Revision Comm'n Reports 419 (2018).

72. 2019 Cal. Stat. ch. 122 (AB 473 (Maienschein)).

73. See *Draft* Minutes (May 2020), p. 6.

74. See Minutes (Dec. 2018), p. 7; *Revocable Transfer on Death Deed: Follow-Up Study*, 46 Cal. L. Revision Comm'n Reports 135, 144-45, 157 (2019).

75. Minutes (Dec. 2018), p. 8.

Transfer of Use-Restricted Property at Death

In its RTODD follow-up study, the Commission noted that real property can be subject to an enforceable restriction on who may occupy the property. For example, a condominium project might be subject to an enforceable rule that requires board approval of any new occupant.

That prompted a question: What is the result when such property is inherited? Can the heir, devisee, or beneficiary take title even if that person is ineligible to occupy the property? The Commission decided to consider that issue in a separate study. The study would consider all forms of property transfer on death, not just a transfer by an RTODD.[76]

In last year's new topics memorandum, the staff suggested that "[w]ith the Commission's recent work on probate matters, it may be useful to address this relatively narrow issue sooner rather than later."[77] The Commission agreed with that recommendation,[78] but the staff has not yet begun to work on the topic. **The Commission may want to work on this project in 2021, as time permits.**

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.

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

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76. Minutes (Dec. 2018), p. 8.
77. Memorandum 2019-44, p. 39; see also *id.* at 47 (recommending that the Commission "[b]egin one or two new studies of the estate planning matters discussed above (transfer of use-restricted property at death and use of Uniform TOD Registration Act to transfer interest in stock cooperative).").
78. Minutes (Sept. 2019), p. 4.

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. Under that authority, the Commission made ten recommendations that were enacted into law.[79] In addition, the Commission recommended the creation of a CID Ombudsperson in the Department of Consumer affairs. That office would have been given authority to provide educational resources to homeowners, give advice, and mediate disputes. It would have received fee-based revenue sufficient for that purpose. The Ombudsman would have also made a recommendation to the Legislature on whether its powers should be expanded to include administrative enforcement of CID law.[80] That proposal was approved by the Legislature, but vetoed by the Governor.[81]

That body of work covered the ground that the Legislature had authorized the Commission to study. For that reason, the Commission requested that the specific grant of authority to study certain aspects of CID law be removed from the Commission's Calendar of Topics Authorized for Study. Instead, a broad reference to CIDs would be added to the Commission's general grant of authority to study property law, thus:

> 3. Whether the law should be revised that relates to real and personal property, including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restrictions on land use or relating to land, common interest developments, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant on assignment, subletting, termination, or abandonment of a lease, and related matters.

Those changes were made by the Legislature earlier this year.[82] Consequently, the Commission still has general authority to study CID law, but no specific legislative emphasis or urgency.

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79. See 2003 Cal. Stat. ch. 557 (organizational changes; rulemaking); 2004 Cal. Stat. ch. 346 (architectural review); 2004 Cal. Stat. ch. 754 (alternative dispute resolution); 2005 Cal. Stat. ch. 37 (preemption of architectural restrictions); 2012 Cal. Stat. ch. 180 (recodification and simplification of Davis-Stirling Common Interest Development Act); 2013 Cal. Stat. ch. 183 (clean-up legislation; further clean-up legislation); 2013 Cal. Stat. ch. 605 (commercial and industrial CIDs); 2017 Cal. Stat. ch. 144 (mechanics liens in CIDs).

80. See *Common Interest Development Ombudsperson*, 35 Cal. L. Revision Comm'n Reports 123 (2005).

81. See AB 770 (Mullin, 2005).

82. See 2020 Cal. Stat. res. ch. 46.

Over the years, the Commission has received a long list of suggestions for possible CID study topics. The possibility of turning back to that work has been a low priority, for a number of reasons. Paramount among them is the steady flow of new assignments from the Legislature, which has kept the Commission very busy over the last several years. In general, the Commission gives legislative assignments priority over self-initiated projects. Consequently, the Commission has simply been too busy to reactivate its study of CID law.

The onset of the pandemic changed that slightly. In response to the public health emergency, the Commission decided to dedicate some of its resources to the development of emergency-related law reforms. One of the first such topics it undertook was the currently active study of CID teleconference meetings during an emergency.[83] **The Commission should complete that ongoing study.**

Upon commencing that emergency-related work, the Commission started receiving requests to examine other aspects of CID law. The suggestions are largely duplicative of ideas that the Commission has heard before. Some letters of that type are attached to this memorandum.[84]

Without discussing the individual merits of any of those suggestions, the staff strongly recommends that the Commission not reactivate a general study of CID law at this time. In part, that is because the Commission continues to be busy with higher priority work and does not have the resources to take on such a sprawling subject. More pointedly, the staff believes that the Commission's efforts on CID law reform have reached a point of diminishing returns. In its enacted recommendations, the Commission created better options for nonjudicial dispute resolution, imposed some minor good governance procedural requirements, wholly recodified the Davis-Stirling Act, and separated the statutory law for residential and nonresidential CIDs.

Moreover, as the staff has explained at recent meetings, many of the problems that people have with CID law are not grounded in the inadequacy of the law itself. They are the result of noncompliance with the law (whether erroneous or willful). The Commission made a good effort at addressing that problem, with its proposal to create the CID Ombudsperson. Under that proposal, resources would have been spent on creating a neutral expert body that could help CIDs manage themselves, with less cost and rancor. At least for now, that approach is off the

83. See Tentative Recommendation on *Emergency Reforms: Common Interest Development Meetings* (Sept. 2020).

84. See Exhibit pp. 1-5 (comments of Linda Brown), 39-41 (comments of A.L. Stanaway), 42 (same).

table. The staff does not see any other good alternative for addressing noncompliance with the law.

Except in special circumstances (e.g., the study of teleconference meetings in an emergency), the staff believes that the study of CID law should remain dormant.

Eminent Domain

In *Property Reserve, Inc. v. Superior Court*,[85] the California Supreme Court concluded that the pre-condemnation entry and testing statutes in the Eminent Domain Law were constitutionally flawed. Rather than invalidating those statutes, the Court reformed them to include an optional jury trial.[86]

The statutes at issue in *Property Reserve* were enacted on the Commission's recommendation.[87] In light of the Court's decision, there is a significant inconsistency between the statutory text and its meaning as judicially construed. Consequently, the Commission decided to study the matter.[88]

In 2017, the Commission made significant process on this topic, including completion of a draft recommendation.[89] In the course of preparing the draft recommendation, the Commission received comments suggesting additional, related statutory reforms.[90] In response to those comments, the Commission decided to expand the scope of the study to include those issues.[91]

Since then, the Commission has circulated a revised tentative recommendation and approved a final recommendation.[92] **The proposed legislation is ready for introduction in 2021.**

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.[93]

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85. 1 Cal. 5th 151 (2016).
86. See *id.* at 208.
87. See *Recommendation Proposing The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1741-42 (1974) (proposed Code Civ. Proc. § 1245.060).
88. See Memorandum 2016-53, p. 13; Minutes (Dec. 2016), p. 4.
89. See Memorandum 2017-43.
90. See Memorandum 2017-43, pp. 4-5, 8-9; see also First Supplement to Memorandum 2017-43.
91. See Minutes (Sept. 2017), p. 4.
92. See *Draft* Minutes (Sept. 2020), p. 3.
93. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); 2011 Cal. Stat. ch. 44 (SB 190 (Lowenthal)).

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 might be appropriate for future work.

Thereafter, the Commission studied the application of mechanics lien law to common area property. In 2016, it approved a final recommendation on that subject,[94] which was enacted the following year.[95]

The staff is not currently aware of any high priority issues relating to mechanics liens. 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 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

94. *Mechanics Liens in Common Interest* Developments, 44 Cal. L. Revision Comm'n Reports 739 (2016).
95. See 2017 Cal. Stat. ch. 144.

enforceability of premarital agreements.[96] In particular, the Commission could study the circumstances in which a person can waive the right to support.[97]

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.[98]

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 2017, the Commission directed the staff to examine a discovery topic suggested by then-Commissioner Capozzola (related to depositions) and to prepare a list of other discovery topics suggested for study.[99] The Commission later suspended that work in light of a pending discovery-related bill (AB 383 (Chau)).[100] After AB 383 was enacted into law with a sunset date of January 1, 2023,[101] the Commission decided to suspend its work on discovery-related issues until the sunset of AB 383.[102]

Consistent with the Commission's decision, work on this topic is currently suspended.

Since the Commission suspended work on this topic, the Legislature has enacted additional discovery-related reforms.[103] The staff will continue to monitor

96. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36; see also, e.g., 2019 Cal. Stat. ch. 193 (AB 1380 (Obernolte), *In re* Marriage of Clarke & Akel, 19 Cal. App. 5th 914, 228 Cal. Rptr. 3d 483 (2018), *In re* Marriage of Cadwell-Faso & Faso, 191 Cal. App. 4th 945, 119 Cal. Rptr. 3d 818 (2011).
97. See *In re* Marriage of Pendleton & Fireman, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).
98. 37 Cal. L. Revision Comm'n Reports 99 (2007); see 2008 Cal. Stat. ch. 231.
99. See Minutes (Dec. 2016), p. 3.
100. See Minutes (Aug. 2017), p. 7; Memorandum 2017-26, pp. 22-24.
101. 2017 Cal. Stat. ch. 189.
102. Minutes (Dec. 2018), p. 3.
103. See 2020 Cal. Stat. ch. 112 (SB 1146 (Umberg)); 2019 Cal. Stat. ch. 208 (SB 370 (Umberg)); 2019 Cal. Stat. ch. 839 (SB 17 (Umberg)); 2018 Cal. Stat. ch. 317 (AB 2230 (Berman)).

the developments on this topic and provide a more detailed discussion of these issues when the Commission recommences work on this topic.

6. 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,[104] which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. Awhile 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 appeared likely to be relatively noncontroversial.[105] 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.**

7. 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 in the Calendar of Topics, in case such work appears appropriate in the future.**

8. 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

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104. 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.

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

of bills dealing with administrative adjudication and administrative rulemaking were enacted.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case any adjustments are needed in the laws enacted on Commission recommendation.**

9. 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 in its Calendar of Topics, as related work is currently ongoing.[106]

10. Contract Law

The Commission's Calendar of Topics authorizes 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.[107] **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.**

11. 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."[108] That request was prompted by an unpublished decision in which the Second District Court of Appeal noted that Code of Civil Procedure Section 394, a venue statute, was a "mass of cumbersome phraseology," and that there was a "need for revision and clarification of the venue statutes."[109] The court of appeal

106. See discussion of "Trial Court Restructuring" *supra*.
107. See Memorandum 2014-41, p. 19.
108. 2007 Cal. Stat. res. ch. 100.
109. See Memorandum 2005-29, Exhibit p. 59.

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.

While this topic is one of the higher priority matters awaiting Commission attention, the staff does not believe that there will be sufficient resources to address this matter in 2021.

12. Fish and Game Law

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

13. Recodification of Toxic Substance Statutes

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. For the most part, the carryover topics appear to be issues that the Commission is well-suited to address.

A few of these issues appear to be narrow, not likely to be controversial, and relatively straightforward to address.[110] **In 2021, the staff recommends that these narrow issues be considered for staff-directed student work, as appropriate, or as low-priority staff projects as time permits.**

Given the Commission's current slate of assignments, the staff expects that the Commission will lack the staff resources to undertake work on the other carryover suggestions. **The staff recommends that these suggestions be carried over for consideration in future years.**

Intestate Inheritance by a Half-Sibling[111]

Marlynne Stoddard of Newport Beach asked the Commission to study intestate inheritance by a half-sibling who lacks a familial relationship with the decedent.[112] 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

110. See discussion of "Social Security Number Disclosure Requirement in Probate Code," "Attachment of Limited Liability Company Property," and "Clarify What Documents a Motion for Summary Judgment Must Include for Unlawful Detainer Proceedings."
111. See full analysis in Memorandum 2013-54, pp. 22-23.
112. See Memorandum 2012-5, Exhibit pp. 48-51.

blood."[113] 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 half-siblings (who were estranged from her brother) each received a one-third share of her brother's estate.[114] Ms. Stoddard indicated that "the current half-blood statute … produces grossly unfair and irrational results in cases like mine."[115]

Civil Procedure: Stay of Trial Court Proceeding During Appeal[116]

Attorney H. Thomas Watson suggested that the Commission consider a proposed amendment[117] 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.[118] 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."[119]

Uniform Trust Code[120]

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."[121]

Social Security Number Disclosure Requirement in Probate Code[122]

Attorneys Peter Stern and Jennifer Wilkerson shared a concern about Probate Code Section 1841, which requires a conservatorship petition to include the social security number of the proposed conservatee if that person is an absentee. Mr. Stern pointed out that social security numbers are generally not used in any non-confidential pleadings or filings. In reviewing this issue, the staff found another

113. Prob. Code § 6406.
114. See Memorandum 2012-5, Exhibit pp. 48-51.
115. *Id.* at 50.
116. See full analysis in Memorandum 2013-54, p. 27.
117. First Supplement to Memorandum 2012-5, Exhibit p. 12.
118. *Id.* at 12-13.
119. *Id.* at 13.
120. See full analysis in Memorandum 2013-54, pp. 32-33.
121. *Id.* at Exhibit p. 36.
122. See full analysis in Memorandum 2014-41, pp. 26-29.

section of the Probate Code (Section 3703), which also requires inclusion of an absentee's social security number in a court filing.

Revocability of Trusts by Surviving Co-Trustee and Disposition of Trust Assets[123]

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.[124] In particular, Ms. Pellegrini believes that the phrase is ambiguous 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).[125]

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?[126] 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?[127]

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123. See full analysis in Memorandum 2015-47, pp. 27-29; see also First Supplement to Memorandum 2015-47, p. 2.

124. 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).

125. Memorandum 2015-47, Exhibit p. 28.

126. 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.

127. 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.

Bond and Undertaking Law[128]

Attorney Frank Coats raised concerns that recent changes to California's Bond and Undertaking Law do not adequately account for the operation of the law in non-litigation matters.[129] 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.[130]

In addition, Mr. Coats identifies a few provisions in the current law that may cause confusion.[131] 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[132]

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)).[133] 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.[134]

Given the similarities between Sections 1010.6 and 1013, the differing interpretations as to who is entitled to a time extension seem problematic and

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(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.

….

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

129. Memorandum 2015-47, Exhibit pp. 1-2.

130. See Code Civ. Proc. § 995.710(a)(2).

131. 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).

132. See full analysis in Memorandum 2015-47, pp. 31-32.

133. *Id.* at Exhibit pp. 6-27.

134. *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.

potentially confusing. Addressing this issue would clarify the applicable deadlines and help to avoid inadvertent late filings, which could have significant legal consequences.[135]

Attachment of Limited Liability Company Property[136]

Attorney Dana Cisneros wrote with concern that the prejudgment attachment statutes (in particular, Code of Civil Procedure Section 487.010) make no provision for limited liability company property.[137] However, Ms. Cisneros indicates that, in practice, "courts are issuing attachments for LLCs."[138]

Code of Civil Procedure 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.

The staff's initial analysis of this issue suggests that the failure to address LLCs in the prejudgment attachment statute may have been an oversight.[139] Assuming further study confirms this assessment, the statutes would benefit from a clarifying reform that specifies that LLCs are subject to the same rules for prejudgment attachment as other legal entities.

