

Memorandum 2022-3

New Topics and Priorities

Annually, 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:

Exhibit p.

- Mark Woodruff, Oceanside (March 1, 2021)1

1. The current Calendar of Topics is in 2021 Cal. Stat. res. ch. 108 (ACR 24 (Chau)).

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. In 2021, the Legislature adjourned on September 10. The last day for the Governor to act on bills was October 10. See <<https://www.senate.ca.gov/legdeadlines>>.

- CLRC staff, *Trial Court Restructuring: Remaining Projects (as of Jan. 4, 2022)*.....2

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 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 a chief of administrative services. Two of the attorneys currently work part-time. An additional constraint is that the Executive Director, the Chief Deputy Director, and the chief of administrative services have responsibilities for the Committee, not just for the Commission.

Most importantly, the Commission will have a significant staffing change in 2022. In the first half of the year, the Commission’s Chief Deputy Director plans to retire. We wish her all the best in her retirement. Her wealth of knowledge, thorough analysis, and dedication to the Commission have been greatly appreciated and will be sincerely missed. In planning for 2022, the Commission

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

should be aware of her planned retirement as it considers how best to dedicate its limited staffing resources in 2022.

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

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

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

5. *Id.*

6. Assembly Committee on Judiciary Analysis of SCR 83 (Jun. 6, 2014), p. 3, *available at* <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SCR83#>.

7. Gov’t Code § 8293.

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.

PENDING NEW ASSIGNMENT BEING CONSIDERED BY LEGISLATURE

In considering its work priorities for 2022, the Commission should be aware of a possible new assignment being considered by the Legislature. A pending legislative resolution, Assembly Concurrent Resolution 95, would assign the Commission a major study related to antitrust law.⁸ So far, the votes on this resolution have been unanimously in favor of passage and there are a number of organizations registered in support.⁹

A legislative resolution, like ACR 95, would be submitted to the Secretary of State after passing the second house. The resolution would then take effect upon filing with the Secretary of State.¹⁰

This type of direct legislative assignment is one that the Commission would typically accord high priority. So, if the resolution passes and takes effect in early 2022, the staff anticipates that the Commission may wish undertake work on this topic straightaway.

The staff will continue to monitor the progress of ACR 95 and keep the Commission updated on its status. The Commission may need to revisit its work priorities midyear in 2022, depending on the outcome of this resolution.

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. In 2021, the Commission was assigned additional work on revocable

8. ACR 95 (Cunningham & Wicks); see also Memorandum 2021-35.

9. See Assembly Committee on Judiciary Analysis of ACR 95 (Jul. 2, 2021), *available at* <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220ACR95#>; <https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220ACR95>.

10. Gov’t Code § 9602.

transfer on death deeds,¹¹ but otherwise did not receive any new assignments. 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).¹² 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[.]

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 was completed in early 2021. The Commission approved a recommendation for the recodification of that chapter, as well as a separate recommendation for the associated conforming revisions.¹³ The staff plans to seek legislative introduction of the proposal to recodify Chapter 6.8 in 2022.¹⁴

The Commission also commenced work on the substance of Chapter 6.5.¹⁵

The staff recommends that the Commission prioritize the legislative consideration of its Chapter 6.8 proposal in 2022.

11. See discussion of "Report Due in 2031" under "Transfer on Death Deeds" *infra*.

12. 2018 Cal. Stat. res. ch. 158; see also 2020 Cal. Stat. res. ch. 46.

13. See *Hazardous Substance Account Recodification Act*, 48 Cal. L. Revision Comm'n Reports __ (Feb. 2021); *Hazardous Substance Account Recodification Act: Conforming Revisions*, 48 Cal. L. Revision Comm'n Reports __ (Feb. 2021).

14. See also Memoranda 2021-65 and 2021-66 (discussing updates to the Commission's recommendations, referenced in *supra* note 13, to reflect 2021 legislative changes).

15. See Memorandum 2021-19.

The staff recommends that the work on Chapter 6.5 be put on hold until the Legislature has considered the Commission’s recommended recodification of Chapter 6.8. Given the scale of this assignment, the staff concluded that, before spending additional resources to prepare the next phase (Chapter 6.5) of the recodification, it may be helpful to first gauge the receptivity to the recodification work to date (Chapter 6.8).

California Public Records Act

In August 2016, the Legislature approved Assembly Concurrent Resolution 148 (Chau).¹⁶ 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.
- (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”).¹⁷ The Commission also approved a separate recommendation consisting of conforming revisions for the proposed recodification.¹⁸

16. 2016 Cal. Stat. res. ch. 150; see also 2018 Cal. Stat. res. ch. 158.

17. See *California Public Records Act Clean-Up*, 46 Cal. L. Revision Comm’n Reports 207 (2019).

18. See *California Public Records Act Clean-Up: Conforming Revisions*, 46 Cal. L. Revision Comm’n Reports 563 (2019).

In 2021, Assemblymember Chau authored two bills to effectuate the Commission's recommendations on this topic.¹⁹ Both of those bills were enacted.²⁰

Although the bulk of the work on this topic is completed, there is a need for follow-up legislation to address cross-references to the CPRA, as described in Memorandum 2021-54. In 2022, the staff will continue work on this issue and keep the Commission apprised of the status of this work. The staff anticipates that this topic will require little of the Commission's time in 2022.

Transfer on Death Deeds

Report Due in 2020

In August 2016, the Governor signed Assembly Bill 1779 (Gatto),²¹ which expanded the Commission's previously-assigned²² 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.

(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.

19. AB 473 (Chau) and AB 474 (Chau).

20. 2021 Cal. Stat. ch. 614, 615.

21. 2016 Cal. Stat. ch. 179.

22. 2015 Cal. Stat. ch. 293.

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 in November 2019.²³

In 2020, Senator Roth authored legislation to implement the recommendation.²⁴ Due to the pandemic, however, he amended the bill to extend the sunset date on the RTODD statute but do nothing more. The bill was enacted in that barebones form.²⁵

In 2021, Senator Roth re-introduced a bill to implement the recommendation.²⁶ That bill was enacted.²⁷ The legislation included an assignment to the Commission to conduct further work on RTODDs, which will be discussed in more detail below.²⁸ **With the enactment of this legislation, the Commission’s work on the 2020 RTODD assignment is complete.**

In the course of conducting this study, the Commission identified a few related issues for possible study. The Commission has commenced work on some of those issues under its general authority to study probate matters.²⁹ In some instances, those topics would also fall under the Commission’s assignment to undertake further RTODD work in the 2021 legislation. These different study topics will be discussed later in this memorandum.

