
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 14-15, 2000
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on December 14-15, 2000.

Commission:

Present: David Huebner, Chairperson
Joyce G. Cook, Vice Chairperson
Sanford M. Skaggs (Dec. 14)
Howard Wayne, Assembly Member

Absent: Bion M. Gregory, Legislative Counsel
Bill Morrow, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Lynne I. Urman, Staff Counsel

Consultants: James Acret, Mechanic's Lien Law (Dec. 14)
Michael Hone, Unincorporated Nonprofit Association Law
(Dec. 15)
Gordon Hunt, Mechanic's Lien Law (Dec. 14)
William M. McGovern, Probate Code (Dec. 15)

Other Persons:

Yolanda Benson, Mattos & Associates, Sacramento (Dec. 14)
Eric Carlson, Bet Tzedek Legal Services, Los Angeles (Dec. 15)
Jean Carpenter, AARP, Sacramento (Dec. 14)
R. Bradbury Clark, O'Melveny & Myers, Los Angeles (Dec. 15)
Frank Collard, Catalina Pacific Concrete, Glendora (Dec. 14)
Ron Drolet, Barr Lumber Company, Rosemead (Dec. 14)
Theresa Drought, Kaiser Permanente, Oakland (Dec. 15)
Gordon Eng, Los Angeles (Dec. 14)
Peter C. Freeman, Lumber Association of California and Nevada, Barr Lumber, San Bernardino (Dec. 14)
Ellen Gallagher, Contractors State License Board, Sacramento (Dec. 14)
Paul R. Geissler, Surety Company of the Pacific, Encino (Dec. 14)

- Ken Grossbart, Abdulaziz & Grossbart, North Hollywood (Dec. 14)
Keith Honda, San Jose (Dec. 14)
Eric Jorgensborg, Fisher Lumber Co., Lumber Association of California and Nevada (Dec. 14)
Melvin H. Kirschner, M.D., Los Angeles County Medical Association, Los Angeles (Dec. 15)
Stephen F. Lambert, Lambert & Rogers Appliance, El Cajon (Dec. 14)
Karen M. Lutke, San Mateo County Law Library, Redwood City (Dec. 14)
William E. Mayer, State Bar Real Property Law Section, Common Interest Development Sub-Section, San Diego
Jane G. Meyer, Ventura County Law Library, Ventura (Dec. 14)
Dick Nash, Building Industry Credit Association, Los Angeles (Dec. 14)
Terence Nunan, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Dec. 15)
Erin Oshiro, California Judicial Administration Fellowship, Los Angeles Superior Court, Los Angeles (Dec. 14)
Alfonso L. Poiré, Golden State Lumber, Inc., American Canyon (Dec. 14)
Robert Solton, Barristers Domestic Violence Project, Los Angeles (Dec. 14)
Adam L. Streltzer, Los Angeles (Dec. 14)
Shana Wallace, California Judicial Administration Fellowship, Los Angeles Superior Court, Los Angeles (Dec. 14)
Norm Widman, Dixieline Lumber Co., San Diego (Dec. 14)
Richard B. Williams, California Department of Transportation, Sacramento (Dec. 14)
Christine J. Wilson, Los Angeles County Bar Bioethics Committee, Los Angeles (Dec. 15)
Sonia M. Younglove, California Association of Realtors, Los Angeles (Dec. 14)

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1 The Executive Secretary noted that we also have a new administrative
2 assistant, Glista Guilford. Ms. Guilford replaces Lauren Trevathan, who has
3 moved.

4 The Executive Secretary announced that we will have a Santa Clara Law
5 School student intern, Gail Love, working with us this spring.

6 *Consultants*

7 The Executive Secretary reported that he has extended the due date for
8 Professor Uelmen's study on the impact of trial court unification on criminal
9 procedure. The study was due December 31, 2000, but is preempted by Prof.
10 Uelmen's involvement with briefing and arguing a case now pending in the
11 Supreme Court.

12 The Executive Secretary reported that we have made some progress in
13 seeking out an appropriate consultant for the arbitration study. One problem is
14 the relative scarcity of academics familiar with the area. The Executive Secretary
15 is consulting with the Chairperson in making this search.

16 The Executive Secretary proposed adding Keith Honda as a consultant on the
17 mechanic's lien study. Mr. Honda is no longer with the Legislature, but during
18 the time he worked on mechanic's lien issues with the Legislature he acquired a
19 wealth of knowledge that has been a significant resource for the staff. He also
20 presents a perspective that is not heard from the Commission's other consultants
21 on this study. The Commission authorized the Executive Secretary to engage in
22 contract negotiations to pay Mr. Honda's travel expenses to attend Commission
23 meetings when the topic of mechanic's liens is discussed.

