

Admin.

September 1, 2022

## Memorandum 2022-42

**New Topics and Priorities**

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Annually, the Commission reviews its current program of work, determines its priorities for the next year, and decides whether to request changes to the topics on its legislatively-enacted Calendar of Topics Authorized for Study (“Calendar of Topics”).<sup>1</sup>

To assist the Commission in that process, the staff prepares a *New Topics and Priorities* memorandum.

In the past, these have been lengthy documents. For example, Memorandum 2022-3 was 47 pages in length (excluding exhibits). That length is largely attributable to the inclusion of extensive background information that is reiterated every year, with minor updating.

This year, the staff has restructured the *New Topics* memorandum to substantially streamline it. Much of the content that used to be included in the body of the memorandum will instead be attached as an Exhibit. This is intended to make the memorandum easier to use, focusing more on the key information required to decide next year’s priorities.

Under the new structure, a *New Topics* memorandum will be divided into four main parts:

- (1) **Active Studies.** These are studies that the Commission worked on in the preceding year.
- (2) **Pending Legislative Assignments.** These are new assignments that were just enacted by the Legislature (or are almost certain to be enacted).
- (3) **Inactive Studies.** These are studies that the Commission has worked on recently, but set aside prior to completion. Studies in this category may eventually be moved to the “back burner list” (see

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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](http://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.

Exhibit 2), which serves to memorialize a topic that (1) may eventually be reactivated, but (2) is unlikely to be reactivated in the near future.

- (4) **Proposed New Studies.** This part of the memorandum is reserved for discussion of new study topics that the Commission received in the preceding year (if any).

The memorandum then presents a summary of the Commission’s expected workload in 2023, along with any staff recommendations for changes to the Commission’s study authority.

The memorandum concludes with a discussion of whether the new structure should be used going forward and whether any studies should be elevated or demoted in priority, or dropped entirely.

In addition, the following items are attached as Exhibits to this memorandum:

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## ACTIVE STUDIES

### **Fish and Game Law**

In 2022, the Commission continued work on its multi-year project to develop a technical clean-up of the Fish and Game Code. That work was divided into two phases.

Phase One involves analysis of comments received from the Fish and Game Commission and the Department of Fish and Wildlife, with the goal of developing technical improvements to existing Fish and Game Code Provisions. The staff would like to wrap this work up in 2022, but there will likely be some remaining issues to address in 2023.

Phase Two involves the reorganization of the Fish and Game Code to improve its structure and useability. The Commission decided to discontinue that work.<sup>2</sup> At some point, the Commission should prepare a report to the Legislature explaining the decision. The staff expects to prepare that report in 2023. It should not require much staff or meeting time.

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2. See Minutes (May 2022), p. 3.

### **Emergency-Related Reforms**

In 2022, the Commission decided to prepare an informational report on emergency laws, with information about approaches taken in other jurisdictions.<sup>3</sup> This would provide useful information to the Legislature and Governor, without any interference in current reform efforts.

That work is expected to continue into the first half of 2023. Once it concludes, the Commission will need to decide whether to move this topic to the inactive studies list for reactivation later or immediately proceed with the development of substantive reform recommendations.

### **Stock Cooperatives and Revocable Transfer on Death Deeds**

In 2022, the Commission completed a recommendation on this topic. It also considered two minor issues that arose from the study. The Commission discontinued work on those minor issues.<sup>4</sup>

### **State and Local Agency Access to Customer Information from Communication Service Providers**

In 2022, the Commission completed a recommendation on a narrow reform within this larger study (addressing the use of administrative subpoenas to search electronic communication records).

In 2020, the Commission considered a separate issue within this study (minimizing interception of privileged information when conducting a search of electronic communication records). Since that issue is distinct from the Commission's 2022 work, that issue is presented with the inactive studies later in this memorandum.

### **Statutes Made Obsolete by Trial Court Restructuring**

In 2022, the Commission made further progress in its years-long study of statutes made obsolete by "trial court restructuring" (which includes, broadly, elimination of the municipal and justice courts, state funding of the trial courts, state employment of court personnel, and state responsibility for court facilities). Two trial court restructuring recommendations were completed in 2022.