Report Due in 2031

As discussed above, in 2021, the Governor signed Senate Bill 315 (Roth).³⁰ That legislation implements the Commission’s 2019 recommendation on RTODDs.³¹ The legislation includes a provision directing the Commission to conduct further work on RTODDs. In particular, the Commission is directed to:

...study the effect of California’s revocable transfer on death deed and make recommendations for improvement of this part. The commission shall report all of its findings and recommendations to the Legislature on or before January 1, 2031.

23. 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)).

24. See SB 1305 (Roth, 2020).

25. See 2020 Cal. Stat. ch. 238.

26. SB 315 (Roth).

27. 2021 Cal. Stat. ch. 215.

28. 2021 Cal. Stat. ch. 215, § 3.

29. See discussion of various items under “2. Probate Code” *infra*.

30. 2021 Cal. Stat. ch. 215.

31. See *id.*; see also *supra* note 23.

(b) In the study required by subdivision (a), the commission shall address all of the following:

(1) Whether the revocable transfer on death deed is working effectively.

(2) Whether the revocable transfer on death deed should be continued.

(3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.

(4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.

(5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.

(6) Whether there should be any change to the types of property that can be transferred by revocable transfer on death deed.

(7) Whether there should be any change to the types of persons or entities that can be named as the beneficiary of a revocable transfer on death deed.³²

As indicated above, this assignment has a deadline of January 1, 2031. A significant piece of this work will need to be conducted closer to that deadline, as several items require assessing the real-world experiences under the RTODD statute. Work on those items could begin in earnest towards the end of this decade. However, if the Commission identifies RTODD operational issues that require more immediate attention, the Commission can address such matters under this authority as they arise.

As indicated previously, the Commission has undertaken work on certain matters it identified in the course of its 2020 RTODD work. This assignment provides more direct and focused authority for the Commission's work on some of those topics.³³

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

32. See 2021 Cal. Stat. ch. 215, § 3.

33. See discussions of "Transfer on Death Options for Stock Cooperative Ownership" and "Transfer of Use-Restricted Property at Death" *infra*.

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.

(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[.]³⁴

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.³⁵ The recommendation was enacted into law.³⁶ **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, then-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

34. 2013 Cal. Stat. res. ch. 115.

35. *Government Interruption of Communication Service*, 44 Cal. L. Revision Comm'n Reports 681 (2016).

36. 2017 Cal. Stat. ch. 322.

decided to postpone the development of proposed reform legislation. Instead, it finalized an informational report on the topic.³⁷

Senate Bill 178 was enacted, establishing the California Electronic Communications Privacy Act (“Cal-ECPA”).³⁸ 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 issues that had not been addressed.³⁹ The Commission decided to postpone further work on those issues, to give the new law time to develop and settle.⁴⁰

The Commission reactivated this study in 2020. That work culminated in the approval of a tentative recommendation in late 2021.⁴¹ Comments on that tentative recommendation are due in February 2022. **The Commission should continue this work in 2022 to complete its study of this topic.**

Fish and Game Law

In January 2012, the Commission received a letter jointly signed by the Chair of the Senate Natural Resources and Water Committee (then-Senator Fran Pavley) and the Chair of the Assembly Water, Parks, and Wildlife Committee (then-Assemblymember Jared Huffman), urging the Commission to conduct a comprehensive review of the Fish and Game Code.⁴² 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
....⁴³

37. *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements*, 44 Cal. L. Revision Comm’n Reports 229 (2015); see also generally Memorandum 2015-51.

38. 2015 Cal. Stat. ch. 651.

39. See First Supplement to Memorandum 2015-3, pp. 5-7; Memorandum 2015-51, pp. 14-23.

40. See Minutes (Dec. 2015), pp. 4-5.

41. See Tentative Recommendation on *State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena* (Sept. 2021).

42. See Memorandum 2012-5, Exhibit pp. 32-33.

43. 2012 Cal. Stat. res. ch. 108.

The Commission has made significant progress on this topic. That progress, and the work that remains to be done, are summarized below.

- In 2015, the Commission made two recommendations proposing immediate reform of the existing Fish and Game Code.⁴⁴ Both were enacted into law.⁴⁵
- In 2017 and 2018, the Commission temporarily prioritized work on “clarify[ing] program authority and funding sources”⁴⁶ at the request of the Secretary of the Resources Agency.⁴⁷ That work culminated in a report that cataloged the funding and expenditure provisions of the existing Fish and Game Code.⁴⁸
- In 2018, the Commission released a tentative recommendation to repeal the existing Fish and Game Code and replace it with a reorganized Fish and Wildlife Code.⁴⁹ In 2019, the Commission released a companion proposal to make conforming revisions in code sections that cross-refer to the Fish and Game Code.⁵⁰
- Based on a request from the stakeholder agencies, the Commission decided to divide the public comment on the tentative recommendation into two phases. “Phase One” would only address technical issues raised in “notes” in the tentative recommendation. The deadline for submission of those comments was January 1, 2021. The Commission spent all of last year steadily working its way through the Phase One comments, with the intention of eventually recommending technical reforms to the corresponding provisions of the existing Fish and Game Code. Work on the Phase One comments is expected to continue in 2022.
- The “Phase Two” comments will focus on whether to recommend improvements to the organization of the existing Fish and Game Code. The deadline for those comments is January 1, 2022.⁵¹ The staff expects to turn to the Phase Two comments in the first quarter of this year.

The Commission should continue to give this topic priority in 2022. The staff anticipates that it will consume a significant amount of the Commission’s resources.

44. *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).

45. 2015 Cal. Stat. ch. 154, 2016 Cal. Stat. ch. 546.

46. See 2012 Cal. Stat. res. ch. 108.

47. See First Supplement to Memorandum 2017-38; Minutes (Aug. 2017), p. 9.

48. Discussion Draft on *Fish and Game Code: Funding Provisions* (Feb. 26, 2018).

49. Tentative Recommendation on *Fish and Wildlife Code* (Dec. 2018).

50. Tentative Recommendation on *Fish and Wildlife Code: Conforming Revisions* (Feb. 2019).

51. 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; Minutes (May 2020), p. 3.

Deadly Weapons

In 2006, the Legislature directed the Commission to study the statutes relating to control of deadly weapons.⁵² 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 date of July 1, 2009. Two voluminous bills⁵³ and some follow-up legislation⁵⁴ 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.”⁵⁵ The Legislature authorized the Commission to study those issues.⁵⁶

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.”⁵⁷ **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.⁵⁸ 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.⁵⁹

52. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)).

53. 2010 Cal. Stat. ch. 178 (SB 1115 (Committee on Public Safety)); 2010 Cal. Stat. ch. 711 (SB 1080 (Committee on Public Safety)).

54. 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)).

55. *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm’n Reports 217, 265-80 (2009).

56. 2010 Cal. Stat. ch. 711, § 7.