Application of Marketable Record Title Act to Oil and Gas Leases[140]

Attorney Jack Quirk wrote to identify ambiguities regarding the application of certain provisions in the Marketable Record Title Act ("MRTA") to oil and gas leases.[141] In particular, Mr. Quirk is concerned that the statutes are not sufficiently clear on whether the MRTA's abolition of possibilities of reverter applies to such interests in oil and gas leases.[142]

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135. Code of Civil Procedure Section 1010.6 was just amended. See 2020 Cal. Stat. ch. 215 (AB 215 (Rivas)); see also 2020 Cal. Stat. ch. 112 (SB 1146 (Umberg) (urgency)). On quick review, the revisions do not appear to resolve the issue raised by Mr. Merliss.
136. See full analysis in Memorandum 2017-55, pp. 31-32.
137. *Id*. at Exhibit p. 1.
138. *Id*.
139. See 1994 Cal. Stat. ch. 1010 (SB 2053 (Killea)); 1994 Cal. Stat. ch. 469 (SB 469 (Beverly)).
140. See full analysis in Memorandum 2017-55, pp. 33-35.
141. *Id*. at 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.
142. 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.").

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).[143] 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.[144] 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).[145]

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).[146] Several years later, the MRTA was amended, on Commission recommendation, to change the terminology used to refer to certain property interests.[147] However, the change introduced a circular reference problem in the statutory language regarding the treatment of oil and gas leases.

While the current understanding in practice is in accord with the apparent legislative intent (i.e., the MRTA does not convert the possibility of reverter in oil and gas leases), the statutory language itself is somewhat troubling. It should perhaps be revised to improve clarity.

Paid Sick Leave[148]

Commissioner Crystal Miller-O'Brien suggested a new topic at the Commission's December 2017 meeting, relating to California's Healthy Workplaces, Healthy Families Act of 2014.[149]

As described in Memorandum 2018-2, Commissioner Miller-O'Brien

143. See Memorandum 2017-55, Exhibit p. 5.
144. 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.").
145. See *supra* note 144; 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.").
146. See Memorandum 2017-55, pp. 33-34.
147. See 1991 Cal. Stat. ch. 156 (AB 1577); *Application of Marketable Title Statute to Executory Interests*, 21 Cal. L. Revision Comm'n Reports 53 (1991).
148. See full analysis in Memorandum 2018-2 and in Memorandum 2018-57, pp. 43-45 & Exhibit pp. 22-35.
149. See Labor Code §§ 245-249.

> indicates that since the Act was enacted, numerous cities and counties have enacted their own paid sick leave laws. She believes that the resulting patchwork of requirements complicates employment law in problematic ways and that legislative clarification would be helpful. She also suggests creating new exceptions to the application of the law (e.g., limiting the law so that it only applies to businesses with five or more non-family-member employees).[150]

The Commission would need to seek new authority to work on this topic.

Clarify What Documents a Motion for Summary Judgment Must Include for Unlawful Detainer Proceedings[151]

Attorney Bonnie Maly wrote, on behalf of Continuing Education of the Bar ("CEB"), to request that the Commission clarify "what supporting documents are required in summary judgment motions in unlawful detainer actions."[152]

Ms. Maly explains that subdivision (b) of Code of Civil Procedure Section 437c specifies, among other things, the required contents of motions for summary judgment generally.[153] However, subdivision (s) of that section makes subdivisions (a) and (b) expressly inapplicable to actions, like unlawful detainer, which are "brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3."[154]

Subdivisions (a) and (b) of Section 437(c) also include several timing rules for the summary judgment procedure, as well other provisions about motions for summary judgment and hearings.[155]

Ms. Maly suggested that subdivision (s) should be narrowed to specify that only the standard time periods for filing and serving papers and the scheduling of hearings are inapplicable to motions for summary judgment in unlawful detainer proceedings,[156] based on her assessment of the probable original legislative intent.[157]

The Commission has done previous work on unlawful detainer and has identified a few issues pertaining to discovery in unlawful detainer proceedings

150. Memorandum 2018-2, p. 1.
151. See full analysis in Memorandum 2018-57, pp. 32-35, Exhibit pp. 19-21.
152. Memorandum 2018-57, Exhibit p. 19.
153. *Id*. at 19.
154. See also *id*. at 19-21.
155. See, e.g., Code Civ Proc. § 437c(b)(5) ("Evidentiary objections not made at the hearing shall be deemed waived.").
156. See *id*. at 19.
157. Memorandum 2018-57, Exhibit p. 19; see also *id*. at 20-21.

to be addressed when time permits.[158] When the Commission decides to pursue work on this topic, it may be possible to put together a package of minor reforms related to unlawful detainer proceedings.

SUGGESTED NEW TOPICS

During the past year, there have been some suggestions regarding new topics for the Commission to study. Two of those suggestions are discussed below. Other 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 by Commission appointees.

Probate Code

Two different entities submitted suggestions relating to probate conservatorships. Those suggestions would fall within the Commission's existing authority to study the Probate Code.

We describe the suggestions first and then analyze them.

Submission from Spectrum Institute

The Spectrum Institute is a nonprofit foundation that has advocated on a variety of human rights issues. It is currently engaged in a Disability and Guardianship Project that is designed "[t]o promote access to justice for adults with cognitive and communication disabilities who are involved in guardianship proceedings and to promote viable alternatives to guardianship."[159] As part of that project, the founder and legal director of the Spectrum Institute (Thomas Coleman) sent a letter "requesting that the Commission consider conducting an in-depth study of capacity assessment standards and practices in probate conservatorship proceedings."[160]

(**Note:** Different states use different terminology to refer to a proceeding in which a court appoints someone to care for, and/or handle financial matters for, an adult who is unable to cope without such assistance. Many states refer to such an arrangement as a "guardianship," but California uses the term

158. See Memorandum 2006-40, pp. 9-10 ("Timetable for Other Forms of Discovery" and "Interrelationship Between Discovery Cutoff and Hearing Date"); Memorandum 2007-3, pp. 3-4.
159. See https://disabilityandguardianship.org.
160. Exhibit p. 21.

"conservatorship;" the term "guardianship" refers to a similar proceeding for a minor.[161])

In support of that request, Mr. Coleman provided the Commission with a 129-page report entitled "Capacity Assessments in California Conservatorship Proceedings,"[162] which is "the culmination of 15 months of research, writing, and collaboration."[163] The Spectrum Institute also submitted the same report to the Chief Justice, the Governor, and the leaders of the Assembly and the Senate.[164]

The Spectrum Institute's report is quite critical of California's conservatorship system. For example, the report says:

> Despite having … strong laws against disability discrimination, California cannot claim to be a leader when its probate conservatorship system is compared with other nations and states. In terms of protecting the rights of seniors and people with disabilities in such proceedings, and seriously exploring less restrictive alternatives, California is lagging behind much of the developed world.[165]

The report includes more than forty distinct recommendations to various governmental entities, including the California Legislature.[166] No recommendation is directed to the Commission. A number of the recommendations propose statutory revisions.[167]

Submission from CEDAR

The Coalition for Elder and Disability Rights ("CEDAR") is a group that promotes "human rights of elderly and disabled Californians, especially persons under conservatorship."[168] CEDAR sponsored a number of recently-enacted bills

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161. For the statutes governing probate conservatorships, see generally Part 3 (commencing with Section 1800) and Part 4 (commencing with Section 2100) of Division 4 of the Probate Code.
162. See https://spectruminstitute.org/capacity/report.htm (hereafter, "Report"). An appendix to the Report contains 23 separate packets of "Reading Materials" relating to capacity assessments. See https://spectruminstitute.org/capacity/readings.htm.
163. See Report, *supra* note 162, at "About the Report" (unnumbered p. 3).
164. See *id.* at unnnumbered pp. 5-7.
165. Report, *supra* note 162, at 11.
166. The recommendations are interspersed throughout the report, but most of them are summarized at pages 120-29. The Spectrum Institute also prepared a document consisting solely of the recommendations, which collects all of the recommendations directed to a particular entity in one place. That document is reproduced at Exhibit pp. 22-35.
167. A summary of the report's statutory recommendations, prepared by CLRC staff (not by the Spectrum Institute), is attached to this memorandum as Exhibit pp. 36-38.
168. http://www.coalition4rights.com/mission.

in this area.[169] Like the Spectrum Institute, CEDAR has serious concerns about California's conservatorship system and seeks assistance from the Commission in addressing those concerns.[170]

In a series of emails, Richard Calhoun of CEDAR provides background information on the situation,[171] urges the Commission to endorse some of CEDAR's proposals[172] (which the Commission is not authorized to do[173]), and encourages the Commission to conduct its own study of conservatorship law generally[174] or some specific aspects of it.[175]

According to Mr. Calhoun, "[t]he biggest issue is the huge gap between existing polic[ies] (which are pretty good) and current practices (which are pretty bad) because there is no enforcement of existing policies."[176] When asked to identify some specific aspects of conservatorship law that might be suitable for the Commission to study, Mr. Calhoun listed the following matters, in order of priority:

- Enactment of a new law providing that all non-confidential conservatorship court proceedings be available via Zoom or similar technology.
- Enactment of a "Conservatee Protection Act" requiring the termination of a conservatorship within seven days of discovery of violation of key Probate Code protections.
- Enactment of a new law providing standing to future heirs during a conservatee's lifetime.
- Revision of Welfare and Institutions Code Section 15657.3, which grants a court with jurisdiction over probate conservatorships concurrent jurisdiction over civil actions based on abduction or abuse of an elderly or dependent adult conservatee, to clarify legislative intent of amendments to the section made by 2007 Cal. Stat. ch. 48 (SB 183 (Corbett)).
- Enactment of a new law providing that a conservatee's family is not financially responsible for legal and other fees and costs relating to the conservatorship.

169. See, e.g., 2020 Cal. Stat. ch. 247 (SB 1123 (Chang); 2019 Cal. Stat. ch. 847 (SB 303 (Wieckowski); 2018 Cal. Stat. ch. 153 (SB 1191 (Hueso).
170. See Exhibit pp. 6-20.
171. See Exhibit pp. 6-12, 15-16.
172. See Exhibit p. 9.
173. See Gov't Code § 8288.
174. See Exhibit pp. 7, 8.
175. See Exhibit pp. 14-16, 17-19, 20.
176. See Exhibit p. 3.

- Enactment of a new law providing a proposed conservatee "shall have the right to select own counsel, vs being forced to pay for court assigned counsel."
- Enactment of new law mandating court jurisdiction over a conservatee's trust, when the trustee and the conservator are either the same person or associated with each other, or when the court, conservator, or trustee modifies the trust.
- Enactment of new law mandating reporting of abuse of conservatees to local law enforcement, rather than to social services.
- Enactment of a new law requiring conservators, attorneys, guardians ad litem, and others to e-file accountings in .csv format and annual data uploads by January 31st.[177]

Analysis

In 1978, this Commission proposed a new guardianship-conservatorship law, which was enacted in 1979, refined to some extent in 1980, and became operative on January 1, 1981.[178] That body of law was recodified a decade later, with some changes, when the Legislature enacted a new Probate Code on this Commission's recommendation.[179]

The guardianship-conservatorship law in the Probate Code has been repeatedly revised over the years, on recommendation of this Commission and otherwise. In the past couple of decades, the Commission has not done much in the area, other than its study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"),[180] which culminated in enactment of the California Conservatorship Jurisdiction Act ("CCJA").[181]

During the same period, the Legislature and the judiciary have been very active in the area. In 2006, the Legislature found that California's Probate Code conservatorship system was fundamentally flawed and in need of reform:

> The Legislature finds and declares the following:
> (a) The rate of increase in the number of Californians who are 65 years of age or older is surpassing that in other states. The number of people who are 65 years of age will grow from 3.7 million people in the year 2000, to 6.3 million in the year 2020. The fastest growing segment of California's population, expected to increase by 148

177. Exhibit p. 20.
178. See 1979 Cal. Stat. ch. 726; 1980 Cal. Stat. chs. 89, 246; *Guardianship-Conservatorship Law,* 14 Cal. L. Revision Comm'n Reports 501 (1978); *Guardianship-Conservatorship* (technical change), 15 Cal. L. Revision Comm'n Reports 1427 (1980).
179. See 1990 Cal. Stat. ch. 79; *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1989).
180. See *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,* 43 Cal. L. Revision Comm'n Reports 93 (2013).
181. 2014 Cal. Stat. ch. 553.

> percent between the years 1990 and 2020, is people who are 85 years of age or older. As many as 10 percent of the population over 65 years of age and almost 50 percent of the population over 85 years of age will suffer from Alzheimer's disease.
>
> (b) As the population of California continues to grow and age, an increasing number of persons in the state are unable to provide properly for their personal needs, to manage their financial resources, or to resist fraud or undue influence.
>
> (c) One result of these trends is the growing number of persons acting as conservators on behalf of other persons or their estates. It is estimated that about 500 professional conservators oversee $2.5 billion in assets. Over 5,000 conservatorship petitions are filed each year in California.
>
> (d) Probate courts oversee the work of conservators, but, in part due to a lack of resources and conflicting priorities, courts often do not provide sufficient oversight in conservatorship cases to ensure that the best interests of conservatees are protected.
>
> (e) Professional fiduciaries are not adequately regulated at present. This lack of regulation can result in the neglect, or the physical or financial abuse, of the clients professional fiduciaries are supposed to serve.
>
> (f) Public guardians do not have adequate resources to represent the best interests of qualifying Californians and, therefore, many in need of the assistance of a conservator go without.
>
> (g) As a result, the conservatorship system in California is fundamentally flawed and in need of reform.[182]

To address the perceived problems, the Legislature enacted four different bills, which collectively are referred to as the "Omnibus Conservatorship and Guardianship Reform Act of 2006."[183] At about the same time, a Judicial Council task force also conducted a comprehensive review of conservatorship law and issued a lengthy report that included numerous recommendations.[184]

To the extent that problems in this area persist, the staff's perception is that they are primarily due to lack of funding and enforcement of existing law, not to pervasive policy defects in the governing statutes. As both the Spectrum Institute and CEDAR point out, some of the 2006 legislative reforms were contingent on funding that never materialized.[185] According to Mr. Calhoun of CEDAR, "simply having the CLRC actively requesting that the Legislature finally fund the Omnibus

182. 2006 Cal. Stat. ch. 493, § 2.

183. See 2006 Cal. Stat. ch. 490 (SB 1116 (Scott)); 2006 Cal. Stat. ch. 491 (SB 1550 (Figueroa)); 2006 Cal. Stat. ch. 492 (SB 1716 (Bowen)); 2006 Cal. Stat. ch. 493 (AB 1363 (Jones)).

184. See https://www.courts.ca.gov/documents/102607itemD.pdf.

185. See Exhibit pp. 6, 9, 13; Report, *supra* note 162, at 96; 2011 Cal. Stat. ch. 10, §§ 13, 15 (SB 78 (Committee on Budget & Fiscal Review); see also E. Corey, Jr., M. Lodise & P. Stern, *Crisis in Conservatorships*, 12 Cal. Trusts & Estates Q. 43, 43 (Winter 2007).

Conservatorship and Guardianship Reform Act of 2006 would be a huge step forward and something the CLRC should be able to act on quickly."[186]

Similarly, the Spectrum Institute's report says:

> Generally speaking, California has good laws on capacity assessments and determinations and the use of less restrictive alternatives.… *The problem is not so much with the law as it is with the lack of uniform and effective implementation.*
>
> What California needs are methods to ensure that statutory and constitutional requirements are enforced. A reasonable degree of accountability is needed. Without that, judges and attorneys can do whatever they want, without any concern for penalties or discipline for noncompliance.
>
> *The question is how to devise procedural mechanisms that provide incentives for judges and attorneys to follow the law and disincentives for not doing so.* The answer will require new legislation to initiate and fund various methods to require more accountability by the judges and attorneys who process conservatorship cases. A system of accountability would involve new administrative functions, at the state level, in both the executive and judicial branches of government.[187]

Given its limited resources, the Commission is not in a position to conduct a comprehensive study of conservatorship law at this time, nor is it clear that another comprehensive study is warranted in light of the work recently done by both the Legislature and the Judicial Council. Approaching the situation piecemeal might be problematic, however, as the core issues being raised appear to call for a global perspective.