The Commission also approved one reform proposal — the repeal of Penal Code Section 1463.5 — for inclusion in a tentative recommendation. Consideration

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3. See Minutes (March 2022), p. 4.

4. See Minutes (Aug. 2022), p. 3. The Commission is responsible for conducting another follow-up study on revocable transfer on death deeds, due on January 1, 2031. This is memorialized in the attached back burner list. See Exhibit 2.

of public comment on that proposal will likely continue into the early months of 2023.

There is work that remains to be done, but that work is severable and not particularly urgent (as compared to other work priorities for 2023). With the exception noted above, the staff recommends that this topic be moved to the inactive studies list for now.

#### PENDING LEGISLATIVE ASSIGNMENTS

The volume of new work assigned by the Legislature in 2022 is unusually heavy. It could easily consume all of the Commission's resources in 2023. The new work is described below.

#### **Antitrust Law**

Assembly Concurrent Resolution 95 (Cunningham & Wicks) has been enacted and is now in effect.<sup>5</sup>

After a string of "whereas" clauses discussing the need for the study, the Legislature resolved:

That the Legislature approves for study by the California Law Revision Commission the following new topics:

(1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty-First Century Anti-Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.

(2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.

(3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians; ...

Notably, the new study was not given a due date. **However, the Commission should treat this as a high priority and make as much progress as it can in 2023, consistent with other demands on its resources.**

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5. 2022 Cal. Stat. res. ch. 147.

**Because the topic is complex, important, and completely new to the Commission, the staff recommends that work on the topic begin with the identification of appropriate experts to serve as Commission consultants. Consultant work could include the preparation of background reports for the Commission.** The Commission could decide to wait until it has received such materials before beginning active deliberations, which would likely mean that the heavier Commission work would be deferred until the second half of the year.

### **Equal Rights Amendment**

Senate Concurrent Resolution 92 (Leyva) has been enacted and is now in effect.<sup>6</sup>

After a string of “whereas” clauses discussing the need for the study, the Legislature resolved:

That the Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission’s report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination;

This study was also not given a due date. **However, the Commission should treat this as a high priority and make as much progress as it can in 2023, consistent with other demands on its resources.**

**Again, because the topic is complex, important, and completely new to the Commission, the staff recommends that work on the topic begin with the identification of appropriate experts to serve as Commission consultants. Consultant work could include the preparation of background reports for the Commission.** The Commission could decide to wait until it has received such materials before beginning active deliberations, which would likely mean that the heavier Commission work would be deferred until the second half of the year.

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6. 2022 Cal. Stat. res. ch. 150.

## Landlord-Tenant Terminology

Assembly Bill 2503 (Christina Garcia) would require the Commission to study and make recommendations to standardize, to the extent appropriate, the terminology used to refer to real property landlords and tenants.

It has been approved by both the Assembly and the Senate and is on its way to the Governor.

**If AB 2503 is enacted, the Commission should begin work on the new study in 2023.** Notably, the proposed study assignment has a deadline of December 31, 2024. That two-year period should be sufficient to complete the work without consuming too great a share of the resources available in 2023.

## INACTIVE STUDIES

### Recodification of Toxic Substance Statutes

In 2021, the Commission approved a recommendation to recodify Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, relating to hazardous substances. Two bills were introduced in 2022 to enact that recommendation.<sup>7</sup> The bills are now on their way to the Governor and are likely to be enacted.

The Commission is also charged with preparing a recodification of Chapter 6.5 (commencing with Section 25100). That work could have started in 2022, but the Commission decided to wait to see if the recommendation to recodify Chapter 6.8 would be enacted. **Once that is confirmed, work on this legislatively-assigned topic should resume in 2023.**

### State and Local Agency Access to Customer Information from Communication Service Providers

In 2020, the Commission considered the possibility of developing a statutory procedure to minimize the interception of privileged information when searching electronic records (such as email).<sup>8</sup> It decided to work on that topic.<sup>9</sup>

That work has not yet started. **Compared to the other active and pending studies, this topic is not particularly urgent. The staff recommends against starting work on this topic in 2023.** It should remain on the inactive study list for now.