57. 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).

58. For a more detailed discussion of these reforms, see First Supplement to Memorandum 2014-53, pp. 2-5.

59. For further discussion of the Commission’s role, see *id.*

In 2020, Assemblymember Maienschein introduced a bill to implement several of the Commission’s recommendations on trial court restructuring.⁶⁰ That bill was enacted.⁶¹

In 2021, Assemblymember Maienschein introduced another bill to implement two of the Commission’s more recent recommendations on trial court restructuring. Those recommendations are:

- *Trial Court Restructuring Clean-Up: Regional Justice Facilities Acts*
- *Trial Court Restructuring Clean-Up: Completion of Studies Under Government Code Section 70219*

That legislation was also enacted.⁶²

In 2021, the Commission made steady progress on addressing trial court restructuring issues. In late 2021, the Commission approved a tentative recommendation related to the classification of a drug asset forfeiture proceeding.⁶³ At its January 2022 meeting, the Commission will be considering a draft final recommendation related to judicial benefits and representation and indemnification of trial courts and their personnel.⁶⁴ However, there is still trial court restructuring work left to do. A list of the remaining projects is attached as Exhibit page 2.

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 2022 to bring the topics in progress to completion.**

One of the other remaining projects is updating the court reporter compensation statutes to reflect the trial court restructuring reforms.⁶⁵ In 2020, the Commission decided that (1) it was premature to recommence work on that project

60. *Statutes Made Obsolete by Trial Court Restructuring (Part 6): Court Facilities*, 46 Cal. L. Revision Comm’n Reports 25 (2019); *Trial Court Restructuring Clean-Up: Task Force on Trial Court Employees*, 46 Cal. L. Revision Comm’n Reports 1 (2019); *Trial Court Restructuring Clean-Up: Obsolete References to Marshals*, 46 Cal. L. Revision Comm’n Reports 105 (2019); *Trial Court Restructuring Clean-Up: Obsolete “Constable” References*, 45 Cal. L. Revision Comm’n Reports 441 (2018).

The recommendation related to constable references 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 45 Cal. L. Revision Comm’n Reports at 448.

61. See 2020 Cal. Stat. ch. 210.

62. See 2021 Cal. Stat. ch. 117.

63. See Memorandum 2021-64; Minutes (Dec. 2021), p. 4.

64. See Memorandum 2022-5.

65. See Exhibit p. 2.

but (2) the Commission should “reexamine and specifically address this issue each year in the annual memorandum on new topics and priorities.”⁶⁶

Due to the still-ongoing pandemic and resultant upheaval and rethinking of court procedures, court reporting remains an unsettled area. **The Commission should continue to defer work on the court reporter compensation statutes.**

Enforcement of Money Judgments

Code of Civil Procedure Section 681.035 authorizes the Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from time to time under this authority.

There are currently no active studies focusing on this topic.

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature.⁶⁷ The Commission exercises this authority from time to time, 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.”⁶⁸ 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.⁶⁹ 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.⁷⁰ 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

66. Minutes (Aug. 2020), p. 3.

67. Gov’t Code § 8298.

68. See Memorandum 2018-57, pp. 1, 38; Minutes (Dec. 2018), p. 3.

69. See Memorandum 2019-44, pp. 40-41.

70. See *id.* at 41-42.

priority basis, if time permits (probably as a student project).”⁷¹ The staff has not yet undertaken either of the technical projects just described.

- In early 2021, the Commission approved recommendations that would recodify certain toxic substance statutes and make the conforming revisions to provisions that cross-reference those toxic substance statutes. In preparing the cross-reference updates, the staff identified a few minor substantive issues for possible future attention.⁷²

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.⁷³ 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 presented its research on this matter in connection with the Annual Report and there were no decisions to report in 2021.⁷⁴ **No new action on this topic is required at this time.**

CALENDAR OF TOPICS

The Commission’s Calendar of Topics currently includes 14 topics.⁷⁵ 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.

71. See *id.* at 48; Minutes (Oct. 2019), p. 4.

72. See Memorandum 2021-7, pp. 7-10.

73. Gov’t Code § 8290.

74. See 2021-22 *Staff Draft* Annual Report, p. 30 (attached to Memorandum 2021-60). The staff draft was approved by the Commission. See Minutes (Dec. 2021), p. 3.

75. See 2021 Cal. Stat. res. ch. 108.

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 "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.⁷⁶

In 2010, the Commission circulated the background study for a 120-day public comment period.⁷⁷ No detailed comments were received in response to that

76. See Memorandum 2012-45, Exhibit p. 2.

77. See Memorandum 2010-27; Minutes (June 2010), p. 7.

request. The Commission tabled this topic, having received new, higher priority assignments from the Legislature.

The Commission briefly reactivated this study in June 2013.⁷⁸ 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.⁷⁹ 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.⁸⁰

The Commission completed a final recommendation on the first issue in 2019.⁸¹ **The staff plans to seek implementing legislation in 2022.**

The Commission began studying the second issue in 2020. After considering stakeholder input, the Commission decided to discontinue work on the issue.⁸² **No further action on it is contemplated.**

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.⁸³ 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.⁸⁴ In other words, should there be a presumption of fraud or

78. Memorandum 2013-25; Minutes (June 2013), p. 14.

79. Minutes (May 2018), p. 6.

80. *Id.* at 7.

81. See *Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551*, 46 Cal. L. Revision Comm’n Reports 11 (2019).

82. See Minutes (Aug. 2020), p. 4.

83. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm’n Reports 107 (2008).

84. See generally Memorandum 2009-22.

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.⁸⁵

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.⁸⁶ 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”).⁸⁷ TEXCOM’s letter raised concerns about the liability of an RTODD beneficiary for a decedent’s unsecured debts.⁸⁸ The governing 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.⁸⁹ 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.⁹⁰

85. See 2010 Cal. Stat. ch. 620; see also Prob. Code §§ 21360-21392; 2017 Cal. Stat. ch. 56; 2019 Cal. Stat. ch. 10.

86. See generally Division 8 of the Probate Code.

87. As of 2018, TEXCOM is part of the California Lawyers Association, as opposed to the State Bar. See generally <<https://calawyers.org/cla/about-cla/>>.

88. See Memorandum 2017-35, Exhibit pp. 5-8; see also Memorandum 2017-35, pp. 4-6.

89. 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 receipt of decedent’s property without administration).