The Commission is also ill-suited to make any recommendation to the Legislature about funding priorities, particularly during a time of budget cutbacks. Weighing competing funding needs is not its area of expertise.

In addition, the Judicial Council's Probate and Mental Health Advisory Committee recently established a Conservatorship and Legal Capacity Subcommittee, which is actively examining conservatorship issues.[188] The Legislature has also been actively working on conservatorship issues, such as the recently-enacted bills that CEDAR sponsored.[189] To date, the Legislature has not sought the Commission's help in this area. **Absent such a request, it seems best**

186. Exhibit p. 6.
187. Report, *supra* note 162, at 54 (emphasis added).
188. https://www.courts.ca.gov/documents/pmhac-annual.pdf.
189. See *supra* note 169 & accompanying text.

to leave the topic for others to handle; it is not apparent that the Commission has a useful role to play at this time.

AVAILABLE RESOURCES

For the past several years, the staff has been preparing a chart that indicates the amount of staff resources that are expected to be assigned to each of the Commission's active studies.

In assessing that information, it is important to understand that *at least* one full attorney position (of the Commission's four attorneys) is expected be unavailable for study work in 2021. That time will instead be spent on administrative duties, the work of the Committee on Revision of the Penal Code, the Commission's legislative program, and contact tracing. This means that the Commission will have *at most* three attorney positions to assign to studies in 2021.

With that in mind, the chart for 2021 is as follows:

Study Topic	**Percentage of Attorney Position**
Trial Court Restructuring	75%
Fish and Game Recodification	50%
Toxics Statute Recodification	75%
Surveillance of Electronic Communications	25%
Nonprobate Transfer of Stock Cooperative	25%
Total	2.5 pos.

Work on emergency-related reforms is not listed in the chart, because that work cannot begin in earnest until the Legislature grants the Commission the necessary authority. If such authority is granted by concurrent resolution, rather than statute, further work on the topic could begin in 2021.

The upshot is that the studies listed in the chart will take up almost all of the Commission's available resources in 2021. It is possible, but by no means certain, that the Commission will also be able to take on a new study of relatively modest scope.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2021. Traditionally, the Commission's highest priority has been assisting with legislation to implement recently-completed Commission recommendations. That activity typically consumes substantial staff resources, but requires little of the Commission's time.

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[190] 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 2021, as detailed below.

Legislative Program for 2021

In 2021, the **Commission's legislative program will likely include legislation on the following topics**:

- Revocable Transfer on Death Deeds: Follow-up Study
- California Public Records Act Clean-up
- California Public Records Act Clean-up: Conforming Revisions
- Trial Court Restructuring Clean-Up: Regional Justice Facilities Acts

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

- Trial Court Restructuring Clean-Up: Completion of Studies Under Government Code Section 70219
- Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551
- Disposition of Estate Without Administration: Liability Rules
- Eminent Domain: Pre-Condemnation Activities
- Resolution of Authority

In addition, several other studies are nearing completion. **The Commission's legislative program for 2021 might also include legislation on the following topics:**

- Hazardous Substance Account Recodification Act
- Hazardous Substance Account Recodification Act: Conforming Revisions
- Emergency Reforms: Common Interest Development Meetings

Managing this legislative program will consume significant staff resources in 2021, but should not require much attention from the Commission.

Legislative Assignments and Other Matters Deserving Immediate Attention

The Commission received no new legislative assignments in 2020.

The Commission should continue its work on the legislatively-assigned studies for which work is ongoing:

(1) Recodification of Toxic Substance Statutes.
(2) Electronic Communications: State and Local Agency Access to Customer Information from Communications Service Providers
(3) Fish and Game Law.
(4) Trial Court Restructuring.

Consultant Studies

For some studies, the Commission has the benefit of a background report prepared by a consultant. In such circumstances, the Commission generally prioritizes the study, so that the background report does not become stale.

As discussed above, the Commission recently completed its study on creditor claims, family protections, and nonprobate assets, for which it had a background report prepared by its former Executive Director.[191] The Commission also had a background report on common interest development law, prepared by Prof. Susan

191. See discussion of "Creditor Claims, Family Protections, and Nonprobate Assets" *supra.*

French of UCLA Law School. Having since done extensive work on that subject as detailed above, the Commission should consider that study complete as well.[192]

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

- 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).

In line with the Commission's decision to table the civil discovery study, that study should be revisited in 2023, after the sunset of the legislation expressly authorizing informal discovery conferences. The issues addressed in the background report on the Evidence Code do not appear to be pressing at this time, but should be addressed when resources permit.

Other Activated Studies

The Commission is currently examining use of the Uniform TOD Security Registration Act to transfer a share of ownership in a stock cooperative. **The staff recommends that the Commission continue to work on this topic in 2021.**

The Commission has previously activated a study on presumptively disqualified fiduciaries, which is currently on hold. That study should be resumed when resources permit, but it does 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 could *at most* add one *modest* new study to its work for 2021, *on a low-priority basis*.** The study on transfer of use-restricted property at death might be a good choice. The previously-activated but currently tabled study on presumptively disqualified fiduciaries is another possibility.

In addition, **we recommend that the Commission follow its usual practice of addressing technical and minor substantive issues (typically with law student assistance), on a low-priority basis as time permits.**

192. See discussion of "Common Interest Developments" *supra*.

Summary

If the Commission approves the staff recommendations made in this memorandum, the Commission's priorities for 2021 would include:

- Manage the 2021 legislative program.
- Continue to work on any of the candidates for the 2021 legislative program that are not completed in time for introduction in 2021.
- Continue the study on recodification of toxic substance statutes.
- Continue the study of state and local agency access to customer information from communications service providers.
- Continue the study on fish and game law.
- Continue the study on trial court restructuring.
- Continue the study on use of the Uniform TOD Security Registration Act to transfer a share of ownership in a stock cooperative.
- Possibly begin a modest new study, on a low priority basis, such as the study on transfer of use-restricted property at death or the study on presumptively disqualified fiduciaries.
- Study one or more technical or minor substantive issues on a low-priority basis, if time permits (probably as a student project).

Does the Commission approve of these staff recommendations?

CHANGES TO THE CALENDAR OF TOPICS

The staff expects to seek introduction of a resolution of authority in 2021. The resolution will authorize study of the matters listed in the Calendar of Topics.

As discussed above, **the staff recommends that the resolution add the following topic to the Calendar:**

> (14)(a) The Law Revision Commission is authorized to study and recommend statutory reforms to provide special rules that would apply only to an area affected by one or more of the following:
>
> (1) A state of disaster or emergency declared by the federal government.
>
> (2) A state of emergency proclaimed by the Governor under Section 8625 of the Government Code.
>
> (3) A local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code.
>
> (b) Before beginning a study under this authority, the Commission shall provide notice to legislative leadership and any legislative policy committee with jurisdiction over the proposed study topic and shall consider any formal or informal feedback received in response to the notice.

Is this suggested revision of the Calendar of Topics acceptable to the Commission?

Respectfully submitted,

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August 12, 2020

To: Mr. Brian Hebert and the CA Law Revision Commission (CLRC)

From: Linda Brown

Re: **Common Interest Developments (CIDs)-Reforms Needed**
Ref: Comments for August 13+July 9 Follow-up

First, thank you for meeting monthly, making the meetings *easily accessible* to the public via Zoom. I appreciate your letting me know about the meetings in advance and for facilitating public comments. .

Here is follow-up to my July 9 oral comments and additional comments for Thursday.

Last month I urged you to better alert individual CID unit owners of the good work of the CLRC and enlist their help in solving the many problems with CID housing and more specifically the laws governing CIDS. This letter provides three areas of information unit owners need to know and a list of "keywords" describing some, not all, problems.. Due to my time and technology expertise limitations, I offer a few solutions now. More will follow.

I urge the CLRC to:

1) reach out to individual CID unit owners quarterly and help educate them on:
-current laws, legislative bills, and newly-enacted laws, and
-the health and financial safety risks of owning a CID home

2) ensure CLRC and all HOA records are available online 24/7 and made available within two business days upon written and phone call requests, and

3) recognize the inherent disadvantage individual CID homeowners face in:
-forums like this,
-the legislative process,
- associations[1], henceforth also called a homeowners association (HOA) and
-the courts

[1] Yes, I know the law uses the term "association." For brevity, and since my experience is with an attached and stacked apartment-to-condominium conversion governed by a homeowners association (HOA) , I will that term and acronym interchangeable with "association" and to be inclusive and to cover Community Associations (CA) typically associated with planned communities and other associations such as those governing mobile home parks and stock-ownership entities.. I know CID owners in those type of associations who have experienced the same or similar problems.

Solution 1 Reach out to associations through the list with the Secretary of State's office and to property managers through their licensing agency. Require both to transmit information to individual CID unit owners within two business day. Allow transmission via e-mail and on association web and social media sites

Solution 2 Commission experts in the law and in mass communications to prepare 24/7 brief podcasts or webinars on all topics and include links to statutory and case law. Recruit and pay six new and long-term CID unit owners to review these products and provide feedback before release.. Make the finished product available online 24/7 and upon request by any written form—mail, e-mail, or fax.

Solution 3-Work with the county law libraries to make this educational material available locally in the forms described above and to host in-person workshops and briefings when the pandemic restrictions end.

Here are keywords problems in CID living that can be improved with changes to the laws.

Current realities

Inherent disadvantage of individual unit owners compared to the professionals[2]
Lack of accountability, responsibility, and oversight of the professional as their work relates to work in CIDs or on behalf of HOA boards of directors (BODs)
Professionals who take advantage of naïve and unsuspecting CID homeowners, including
-individual unit owners
-those who volunteer on the association BOD
Lack of transparency of who (or what entity) pays for (and benefits from) experts who
-inspect properties
-provide analysis, recommendations, and work

Parties to a dispute or research need to know the scope of work and who is paying the tab for experts: the HOA, the HOA's insurance company attorneys paid for by the HOA or paid for by the HOA's insurance or a unit owner.

Construct Defect laws and litigation that affects new construction
Hidden defects that affect older structures

Insurance policies of 300 pages or more that ordinary people cannot understand

Agency staff (especially in the Department of Insurance and Department of Real Estate) whose wide variation in knowledge and oral communication skills do not help resolve problems.

[2] Property managers, insurance company staff and brokers, attorneys, especially those paid for by an insurance company to defend a HOA, and "preferred construction contractors" of insurance companies and/or property managers whose relationship can present a conflict of interest and is not necessarily disclosed upfront.

Conflict resolution realities within the association that are preventable with legal changes

No rights and responsibility awareness education or training for
-current association homeowners or
prospective CID homebuyers
No best practices training for volunteer BODs and owners
Training in the laws and governing documents
Training in communications and conflict resolution
Confidential internal dispute resolution practices that result in problems being repeated
BODs that do not share information from the professionals while paying these professionals with monies all HOA members pay as dues and/or special assessments
Default conflict resolution going straight to the courts

Conflicts that go to the courts where the process exponentially increases the costs and delays

Confidential mediation that professionals can and do use as a delay tactic
Confidential mediation that ensures problems are repeated

Non-disclosure agreements (NDAs) that:
-ensures bad behavior of all parties is hidden, for example withholding needed documents and
-ensures problems are repeated

Misuse of Strategic Lawsuits Against Public Participation (SLAPPS)

Costs in terms of time and dollars that most CID/association homeowners
-do not know about in advance
-are not prepared to pay
-directly, or
-indirectly through increased dues and special assessments

Due to my time and computer expertise limitations, I am unable to provide examples and recommended solutions at this time. I will do so soon.

In summary, <u>big improvements are needed to CID law now</u>. While education and training using low or no-cost technology like your Zoom meeting will help resolve the problems, reform and a complete overhaul is also needed.

Online access to live CLRC and to all HOA BOD meetings is necessary along with online 24/7 and other forms of access are also needed after the live meeting for those who cannot participate live due to work, family commitments, or other reasons.

Making the professionals responsible for wrong they know about or should know about will also help. Transparency and full disclosure of ACT information is needed for unit owners to make informed decisions and must be required. (ACT = accurate, complete, and timely)

In short, with online resources, inexpensive podcasts, webinars, more upfront training, and education, unit owners will be protected. Unit owners, especially retirees, should not lose their equity because the HOA failed to disclose lawsuits or made decisions without involving members that led to lawsuits..

Please , please be aware of these topics, news reports, and academic and resources that reveal the disaster that CID/HOA law is for too many individual owners and, by extension, some renters.

1) www.verdictsearch.org that shows the legal fees for one party in a HOA lawsuit runs $50,000-$450,000.

2) Educate CID homeowners that legal fees are only one cost. The total costs includes lost time, increased costs for all HOA "members" such as increased dues and special assessments that cover increased construction costs because the project was ignored due to advice of the "professionals" or stopped due to lawsuits, lost revenue for small business owners and lost jobs for employees who have to take off from work to deal with HOA problems, use of savings set aside for retirement, a child's education and/or to donate to charity to pay for the professionals who prey on naïve and unsuspecting CID association homeowners.

3) Educate elected officials and CID homeowners on the long-term health and community problems created by stress associated with preventable CID problems. Stress that starts with ignored reports of problems because the volunteer BOD either does not have time or expertise to deal with the problem can lead to anxiety, depression, stroke, heart disease, and death.

4) Replace the words "members" with "CID homeowners." The word "members" implies voluntary membership in a club, a club most association members would not join if not forced to do so by the state of California.

5) Dr. Evan McKenzie's book Beyond Privatopia, Rethinking Private Residential Government and this sentence in the attached flyer

"With CID housing, people are always one election of one controversy away from disaster."

6) Dr. McKenzie's latest (2019) academic article Private Covenants, Public Laws, and the Financial Future of Condominiums with these words

"These cases where associations made serious mistakes in dealing with insurance-related issues, illustrate certain uncomfortable facts about the potential liabilities that unit owners assume when they buy a CID unit and they are facts that very few homebuyers understand."

7*)*The news report *Home Suite, Home* that captures the behavior-suspected legal behavior---of insurance company personnel and/or brokers and their defense attorneys that caused delay, displacements, and ridiculously high costs for a common problem: leaks.

I wish I had known about these information resources when the HOA BOD quit communicating with owners. Little did all the homeowners know that:

- the "members" would spend over $25,000 in special assessments, ($1,500,000),
-the monthly dues would increase to $75/month, nearly twice what was my initial monthly mortgage payment, or that
-the BOD quit communicating because "the issues were so complex and the BOD member time so limited that they "relied solely on the professionals."

The then-president shared this information year later. He also died of a heart attack at a young age. I think the stress of prolonged litigation unnecessarily contributed to his untimely demise.

Thank you for reading and considering my concerns. I will provide specific examples and suggested cost-effective solutions soon. Please let me know if I can provide more support for the work you are doing.

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EX 5

EMAIL EXCHANGE WITH RICHARD CALHOUN OF CEDAR

Note. Some of the names and potentially identifying information in these communications have been redacted. The redactions are indicated with brackets.

On January 13, 2020, Richard Calhoun wrote:

CEDAR is seeking clarification on how to suggest topics for CLCR to study.

Our understanding in 2018 the CLCR was authorized to study

Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

The CLCR limited this board authorization to

work on estate planning issues is limited to:

• A follow-up study on the revocable transfer on death deed.

• Possible clean-up of certain statutory procedures that allow an heir or devisee to take property without probate administration in certain circumstances.

• The possibility of extending statutory family protections to trusts.

How does the public successfully convey the the CLCR that there are significant problems with how conservatorships are currently practiced in California mainly because of poorly written laws that could have minor amendments at essentially no cost to help protect conservatee.

The Los Angeles Times has done a number of investigative series. The most recent in 2005. This caused the Legislature and the Judicial Council to act in the subsequent years. At that time, Chief Justice Ronald M. George is quoted as saying

he was hopeful that the Legislature and governor would approve the necessary funding. But funding has been a recurring problem for those seeking conservatorship reform.