24 **STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT**

25 The Commission considered Memorandum 2000-88, relating to
26 unincorporated nonprofit associations. The Commission directed the staff to
27 prepare a draft of proposed legislation governing the liability of members and
28 officers of unincorporated nonprofit associations. The following principles were
29 discussed and will guide preparation of the draft:

- 30 (1) A member of an unincorporated nonprofit association should not
31 be personally liable for contracts or torts of the association solely
32 as a consequence of membership status.
- 33 (2) Consistent with agency principles, an officer of an unincorporated
34 nonprofit association should not be personally liable for a contract

1 executed on behalf of the association as a disclosed principal, or for
2 tortious conduct of which the officer is personally innocent.

3 (3) A member of an unincorporated nonprofit association should be
4 personally liable for contracts that the member expressly
5 authorizes. Express authorization should not include signing of
6 by-laws, election of officers, or participation in a vote in which the
7 member voted against authorization of the contract.

8 (4) A member of an unincorporated nonprofit association should be
9 personally liable for an association contract to the extent of the
10 value of any benefits personally received under the contract.

11 (5) A member of an unincorporated nonprofit association should
12 perhaps be liable for an association contract to the extent that
13 association assets were distributed to the member at a time when
14 the association was insolvent. The staff will determine the extent to
15 which the Uniform Fraudulent Transfers Act already addresses
16 this issue.

17 (6) A member or officer of an unincorporated nonprofit association
18 should be liable for a tort in which the member or officer
19 personally participates.

20 (7) A member of an unincorporated nonprofit association should be
21 liable for a tort resulting from conduct of an association agent if
22 the member expressly authorized the conduct. Express
23 authorization should not include signing of by-laws, election of
24 officers, or participation in a vote in which the member voted
25 against authorization of the conduct.

26 (8) Liability of a member or officer of an unincorporated nonprofit
27 association should be secondary to the liability of the association
28 itself, and the assets of the association should be exhausted before
29 the assets of a member or officer can be reached.

30 (9) The law should recognize that a member of an unincorporated
31 nonprofit association may be liable for a contract or tort of the
32 association under the common law alter ego doctrine, taking into
33 account the differences between corporations and unincorporated
34 associations. The Commission's commentary on the proper
35 application of the alter ego doctrine should be fairly extensive.

36 **STUDY EM-456 – WITHDRAWAL OF PREJUDGMENT DEPOSIT IN EMINENT DOMAIN**

37 The Commission considered Memorandum 2000-64 and its First and Second
38 Supplements, analyzing comments received on the tentative recommendation on
39 withdrawal of the prejudgment deposit in eminent domain. The Commission
40 decided not to submit this recommendation to the Legislature.

1 **STUDY EM-459 – PREJUDGMENT DEPOSIT APPRAISAL IN EMINENT DOMAIN**

2 The Commission considered Memorandum 2000-79 and its First Supplement,
3 relating to limitations on use of the condemnor's prejudgment domain appraisal
4 as evidence in an eminent domain proceeding. The Commission approved
5 preparation of a tentative recommendation and its circulation for comment,
6 along the lines set out in the memorandum. The Commission anticipates that if
7 the proposal is ultimately finalized, it will not be of sufficient magnitude to
8 justify a stand-alone bill but should be made part of an omnibus eminent domain
9 bill.

10 **STUDY H-820 – MECHANIC'S LIENS**

11 The Commission considered Memorandum 2000-78, and its First, Second,
12 Third, and Fourth Supplements, concerning draft proposals for a mandatory joint
13 control account in home improvement contracts, and other mechanic's liens
14 reforms. The Commission also received a letter from Stanley Wieg on behalf of
15 the California Association of Realtors, which was distributed at the meeting. (See
16 Fifth Supplement to Memorandum 2000-78, Exhibit pp. 1-2.)

17 Following a discussion of the latest proposals and hearing the views of
18 interested persons at the meeting, the Commission directed the staff to prepare a
19 comprehensive overview of the proposals concerning mechanic's lien reform in
20 the home improvement contract area considered thus far in this study, with a
21 summary of the pros and cons, along with cross-references to memorandums
22 where the different proposals were discussed. In addition, the staff should
23 prepare an analysis of the use of joint checks and how this approach might be
24 made more reliable. The Commission would also be interested in a presentation
25 on the Homeowner Relief Recovery Fund proposal prepared by Prof. J. Clark
26 Kelso and the Institute for Legislative Practice (see Second and Third
27 Supplements to Memorandum 2000-78), if the materials can be submitted
28 sufficiently in advance of the next meeting to permit adequate review, and
29 directed the staff to work with the proponents to address any issues that have
30 been identified.