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

In 2018, the staff, building on the work of student externs, completed two recommendations related to the simplified administration procedures.⁹¹ Those recommendations were enacted into law in 2019.⁹²

In 2020, the Commission completed a recommendation related to liability rules for the simplified administration procedures.⁹³ **The staff plans to seek implementing legislation in 2022.**

Transfer on Death Options for Stock Cooperative Ownership

In its 2020 RTODD study, the Commission determined that, for technical reasons, a deed may not be the right kind of instrument to transfer ownership of a share in a stock cooperative. For that reason, when crafting its RTODD recommendation, the Commission excluded stock cooperatives from the definition of “real property” that can be conveyed by an RTODD.⁹⁴

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.”⁹⁵

The Commission began working on that topic in 2020. In the course of its study, the Commission determined that the RTODD statute could, with minor changes, be made applicable to a stock cooperative ownership interest.⁹⁶ The Commission has been working on a recommendation to implement such a change.⁹⁷

The Commission should prioritize work on this matter in 2022 to bring this study to completion.

During the Commission’s work on stock cooperatives, the Commission identified one related matter for possible future study, which is discussed below.⁹⁸

91. *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).

92. 2019 Cal. Stat. ch. 122 (AB 473 (Maienschein)).

93. See Minutes (May 2020), p. 6; *Disposition of Estate Without Administration: Liability of Transferee*, 47 Cal. L. Revision Comm’n Reports __ (2020).

94. 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).

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

96. See generally Memorandum 2021-15.

97. See Staff Draft Recommendation attached to the First Supplement to Memorandum 2021-62.

98. See Memorandum 2021-55, pp. 1-3.

Rule on Specific Gifts and Its Application to NPTs (Probate Code Section 21134)

In the course of the Commission's ongoing study of transfer on death options for stock cooperative ownership, TEXCOM raised a question about the application of a rule regarding specific gifts to revocable transfer on death deeds.⁹⁹

Probate Code Section 21134 provides for a substitute pecuniary gift for an intended recipient of a specific gift when the property intended to be gifted was encumbered, sold, or otherwise lost while the transferor lacks capacity and is under the protection of a conservator, agent acting pursuant to a durable power of attorney, or trustee.

TEXCOM raised questions about whether the rule in Section 21134 applies to an RTODD and whether the transfer of property under an RTODD is a specific gift. Assuming that an RTODD would be treated as a specific gift, TEXCOM also asked about the source of the substitute pecuniary gift provided by Section 21134 for an intended RTODD recipient. The staff concluded that this final issue is a broader one that extends beyond RTODDs (i.e., the source of the substitute gift may be unclear in any situation where the instrument of the specific gift only applies to a single piece, or small subset, of the decedent's property).

The Commission decided to conduct a separate study of these issues.¹⁰⁰ **The Commission may want to work on this project in 2022, as time permits.**

Transfer of Use-Restricted Property at Death

In its 2020 RTODD 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.¹⁰¹

In an earlier new topics memorandum, the staff suggested that "[w]ith the Commission's recent work on probate matters, it may be useful to address this

99. *Id.*

100. Minutes (Nov. 2021), p. 4.

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

relatively narrow issue sooner rather than later.”¹⁰² The Commission agreed with that recommendation,¹⁰³ but the staff has not yet begun to work on the topic. **The Commission may want to work on this project in 2022, 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.

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.¹⁰⁴ 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 Ombudsperson would have also made a recommendation to the Legislature on

102. 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).”).

103. Minutes (Sept. 2019), p. 4.

104. 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).

whether its powers should be expanded to include administrative enforcement of CID law.¹⁰⁵ At the time, that proposal was approved by the Legislature, but vetoed by the Governor.¹⁰⁶

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. 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.

In 2020, those changes were made by the Legislature.¹⁰⁷ Consequently, the Commission still has general authority to study CID law, but no specific legislative emphasis or urgency.

With the onset of the pandemic, the Commission identified a CID issue that required urgent attention. In response to the public health emergency, the Commission undertook a study of CID teleconference meetings during an emergency. That study culminated in a recommendation, which was enacted by the Legislature in 2021.¹⁰⁸ **With the enactment of that legislation, the staff considers the work on this specific issue complete.**

As discussed in Memorandum 2020-52, the Commission began receiving requests to examine other aspects of CID law after it commenced the emergency-related work.¹⁰⁹ Rather than identifying issues for legal reform, many of the remaining problems people are raising with CID law are the result of noncompliance (whether willful or accidental) with the existing law. The Commission previously sought to address that issue with the proposal to create

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

106. See AB 770 (Mullin, 2005).

107. See 2020 Cal. Stat. res. ch. 46; see also 2021 Cal. Stat. res. ch. 108.

108. See *Emergency Reforms: Common Interest Development Meetings*, 47 Cal. L. Revision Comm'n Reports __ (Nov. 2020); 2021 Cal. Stat. ch. 276 (SB 391 (Min)).

109. See Memorandum 2020-52, Exhibit pp. 1-5 (comments of Linda Brown), 39-41 (comments of A.L. Stanaway), 42 (same).

the CID ombudsperson. Beyond that, the staff concluded that the Commission's efforts on CID law reform have reached the point of diminishing returns.¹¹⁰ **For these reasons, the staff recommends that the study of CID law remain dormant unless special circumstances require the Commission's attention (e.g., the study of teleconference meetings in an emergency).**

Eminent Domain

In *Property Reserve, Inc. v. Superior Court*,¹¹¹ 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.¹¹²

The statutes at issue in *Property Reserve* were enacted on the Commission's recommendation.¹¹³ In light of the Court's decision, there was a significant inconsistency between the statutory text and its meaning as judicially construed. Consequently, the Commission decided to study the matter.¹¹⁴

In 2017, the Commission made significant process on this topic, including completion of a draft recommendation.¹¹⁵ In the course of preparing the draft recommendation, the Commission received comments suggesting additional, related statutory reforms.¹¹⁶ In response to those comments, the Commission decided to expand the scope of the study to include those issues.¹¹⁷

In 2020, the Commission circulated a revised tentative recommendation and approved a final recommendation.¹¹⁸ Proposed legislation to implement this recommendation was enacted in 2021.¹¹⁹ **With the enactment of this legislation, work on this topic is complete.**

110. See Memorandum 2020-52, pp. 19-21.

111. *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151.

112. See *id.* at 208.

113. See *Recommendation Proposing The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1741-42 (1974) (proposed Code Civ. Proc. § 1245.060).

114. See Memorandum 2016-53, p. 13; Minutes (Dec. 2016), p. 4.

115. See Memorandum 2017-43.

116. See Memorandum 2017-43, pp. 4-5, 8-9; see also First Supplement to Memorandum 2017-43.

117. See Minutes (Sept. 2017), p. 4.

118. See Minutes (Sept. 2020), p. 3.

119. 2021 Cal. Stat. ch. 401.

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, 2012.¹²⁰

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,¹²¹ which was enacted the following year.¹²²

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.

120. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); 2011 Cal. Stat. ch. 44 (SB 190 (Lowenthal)).