The just released budget still has no funding for these reforms that were documented to be needed 15 years ago.

There several court rulings starting with Stevens v Stevens that are clearly inconsistent with the legislative intent of the staff recommended amendments of SB183 (2007 Corbett) made during the March 13, 2007 Senate Judiciary Committee hearing that were approved and incorporated.

There are basic issue like a temporary conservatorship is limited to 30 days, but in practice continue for years and often for the duration of the life of the conservatee.

There are conservators that become successor trustee of the conservator's trust and marshal those trust assets but the court requires no accounting of the trust asset because

they are not the asset of the conservatee. In one recent case a free and clear home in Santa Clara County held in trust for the conservatee and the conservatee's prior residence is sold for $2.1 Million. The conservator then goes to court and gets all accounting waived because the estate's value is just $8,300.

There are change of address forms submitted to the USPO prior to mailing of notice so the conservatee is getting conservered without any actual notice and unaware of the Petition being filed.

Professional Fiduciaries licensed by the State of California acting as a court appointed conservator are submitting and getting approval of Petitions for Fees where the bill for going to the Post Office 15 times on one day. But the real eye opener is when they bill for more than 24 hours on a single day. These are routine and exceed 58 hours in a single 24 hour period.

A conservator is requesting that the conservatee pay for the conservator's criminal defense for actions against the conservatee. This was after the PFB acted and closed the loop hole of a conservator being able to bill a conservatee for time spent responding to an investigation of the PFB, which was a common practice.

The abuses in California are identical to those in Las Vegas as exposed in The Guardians. Here is a link to a 4 minute clip that provides an over view https://vimeo.com/166043022

The abuse is not limited to private fiduciaries. ABC I-team did an extensive investigative series featuring the Santa Clara County Public Conservator https://www.youtube.com/watch?v=y809jIIev5w&t=650shttps://www.youtube.com/watch?v=y809jIIev5w&t=650s

The goal is to learn how to get the CLRC to conduct a more comprehensive study in order to implement meaningful reforms to stop the current abuses before we reach the quarter century mark in just a couple of years.

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On January 14, 2020, Kristin Burford wrote:

Thank you for your email.

The California Law Revision Commission accepts suggestions for new topics from interested persons throughout the year. Towards the end of each calendar year, the Commission reviews its workload, the status of its ongoing projects, and any new topic suggestions it has received during the year. The staff prepares a memorandum discussing those issues (for the most recent memo, see http://www.clrc.ca.gov/pub/2019/MM19-44.pdf). After considering those issues, the Commission decides its work priorities for the coming year.

The Commission does not require new topics suggestions to be in any particular format. If you'd like, I could keep your email on hand and provide it (as an attachment to the memo) for the Commission's next consideration of new topics and work priorities. If
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you would like to provide an additional or alternative comment, you can submit it by email or in hard copy.

If you have any further questions, please let me know.

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On January 17, 2020, Richard Calhoun wrote:

You have my permission to do anything with my previous email, especially if it help facilitate the long overdue reform of how California Probate Courts handle conservatorships. The biggest issue is the huge gap between existing policy (which are pretty good) and current practices (which are pretty bad) because there is no enforcement of existing policies. The Probate Code has a ton of good policies, but there isn't a single appropriate negative consequence for failing to follow the Probate Code as written. Imagine the chaos on our roadways if the Motor Vehicle Code eliminated the negative consequences for speeding, failing to yield, parking, and/or registration. That is chaos that is happening in Probate Courts throughout California.

A specific example is Probate Code limits temporary conservatorships to 30-days, in part because a temporary conservatorship restricts many of the conservatee's rights similar to arresting a shoplifting suspect both without any due process. On the criminal side the suspect has a right to bail and a right to a speedy trial and must be set free if the trial doesn't occur in the prescribed time frame. In Probate,there is no bail, many Probate Courts do not have jury facilities, and there is no setting the conservatee free on day 31. The result is temporary conservatorships drag on for years, often until the temporary conservatee passes. This is a huge violation of that temporary conservatee's rights and nobody cares.

[Ms. X] was featured in the LA Times investigative series into abusive conservatorships back in 2005. CEDAR volunteers reviewed [Ms. X's] recent billing practices (1/1/2017-6/30/2018) that have all been approved by the court. CEDAR's review is incomplete as it does not include sealed cases, work allegedly done without the date specified, work done on cases where statutory fees are granted opposed to hourly compensation and cases not located by volunteers. CEDAR found 13 days during 2017 where [Ms. X] billed for and was paid for working more than 24 hours during a single calendar day. CEDAR would actually seriously question anything over 18 billable hours of work as time sleeping, eating, commuting, breaks, and interruptions should not be billed.

To gauge how widespread conservator billing issues are, CEDAR volunteers investigated a second conserator, [Ms. Y] in Orange County. [Ms. Y's] billings have several similar issues including 1) billing 58.1 hours in a 24 hour day; 2) 19 trips to the USPS on a Sunday to mail certified letters; 3) 15 trips to the CPA in a single day to drop of requested tax information; 4) 9 trips to the bank to make deposits; 5) billing 10.4 hours to write 27 checks in one day (that is over 23 minutes for each and every check); 6) triple billing the same client on the same day for the same description and for the same duration. None of these issues were raised any concern during the Probate Court's review
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and oversight of [Ms. Y's] billings. These clearly questionable if not fraudulent billings were all approved by the Court.

Attached is a 3 page summary of CEDAR's legislative efforts [see Exhibit pp. 17-19] that would start to address many of the current issues related to gaps between existing policy and current practice. It is clear that the State of California has no interest in funding conservatorship reform (at least for the past 15 years), so any costly reforms simply won't happen. That is why CEDAR's has focused only on economical reforms. CEDAR would be happy to forward any or all of the Legislative Counsel's RNs should the CLRC have interest. If the CLRC wanted to endorse any of these still unbacked bills, that assistance would be welcomed. Because these (all but two of these proposals) have already been drafted by Legislative Counsel the deadline to find a legislator willing to be an author is Feb 21.

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On January 14, 2020, Kristin Burford wrote:

Thank you for the additional information about CEDAR's reform proposals. Given how much work your organization has done on this issue, I want to mention that you are welcome to identify the specific conservatorship issues that the Commission should consider prioritizing for study. When the Commission considers new topics suggestions, specific proposals of high priority items within the broad area of conservatorship law will allow for a more concrete discussion.

You asked about the CLRC endorsing CEDAR's legislative proposals. Aside from making its own recommendations to the legislature, the Commission is restricted from weighing in on legislative proposals. In light of your inquiry, I wanted to provide a bit more information about Commission's process. When the Commission takes up a new issue, it conducts a study. During the study process, the staff prepares background material to inform the Commission about the issue and the issue is discussed at one or more public meetings of the Commission. At the end of a study (assuming the Commission identifies a need for reform), the Commission will prepare a recommendation with proposed legislative language to implement its recommended reform.

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On January 24, 2020, Richard Calhoun wrote:

I would absolutely expect the CLRC to do their own research. However that research could be expedited by starting with a search of previous research into the failings of how conservatorship are actually being practiced. In that light, here is some of that research done by others.

BACKGROUND:

In November 2005 the Los Angeles Times did a significant investigative series on abusive conservatorships. In fairness the LA Times also reported on these issue in the 80's and 90's. 2005 is the most recent series focused on California and resulted in a flurry of activity. Some of those LA Times articles are still available on the web:

www.latimes.com › la-xpm-2005-nov-03-me-bodyparts3-story
Severed Body Is Identified as San Bernardino Man's - Los ...
Nov 3, 2005 - Gillespie's caretaker and legal **conservator**, Charmain Bergmann, 53, was interviewed by homicide investigators, but neither she nor anyone else has been ...

www.latimes.com › archives › la-xpm-2005-nov-13-me-labow13-story
'Ruling Over Someone' Has Paid Off Handsomely - Los ...
Nov 13, 2005 - Frumeh Labow buzzes through the double doors of Los Angeles County's main **Probate** Court, a queen bee in her hive. She has several items to settle.

https://www.latimes.com/archives/la-xpm-2005-nov-13-me-conserve13-story.html
When a Family Matter Turns Into a Business - Los Angeles ...
Nov 13, 2005 - **Probate** courts are supposed to supervise their work. Yet oversight is erratic and superficial. Even when questionable conduct is brought to their attention, judges ...

https://www.latimes.com/news/la-me-conserve14nov14-story.html
Nov 14, 2005 Justice Sleeps While Seniors Suffer

https://www.latimes.com/archives/la-xpm-2005-dec-15-me-metroside15-story.html
Dec 15, 2005 Parents Thought They'd Found Haven for Teen

www.latimes.com › archives › la-xpm-2006-jan-19-me-civil19-story
County Weighs Sealing Records - Los Angeles Times
Jan 19, 2006 - As a reporter, he was part of the team that exposed fraud and abuse in California's **conservatorship** system, a series that won several national awards. He went ...

In 2006 the California Legislature responded and passed several reforms including AB-1363, SB 1116, SB 1550, and SB 1716. 14 years later this legislative reform package is still just ink on paper because the funding demanded by the Judicial Council was never provided, specifically because of fears of the approaching 2007-2008 recession.
AB-1363 Omnibus Conservatorship and Guardianship Reform Act of 2006.

In October 2007 the Judicial Council issued their own report with 85 recommended reforms. Many of those reforms are still not implemented or only partially implemented.
https://www.courts.ca.gov/documents/102607itemD.pdf

In November 2009 California Senate Office of Oversight and Outcomes Committee issued their own report on the Ombudsman. Ombudsman should provide crucial service to conservatees in facilities but don't because by definition a conservatee cannot provide informed consent. https://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/ombudsmanreport10_29.pdf

In March 2010 California Senate Office of Oversight and Outcomes Committee issued a report Dangerous Caregivers: State Failed to Cross-Check Backgrounds, Exposing Elderly to Abusive Workers
https://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/dangerouscaregiversreport1.pdf

In April 2011 California Senate Office of Oversight and Outcomes Committee issued a report Caregiver Roulette: California Fails to Screen those who Care for the Elderly at Home
https://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/2385.caregiver%20roulette.pdf

In 2012-13 ABC News San Francisco I-team did a many part series on abusive conservatorship practices in Santa Clara County by the Public Conservator.
https://www.youtube.com/watch?v=y809jIIev5w&t=591s

Also in 2012-13 San Jose Mercury News was covering Danny Reed's case. This lead to more reforms SB-156 (2013 Beall) that was subsequently vetoed by then Governor Brown. 7 years later, conservatees still have zero protection.
https://www.google.com/search?q=site%3Amercurynews.com+danny+reed+trust&oq=site%3Amercurynews.com+danny+reed+trust&aqs=chrome..69i57j69i58j69i60l2.607j0j8&sourceid=chrome&ie=UTF-8

In 2018 The Orange County Register Money-draining probate system 'like a plague on our senior citizens'
https://www.ocregister.com/2018/09/23/money-draining-probate-system-like-a-plague-on-our-senior-citizens/

In January 2019 The Guardians by Billie Mintz was released in the US. Although based in Las Vegas, change a few terms of the trade this documentary could have been filmed in any of California's urban counties.
90 second and 4 minute summary clips available
https://www.billiemintz.com/the-guardians

Full length 1 ¾ hour documentary available for free for Prime members
https://www.amazon.com/Guardians-Julie-Belshe/dp/B07KNN8B8W/ref=sr_1_2?keywords=The+Guardians+2019&qid=1579387953&sr=8-2

CEDAR does have access to a 54 minute version that deletes the Hollywood fillers and is more focused on the educational aspects of abusive conservatorships.

In 2019 the PFB that licenses professional conservators is finally realizing that nearly all of their 750 licensees have never complied with the PFB licensing requirements. PFB's typical citation reads: https://www.fiduciary.ca.gov/public/pf-57_2019_12_20_cit.pdf

The Bureau conducted an audit of your file and determined the annual statements you submitted for 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, and 2019 were received by the Bureau after September 1. Most recently, your 2019 annual statement was received on October 18, 2019. Due to the untimely submission of your annual statement, your license expired. During the time your license was expired, you continued to operate and hold yourself out to the public as a professional fiduciary. The

Bureau's records indicate the open cases under your management at this time exceeded the number of cases you are permitted to have without a valid professional fiduciary license.

The fine for this violation is $500.

$500 may sound significant, but at $175/hour and 58 hours/day the licensee bills $10,000 per day.

With the silver tsunami reaching the age of conservatorship, national media including CNN, The New Yorker, and Wall Street Journal have all carried significant articles on abusive conservatorships/guardianships across the Nation. California is not alone in being long overdue for meaningful reforms.

With this extensive historical and well documented database of shortcomings, even a superficial current overview of existing gaps would quickly find:

1) Conservators are entitled to a jury trial, yet Probate Courts don't even have facilities for juries.

2) Temporary conservatorships are limited to 30 days, yet the earliest date for just 3 hours of court time is 9 months away and frequently never occur.

3) Conservatees and families are often never noticed about hearings.

4) Conservatees are frequently denied legal representation of their own choice.

5) Conservatee's court appointed attorney have no client agreement with anyone. The scope of the attorney's work, who the attorney represents, and even the attorney's hourly rate are often unknown.

6) When law enforcement services are request the most common response is the court is overseeing everything.

7) Conservators are frequently completely isolate conservatees from the outside world. Since AB-937 (2013 Wieckowski) emergency temporary restraining orders are lasting for years.

8) Conservators are moving conservatees multiple times without reporting these moves to the court, family, friends, or other visitors. Court investigators are either never visiting conservatees or are failing to bring this issue to the court's attention.

9) Conservators are billing for and getting paid for 58 hours of "work" that was "performed" in a single day, which are only 24 hours long.

10) Conservators are selling conservatee's residence for $2.1 Million and then going to Probate Court and getting accountings waived based on the estate being low valued, specifically $8,300. The $2 Million proceeds from the sale simple disappear never to be seen again.

11) Conservators sell the property for $1.1 Million. The very next day the property is resold at $1.725 Million for a lose of $625,000. Then with professional marketing the property is resold yet again for $3.7 Million. All publicly available from Grant Deeds in Orange County Recorder's Office but nothing happens. 3 Grant Deeds attached

CEDAR would be happy to share our original research into clearly abusive billing practices of licensed Professional Fiduciaries acting as court appointed conservators and then submitting abusive Petitions for Fees that are not flagged by the probate examiner and approved by the court. As an example there is a 9 page summary of the typical examples of clearly abusive billings. This document has the court case name and number (vast majority are Orange County) allowing the CLRC to quickly verify the accuracy of

the information. Also attached is a 571 page pdf printout the database to better convey the real scope of these issues. Not attached but available on request are selected issues with a copy of the specific page from the Petition for Fees that shows each detailed billing that make up the abusive billing. Also there are thousands of pages of the Petitions for Fees then CLRC would just need to verify that these are accurate copies of what was filed and approved by the court. Did feel compelled to attach a one page example that show that two triple billings on the same page get approved. Even the out of date order of this group of detailed billings was not enough to raise any red flags. Also happy to share the Excel database opposed to printouts that are not sortable.

On the legislative front, the CLRC can use any of the legislative language as a guide in crafting their own language. All have been draft by the Legislative Counsel as unbacked bills, however two are still in the US Mail and not yet in CEDAR's possession. Those two have the language that was submitted to Legislative Counsel, but there were significant changes to writing style but not the intent of the proposals. But simply having the CLRC actively requesting that the Legislature finally fund the Omnibus Conservatorship and Guardianship Reform Act of 2006 would be a huge step forward and something the CLRC should be able to act on quickly.

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On August 23, 2020, Steve Cohen wrote:

I am a staff counsel for the California Law Revision Commission, presently charged with summarizing requests you made earlier this year on behalf of CEDAR that the Commission commence a study of several issues relating to conservatorships under the California Probate Code.

At the end of your email to Ms. Burford that appears below, you attached a document listing a series of unbacked bills representing CEDAR's own legislative efforts in this area this year.