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7. Assembly Bills 2293 and 2327 (Committee on Environmental Safety and Toxic Materials).

8. Memorandum 2020-54 and its First Supplement.

9. Minutes (Oct. 2020), p. 4.

## PROPOSED NEW STUDIES

The Commission has received no new study suggestions that need to be discussed.

## WORK PRIORITIES FOR 2023

**The Commission should continue work on projects that are nearly completed.** That would include:

- Completing any Phase One work that remains in the Fish and Game Study.
- Preparing a report that explains why Phase Two work was discontinued.
- Preparing the informational report on emergency law.
- Completing work on the narrow trial court restructuring issue approved for inclusion in a tentative recommendation.

It should be possible to complete all of that work in the first few months of 2023, with only a modest investment of Commission resources.

**If the related bills are enacted, the Commission should reactivate the work on recodification of hazardous material statutes.** That legislative assignment has no deadline, but it has been sidelined for the last year and should be resumed.

**The Commission should begin work on its new legislative assignments: antitrust law, the Equal Rights Amendment, and landlord-tenant terminology.** The first two assignments could begin with work by consultants, which would not consume much of the Commission's own staff resources or meeting time. The last item is the only current work with a statutory deadline. But it is a generous two-year deadline that should not be difficult to meet.

In addition to the study work described above, the staff will have some legislative work. In 2023, the staff will be seeking authors for legislation to implement Commission recommendations on trial court restructuring, use of an administrative subpoena, and revocable transfer on death deeds.

With the Chief Deputy Counsel position still vacant, the work outlined above is more than enough to keep the Commission busy in 2023. **The staff recommends that the Commission approve the priorities outlined above.**

## CHANGES TO STUDY AUTHORITY

At this time, the staff has no proposed changes to the Commission's existing authority.

### STRUCTURE OF MEMORANDUM

As noted at the outset, this memorandum has been prepared with a much simpler and shorter structure than prior *New Topics* memoranda. If Commissioners wish to compare the old approach with the new, Memorandum 2022-3 is an example of the old approach.<sup>10</sup>

Part of the simplification has been to move content from the body of the memorandum into the attached Exhibits. Using this approach organizes all of the possible work into a graduated set of divisions, as follows:

#### **Addressed in Memorandum Body**

- (1) **Active Studies.** Studies worked on in the prior year.
- (2) **Pending Studies.** New legislative assignments enacted in the prior year.
- (3) **Inactive Studies.** Recent work that has been temporarily suspended.

#### **Addressed in Exhibit to Memorandum**

- (4) **Back Burner List.** Topics that the Commission has expressed interest in starting or restarting at some point, that remain a low priority compared to other work.
- (5) **Prior Suggestions Held Over for Future Reconsideration.** New topic suggestions that were not approved, but were held for reconsideration the next year.

The Commission should consider whether it finds that differentiation useful and whether any changes should be made to the structure.

In addition, the Commission should consider whether any items in any of those categories should be moved to another category or deleted. To help in assessing this point, the headings for items in categories (4) and (5) have parentheticals showing the year in which they were placed into those categories.

The staff raises these points in part to give the Commission the opportunity to reject or modify the new structure. In addition, the staff feels that categories (4) and (5) tend to accumulate ideas that, realistically, the Commission will never have

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10. Available at <http://www.clrc.ca.gov/pub/2022/MM22-03.pdf>.



the resources to study. It might be helpful to trim the lists occasionally (or on a regular schedule).

**How would the Commission like to proceed on these issues?**

Respectfully submitted,

Brian Hebert  
Executive Director



## EXHIBIT 1. COMMISSION STUDY AUTHORITY

There are two sources of Commission study authority: (1) the “Calendar of Topics Authorized for Study” that is enacted as a concurrent resolution, at least once per two-year legislative session, and (2) any other concurrent resolutions or statutes that authorize or direct the Commission to study a particular topic.<sup>1</sup> The current authority conferred by each of those sources is listed below.