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

122. See 2017 Cal. Stat. ch. 144.

If the Commission decides to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements.¹²³ In particular, the Commission could study the circumstances in which a person can waive the right to support.¹²⁴

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 2008.¹²⁵

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.¹²⁶ The Commission later suspended that work in light of a pending discovery-related bill (AB 383 (Chau)).¹²⁷ After AB 383 was enacted into law with a sunset date of January 1, 2023,¹²⁸ the Commission decided to suspend its work on discovery-related issues until the sunset of AB 383.¹²⁹

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.¹³⁰ The staff will continue to monitor

123. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36; see also, e.g., 2019 Cal. Stat. ch. 193 (AB 1380 (Oberholte)), *In re Marriage of Clarke & Akel* (2018) 19 Cal.App.5th 914, 228 Cal.Rptr.3d 483, *In re Marriage of Cadwell-Faso & Faso* (2011) 191 Cal.App.4th 945, 119 Cal.Rptr.3d 818.

124. See *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 5 P.3d 839, 99 Cal.Rptr.2d 278.

125. 37 Cal. L. Revision Comm'n Reports 99 (2007); see 2008 Cal. Stat. ch. 231.

126. See Minutes (Dec. 2016), p. 3.

127. See Minutes (Aug. 2017), p. 7; Memorandum 2017-26, pp. 22-24.

128. 2017 Cal. Stat. ch. 189.

129. Minutes (Dec. 2018), p. 3.

130. 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,¹³¹ which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. A while 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.¹³² 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

131. 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.

132. 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.¹³³

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. Regarding this topic, 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.¹³⁴ **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."¹³⁵ 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."¹³⁶ The court of appeal

133. See discussion of "Trial Court Restructuring" *supra*.

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

135. 2007 Cal. Stat. res. ch. 100.

136. 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.

This topic is one of the higher-priority matters awaiting Commission attention. The Commission may want to consider activating this study in 2022.

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.

14. Emergencies

The COVID-19 public health emergency upended many aspects of our lives. Beyond the obvious health effects, the pandemic posed a variety of practical and legal challenges, as the world sought to transition from a largely in-person, hard-copy way of doing business to operating via video teleconferencing and electronic signatures.

A variety of laws had to be suspended or amended to permit operations to change as the COVID-19 pandemic demanded.¹³⁷ Much of this work was done responsively, after practical considerations had already foreclosed strict compliance with the letter of the law. For instance, the Commission proposed a reform of the law governing CID meetings to permit them to occur by teleconference.¹³⁸

Going forward, however, the Commission saw an opportunity to take what has been learned from the COVID-19 pandemic and build some emergency flexibility into the law proactively. As such, in 2021, the Commission sought and was granted authority to work on the following topic:

Whether the law should be revised to provide special rules that would apply to an area affected by a state of disaster or emergency declared by the federal government, a state of emergency proclaimed by the Governor under Section 8625 of the Government Code, or a local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code. 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

137. See, e.g., Governor’s Exec. Order Nos. N-25-20 (Mar. 12, 2020), N-23-21 (Dec. 16, 2021).

138. See, e.g., discussion of “Common Interest Developments” *supra*.

consider any formal or informal feedback received in response to the notice.¹³⁹

In August 2021, the Commission, when considering the survey of COVID-related legislation prepared by Alexandra Aziz,¹⁴⁰ discussed two possible topics in this area:¹⁴¹ revising and clarifying the California Emergency Services Act¹⁴² in light of the lessons learned during the COVID-19 pandemic and revising to law to accommodate licensure reciprocity during an emergency.

The staff believes it may be helpful to undertake this emergency-related work while the COVID-19 pandemic is still ongoing, so that we can benefit from the lessons learned while these issues are still top of mind for many. **Given that, the Commission may want to consider activating a study of emergency-related law reform in 2022.**

CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

When it considered last year's memorandum on new topics, the Commission retained several suggestions from prior years 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.¹⁴³ **In 2022, 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.**

139. See Minutes (Aug. 2020), pp. 4-5; see also 2021 Cal. Stat. res. ch. 108.

140. See report attached to Memorandum 2021-36.

141. See video recording of August 26, 2021 meeting (Part 1), starting at 34:50, *recording available at* <http://clrc.ca.gov/Menu1_meetings/video.html>.

142. See Gov't Code §§ 8550-8669.7.

143. 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" *infra*.

Intestate Inheritance by a Half-Sibling¹⁴⁴

Marlynn Stoddard of Newport Beach asked the Commission to study intestate inheritance by a half-sibling who lacks a familial relationship with the decedent.¹⁴⁵ Currently, California's law on intestate succession provides that "relatives of the halfblood inherit the same share they would inherit if they were of the whole blood."¹⁴⁶ 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.¹⁴⁷ Ms. Stoddard indicated that "the current half-blood statute ... produces grossly unfair and irrational results in cases like mine."¹⁴⁸

Civil Procedure: Stay of Trial Court Proceeding During Appeal¹⁴⁹

Attorney H. Thomas Watson suggested that the Commission consider a proposed amendment¹⁵⁰ 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.¹⁵¹ 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."¹⁵²

Uniform Trust Code¹⁵³

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."¹⁵⁴

144. See full analysis in Memorandum 2013-54, pp. 22-23.

145. See Memorandum 2012-5, Exhibit pp. 48-51.

146. Prob. Code § 6406.

147. See Memorandum 2012-5, Exhibit pp. 48-51.

148. *Id.* at 50.

149. See full analysis in Memorandum 2013-54, p. 27.

150. First Supplement to Memorandum 2012-5, Exhibit p. 12.

151. *Id.* at 12-13.

152. *Id.* at 13.

153. See full analysis in Memorandum 2013-54, pp. 32-33.

154. *Id.* at Exhibit p. 36.

Social Security Number Disclosure Requirement in Probate Code¹⁵⁵

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 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 Assets¹⁵⁶

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.¹⁵⁷ 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).¹⁵⁸

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?¹⁵⁹ To the extent that the

155. See full analysis in Memorandum 2014-41, pp. 26-29.

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

157. 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).

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

159. 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.

surviving spouse has the power to revoke the entire trust corpus, does that spouse also control the disposition of that property?¹⁶⁰

Bond and Undertaking Law¹⁶¹

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.¹⁶² 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.¹⁶³

In addition, Mr. Coats identifies a few provisions in the current law that may cause confusion.¹⁶⁴ 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 Email¹⁶⁵

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)).¹⁶⁶ 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).

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

At the termination of a trust, the trust property shall be disposed of as follows:

(a) In the case of a trust that is revoked by the settlor, the trust property shall be disposed of in the following order of priority:

(1) As directed by the settlor.

(2) As provided in the trust instrument.