Can you advise whether any of the unbacked bills summarized in that document were introduced during this legislative session? If so, it would be most helpful if you could provide us with the bill number.

Thank you very much.

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On Aug 24, 2020, Richard Calhoun wrote:

Answering your specific question, RN19-05927 (1st item under Public Safety on page 2 of CEDAR's list) is SB1123 (Chang). Currently on Assembly Floor Consent no opposition, zero no votes. Then onto the Senate for concurrence of a very minor change. CEDAR does expect it to pass.

CEDAR has made a minor change to RN19-06817 third under Judiciary (con't) on page 2. In reviewing the 2006 analysis $9 M of the $13.4 M estimated funds is for

doubling the frequency of accounting from 1st year then bi-annual to 6 months and annually. CEDAR does not believe that more frequent accountantings will reduce abuse and would support dropping the more frequent accounting.

I am assuming you have my January 24, 2020 emal to Ms. Burford. If not it is easy to resend. That email has a list of extensive historical background investigations that are unfortunately still just as relevant today. Also attached to that email were the RNs associated with the summary spreadsheet that you already have. FYI Mandatory reports to law enforcement became RN20-03815 and Probate Examiners requirements became RN20-03819.

I think it is important that you have CEDAR's complete list of legislative reforms (attached) [see Exhibit p. 20] versus just the 1/24 summary list that was CEDAR's focus for the 2020 year. CEDAR's reform list is always a work in progress as we are referred to more and more abusive conservatorships. CEDAR focuses on systemic low to no cost solutions. Happy to send all or requested RNs and provide details or answer questions on any listed topic.

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On August 24, 2020, Steve Cohen wrote:

Thank you for your response, which is helpful. I have one additional request, which relates to the Commission process as explained by Ms. Burford in earlier emails.

In your correspondence with the Commission on behalf of CEDAR, you have identified a significant number of varied conservatorship issues that you suggest the Commission consider studying. Unfortunately, the Commission operates with a small staff and limited resources.

It would therefore be most helpful if, from among the many issues you have noted, you could offer specific proposals relating to one or more of issues that CEDAR believes are of the highest priority for the Commission to consider at the present time. As Ms. Burford has previously indicated, doing so will allow for a more concrete discussion when the Commission engages in its annual review of suggested new topics.

Thank you very much.

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On August 25, 2020, Richard Calhoun wrote:

If the CLRC was able to develop an effective oversight mechanism for conservatorship cases with an incentive to resolve conservatorships quickly and amicably the need for nearly all CEDAR's legislation would evaporate. The Probate Code currently lacks consequences for violations. There seems to have been an assumption that the Code would be followed simply because it is the law. Absent any negative consequence, human nature kicks in and people simply do what is the easiest regardless of the Code.

CEDAR revised conservatorship issues list is attached. The issues are listed in order of CEDAR's priority of importance. Audit requests are at the top of the list, but our understanding is that is an area CLRC does engage in, so we assume they will be skipped over. The yellow highlighting issues indicate the issue is more complicated and that CEDAR would appreciate CLRC looking into that issue. The reason that some of the top priorities are not highlighted is the unhighlighted legislation is simple enough CEDAR believes that we can get it introduced without CLRC and CEDAR would prefer that CLRC use their limited resources on another issue lower down the list.

For issues with an RN assigned, would it be helpful to have the Legislative Counsel's drafting of the unbacked bill and CEDAR's 1 page summary sheet? Some issues like standing (RN19-05630) CEDAR has more extensive background such as two different Appeals Court Briefings that go into detail. We also have a highlighted copy of the Senate Judiciary Committee analysis where staff caught the catch-22 of the conservator being the abuser. The Committee accepted staff's amendment to address this issue. Despite the clear legislative intent, the courts throughout the State continue to maintain only the conservator can file civil action during the conservatee's lifetime even when the alleged abuse is done by the conservator who will clearly not file litigation to stop their own abuse.

Background

CEDAR's experience throughout the State and dating back to 2010 is the California Probate Code as written is not bad. The fundamental problem is conservator's, court appointed attorneys, and guardians ad litem have no effective oversight. The result is the Probate Code is rarely followed. This results in wholesale violations of the conservatee's right of due process. The end result is conservators have effective absolute power over other human beings. This power results in widespread abuse not unlike the infamous Stanford Prison Experiment. Many of the abusive participants are paid a high hourly wage, which provides a huge personal incentive to manufacture conflict opposed to resolution to increase billable hours and thus their income.

When discovered, the abuse cannot currently be stopped. This is demonstrated by the [Ms. Z] example of complete isolation since 2012 and discovered in 2014. [Citation omitted.] Even when the abuse is well documented in public court records, nothing can be done to call this abuse to the court's attention for corrective action. (coalition4rights.com/legal-assistance-for-seniors)

CEDAR developed a database of the detailed billings of two Professional Fiduciaries featured in the LA Times 2005 series. This review of documents filed with and approved by the court shows their current independent billings each routinely exceeds 24 hours per day. The highest billing was 58.1 hours for a single day. Billing 19 different clients for one trip to the USPS. Selling a property for $1.1 M, despite it being resold in 26 hour for $1.725 M and within 6 month for $3.7 M. The PFB determined these clearly fraudulent invoices and acts were not a violation of licensing regulations because these billings were approved by the court.

The State Bar is also worthless. Responses to CEDAR's complaints indicate that the Bar will not accept complaints from anyone other than the client. Conservatee's don't

have the ability to complain. Another response was that court appointed attorneys and Guardian ad Litem are supervised by the Court not the Bar. A follow-up complaint to the Court resulted in a letter saying that the Bar is responsible for all disciplinary actions.

Then there is the issue of the caliber of court appointed professionals. The best example is out of the San Bernardino Court where one judge ruled *I'll put in the Minute Order that the defense was a total sham and fraudulent and false, and that [Mr. A's] testimony was fraudulent and false. And the Court finds it offensive to see a member of the State Bar engage in such conduct.* Simultaneously the probate judges in the same building were then and a decade later continued to force conservatees to be represented by [Mr. A]. [Citation omitted.]

CEDAR will acknowledge that several complaints to the Commission on Judicial Performance appear to have resulted in an unexpected rotation of that probate judge. The courts' position has been these changes were "normal" rotations and there has been no public discipline of any of the rotated judges. This simply places a different judge in the probate courtroom with the same participants and tools. Initially there has been improved performance in following the Probate Code, but sloppy practices rapidly return including excuses like "this is the way we have always done it." Rotation of a judge does not and cannot solve systemic issues in the conservatorship practices.

CEDAR will also acknowledge that several County Public Guardians have unexpectedly retired or in one case (Santa Clara County) fired. This was a result of public accountability via the Board of Supervisors. There is no ability to hold the privately employed professional conservators accountable.

Completely independent of CEDAR, there is an extensive body of background investigation into the conservatorship practices. Attached is a list with active links that CEDAR is aware of. This was included in the body of the email 1/24 email. You responded to my 1/17 email so it is unclear if you have this info.

Most of CEDAR's proposed legislation is focused on establishing effective oversight because if the existing regulations were simply followed CEDAR would never have come into existence. Because of the inability to get reform, CEDAR is forced to address minor clarifications to the existing Code to clarify that many of the common practices are actual violations. Without effective oversight the result is the practices shift slight and take advantage of another section. Without systemic oversight reform advocates are left play whack a mole.

Happy to provide whatever assistance would be the most helpful. If I am still missing the mark, potentially scheduling a zoom meeting with others would help us understand better how to help the CLRC. Thank you for the interest in what negatively impacts so many California families.

JLAC Audit

Audit of Conservatorships for Due Process Violations in selected Counties.

a) Frequency of Probate Code 1801 due process violations in stripping conservatees of civil rights, b) Impact of Probate Code 1801 due process violations, c) Impact failure to implement 2006 Omnibus Conservatorship and Reform Act, d) Impact of failure to implement 2007 Judicial Council conservatorship reforms (83 items), e) Frequency with which conservatees are isolated from loved ones through retsraining orders or Probate Code 2351 orders, f) Obtain data on: number of conservatorships, type of conservatorships, type of conservators, number of conservatees who are isolated from family, g) Number of temporary conservatorships that exceed 30-day limit, h) Obtain data on over-billing and fraudulent billing by professional fiduciaries such as invoicing 58 hours for a calendar day, 10.4 hours to write 27 checks, 18 trips to same location, double & triple billing same conservatee. Suggested counties are: Alameda, Contra Costa, Monterey, Orange, Riverside, Santa Barbara, and/or San Bernardino

Judiciary

RN17-08225 Enforce existing 30-day limit on Temp Conservatorships.

Clarify the Legislatures intent as expressed in currnet Probate Code of limiting temporary conservatorship to 30 days. Any extension the Court grants itself may not exceed an additional 30 day period. Temporary conservatorships are grated with minimal if any due process. Temporary conservatorships are intended to act cover temporary emergency measures only and short in duration, yet temporary conservatorships last for years, often until death of the conservatee.

RN19-05556 Conservatee Protection Act.

Clarify that Probate Courts should be following existing Probate Code by terminating conservatorship if key conservatee protection sections are not followed. Key provision:*An order appointing a conservator resulting from a hearing that does not comply with subdivision (g) of Section 1822 or Section 1827.3 shall be void and of no force or effect. Identify any additional key provisions that should trigger termination.*

RN19-05630 Civil Standing during conservatee's lifetime for heirs WIC 15657.3(d)(2).

Courts rule including published Court of Appeals that only the conservator has standing during conservatee's lifetime. The court's rulings contradicts SB 183 2007 Corrbet 3/13/2007 Senate Judiciary analysis that discussed the catch-22 that occurs when the conservator is the abuser. Staff's amendment to eliminate the catch-22 were accepted.

RN19-06727 Limit Emergency TROs (temporary restraining orders).

With passage of AB-937 (2013 Wieckowski) conservators are using TROs to isolate the conservatee The court hearing on the TRO is then intentionally dragged on for months and years, likely to stay in place without any resolution until the conservatee dies. If a TRO is needed, have the hearing with the best evidence first.

Judiciary (con't)

RN19-06753 Require 15-day notice prior to dispose of conservatee's property.

Conservators routine dispose of personal property giving future heirs no ability to claim sentimental items

RN19-06749 Permanent conservatorship prior to fees.

Petition for Fees could only be filed after an evidentiary hearing or trial appointing a conservator. This would incentivize professionals to ensure that temporary conservatorship do not continue for years. Probate Codes currently limits temporary conservatorhip to 30 days, let they continue for years.

RN19-06817 Require Court's to implement Conservatorship and Guardianship Reform Act of 2006.

Probate Code 1826(h) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes of 2006 until the Legislature makes an appropriation identified for this purpose.LA Times did a series in 2005, leading to these reforms in 2006. 14-years later the reforms the Legislature never funded these reforms. Current statutes are misleading as they are not enforced because lack of funding.

RN submitted Require probate examiners flag issues inconsistent with Probate Code, State or Local Rules.

Require probate examiners identify and flag violations of probate code, civil code, state or local rules of court. Conservatorship court records are replete with violations of laws and codes, plus egregious over-billing and fraudulent billing by conservators. Probate examiners rarely flag those violations for the court.

RN submitted Clarify conservatee's assets include assets held in trust for the conservatee.

Require probate courts take jurisdiction of all conservatees' assets marshaled including trust assets. Conservators routinely conceal assets in trusts, and then claim trust assets are not under court oversight. This practice allows conservators to misappropriate a significant portion of the conservatee's assets.

Implement the American Bar model community volunteer oversight program.

Test basis in most troubled counties Alameda, Monterey, Santa Barbara, Orange, Riverside, and/or San Bernardino

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/court_volunteer_guardianshipmonitoring.html

Public Safety

RN19-05927 Align Penal Code with definition of abuse used in Welfare and Institutions Code 15610.07.

Existing Penal Code does not have a definition of abuse. WIC already has a good definition of abuse. Simply transfer the definitions of abuse and isolation from WIC into the Penal Code.

RN19-06751 Establish procedure for investigating abuse of conservatee.

Clarify the Penal Code 368.5 applies to all residents including conservatees. Currently, law enforcement does not investigate allegation of crimes involving conservatees because the case is being "overseen" by the court. In court conservators use that law enforcement did nothing as "proof" there was no wrong doing.

Public Safety (con't)

RN submitted Reporting abuse to law enforcement.

Require suspected abuse to be reported to law enforcement. California is nearly unique to reporting abuse in facilities to Ombudsman vs law enforcement. Federal law requires ombudsman confidentiality. Ombudsmen are prohibited from reporting abuse to law enforcement, without informed consent from the victim. 75% of victims are unable or fail to provide consent.

Business and Professions

RN19-05589 PFB to promote existance of and encourage use of local mediation program.

Require each licensed Professional Fiduciary to provide local county mediation information to the conservatee, conservatee's family and anyone that complains about the conservator or conservatorship. Conservator must meaningful participate or shall be removed.

RN19-05593 Acting in the best interest of conservatee.

It is never in the best interest of the conservatee to violating existing laws, regulations, or PFB code of ethics, especially not a Penal Code such as isolation and false imprisonment.

RN19-05595 Attorney written retainer (BPC 6148) applies to all clients including conservatees.

Clarify that PBC 6148 applies to all attorneys including court appointed attorneys. Throughout California, court appointed attorneys for conservatees have no written agreement with clients, the counties, or the courts. There is no document guiding the actions of court appointed attorneys. Even the hourly rate is unknown for years until the invoice arrives. The Bar rules only the conservatee can file a complaint.

RN19-05598 BPC 6534 requires PFB to redact publically available data. Use of PO Box

Amend BPC 6534 so that public information (case number and title) can and should be released by PFB. PFB's form indicates "Physical Address" yet the vast majority are private mailboxes.

Com	code	Description
JLAC	JLAC-11	Audit conservatorship practices for denial of due process and other Probate Code violations.
JLAC	JLAC-21	Audit the Professional Fiduciary Bureau (PFB). (Akel on PFB Advisory Committee while investigated for misconduct)
Jud	draft	Limited conservatees have a right to visitation. Align Probate Code 2351.5(b)(6) with more current ProbC 2351(a).
Jud	RN17-09263	Limit temporary conservatorships to an absolute maximum duration of 60 days.
Jud	NEED	Require that all non-confidential conservatorship court proceedings be available via Zoom or similar. Prob C 1043?
Jud	RN19-05556	Conservatee Protection Act. If key Prob C protections are violated, then conservatorship is terminated within 7 days of discovery.
Jud	NEED	Person seeking visitation restriction in Probate Court should pay all costs and not estate, including in limited conservatorships
Jud	RN19-05630	Provide civil standing to future heirs during conservatee's lifetime. Clarify WIC 15657.3(d)(2) to be consistent w/SB186 2007 as amended 3/13/2007 Senate Judiciary Committee.
Jud	NEED	Implement American Bar Association volunteer court conservatorship monitoring program (or equivalent)
Jud	NEED	Conservatee's family shall never be required to pay the legal and/or conservatorship fees/cost as these are the liabilabity of the adult conservatee.
Jud	NEED	Proposed conservatee shall have the right to select own counsel vs being forced to pay for court assigned counsel
Jud	Need	Conservatorship electronic court files available to family, heirs, advocates at no cost.
Jud	RN20-03233	Mandate court jurisdiction over conservatee's trust if (a) trustee & conservator are associates or 1 person, or (b) court/conservator/trustee modifies trust in any way.
Bus	RN19-05595	Clarify that the attorney/client written retainer agreement requirement (BPC 6148) applies to all clients including conservatees.
PubS	RN20-03815	Mandated reporting of abuse to local law enforcement. CA incorrectly instructs mandated reporters to report crime to social services.
HumS	RN19-05559	When conservator/associate abuses conservatee, presume conservatee's consent for LTC Ombudsman to report abuse to local law enforcement.
Jud	NEED	Conservators, attorneys, GAL, others must e-file accountings in .csv format for easy review & annual data uploads Jan 31st
Jud	RN19-06817	Require Courts implement Conservatorship Reform Act of 2006, but maintain current accounting intervals & 2007 Jud Council reforms
Jud	RN19-06749	Prohibit estates from paying legal/conservator costs until after end of temp conservatorship.
Jud	RN19-06727	Limit the duration of emergency temporary restraining orders (TROs) based on who is persent & requesting/objecting.
PubS	RN19-06751	Clarify law enforcement jurisdiction over all elder and dependent adult abuse, including abuse of conservatees with dementia.
Jud	RN19-06753	Require 15-day notice prior to dispose of the conservatee's property.
Bus	RN19-05589	Require PFB to promote the existence of and encourage the use of mediation.
Jud	RN19-06743	Limit “Fees on Fees” in Conservatorships SB-156 2013 Beall vetoed by then Governor Brown.