### Calendar of Topics Authorized for Study

The most recent version of the Calendar of Topics was enacted in 2021.<sup>2</sup> It grants authority to study 14 topics:

- (1) **Creditors Remedies.** Whether the law should be revised that relates to creditors’ remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.
- (2) **Probate Code.** Whether the Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.
- (3) **Real and Personal Property.** 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.
- (4) **Family Law.** Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.
- (5) **Civil Discovery.** Whether the law relating to discovery in civil cases should be revised.

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1. See Gov’t Code § 8293.

2. ACR 24 (Chau); 2021 Cal. Stat. Res. ch. 108.

- (6) **Evidence Code.** Whether the Evidence Code should be revised.
- (7) **Alternative Dispute Resolution.** Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.
- (8) **Administrative Law.** Whether there should be changes to administrative law.
- (9) **Trial Court Unification.** Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.
- (10) **Contracts.** Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.
- (11) **Place of Trial in a Civil Case.** Whether the law governing the place of trial in a civil case should be revised.
- (12) **Fish and Game Code.** 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.
- (13) **Hazardous Materials.** The 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; and be it further
- (14) **Emergency Response.** 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.

#### **Authority Conferred by Other Statute or Concurrent Resolution**

Other concurrent resolutions or statutes authorize or direct the Commission to work on the following topics (listed in reverse chronological order of enactment):

- **Antitrust Law.**<sup>3</sup>
  - **Equal Rights Amendment.**<sup>4</sup>
  - **Landlord-Tenant Terminology (pending).**<sup>5</sup>
  - **Revocable Transfer on Death Deeds.**<sup>6</sup>
  - **California Public Records Act.**<sup>7</sup>
  - **State and Local Agency Access to Customer Information from Communication Service Providers.**<sup>8</sup>
  - **Deadly Weapons.**<sup>9</sup>
  - **Trial Court Restructuring.**<sup>10</sup>
  - **Enforcement of Judgments.**<sup>11</sup>
  - **Technical and Minor Substantive Matters.**<sup>12</sup>
  - **Statutes Repealed by Implication or Held Unconstitutional.**<sup>13</sup>
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3. ACR 95 (Cunningham & Wicks); 2022 Cal. Stat. res. ch. 147.  
4. SCR 92 (Leyva); 2022 Cal. Stat. res. ch. 150.  
5. AB 2503 (Garcia) (not yet approved by Governor).  
6. Prob. Code § 5605. See also Exhibit 2.  
7. 2016 Cal. Stat. res. ch. 150.  
8. 2013 Cal. Stat. res. ch. 115.  
9. 2010 Cal. Stat. ch. 711, § 7.  
10. Gov't Code § 71674.  
11. Code Civ. Proc. § 681.035.  
12. Gov't Code § 8298.  
13. Gov't Code § 8290.

## EXHIBIT 2. BACK BURNER LIST

This Exhibit serves to memorialize mandatory studies with remote due dates and to list topics that the Commission has expressed interest in starting or returning to, but that are unlikely to activate any time soon.

### Remote Deadline Studies

- **Revocable Transfer on Death Deed.** The Commission is required to conduct a second follow-up study of the revocable transfer on death deed statute, with a deadline of January 1, 2031. Work on that study should probably begin in 2029.<sup>14</sup>

### Topics that the Commission Might Eventually Start or Restart

The topics below are listed in reverse chronological order, by reference to the date that work was suspended or the Commission expressed interest in the possibility of studying the topic. The relevant date is shown in parentheses in the headings.

Commissioners should always feel free to suggest that a topic listed below be dropped from the back burner list, if it seems likely that the topic will never have sufficiently high priority to be started or restarted. From time to time, the staff may do so as well.

#### *Discovery in Civil Cases (2017/2009)*

Some time ago, the Commission undertook a study of civil discovery, with the benefit of a 2001 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.<sup>15</sup>

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.<sup>16</sup> The Commission later suspended that work in light of a pending discovery-related bill (AB 383 (Chau)).<sup>17</sup> After AB 383 was enacted into

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14. See Prob. Code § 5605.