31 **STUDY J-111 – STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE**

32 The Commission considered Memorandum 2000-61 and its First Supplement,
33 concerning the statute of limitations for estate planning malpractice. The

1 Commission decided to further explore the concerns raised by the State Bar
2 Estate Planning, Trust, and Probate Law Section.

3 STUDY J-1307 – LAW LIBRARY BOARD OF TRUSTEES

4 The Commission considered Memorandum 2000-80 and its First and Second
5 Supplements, concerning the composition of a law library board of trustees. The
6 draft recommendation should be revised as indicated below and circulated to the
7 county law libraries for comment (through Karen Lutke, Director of the San
8 Mateo County Law Library). The Commission will consider the comments, if
9 any, at its February meeting. The staff should also submit the draft legislation to
10 Legislative Counsel, so that a bill can be introduced if the Commission finalizes
11 its proposal in February.

12 **Board of Law Library Trustees (Bus. & Prof. Code § 6301)**

13 Business and Professions Code Section 6301 should be amended along the
14 following lines:

15 6301. A (a) Except as otherwise provided by statute, a board of
16 law library trustees is constituted as follows:

17 (a)

18 (1) In a county where there are no more than three judges of the
19 superior court, each of those judges is ex officio a trustee; in a
20 county where there are more than three judges of the superior
21 court, the judges of the court shall elect three of their number to
22 serve as trustees. However, where there are no more than three
23 judges of the superior court, the trustee. The judges may at their
24 option select only one of their number to serve as a trustee, and in
25 that event they shall appoint two additional trustees who are
26 residents of the county or members of the bar of the county State
27 Bar.

28 (2) In a county where there are more than three judges of the
29 superior court, the judges of that court shall elect at least four and
30 no more than five of their number to serve as trustees.

31 (3) Any judge of the superior court who is an ex officio or
32 elected member may at the judge's option designate a resident of
33 the county or a member of the bar of the county State Bar to act for
34 the judge as trustee.

35 (b) In a county with one or two municipal courts the judges of
36 the court or courts shall elect one of their number to serve as
37 trustee. In a county with three or more municipal courts, the judges
38 of the courts may elect two of their number to serve as trustees. In a
39 county in which there is no municipal court, the judges of the

1 superior court may elect one or more of their number to serve as
2 trustee, in addition to the trustees elected pursuant to subdivision
3 (a), so that the number of judges elected shall not exceed the
4 number of judge trustees authorized as of January 1, 1998. Any
5 judge who is an elected member may at the judge's option
6 designate a member of the bar of the county to act for the judge as
7 trustee.

8 (e)

9 (4) The chair of the board of supervisors is ex officio a trustee,
10 but the board of supervisors at the request of the chair may appoint
11 a member of the bar of the county or State Bar, any other member
12 of the board of supervisors of the county county, or a resident of
13 the county to serve as trustee in place of said the chair. The
14 appointment of the person selected in lieu place of the chair of the
15 board of supervisors shall expire when a new chair of the board of
16 supervisors is selected, and that appointment shall not be subject to
17 the provisions of Section 6302.

18 (d)

19 (5) The board of supervisors shall appoint as many additional
20 trustees, who are members of the bar of the county State Bar, as
21 may be necessary to constitute a board of six members in any
22 county where one member is elected pursuant to subdivision (b), or
23 of seven members in any county where two members are elected to
24 serve as trustees pursuant to subdivision (b) at least six and not
25 more than seven members.

26 (b) No more than two (2) law library trustees may be residents
27 of the county who are not judges of the county or members of the
28 State Bar.

29 (c) In a county with a municipal court, a board of law library
30 trustees is constituted as described in subdivisions (a) and (b),
31 except as follows:

32 (1) The judges of the municipal court shall elect one of their
33 number to serve as trustee. Any municipal court judge who is an
34 elected member may at the judge's option designate a resident of
35 the county or a member of the State Bar to act for the judge as
36 trustee.

37 (2) If the county has more than three judges of the superior
38 court, the judges of the superior court shall elect three of their
39 number to serve as trustees.

40 **Comment.** Section 6301 is amended to consolidate the
41 requirements for selection of a law library board in a county with a
42 unified superior court. Subdivisions (a) and (b) state those
43 requirements; subdivision (c) states the requirements for selection
44 of a law library board in a county with a municipal court.

45 Section 6301 is also amended to permit a resident of the county
46 to serve on a law library board in place of a judge or in place of the

1 chair of the board of supervisors. To ensure that judges, attorneys,
2 and boards of supervisors continue to be represented on law library
3 boards, the number of lay trustees serving at the same time is
4 limited to two.

5 Section 6301 is further amended to permit the judges of a
6 unified superior court to select either four or five of their number to
7 serve on the law library board, at their discretion. Formerly, the
8 number of judge trustees in a county with a unified superior court
9 depended on how many judge trustees were authorized as of
10 January 1, 1998. See 1998 Cal. Stat. ch. 931, § 3.