EX 20

Disability and Guardianship Project
1717 E. Vista Chino A7-384, Palm Springs, CA 92262
(818) 230-5156 • www.spectruminstitute.org

July 1, 2020

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

Attn: Brian Hebert, Executive Director (bhebert@clrc.ca.gov)

Re: *Capacity Assessments in California Conservatorship Proceedings*
A Report to the Chief Justice, Governor, and Legislature

Dear Chairperson King:

The enclosed report is being sent to the California Law Revision Commission. We are requesting that the Commission consider conducting an in-depth study of capacity assessment standards and practices in probate conservatorship proceedings. Please consider this outreach to be part of the "public participation" that the commission welcomes.

As you will see from this report, there are major deficiencies in legal standards and assessment practices in the current capacity assessment system. Considering the purpose and history of the commission, a study of this area fits perfectly into your mission to assist the Legislature and Governor by examining California law and recommending needed reforms.

Please share the report and ancillary documents with commission members and staff. These materials are found online at: https://spectruminstitute.org/capacity/

Respectfully,

Thomas F. Coleman
Legal Director

Capacity Assessments in California Conservatorship Proceedings

Improving Clinical Practices and Judicial Procedures to Better Protect the Rights of Seniors and People with Disabilities

A Report to the Chief Justice, Governor, and Legislature

RECOMMENDATIONS
(per official or agency)

Thomas F. Coleman
Legal Director
Spectrum Institute

July 1, 2020

https://spectruminstitute.org/capacity/

Prologue

In response to a series of articles published by the Los Angeles Times in 2005 exposing rampant abuses in the probate conservatorship system, the legislative and judicial branches of government initiated investigations.

After some oversight hearings were conducted, an Assembly report found that probate conservatorship proceedings were operating in a "closed system" that had allowed abuses to go undetected for too long. That same closed system exists today.

Chief Justice Ronald George responded to the newspaper stories by convening a Probate Conservatorship Task Force in January 2006. Taking testimony, consulting experts, and reviewing records, members studied the conservatorship system for 18 months. A report was issued – mostly focusing on seniors in general conservatorships of the person or estate – that was very unflattering to the conservatorship system and those who operate it.

The report described a system that was out of control. A subsequent report acknowledged that the Judicial Council did not have basic data about probate conservatorships because there was no statewide case management system in place. This problem continues today.

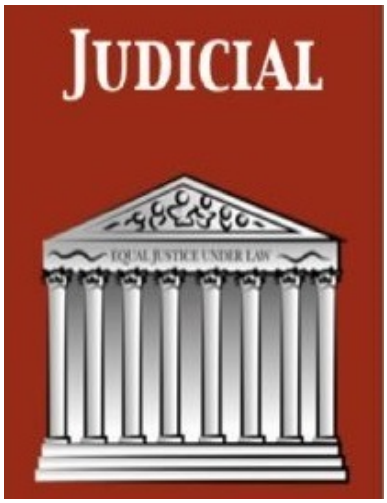
The regular involvement of an executive branch agency in legal proceedings brings a degree of accountability to the judicial system. Unlike an individual litigant who is involved in one case only, an agency may be involved in scores of cases and therefore can monitor what is systematically occurring in those cases. This routinely happens in criminal and child welfare proceedings. It also occurs in mental health conservatorships. Unfortunately, that source of accountability is generally lacking in probate conservatorship cases.

The information that appears above is taken from an amicus curiae brief filed by Spectrum Institute in a conservatorship case under review by the California Supreme Court. Much of the brief calls the court's attention to the broken conservatorship system – one in which the actions and inactions of unaccountable judges and attorneys determine the fate of thousands of seniors and people with disabilities each year.

This report focuses on one part of probate conservatorship proceedings – a part that should be at the core of each case and which should be handled with the utmost professionalism and concern for due process. That part is the capacity assessment process.

If this part of conservatorship proceedings were to be done properly – following statutory directives and constitutional imperatives – the rest of the process would improve and just results would occur more frequently. But in order for that to happen, government officials who are responsible for how conservatorship cases are processed would have to acknowledge deficiencies in policy and practice and then take steps to address them.

The Legislature has established the policies under which the conservatorship system operates. It also funds most aspects of the system. The chairpersons of the judiciary committees in the Assembly and Senate are the legislative leaders who could hold hearings to identify systemic deficiencies in conservatorship proceedings and solicit testimony for improvements in conservatorship policies and practices. The chairpersons of the fiscal committees of both chambers are the key legislators who can identify funding deficiencies that contribute to a lack of due process or unjust results for seniors and people with disabilities whose lives are upended by these proceedings.



The Chief Justice leads the judicial branch. She presides over the Supreme Court which promulgates rules of ethics for judges and rules of professional conduct for attorneys. With her leadership, the Supreme Court could modify these rules to address some of the major deficiencies in conservatorship proceedings. The Chief Justice is also the chairperson of the Judicial Council. That body promulgates procedural rules for legal proceedings, including conservatorship proceedings, and adopts standards for judicial education. With leadership from the Chief Justice, the Judicial Council could adopt new rules and standards to address many of the deficiencies in judicial practices that occur all too frequently in probate conservatorship proceedings.

The Governor is in charge of the executive branch. Departments in that branch are mostly missing in action when it comes to helping seniors and people with disabilities get a fair shake in conservatorship proceedings. That can be changed. The Governor could direct several state entities to become more involved in protecting the rights of conservatees and proposed conservatees. There is much that could be done by the Department of Aging, Department of Developmental Services, Department of Consumer Affairs, the Department of Fair Employment and Housing, and Department of Social Services. These actions could be coordinated by the Health and Human Services Agency and the Business, Consumer Services, and Housing Agency.

This report calls on officials in all three branches to study this report and formulate actions to improve the conservatorship system, including the capacity assessment process.

Recommendations

(Per Official or Agency)

Chief Justice

It is recommended that the Chief Justice, in coordination with the Judicial Council, convene a Task Force on Alternatives to Conservatorship. The Task Force should investigate how judges who process probate conservatorship cases throughout the state are complying with statutory and constitutional requirements that alternatives to conservatorship be seriously considered. The Chief Justice should direct the presiding judges in all 58 counties to cooperate with this investigation. The Task Force should issue a report to the Judicial Council and the Legislature within one year of its first meeting. (p. 45)

Judicial Council

It is recommended that the Judicial Council direct its Center for Judicial Education and Research to include the Convention on the Rights of Persons with Disabilities, especially sections 12, 13, and 16, into all training programs and materials for judicial officers and court personnel regarding probate conservatorship proceedings or the assessment of capacity in any legal context. (p.13)

It is recommended that the Judicial Council convene an ongoing WINGS agency to advance each of these action items in California for the purpose of improving the capacity assessment process used in probate conservatorship proceedings. WINGS is a Working Interdisciplinary Network of Guardianship Stakeholders. (p. 20)

It is recommended that the Judicial Council direct its Probate and Mental Health Advisory Committee to review current policies and practices for capacity assessments regarding all areas of decision-making involved in probate conservatorship proceedings. The committee should determine whether any new court rules or statutes should be enacted to make current policies and practices conform to the letter and spirit of Standard 3.3.9 of the National Probate Court Standards, due process, and requirements under the ADA. (p. 22)

It is recommended that the Rules of Court be amended to require a full day of training on conservatorship issues before a judicial officer is allowed to hear and decide such cases. The amendment should specify the issues to be covered in such a training, including the requirements of due process, best practices specified in the ABA/APA Handbook for Psychologists, and the *sua sponte* duties of courts to litigants

with cognitive and other disabilities under Title II of the ADA. The Rules of Court should also be amended to require that judges hearing and deciding probate conservatorship cases must participate in a half-day training program each year. These annual refresher courses should focus on recent developments in conservatorship law in California, nationally, and around the world. (p. 38)

It is recommended that the Judicial Council direct the Center for Judicial Education and Research (CJER) and the Probate and Mental Health Institute (PMHI) to expand their trainings on capacity assessments and conservatorships to include the following legal topics: constitutional considerations in capacity assessment and adjudications and the application of the ADA to the capacity assessment process. The use of interdisciplinary teams should be included in the clinical aspect of trainings, with special emphasis on the use of social workers and service providers in identifying supports and services that may enhance or strengthen a person's functional abilities to make a conservatorship unnecessary. An intensive training should be developed on capacity assessments and alternatives to conservatorship for adults with intellectual and developmental disabilities. (p. 38)

It is recommended that the Judicial Council adopt rules pertaining to pre-adjudication conservatorship proceedings. Judges need specific guidance on what they should do to comply with due process and what they must do, sua sponte, under the Americans with Disabilities Act (ADA) to afford proposed conservatees access to justice in these proceedings. Access to justice is required not only inside the courtroom but also in ancillary services such as capacity assessments and investigations by court investigators. The absence of guidance in state court rules leaves too much room for errors and abuses of discretion by judges at the local level. (p. 38)

It is recommended that the Judicial Council revise Rule 1.100 and its educational materials to clarify that more is required than merely responding to requests for accommodations. The rule and materials should specify that courts have a duty on their own motion to initiate an interactive process to determine what accommodations to provide when judges or court staff become aware that a litigant, witness, or other participant may require an accommodation to maximize effective communication and meaningful participation in the proceeding. This clarification is especially important for conservatorship proceedings where judges and court staff are informed from the start that a proposed conservatee has, or is perceived to have, one or more serious disabling conditions that impair cognitive or communication functions. (p. 40)

It is recommended that the Judicial Council direct staff to study the Department of Justice (DOJ) guidance memos on court responsibilities in criminal and child welfare proceedings and to prepare educational materials for judges and court

staff about analogous duties in probate conservatorship and other mental health proceedings. The current void in education and training on these issues should be filled without delay. (p. 41)

It is recommended that the Judicial Council conduct a survey of all 58 superior courts to inquire into: (1) the number of new probate conservatorship proceedings that were filed in the previous three years; (2) the number of times experts were appointed in these cases; (3) the number of IPP reviews the court requested or ordered from regional centers; (4) any procedures the court has in place for evaluating less restrictive alternatives; and (5) an explanation as to why such appointments or IPP reviews are not ordered more frequently. (p. 45)

It is recommended that the Judicial Council should create, and the Legislature should fund, an Office of Conservatorship Research and Planning within the Judicial Branch. There is no statewide administrative accountability within the judicial branch with respect to conservatorship proceedings. The Chief Justice and Judicial Council do not even know how many seniors and people with disabilities are living under an order of conservatorship in California. These vulnerable adults are supposed to be under the "protection" of the superior courts. The superior courts are part of a unified statewide judicial system. Therefore, the safety and well-being of these protectees are the responsibility of the State of California via the Judicial Branch. But how much protecting is actually occurring when the Chief Justice and the Judicial Council do not know what the 58 superior courts are doing in these cases, much less how many seniors and people with disabilities are living under orders of conservatorship? (p. 56)

It is recommended that the Judicial Council require the following information to be provided by a physician or psychologist executing a Capacity Declaration Form: (p. 62)

1) Name of the person who scheduled the appointment;
2) Name and relationship of the person who paid the evaluator's fees;
3) Prior contact of the evaluator with petitioners, proposed conservators, or their attorneys;
4) Names and relationships of any individuals present during the evaluation;
5) Extent of prior medical relationship of the evaluator with the person evaluated;
6) What ADA assessment was done prior to the evaluation to determine what supports and services might be necessary to ensure effective communication by the person evaluated and meaningful participation of that person in the evaluation process;
7) Training and experience of the evaluator to interact with and evaluate people with developmental disabilities or seniors with dementia or other adults with cognitive issues;

8) Amount of time that was spent during the evaluation process;
9) Names of persons other than the respondent who were interviewed;
10) Documents that were reviewed;
11) List of all medications the person evaluated has been taking prior to and at the time of the evaluation and whether those medications might have side effects that could affect the performance of the person during the evaluation;
12) Whether the effects of the medications were ruled out as a source of incapacity; and
13) Whether the respondent is suffering from depression and whether such depression was ruled out at the source of some or all of the incapacity;
14) Whether the individual has had a comprehensive physical examination that might rule out physical problems that could be causing cognitive decline or confusion.

It is also recommended that, since judges are so pressed for time, the addendum should contain a short and concise narrative about the practitioner's opinion and the basis for the opinion. It should also state the degree of certainty underlying the practitioner's opinion that there is no form of medical treatment for which the conservatee has the capacity to give informed consent. Is the opinion supported by reasonable suspicion, probable cause, preponderance of evidence, or clear and convincing evidence? The practitioner should know the definition for each degree of proof. (p. 63)

It is recommended that if a practitioner declares that an individual is unable to attend a hearing or hearings due to medical inability, the form should ask the practitioner to describe the specific reasons for that medical inability. To comply with the ADA, there should also be an opinion about whether personal presence would be possible if certain supports or services were provided by the court to the individual. If the practitioner is unsure of this, the practitioner should recommend that an ADA needs assessment be done by a qualified professional to make this determination. (p. 64)

It is also recommended that the capacity declaration form should ask the practitioner to render an opinion on the individuals's capacity to waive the right to attend court hearings. The practitioner should evaluate the individual's ability to understand the consequences of the proceedings, the benefit to the individual of personal presence, and the value to the court of having the individual at the hearing and the ability to make an informed decision on waiving the right to be present in court. An informed waiver of being personally present would require an understanding of these matters. (p. 64)

It is recommended that if a proposed conservatee has executed a medical power of attorney or health care directive prior to the initiation of the conservatorship proceedings, Form GC-335 should ask the practitioner to assess whether, in his or her professional opinion, the individual had the capacity to execute the document at

the time it was signed. Such previously executed documents should not be ignored or lightly dismissed as they often are. If such capacity existed at the time a document was signed, it should be honored and medical decision-making authority should not be delegated to a conservator. (p. 65)

It is recommended that the Judicial Council include the issues of social decision-making capacity and constitutional rights in conservatorship training programs for judges. These issues should also be included in mandatory training programs for court-appointed attorneys in conservatorship proceedings. (p. 82)

It is recommended that the Judicial Council study the issue of capacity of conservatees and proposed conservatees to waive statutory and constitutional rights with a view toward adopting a rule for probate conservatorship proceedings similar to Rule 5.682 in juvenile dependency proceedings. The Judicial Council should consult with the Department of Aging and the Department of Developmental Services regarding the capacity of seniors with cognitive disabilities and adults of all ages with intellectual and developmental disabilities to understand the nature of conservatorship proceedings, the consequences of an order of conservatorship, the role of and importance of an attorney in such proceedings, and the ability of such adults to withstand direct or subtle pressures to waive their rights. The Department of Fair Employment and Housing enforces Section 11135 regarding the ADA duties of public entities, including the courts, and therefore should be consulted as well. (p. 92)