(3) To the extent that there is no direction by the settlor or in the trust instrument, to the settlor, or his or her estate, as the case may be.

(b) In the case of a trust that is revoked by any person holding a power of revocation other than the settlor, the trust property shall be disposed of in the following order of priority:

(1) As provided in the trust instrument.

(2) As directed by the person exercising the power of revocation.

(3) To the extent that there is no direction in the trust instrument or by the person exercising the power of revocation, to the person exercising the power of revocation, or his or her estate, as the case may be.

....

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

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

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

164. 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).

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

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

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.¹⁶⁷

Given the similarities between Sections 1010.6 and 1013, the differing interpretations as to who is entitled to a time extension seem problematic and potentially confusing. Addressing this issue would clarify the applicable deadlines and help to avoid inadvertent late filings, which could have significant legal consequences.¹⁶⁸

Attachment of Limited Liability Company Property¹⁶⁹

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.¹⁷⁰ However, Ms. Cisneros indicates that, in practice, “courts are issuing attachments for LLCs.”¹⁷¹

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.¹⁷² 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 Leases¹⁷³

Attorney Jack Quirk wrote to identify ambiguities regarding the application of certain provisions in the Marketable Record Title Act (“MRTA”) to oil and gas

167. *Id.* at Exhibit pp. 6-7. The cases are *Westrec Marina Management v. Jardine Ins. Brokers Orange County* (2000) 85 Cal.App.4th 1042, 102 Cal.Rptr.2d 673 and *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227, 192 Cal.Rptr.3d 679. See also Memorandum 2015-47, Exhibit pp. 8-27.

168. Code of Civil Procedure Section 1010.6 was recently amended. See 2021 Cal. Stat. ch. 214 (SB 241 (Umberg)); 2020 Cal. Stat. ch. 215 (AB 215 (Rivas)); see also 2021 Cal. Stat. ch. 124 (AB 938 (Davies)); 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.

169. See full analysis in Memorandum 2017-55, pp. 31-32.

170. *Id.* at Exhibit p. 1.

171. *Id.*

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

173. See full analysis in Memorandum 2017-55, pp. 33-35.

leases.¹⁷⁴ 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.¹⁷⁵

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).¹⁷⁶ 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.¹⁷⁷ 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).¹⁷⁸

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).¹⁷⁹ Several years later, the MRTA was amended, on Commission recommendation, to change the terminology used to refer to certain property interests.¹⁸⁰ 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.

174. *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 Commission.

175. 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.").

176. See Memorandum 2017-55, Exhibit p. 5.

177. See *id.*; see also, e.g., *Dabney v. Edwards* (1935) 5 Cal.2d 1, 11-13, 53 P.2d 962; *Lough v. Coal Oil, Inc.* (1990) 217 Cal.App.3d 1518, 1526, 266 Cal.Rptr.611 ("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.").

178. See *supra* note 177; see also *Renner v. Huntington-Hawthorne Oil and Gas Co.* (1952) 39 Cal.2d 93, 244 P.2d 895 ("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.").

179. See Memorandum 2017-55, pp. 33-34.

180. 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).

Paid Sick Leave¹⁸¹

At the Commission's December 2017 meeting, then-Commissioner Crystal Miller-O'Brien suggested a new topic, relating to California's Healthy Workplaces, Healthy Families Act of 2014.¹⁸²

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

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).¹⁸³

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 Proceedings¹⁸⁴

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."¹⁸⁵

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.¹⁸⁶ 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."¹⁸⁷

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.¹⁸⁸

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

181. See full analysis in Memorandum 2018-2 and in Memorandum 2018-57, pp. 43-45 & Exhibit pp. 22-35.

182. See Lab. Code §§ 245-249.

183. Memorandum 2018-2, p. 1.

184. See full analysis in Memorandum 2018-57, pp. 32-35, Exhibit pp. 19-21.

185. Memorandum 2018-57, Exhibit p. 19.

186. *Id.* at 19.

187. See also *id.* at 19-21.

188. See, e.g., Code Civ Proc. § 437c(b)(5) ("Evidentiary objections not made at the hearing shall be deemed waived.").

hearings are inapplicable to motions for summary judgment in unlawful detainer proceedings,¹⁸⁹ based on her assessment of the probable original legislative intent.¹⁹⁰

The Commission has done previous work on unlawful detainer and has identified a few issues pertaining to discovery in unlawful detainer proceedings to be addressed when time permits.¹⁹¹ 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, the Commission has received several 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

The Commission received one suggestion that would fall, at least in part, under the Commission's general authority to study the Probate Code.

Financial Wrongdoing by Trustees and Persons Responsible for Managing Financial Affairs of Others

Mary Madeline DelPonti contacted the Commission to reiterate concerns she raised previously regarding trust administration and trustee wrongdoing. She emphasized the need to address these issues, given recent events.

Ms. DelPonti previously wrote the Commission in 2019, requesting reform of the laws governing the accountability of a trustee and describing the challenges faced by those seeking to hold trustees accountable.¹⁹² While Ms. DelPonti's initial emails focused on trustee misconduct, her more-recent communication focuses

189. See Memorandum 2018-57, Exhibit p. 19.

190. *Id.*; see also *id.* at 20-21.

191. 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.

192. See Memorandum 2019-44, pp. 37-39; see also emails from Mary Madeline DelPonti to Brian Hebert (June 26, 2019 and June 30, 2019) (on file with the Commission).

Ms. DelPonti's emails have not been attached to the Commission's memoranda, as they contain allegations of misconduct or wrongdoing against identified persons. See CLRC Handbook Rule 370(c).

more broadly on the wrongdoing of persons with similar roles (i.e., those who are responsible for managing the financial affairs of others, including attorneys and conservators) and challenges faced by those seeking to remedy the wrong.

Ms. DelPonti highlighted the “timely and urgent” need to address these issues, pointing to the recent high-profile cases involving lawyers (Thomas Girardi, Alex Murdaugh)¹⁹³ accused of significant financial wrongdoing. She recommends making changes to “improve the current administration of trusts and life insurance policies as well as creating a safeguard for the supervision and control and management of trusts going forward.” Specifically, Ms. DelPonti suggests changes related to information access, stronger verification rules, requirements for representation of certain interests in proceedings, and disclosure obligations. She also recommends changes to court proceedings (related to timing and document disclosure).

The Probate Code contains the main rules governing trusts and conservatorships, while the broader issues Ms. DelPonti raises about financial wrongdoing (involving life insurance or lawyers) and the associated court proceedings would involve other bodies of law. For the purposes of this memorandum, the discussion focuses on the financial wrongdoing involving trusts and conservatorships, as those appear to be central to Ms. DelPonti’s concerns.