15. 37 Cal. L. Revision Comm'n Reports 99 (2007); see 2008 Cal. Stat. ch. 231.

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

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

law with a sunset date of January 1, 2023,<sup>18</sup> the Commission decided to suspend its work on discovery-related issues until after the sunset of AB 383.<sup>19</sup>

*Uniform Electronic Transactions Act (2014)*

The Commission has expressed some interest in examining the Uniform Electronic Transactions Act (“UETA”), including the possible preemption of California’s version of UETA by the federal Electronic Signatures in Global and National Commerce Act.<sup>20</sup>

*Marital Agreements Made During Marriage (2012)*

California has enacted the Uniform Premarital Agreements Act, as well as detailed provisions concerning agreements relating to rights on death of one of the spouses. Yet there is no general statute governing marital agreements made during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues.

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

If the Commission decides to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements.<sup>21</sup> In particular, the Commission could study the circumstances in which a person can waive the right to support.<sup>22</sup>

*Presumptively Disqualified Fiduciaries (2009)*

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

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18. 2017 Cal. Stat. ch. 189.

19. Minutes (Dec. 2018), p. 3. It does not appear that the sunset date has been extended.

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

21. 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.

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

those provisions.<sup>23</sup> 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.<sup>24</sup> In other words, should there be a presumption of fraud or undue influence when an instrument names a “disqualified person” as the fiduciary of the person executing the instrument?

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

In 2010, the Legislature enacted SB 105, with amendments.<sup>25</sup>

#### *Venue in Civil Case (2007)*

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.”<sup>26</sup> 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.”<sup>27</sup> The court of appeal was sufficiently concerned about this matter to direct its clerk to send a copy of its opinion to the Office of Legislative Counsel, which in turn alerted the Commission.

#### *Review of Evidence Code (2005)*

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 in 2002,<sup>28</sup> which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. A while ago, the Commission began to examine some

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

24. See generally Memorandum 2009-22.

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

26. 2007 Cal. Stat. res. ch. 100.

27. See Memorandum 2005-29, Exhibit p. 59.

28. The background study consists of a series of reports prepared by Prof. Méndez. See [http://www.clrc.ca.gov/Menu3\\_reports/bkstudies.html](http://www.clrc.ca.gov/Menu3_reports/bkstudies.html).



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.<sup>29</sup> 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. This work could be recommenced upon reactivation of this study topic.

*Uniform Custodial Trust Act (2000)*

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.

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

### EXHIBIT 3. CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

In the past, the Commission has sometimes decided against embracing a new topic suggestion in the year it was suggested, but instead held the suggestion over to the next year for reconsideration. Those suggestions are summarized below. The Commission has no routine way to clean out the carry-over list and has not had the resources to take on lower-priority work, so the carryover list tends to grow over time.

The suggestions below are listed in reverse chronological order, by reference to the date that they were first presented. The relevant date is shown in parentheses in the headings.

A few of the suggestions appear to be narrow, not likely to be controversial, and relatively straightforward to address. These could be appropriate for staff-directed student work or as low-priority staff projects as time permits.

#### **Clarify What Documents a Motion for Summary Judgment Must Include for Unlawful Detainer Proceedings<sup>30</sup> (2018)**

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.”<sup>31</sup>

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.<sup>32</sup> 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.”<sup>33</sup>

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.<sup>34</sup>

Ms. Maly suggested that subdivision (s) should be narrowed to specify that only the standard time periods for filing and serving papers and the scheduling of hearings are inapplicable to motions for summary judgment in unlawful detainer proceedings,<sup>35</sup> based on her assessment of the probable original legislative intent.<sup>36</sup>

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

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

32. *Id.* at 19.

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

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

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

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

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.<sup>37</sup> 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.