Supreme Court

The State Bar is an arm of the Supreme Court. That court has been apprised of myriad systemic deficiencies in probate conservatorship proceedings. **It is therefore recommended** that the Chief Justice should put this recommendation on the administrative agenda of the Supreme Court. The justices should direct the State Bar to initiate and conduct a study looking into the manner in which legal services are currently being provided in probate conservatorship proceedings and what should be done to improve these services. Without such a proactive measure, it is likely that the status quo of deficient legal services for seniors and people with disabilities will continue to be the norm. (p. 57)

State Bar

It is recommended that the California State Bar develop a new rule regarding the professional duties of attorneys representing clients in conservatorship proceedings or other litigation where the legal capacity of the client is at issue. In addition to clearly stating that lawyers have the same ethical and professional duties to these clients as they do to all clients, comments to the rule should offer guidance

regarding investigative, advocacy, and defense activities and provide examples of what attorneys should and should not do. (p. 30)

It is recommended that the State Bar reach out to and work with disability rights organizations to identify specific topics, references, and resources that should be mentioned in any trainings authorized by the State Bar for credit under its mandatory continuing education program. The quality of new trainings programs on these topics should not be left to chance. (p. 42)

It is recommended that the Legislature should direct the State Bar to develop performance standards for public defenders and private attorneys who are appointed to represent seniors and people with disabilities in probate conservatorship proceedings. The standards should explain the need for attorneys to ask for Section 730 appointments of social workers for the purpose of evaluating the viability of a supported decision-making arrangements as a less restrictive alternative to a conservatorship. (p. 97)

MCLE Providers

It is recommended that training programs for attorneys who represent proposed conservatees should reference the APA/ABA Handbook for Psychologists and urge the attorneys to become familiar with the best practices it offers. As competent advocates for proposed conservatees, these attorneys should question any expert who offers an opinion on capacity about the procedures and standards they used, whether they are familiar with the handbook, and whether the expert used or deviated from any of the suggested practices. (p. 27)

Superior Courts

It is recommended that if a superior court has a list of experts qualified for appointments in conservatorship proceedings or for capacity assessments in other proceedings, the court should require a professional to disclose whether he or she has received specialized training in capacity assessments and whether the methodology used in the evaluation conforms to the best practices suggested by the APA/ABA psychologists handbook for the evaluation process. (p. 28)

Governor

It is recommended that the Legislature authorize funding for a Governor's Commission on Alternatives to Conservatorship. The purpose of the commission would be to review international trends in reforming guardianship and conservatorship systems with a view to developing improvements and alternatives to the

conservatorship system in California. The commission should be housed in the executive branch since it plays little or no role in conservatorship proceedings and therefore would not have a real or apparent conflict of interest that could hinder an honest and thorough consideration of moving away from the status quo of the current conservatorship system. Commissioners would be appointed by the Governor, Legislature, and Chief Justice. The commission would be staffed by the Department of Aging and the Department of Developmental Disabilities. It would take testimony from scholars, advocates, service providers, and most importantly from persons who have participated in conservatorship proceedings, including seniors and people with disabilities. The commission would submit a report and recommendations to the Governor, Legislature, and Chief Justice within two years of its first meeting. Without a properly funded study, conservatorship reform may remain perpetually stagnant and elusive. (p. 17)

It is recommended that all three branches of government work together to review the current process used for evaluating the capacities of proposed conservatees with intellectual and developmental disabilities and investigating the feasibility of alternatives to conservatorship. The Governor should take the lead by convening a task force to determine what increases in funding would be required to ensure that regional centers have adequate resources to conduct such assessments and that DDS has sufficient resources to provide the necessary direction to, and oversight of, regional centers to assure quality and uniformity throughout the state. (p. 47)

DDS

It is recommended that the Department of Developmental Services include in its contracts with regional centers a clause requiring that an Individual Program Plan (IPP) review process be conducted for clients who are proposed conservatees in probate conservatorship proceedings and include a line item in the regional center's budget to provide funding for such reviews. (p. 45)

It is also recommended that the Department of Developmental Services establish criteria for determining the training and experience required for regional center staff or medical or mental health professionals to be considered qualified to conduct assessments of capacity to consent to marriage. (p. 75)

It is recommended that the Department of Developmental Services (DDS) amend the regulations it has adopted on client's rights to clarify the right of adults with developmental disabilities to exercise their freedom of association. Section 50510 of Title 17 of the California Code of Regulations should be amended to specify that such adults have the right to make choices to associate or not with anyone and to have those choices respected and implemented. (p. 80)

It is recommended that DDS add the italicized phrase to Section 50510(a)(6) so that it states: "A right to social interaction and participation in community activities, *including the right to associate with specific individuals or not to associate with them.*" The regulation should be abundantly clear that the right to social interaction includes the constitutional right to freedom of association. (p. 81)

It is recommended that the Legislature direct the Department of Developmental Services to require regional centers, as part of their ongoing contractual duties, to take steps to ensure that all conserved regional center clients who desire to vote have their voting rights restored. The Legislature should also direct the Department of Aging to coordinate with the Judicial Council to survey all superior courts about their voting rights restoration practices for all other adults who have lost their voting rights in conservatorship proceedings. Most of these individuals would have been seniors. (p. 87-88)

DFEH / FEHC

It is recommended that the Fair Employment and Housing Council (FEHC) include in its new regulations a specific section on the application of the ADA and Section 11135 to court proceedings, including and especially conservatorship and other mental health proceedings. (p. 42)

It is recommended that the Fair Employment and Housing Department develop educational materials on the application of the ADA and Government Code Section 11135 to court proceedings, with special guidance to judges, court staff, and public defenders and other attorneys appointed to represent conservatees and proposed conservatees. The department should notify the State Bar, local bar associations, presiding judges of all 58 superior courts, Center for Judicial Education and Research, California Judges Association, and Public Defenders Association, that such materials are available online. (p. 42)

ARCA

It is recommended that the Association of Regional Center Agencies develop guidelines for evaluations of the capacity of clients to consent to marriage. The guidelines should be developed in consultation with psychological and medical professionals as well as the Client's Rights Office of Disability Rights California. (p. 75)

Legislature

It is recommended that the chairpersons of the Assembly and Senate judiciary committees direct all staff members to become acquainted with the Convention

on the Rights of Persons with Disabilities, especially sections 12, 13, and 16, so that any proposed legislation coming before those committees for approval can be evaluated by legislators and staff with these principles in mind. (p. 13)

It is recommended that legislators in California review the representation agreement statute in Austria. The Legislature should pass a bill giving adults with cognitive or mental disabilities a method of selecting someone to make medical decisions and conduct ordinary financial transactions for them. Powers of attorney should be made available to adults who lack the capacity to contract but who nonetheless can understand in general terms the concept of appointing another person to make such decisions on their behalf. The lack of capacity to contract should not be used as a barrier to receiving the benefits of a simplified power of attorney. (p. 16)

It is recommended that the Legislature authorize funding for a Governor's Commission on Alternatives to Conservatorship. The purpose of the commission would be to review international trends in reforming guardianship and conservatorship systems with a view to developing improvements and alternatives to the conservatorship system in California. The commission should be housed in the executive branch since it plays little or no role in conservatorship proceedings and therefore would not have a real or apparent conflict of interest that could hinder an honest and thorough consideration of moving away from the status quo of the current conservatorship system. Commissioners would be appointed by the Governor, Legislature, and Chief Justice. The commission would be staffed by the Department of Aging and the Department of Developmental Disabilities. It would take testimony from scholars, advocates, service providers, and most importantly from persons who have participated in conservatorship proceedings, including seniors and people with disabilities and their family members. The commission would submit a report and recommendations to the Governor, Legislature, and Chief Justice within two years of its first meeting. Without a properly funded study such as this, conservatorship reform may remain perpetually elusive. (p. 17)

It is recommended that the Legislature enact a law requiring courts to inform conservatees or proposed conservatees of their right to request the appointment of an interdisciplinary team to evaluate relevant areas of the individual's capacity, with or without ancillary supports and services, prior to the court limiting any area of the individual's decision-making authority. As contemplated by this statute, an interdisciplinary team should include a physician, licensed mental health professional, and social worker or regional center case worker. In many nations, interdisciplinary teams are a standard procedure for determining whether a guardianship or conservatorship is needed or whether a supported decision-making arrangement would be sufficient to protect the individual, while at the same time respecting his or her right to self-determination. It is time for California to modernize its antiquated capacity assessment process and to bring its procedures into conformity with international trends. (p. 23)

It is recommended that the Legislature enact a law stating that, absent exceptional circumstances, courts shall only appoint experts to conduct capacity assessments in conservatorship proceedings if they have received specialized education or training on capacity evaluations within five years of the date of the appointment. If a court appoints an expert without such training, the court should be required to state on the record the reason for doing so. Since capacity assessments should be essential to a court's decision in a conservatorship proceeding, professionals without training in capacity assessments should not be appointed to conduct such evaluations. While the initial training of a professional regarding the capacity assessment process could have been many years before the date of appointment, the professional should have more current training to ensure that he or she has been educated on new developments, improvements, or recent trends in the capacity evaluation process. (p. 28)

It is recommended that the Legislature enact a statute declaring that regional center reports must be filed in all cases involving proposed conservatees with developmental disabilities and attorneys must be appointed in all such cases regardless of whether petitioners have filed for a general or a limited conservatorship. Judges should always receive regional center reports in conservatorship proceedings involving proposed conservatees with developmental disabilities. The report should be reviewed by the court prior to any adjudication on issues of capacity. Proposed conservatees should always have an attorney appointed to ensure they receive due process, have access to justice as required by the ADA, and receive the benefit of a thorough capacity assessment – one that includes the serious exploration of less restrictive alternatives. (p. 33)

It is recommended that the Assembly Committee on Aging and Long Term Care hold hearings to inquire into amending state law to entitle proposed conservatees to have an interdisciplinary assessment of capacities and alternatives. Just as adults with developmental disabilities are entitled to an IPP review for such purposes, seniors and other adults with disabilities should have access to a similar process. The committee should ask the Department of Aging to develop a report outlining procedures that may be available under existing law and recommendations for legislation that may be needed to make interdisciplinary assessments readily available to proposed conservatees. Judges will make better and more reliable decisions on issues of capacity and alternatives to conservatorship if they have the benefit of the opinions of a multidisciplinary team of professionals. (p. 34)

About Spectrum Institute

Spectrum Institute is a nonprofit operating foundation incorporated in California in 1987. It has tax exempt status under section 501c3 of the Internal Revenue Code. Through research, education, and advocacy, the organization promotes justice, equal rights, and respect for human diversity. Over the years, Spectrum Institute has championed a variety of human rights issues and causes: protecting the right of personal privacy; combating hate crimes against sexual minorities; promoting respect for family diversity; challenging discrimination on the basis of marital status and sexual orientation; stopping the abuse of teenagers by boarding schools and boot camps; promoting risk reduction and developing effective responses to the physical, sexual, and emotional abuse of people with intellectual and developmental disabilities; and advocating for systemic reforms to the probate conservatorship system in California and the adult guardianship systems in other states.

About the Report

This report is the culmination of 15 months of research, writing, and collaboration. Likely the most comprehensive study ever done on state standards and assessment practices involving decision-making capacities, the report offers dozens of recommendations to officials in California to improve this area of the law. Current legal standards and capacity assessment practices are sorely outdated. Seniors and adults with intellectual and developmental disabilities deserve to have their rights protected by judges, attorneys, and professionals who are involved in legal proceedings that place their freedoms at risk based on allegations of incapacity. This report documents deficiencies in current policies and practices and provides recommendations to address those deficiencies. It gives public officials the information they need to make the necessary adjustments to ensure that such legal proceedings comply with the requirements of due process and are conducted in a manner consistent with state and federal laws prohibiting discrimination on the basis of disability.

About the Author

Thomas F. Coleman is the founder of Spectrum Institute and serves as its legal director. The primary focus of his 47-year career as an attorney has been improving the administration of justice and securing equal rights for disadvantaged populations. In addition to his advocacy in state and federal courts and his lobbying efforts in Congress and state legislatures, Coleman has written numerous public policy reports on a wide range of topics involving access to justice and the protection of civil and constitutional rights.

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SPECTRUM INSTITUTE RECOMMENDATIONS: PROPOSED STATUTORY REFORMS

Note: This summary was prepared by CLRC staff, not by the Spectrum Institute.

The Spectrum Institute's report entitled "Capacity Assessments in California Conservatorship Proceedings" (hereafter, "Report") includes numerous recommendations. Some of them propose statutory revisions, including the following:

- The enactment of a new law directing judges to process any conservatorship case involving an adult with a developmental disability as a limited conservatorship proceeding, even if a petitioner files for a general conservatorship.[1]
- The enactment of a new law requiring a court to inform a conservatee or proposed conservatee, before the court restricts any aspect of that individual's decision-making authority, that the individual is entitled to request the appointment of an interdisciplinary team, including a physician, a licensed mental health professional, and a social worker or a regional center case worker, to evaluate relevant areas of the individual's capacity.[2]
- The enactment of a new law providing that, absent exceptional circumstances justified by an expressed statement of need, an expert appointed by a court to conduct a capacity assessment in a conservatorship proceeding must have received specialized education or training on capacity evaluations within five years of the date of the appointment.[3]
- The enactment of a new law requiring that in any case in which a petition is filed for a conservatorship of a person with developmental disabilities, an attorney must be appointed for the proposed conservatee, and regional center reports relating to the proposed conservatee must be made available to the attorney and filed with the court.[4]

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1. Report, p. 84. When a proposed conservatee is an adult with a developmental disability who cannot fully care for themselves or their finances, a petition for a limited conservatorship, which provides enhanced statutory protections for the conservatee, is normally filed. See Prob. Code §§ 1420, 1471(c), 1827.5; https://www.courts.ca.gov/selfhelp-conservatorship.htm. However, the report suggests that petitioners can and sometimes do avoid these additional statutory protections by instead petitioning for a general conservatorship.

2. Report, pp. 22-23. In general, existing law requires a court assessing the need for a conservatorship only to appoint a court investigator, who by statute must be qualified to make whatever investigation is required by existing law. See Prob. Code §§ 1454, 1456, 1826. Regional center assessments of the proposed conservatee are also required by statute in limited conservatorship proceedings. Prob. Code § 1827.5.

Existing law also allows a court, on its own motion or the motion of any party, to appoint any expert, if it appears to the court that expert evidence is or may be required by the court or by any party to the action. See Evid. Code § 730.

3. Report, pp. 24-29. See also *supra* note 2.

4. Report, pp. 31-33. In many cases, a petition for a conservatorship for a person with developmental disabilities would be a petition for a limited conservatorship, for which appointment of counsel to represent the proposed conservatee is required if the proposed conservatee has not retained counsel. See Prob. Code § 1471(c). However, if the petition instead requests a general conservatorship, appointment of counsel is

- The enactment of a new law under which the capacity standard for a proposed conservatee to designate a healthcare proxy is lower than the capacity standard for a proposed conservatee to make a medical decision.[5]
- The enactment of a new law precluding a court from restricting the right of a conservatee to engage in solitary sexual activity or in sexual activity with another adult, unless the conservatee has been evaluated by a professional with specified training and experience who has submitted a report to the court indicating that sexual incapacity exists, and the facts and reasons underlying this opinion.[6]
- The enactment of a new law requiring a professional capacity assessment if a petitioner seeks to restrict a proposed conservatee's ability to make decisions relating to the proposed conservatee's education.[7]
- Revision of existing law regarding a conservatee's residence, such that a conservatee would retain the right to choose the conservatee's residence following a general conservatorship proceeding, absent a specific request in the conservatorship petition for the transfer of such authority, which would have to be resolved with a professional capacity assessment.[8]
- The enactment of new law providing that a guardian ad litem may be appointed to litigate a civil matter on behalf of a person with a mental health disorder or developmental disability only if that disorder or disability "renders the party unable to understand the nature or consequences of the proceedings or to assist counsel in the conduct of the litigation in a rational manner."[9]

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discretionary with the court, absent a request from the proposed conservatee. See Prob. Code §§ 1470(a), 1471(a), 1471(b); see also *supra* note 1.