The Commission has received several letters related to wrongdoing or mismanagement by trustees and conservators over the last several years.¹⁹⁴ These issues are serious, problematic, and deserving of policy attention.

However, as indicated in previous New Topics memoranda discussing such suggestions, these issues are complex ones that require a broad perspective.¹⁹⁵ Some of the potential solutions could entail significant policy changes with wide-ranging impacts — adjusting the overall balance struck between trustees and beneficiaries or expanding the state’s role in overseeing trust administration.¹⁹⁶

Given the scale and magnitude of these issues, a Commission study of these issues would be a significant undertaking, consuming significant Commission

193. See, e.g., generally <<https://losangeles.cbslocal.com/2021/08/24/law-firm-of-disgraced-attorney-thomas-girardi-goes-to-auction/>>; <<https://apnews.com/article/florida-orlando-south-carolina-arrests-lawsuits-0ad00ecbe0f31748409366a393c00e24>>.

194. See, e.g., Memorandum 2020-52, pp. 33-39 and Exhibit pp. 6-38, Memorandum 2018-57, pp. 35-38 and Exhibit pp. 1-16; see also discussion of Ms. DelPonti’s concerns in Memorandum 2019-44, pp. 37-39.

195. See generally Memorandum 2020-52, pp. 38-39; Memorandum 2019-44, pp. 37-39; Memorandum 2018-57, pp. 35-38; see also Memorandum 2018-57, Exhibit pp. 1-16.

196. See, e.g., Memorandum 2019-44, pp. 38-39; Memorandum 2018-57, p. 36.

resources over a long timeframe. **Unless the Legislature seeks the Commission’s assistance on these matters, the staff recommends against the Commission undertaking a study of this weighty and wide-ranging topic.**

Data Privacy

The Commission received one suggestion related to data privacy and consumer protection. The Commission is not currently authorized to study this issue. To undertake the suggested study, the Commission would have to request authority from the Legislature.

Mark Woodruff writes with concern about the ability of website owners to access identifying information for consumers who log on to their website. In particular, Mr. Woodruff states “if someone logs into our website, we can be informed who they are with or without their permission.” He suggests that the easily-available identifying information makes website users vulnerable to scams with little protection. To address this problem, Mr. Woodruff suggests that individuals need to own their personal data and penalties (of \$1,000 per use) need to be assessed on companies that use that data without permission.

Mr. Woodruff also raises concerns about telephone scams and the national Do Not Call registry.¹⁹⁷ He notes that it is difficult to answer phones knowing that “most incoming calls are scams.” He observes that calls often avoid the sales prohibition by claiming to be polls, where the only question is whether you want a salesman to visit. He suggests enforcing Do Not Call rules with arrest and \$1,000 fine per call.

The issues Mr. Woodruff raises are all too familiar to many of us. These days, answering the phone when the incoming call is from an unrecognized number feels fraught. Could it be a legitimate return call from a business you’ve been trying to reach or is it just another call about your (non-existent) expiring extended warranty?

While the issues of consumer data privacy and the Do Not Call rules are related, the law reform issues are distinct and will be discussed in turn below.

Consumer Data Privacy

In California, the legal issue of consumer data privacy is one that has been receiving increasing attention in recent years.

197. See <<https://www.donotcall.gov/>>.

At the start of the 2015 legislative session, the California Assembly established a standing committee on Privacy and Consumer Protection.¹⁹⁸ The committee has jurisdiction “over matters related to privacy, the protection of personal information (including digital information), the security of data, and information technology, as well as false advertising, charitable solicitations, weights and measures, and consumer protection generally.”¹⁹⁹

In 2018, the California Consumer Privacy Act of 2018 (“CCPA”) was enacted.²⁰⁰ In the 2019-2020 legislative session, the Assembly Privacy and Consumer Protection Committee considered nine bills related to the CCPA, seven of which were enacted.²⁰¹

In 2020, Proposition 24, the Consumer Personal Information Law and Agency Initiative, was approved by the voters.²⁰² Among other things, this proposition established a new state agency, the California Privacy Protection Agency.²⁰³ The board governing that agency was appointed in 2021 and, more recently, the executive director for the agency was hired.²⁰⁴

Previously, technology companies have crafted and implemented consumer data privacy practices with limited oversight, outpacing the development of law and policy in this area. However, as described above, the state is devoting attention and resources to this increasingly important area of law. And, the laws on this topic are actively developing and changing.

Given the unsettled legal landscape, the staff believes it would be a difficult topic for the Commission to work on effectively. The Commission’s study process is not well-suited for issues that are receiving active and ongoing legislative and regulatory attention. **For this reason, the staff would recommend against the Commission seeking authority to work on this topic.**

198. See <https://ballotpedia.org/Privacy_and_Consumer_Protection_Committee,_California_State_Assembly>; see also Alexei Koseff, AM Alert: Assembly Launches Consumer Tech-Focused Committee, Sacramento Bee, January 8, 2015.

199. See <<https://privacycp.assembly.ca.gov/>>.

200. See 2018 Cal. Stat. ch. 55 (AB 375 (Chau)).

201. See pages 5, 7-11 of the Assembly Privacy and Consumer Protection Committee 2019-2020 Legislative Bill Summary, available at <https://privacycp.assembly.ca.gov/sites/privacycp.assembly.ca.gov/files/2019%20-%202020%20PCP%20Legislative%20Bill%20Summary_1.pdf>.

202. See <<https://elections.cdn.sos.ca.gov/sov/2020-general/sov/official-dec-vote-results-bm.pdf>>; see also generally <<https://lao.ca.gov/BallotAnalysis/Proposition?number=24&year=2020>>.

203. See <<https://cppa.ca.gov/>>.

204. See <<https://www.gov.ca.gov/2021/03/17/california-officials-announce-california-privacy-protection-agency-board-appointments/>>, <<https://cppa.ca.gov/announcements/index.html#20211005>>.

Unwanted Sales Calls

In 2003, the Federal Trade Commission (“FTC”) established a National Do Not Call registry where consumers can register their number to avoid receiving telemarketing calls.²⁰⁵ The website also allows consumers to report unwanted calls to the FTC. The FTC website emphasizes that the Do Not Call registry is intended to stop unwanted sales calls and not all unwanted calls.²⁰⁶

The FTC is responsible for enforcing telemarketer compliance with the Do Not Call registry.²⁰⁷ The maximum current fine for calls violating the Do Not Call registry or illegal robocalls is \$43,792 per call.²⁰⁸

California law “adopt[s] the California telephone numbers on the national ‘do not call’ registry as the California ‘do not call’ registry” and includes associated implementation rules.²⁰⁹ California law authorizes the Attorney General, a district attorney, or a city attorney to bring a civil action to enforce the Do Not Call rules in California.²¹⁰

The Do Not Call legal framework deals with only a portion of the unwanted calls, but other efforts are being made to prevent other unwanted calls.