### **Paid Sick Leave<sup>38</sup> (2018)**

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.<sup>39</sup>

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).<sup>40</sup>

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

### **Attachment of Limited Liability Company Property<sup>41</sup> (2017)**

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.<sup>42</sup> However, Ms. Cisneros indicates that, in practice, "courts are issuing attachments for LLCs."<sup>43</sup>

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.<sup>44</sup> Assuming further study

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37. 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.

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

39. See Lab. Code §§ 245-249.

40. Memorandum 2018-2, p. 1.

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

42. *Id.* at Exhibit p. 1.

43. *Id.*

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

confirms this assessment, the statutes would benefit from a clarifying reform that specifies that LLCs are subject to the same rules for prejudgment attachment as other legal entities.

### **Application of Marketable Record Title Act to Oil and Gas Leases<sup>45</sup> (2017)**

Attorney Jack Quirk wrote to identify ambiguities regarding the application of certain provisions in the Marketable Record Title Act (“MRTA”) to oil and gas leases.<sup>46</sup> 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.<sup>47</sup>

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).<sup>48</sup> 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.<sup>49</sup> 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).<sup>50</sup>

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).<sup>51</sup> Several years later, the MRTA was amended, on Commission recommendation, to change the terminology used to refer to certain property interests.<sup>52</sup> However, the change introduced a circular reference problem in the statutory language regarding the treatment of oil and gas leases.

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

46. *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.

47. 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.”).

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

49. 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.”).

50. See *supra* note 55; 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.”).

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

52. 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).

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.

### **Revocability of Trusts by Surviving Co-Trustee and Disposition of Trust Assets<sup>53</sup> (2015)**

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.<sup>54</sup> 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).<sup>55</sup>

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?<sup>56</sup> To the extent that the surviving spouse has the power to revoke the entire trust corpus, does that spouse also control the disposition of that property?<sup>57</sup>

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

54. 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).

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

56. 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.

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

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

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

(1) As directed by the settlor.

(2) As provided in the trust instrument.

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

## **Bond and Undertaking Law<sup>58</sup> (2015)**

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.<sup>59</sup> 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.<sup>60</sup>

In addition, Mr. Coats identifies a few provisions in the current law that may cause confusion.<sup>61</sup> These issues may be appropriate to address if the Commission undertakes a study of the issue discussed above.

## **Timing Rules for Service by Mail and Email<sup>62</sup> (2015)**

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)).<sup>63</sup> Each provision extends litigation deadlines, notice periods, and the like for a certain number of days after service occurring by the specified means (mail or email).

However, the statutes do not expressly say who can take advantage of the extension of time. With respect to whether a person other than a recipient of the service is entitled to the extension of time, Mr. Merliss indicated that two appellate courts have reached differing conclusions.<sup>64</sup>

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.

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

(1) As provided in the trust instrument.

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

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

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

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

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

61. 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).

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

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

64. *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.

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

### **Social Security Number Disclosure Requirement in Probate Code<sup>65</sup> (2014)**

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.

### **Uniform Trust Code<sup>66</sup> (2013)**

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."<sup>67</sup>

### **Civil Procedure: Stay of Trial Court Proceeding During Appeal<sup>68</sup> (2012)**

Attorney H. Thomas Watson suggested that the Commission consider a proposed amendment<sup>69</sup> 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.<sup>70</sup> 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."<sup>71</sup>

### **Intestate Inheritance by a Half-Sibling<sup>72</sup> (2012)**

Marlynne Stoddard of Newport Beach asked the Commission to study intestate inheritance by a half-sibling who lacks a familial relationship with the decedent.<sup>73</sup> Currently, California's law on intestate succession provides that "relatives of the

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

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

67. *Id.* at Exhibit p. 36.

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

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

70. *Id.* at 12-13.

71. *Id.* at 13.

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

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

halfblood inherit the same share they would inherit if they were of the whole blood.”<sup>74</sup> 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.<sup>75</sup> Ms. Stoddard indicated that “the current half-blood statute ... produces grossly unfair and irrational results in cases like mine.”<sup>76</sup>

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74. Prob. Code § 6406.

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

76. *Id.* at 50.