5. Report, pp. 65-67. Existing law provides that the ability of a conservatee to give informed consent to medical treatment turns on whether the conservatee is able to respond knowingly and intelligently to queries about medical treatment and participate in a treatment decision by means of a rational thought process. Prob. Code § 1881(a). No different standard is specified for the designation of a proxy to make health care decisions for the conservatee. The report urges California to adopt the lesser standard allowing such a designation under Vermont law (whether "the individual has a basic understanding of what it means to have another individual make healthcare decisions for oneself and of who would be an appropriate individual to make those decisions, and can identify whom the individual wants to make health care decisions for the individual"), or a multi-factor test that represents the law in Utah.

6. Report, pp. 75-78. Under existing law, a limited conservator has no power or control over a limited conservatee's social and sexual contacts and relationships, unless specifically requested in the petition for conservatorship and granted by the court. Prob. Code § 2351.5(b)(6). However, existing law does not appear to impose a similar restriction on a general conservator. See also *supra* note 1.

7. Report, pp. 84-86. Again, existing law does not give a limited conservator any power or control over the education of the limited conservatee, unless specifically requested in the petition for conservatorship, and granted by the court (Prob. Code § 2351.5(b)(7)). However, existing law does not appear to place a similar restriction on a general conservator. See also *supra* note 1.

8. Report, pp. 82-84. Existing law presumes that the personal residence of a conservatee at the time the conservatorship proceeding is commenced is the appropriate residence for the conservatee after a conservationship order, unless overcome by clear and convincing evidence. Prob. Code § 2352.5(a).

9. Report, pp. 98-104. Probate Code Section 1003, which addresses the appointment of a guardian ad litem in a conservatorship proceeding, does not clearly specify the standard by which capacity to pursue civil litigation is to be assessed by the court. See also Code Civ. Proc. § 373(c). The standard that the Spectrum Institute proposes is drawn from related case law. See *In re Sara D.*, 87 Cal.App.4th 661, 663, 671-72, 104 Cal.Rptr.2d 909 (2001).

- The enactment of a new law requiring that before a guardian ad litem may be appointed in civil litigation over a party's objection, the party must be given notice of the right to an evidentiary hearing at which the party may contest evidence of alleged incapacity, cross examine witnesses, and present evidence to the court on the matter.[10]
- The enactment of a new law clarifying that an order appointing a guardian ad litem may be the subject of an immediate appeal, and requiring the court to notify the party for whom the guardian was appointed of this right of appeal.[11]

10. Report, pp. 98-104. Existing law does not appear to address this issue.
11. Report, pp. 98-105. Existing law also does not appear to address either of these issues.

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07/10/20

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

Re: Proposal for Consideration by the California Law Revision Commission

Commissioners:

Respectfully submitted, please find my suggestion of just some of the revisions to the Davis-Stirling Common Interest Development Act [see California Civil Code 4000, et seq.] that would benefit California's rapidly growing homeowner association (HOA) population organized under California's Nonprofit Mutual Benefit Corporation Law §7110-8910 and Internal Revenue Service (IRS) **code** 501(c)(3). What HOAs in California need is transparent governance! Boards that rule as an autocracy, rather than govern by the precepts of democracy do nothing but disenfranchise the general membership! Study and decision by the Commission can help! HOA members would benefit from implementation of many of the policies enforced in Cities courtesy of Government Code 54950, et seq. (The Brown Act). Similarly, application of the Political Reform Act of 1974 would expose and discipline HOA Boards who, rife with undisclosed conflict of interest, continually violate even the most basic member rights guaranteed by California's constitution. Revisions to Board meeting statutes surrounding disclosure of "interest" are long overdue.

Board abuse of meeting protocol is at the heart of the problem. Boards of Directors habitually contravene Law and Association governing documents without fear of redress from the membership by invoking secrecy (in the name of privacy) to keep the membership uninformed! Without an open pipeline to Association information members cannot possibly vote rationally to benefit mutual interests, effectively defeating the primary purpose of a "Mutual Benefit Corporation"(Battram v. Emerald Bay Cmty. Ass'n, 157 Cal. App. 3d 1184, 204 Cal. Rptr. 107, 1984 Cal. App. LEXIS 2275). Board meetings, the only venue where Association business is routinely discussed, are commonly advertised in an inconspicuous format and place, often inaccessible to the handicapped; meeting minutes are a mere regurgitation of a very cryptic and enigmatic agenda; and all recording of open meetings by members is banned. Members must often resort to employing private legal representation to get copies of even the most mundane Association records: minutes, financial reports, and other reports discussed at open Board meetings. Having settled past actions for their violations of Davis-Stirling's Open Meeting Act [see California Civil Code 4900, et seq.], HOA Boards focus on crafting new and ingenious measures designed to circumvent California Civil Code §§4935 and 5200-5210 to curtail member access to information about the conduct of Association business wherever their general counsels can possibly twist applicable Law.

The "people's right to know" is a first principle of the California Constitution (Article 1, Section 3). HOA Boards are populated primarily by elected individuals similar to California's city councils. California's Appellate Courts long ago recognized that HOAs are actually "small cities". (Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642; Sproul & Rosenberry, Advising Cal. Condominium and Homeowners Associations (Cont.Ed.Bar 1991) § 7.1, pp. 300-301). Governed by "elected" individuals, HOAs are the very definition of popular government. Government Code 54950, et seq. (The Brown Act) protects the public from abuse of authority by popular government at the municipal level. Without protections afforded California's cities, unwitting members of HOAs are being stripped of their rights by rogue Boards of Directors. " A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or

perhaps both." (San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at p. 772, citing Shaffer et al., A Look at the California Records Act and Its Exemptions (1974) 4 Golden Gate L Rev 203, 212.) The following codification within the Davis-Stirling Common Interest Development Act [see California Civil Code 4000, et seq.] would be of immense benefit to California's HOA membership:

1. **Establish and codify members' right to record Board Meetings** to the same degree that persons may record public meetings under the Brown Act (Government Code 54953.5, et seq).
2. **Establish a clear definition for "adequate records"** (see California Corporations Code §1500) modeled on Government Code §6252 so that each HOA is obligated to keep a truly informative store of books, records, and minutes fully representative of the proceedings of its open meetings for review by its membership "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."(Government Code §6250). Real estate managed under the HOA paradigm houses a vast and burgeoning segment of California's population. Ensuring access to information concerning the governance of HOAs is, therefore, very much the people's business. Codification of mandatory fines for violation of standards established in the amended Law would be vital to effective enforcement.
3. **Establish mandatory fines for violation of California Civil Code §5210(b).** HOAs routinely slow-walk access to Association records, seldom producing Association records in a timely manner. Consider deeming and reclassifying this practice as *de facto* withholding of Association records, controlled by California Civil Code §5215.
4. **Clarify California Civil Code §4935(a) and codify mandatory fines for violation.** Associations routinely unlawfully agendize "litigation" as the sole matter for discussion during a Board meeting for no other reason than to invoke executive session secrecy in order to deny members information to which they are lawfully entitled. Decision on this infraction became settled Law after Appellate hearing of *Ruiz v Harbor View Community Assn., 134 Cal. App. 4Th 1456, 37 Rptr. 3D 133, 2005 Cal. Daily Op. Service 10704*, (executive session privilege only arises *at the point when litigation is no longer a mere possibility, but instead ripened into a proposed proceeding....*). Still, HOA Boards persist in cloaking their discussions inappropriately with executive session secrecy. Mandating that agendas list the litigation case number plus the expected date of resolution would avoid any confusion.
5. **Clarify usage of California Civil Code §4935(b) as authority to convene executive sessions**. Boards routinely agendize executive sessions to "discuss member discipline" citing California Civil Code §4935(b) as authorization to invoke secrecy. In fact, executive sessions can only be called using this authority if the member under discussion specifically requests the matter be heard in secret. In addition, the member being discussed is entitled to be present during those Board's discussions. Law must establish mandates that the member proposed for discussion be notified by individual delivery at least 30 days prior to the proposed Board review of the matter listing date, time, and place and all member rights surrounding choice of venue (open or executive session Board meeting) and the member'right to attend any Board meeting held to consider the matter. Establish a mandate that agendas invoking use of executive secrecy spell out the precise rationale behind calling for an executive session including whether or not the member under discussion will be present. In addition, include statutory mandates that the Association's Annual Policy Statement (California Civil Code §5310) inform its members of their right to be present at all Board meetings convened using §4935(b) or member discipline as authority. Craft mandatory language to be used for notification of membership rights pursuant to California Civil Code §5310.
6. **Establish penalties for Associations found tolerating non-disclosure of Board member conflict of interest**. HOA directors are limited purpose public figures {Copp v. Paxton, 52 Cal.Rptr.2d 831, 844 (Cal. Ct. App. 1996)} With such status comes obligations not yet addressed by Davis-Stirling. Granted, California Civil Code §5350 establishes voting restrictions, but the Davis-Stirling Common Interest Development Act needs to articulate a set of specifically tailored principles by which director "conflict of interest" shall be evaluated in HOAs. Many HOA directors use their Board positions as resume builders and/or stepping stones into the larger political arena. Material conflict of interest (both present and future) must be scrupulously defined as it applies to any revision to California Civil Code §5350. In the

case of HOAs, adding a personal element to a working definition of "material interest" should be considered. HOA Board members often overstep their authority making arbitrary decisions and granting favors to solidify a constituency through which to advance very personal agendas. Of course, any revision to current statute must consider setting remedies and redress available to the membership at large when violations are discovered including a mandate to establish a protocol for bringing member complaints before the small claims court. Consider modeling revisions to Law on the Political Reform Act of 1974. (Government Code §§ 81000 – 91014, enacted through Proposition 9 at the June 4, 1974 Primary Election)

7. **Codify provisions that nullify any Board action that does not follow due process** covered by the Davis-Stirling Common Interest Development Act or applicable Law. For example, HOA operating rules are routinely used as backdoor amendments to HOA Declarations and Bylaws. Davis-Stirling bans this practice (California Civil Code §§4350, 4205), yet many Boards of Directors insist on proposing operating rules that are in clear conflict with the Association's Declaration and/or Bylaws. The general membership often assumes their Board is acting according to due process simply because they get the required notification of rule change. Sadly, many Boards do not even follow the codified rule making procedures (due process) set by California Civil Code §§4350, 4360 and 4205, but produce a notice clearly in violation of member right to know (California Constitution, Article 1, Section 3). Violation of due process during operating rule changes is just the tip of the iceberg! Davis-Stirling needs to include an explicit ban on any Board violation of due process, setting mandatory fines, and granting small claims courts discretion to nullify when Board execution of due process is found to be improper would discourage this practice.

I asked my attorney to weigh in on the substance of this communique. Here is his (unedited) comment: *they should amend Davis-Stirling so that it mirrors the Brown Act and clarifies improper practices like Executive Sessions for "Litigation," etc. They should also enhance Davis-Stirling's conflict of interest restrictions and more clearly codify provisions to nullify any Board action that is not done under proper procedures.*

Thank you for your consideration of this slate of most important issues.

Yours faithfully

Ann L. Stanaway

EMAIL FROM A.L. STANAWAY (JULY 16, 2020)

Re: Proposal for Study and Revision of Davis-Stirling Common Interest Development Act Sections Concerning Board Meetings

…. When deciding the Commission's scope of review for 2021, it might be worth considering an examination business judgment as applied to HOA governance.

The business judgment rule (and California's versions of it —California Corporation Code §7231 and California's Appellate Courts own Judicial Deference Rule) is often used by HOAs to quash member complaints about the sloppy enforcement of the supposedly equitable servitudes (governing documents) by which an Association must be governed (California Civil Code §5975). CORP §7231 provides only vague guidance on the matter, yet many Associations specifically include reliance on their Board's "sole discretion" as an integral part of their governing documents. When challenged regarding apparently unreasonable decisions, these Associations invariably use the vagaries of "business judgment" to try excuse blatant abuse of position. Even California's Appellate Courts *Judicial Deference Rule* is subject to exploitation by Associations although that deference has been found clearly inapplicable in many instances. Consider codifying a version of "business judgment rule" tailored specifically to entities covered by the Davis-Stirling Common Interest Development Act.

Consider studying the codification of: 1. Fiduciary responsibilities at the Board level; 2. Standards of fiduciary responsibility modeled on seminal decisions such as:

- Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361; Dolan-King v. Rancho Santa Fe Assn. (2000) 81 Cal.App.4th 965. where the board failed to enforce the governing documents.
- Ekstrom v. Marquesa at Monarch Beach HOA (2008) 168 Cal.App.4th 1111. on Board decisions made contrary to the governing documents
- Dover Village Association v. Jennison (2010) 191 Cal.App.4th 123. on Board decisions applying ambiguous maintenance and repair responsibilities
- Affan v. Portofino Cove HOA (2010) 189 Cal.App.4th 930. on Board neglect to adequately investigate maintenance and repair issues
- Ritter & Ritter v. Churchill Condominium Assn. (2008) 166 Cal.App.4th 103, 123. on judicial deference as set forth in the *Lamden* providing protection from personal liability for the individual directors , not the HOA itself.
- Palm Springs Villas II HOA v. Parth (2016) 248 Cal.App.4th 268, 280. on Business Judgment Rule's protections of directors who "remain ignorant and to rely on their uninformed beliefs" as to the issues surrounding their decisions, or their authority to make those decisions in their capacity as directors.

Again, thank you for considering my submission to the Commission. I anticipate a great deal of statutory improvements resulting from the Commission's study of the important matters on its agenda.

A.L. Stanaway,
Honni soit qui mal y pense

Trial Court Restructuring: Remaining Projects (as of Oct. 8, 2020)

PREMATURE	WHEN TIME PERMITS (may not result in legislation)	WHEN TIME PERMITS (legislation likely)	STUDY IN PROGRESS	LEGISLATION READY OR ALMOST READY TO INTRODUCE
Compensation of Official Reporter. See MM20-15, MM20-39 & s1; Minutes (Aug. 2020). Revisit annually in new topics memo.	**References to "Superior Court."** See MM18-5, p. 7.	**Rights and Responsibilities of County vs. Superior Court (Part 2).** See MM18-5, p. 6.		*Regional Justice Facilities Acts* (J-1405.4)
Organization of Government Code. See MM18-5, p. 9; MM14-53s1, p. 9. Do when TCR clean-up is almost done.		**Judicial Benefits.** See MM18-5, p. 7.		*Completion of Studies Under Government Code Section 70219* (J-1406.1)
Final Review of References to "Municipal Court." See MM18-5, p.9; MM14-53s1, p. 20. Do when TCR clean-up is almost done.		*Representation and Indemnification of Court and Court Personnel*. See MM14-53s1, pp. 11-12.		
		Judicial Districts & Local Venue. See MM14-53s1, pp. 12-13.		
		Judicial Disqualification. See MM14-53s1, pp. 13-14.		
		Minor Odds & Ends. See attached list.		

Major projects are in boldface; *other projects are in italics*

EX 43

TCR: Minor Leftover Odds & Ends
(as of Oct. 8, 2020)

(1) Revisit TCR5 leftovers (BV39:126-32). Court interpreters & translators (Gov't Code §§ 26806, 69894.5). Dropped from AB 1529 in 2011; see AB 810 in 2011 (died).

(2) Revisit Lassen County matter (Gov't Code § 76101.5). See MM19-36 & Minutes (May 2019).

(3) Fix Penal Code § 1463.5's cross-reference to Gov't Code § 71383. See MM18-31, pp. 7-8; Minutes (Aug. 2018), p. 6. Do in a technical corrections study?

(4) When reorganize Gov't Code, clean out Chapter 10 of Title 8. Move substance of § 73758 to be with other material on sheriffs/court security. Put it into a new Article 9 (commencing with Section 26780) entitled "Transportation of Prisoners in Madera County? Substance of § 72116 should also be with material on sheriffs/court security.