Other Unwanted Calls

The state and federal government both recently adopted laws seeking to prevent deceptive robocalls.²¹¹

The Federal Communications Commission (“FCC”) is the federal agency in charge of implementing the federal act.²¹² The FCC “has made combatting unlawful robocalls and malicious caller ID spoofing a top consumer protection priority.”²¹³ The FCC has been actively implementing rules and pursuing enforcement actions.²¹⁴ It appears that a significant piece of this effort involves

205. See <<https://www.donotcall.gov/>> .

206. See <<https://www.consumer.ftc.gov/articles/national-do-not-call-registry-faqs>> .

207. See generally <<https://www.ftc.gov/news-events/media-resources/do-not-call-registry/enforcement>>; see also <<https://oag.ca.gov/privacy/facts/other-privacy/leave-me-alone>> .

208. See <<https://www.consumer.ftc.gov/articles/national-do-not-call-registry-faqs#report>> .

209. Bus. & Prof. Code § 17590(c); see also generally *id.* §§ 17590-17594 .

210. *Id.* § 17593(a).

The law also permits persons who receive prohibited calls to bring a civil action in small claims court for an injunction or order to prevent further violations. *Id.* § 17593(b).

211. See 2019 Cal. Stat. ch. 471 (SB 208 (Hueso)); Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (“TRACED Act”), Pub. L. No. 116-105, 133 Stat. 3274 (2019); see also <<https://www.fcc.gov/TRACEDAct>> .

212. See generally <<https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts>> .

213. See generally <<https://www.fcc.gov/spoofed-robocalls>> .

214. See *id.*

implementing better caller ID authentication and blocking tools. As the FCC website describes, addressing robocalls is a complicated problem:

Advances in technology have unfortunately allowed illegal and spoofed robocalls to be made from anywhere in the world and more cheaply and easily than ever before. That's why it's become more of a problem for consumers, and a more difficult problem to solve.

Keep in mind that many robocalls are legal. While we have taken several actions, and continue to work on reducing illegal robocalls, it is a difficult problem that requires complex solutions. The most complex part is identifying the illegal calls in real time to be able to block them without blocking lawful calls.²¹⁵

Given the recent adoption of laws and active regulatory attention to address this issue, the staff recommends against seeking authority for the Commission to work on this topic.

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 and a half full attorney positions (of the Commission's four attorneys) are expected be unavailable for study work in 2022. This is due to the retirement of the Commission's Chief Deputy Counsel, as well as time spent on administrative duties, the work of the Committee on Revision of the Penal Code, and the Commission's legislative program. This means that the Commission is likely to have no more than two and a half attorney positions to assign to studies in 2022.

With that in mind, the chart for 2022 is as follows:

Study Topic	Percentage of Attorney Position
Trial Court Restructuring	25%
Fish and Game Law	125%
Surveillance of Electronic Communications	25%
Nonprobate Transfer of Stock Cooperative	25%
Total	2 pos.

215. See <<https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts>>.

The upshot is that the studies listed in the chart will take up more than half of Commission's available resources in 2022. Given that, the Commission could take one or two new studies of relatively modest scope.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2022. Traditionally, the Commission's highest priority has been assisting with legislation to implement recently-completed Commission recommendations. That activity typically consumes significant 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 employees²¹⁶ 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 2022, as detailed below.

Legislative Program for 2022

In 2022, the Commission's legislative program will likely include legislation on the following topics:

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

- Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551
- Disposition of Estate Without Administration: Liability Rules
- Hazardous Substance Account Recodification Act
- Hazardous Substance Account Recodification Act: Conforming Revisions
- California Public Records Act Clean-Up: Conforming Revisions (follow-up legislation reintroducing conforming revisions superseded by other legislation in 2021)

Managing this legislative program will consume significant staff resources in 2022, but should not require much attention from the Commission.

Legislative Assignments and Other Matters Deserving Immediate Attention

The Commission received one assignment for additional study work on revocable transfer on death deeds in 2021. In addition, there is a resolution pending before the Legislature that would assign the Commission a significant new study. If that resolution passes, the Commission would have immediate authority to work on that topic.

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

- (1) **Electronic Communications: State and Local Agency Access to Customer Information from Communications Service Providers**
- (2) **Fish and Game Law.**
- (3) **Trial Court Restructuring.**

As discussed previously,²¹⁷ the staff recommends that the Commission’s study work on Toxic Substance Statutes be put on hold while the Legislature considers legislation to implement the Commission’s completed recommendations on this topic.

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

217. See discussion of “Recodification of Toxic Substance Statutes” *supra*.

report prepared by its former Executive Director.²¹⁸ The Commission also had a background report on common interest development law, prepared by Prof. Susan 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.²¹⁹

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 transfer on death options for stock cooperative shares. **The staff recommends that the Commission continue to work on this topic in 2022 to bring the study to completion.**

The Commission has previously activated a study on presumptively disqualified fiduciaries, which is currently on hold. **The Commission could consider reactivating work on this topic in 2022.**

New Topics

Given the Commission's traditional priority scheme and the number of outstanding, active and higher priority issues, **the Commission could potentially add two modest new studies to its work for 2022.** The Commission should be aware that work on these studies may need to be put on hold if the Commission receives a new higher-priority assignment. Different new study options for the Commission to consider are discussed below.

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

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

The Commission could consider activating a study of the laws on venue.²²⁰ The Commission previously sought authority to work on this topic and it is one of the higher-priority matters awaiting the Commission's attention.

The Commission could also consider activating a study of emergency-related law reform.²²¹ This work would be informed by the ongoing experience in addressing the COVID-19 pandemic and should be undertaken while these issues are still top of mind for many.

In addition, the studies on transfer of use-restricted property at death and the application of specific gift rules to NPTs might be good choices. Given the Commission's recent work on related probate matters, these studies would provide continuity to the Commission's work portfolio and benefit from the Commission and staff's familiarity with these matters. As indicated above, the previously-activated but currently tabled study on presumptively disqualified fiduciaries is another possibility.

Among these options, the staff recommends that the Commission undertake work on emergency-related law reform and the application of specific gift rules to NPTs.

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.

Summary

If the Commission approves the staff recommendations made in this memorandum, the Commission's priorities for 2022 would include:

- Manage the 2022 legislative program.
- 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 to bring the active matters to completion.
- Continue the study on transfer-on-death options for stock cooperative ownership.
- Activate the study of emergency-related law.
- Activate the study of rules on specific gifts and their application to NPTs.

220. See discussion of "11. Venue" *supra*.

221. See discussion of "14. Emergencies" *supra*.

- 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?

Respectfully submitted,

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