11 To further promote flexibility, Section 6301 is amended to
12 permit a law library board to consist of either six or seven
13 members. Formerly, the size of the board depended on the number
14 of judge trustees, which in turn depended on the number of
15 municipal courts in the county or the number of judge trustees
16 authorized as of January 1, 1998. See 1998 Cal. Stat. ch. 931, § 3.

17 Finally, Section 6301 is amended to clarify that an attorney need
18 not belong to a county bar association to serve on a law library
19 board. It is also unnecessary for the attorney to reside in the county
20 or regularly practice law in the county. It is sufficient if the attorney
21 is a member of the State Bar. The local trial judges and the board of
22 supervisors thus have broad discretion to select capable attorneys
23 to serve as trustees, yet eliminate unsuitable candidates in the
24 selection process.

25 For a special provision governing the composition of the law
26 library board in San Diego County, see Section 6301.1. For a
27 provision authorizing a board of less than six members in a county
28 with three or fewer judges, see Section 6301.5. For a provision
29 grandfathering pre-1941 legislation establishing a law library and
30 board of law library trustees in a county, see Section 6363. See also
31 Section 6364 (discretion of board of supervisors in applying
32 chapter).

33 Section 6301 is also amended to make technical changes.

34 **Bus. & Prof. Code § 6301.5. Board of law library trustees in county with three**
35 **or fewer judges**

36 Business and Professions Code Section 6301.5 should be amended along the
37 following lines:

38 ~~6301.5. In any county in which there is no county bar association~~
39 ~~if the board of supervisors determines that there is not a sufficient~~
40 ~~number of members of the State Bar residing, and with their~~
41 ~~principal places of office for the practice of law, in the county~~
42 ~~eligible for appointment to the board of library trustees by the~~
43 ~~board of supervisors pursuant to subdivision (d) of Section 6301 for~~
44 ~~the constitution of a six-member or seven-member board of library~~

1 ~~trustees, the board of library trustees may consist of where there are~~
2 ~~three or fewer judges of the superior court, the board of~~
3 ~~supervisors, with the concurrence of the judges of the superior~~
4 ~~court, may reduce the number of law library trustees to not less~~
5 ~~than three members.~~

6 **Comment.** Section 6301.5 is amended to apply to any county
7 where there are three or fewer judges of the superior court.
8 Reduction of the size of the board pursuant to this provision is
9 optional, not mandatory. Where the board of supervisors and the
10 judges of the superior court agree to reduce the size of the board
11 pursuant to this provision, the agreement may also address the
12 composition of the board.

13 For the composition of a law library board generally, see Section
14 6301. For a special provision governing the composition of the law
15 library board in San Diego County, see Section 6301.1. For a
16 provision grandfathering pre-1941 legislation establishing a law
17 library and board of law library trustees in a county, see Section
18 6363. See also Section 6364 (discretion of board of supervisors in
19 applying chapter).

20 **STUDY J-1306 – CASES IN WHICH COURT REPORTER IS REQUIRED**

21 The Commission considered Memorandum 2000-81 and its First Supplement,
22 concerning comments on the tentative recommendation relating to *Cases in Which*
23 *Court Reporter Is Required*. The Commission directed the staff to prepare a draft of
24 a revised tentative recommendation, incorporating the following revisions:

25 **Code Civ. Proc. § 269. Reporting of cases**

26 Code of Civil Procedure Section 269 should be amended along the following
27 lines:

28 ~~269. (a) The official reporter of a superior court, or any of them~~
29 ~~where there are two or more, shall, at the request of either party, or~~
30 ~~of the court in a civil case other than a limited civil case, and on the~~
31 ~~order of the court, the district attorney, or the attorney for the~~
32 ~~defendant in a felony case, An official reporter or official reporter~~
33 ~~pro tempore of the court shall take down in shorthand all~~
34 ~~testimony, objections made, rulings of the court, exceptions taken,~~
35 ~~all arraignments, pleas, and sentences of defendants in felony cases,~~
36 ~~arguments of the prosecuting attorney attorneys to the jury, and all~~
37 ~~statements and remarks made and oral instructions given by the~~
38 ~~judge. judge, in the following cases:~~

39 ~~(1) In a civil case, on the order of the court or at the request of a~~
40 ~~party.~~

1 (2) In a felony case, on the order of the court or at the request of
2 the district attorney or the defendant.

3 (3) In a misdemeanor or infraction case, on the order of the
4 court.

5 (b) If directed by the court, or requested by either a party, the
6 official reporter shall, within such reasonable time after the trial of
7 the case as the court may designate, write the transcripts out, or the
8 specific portions thereof as may be requested, in plain and legible
9 longhand, or by typewriter, or other printing machine, and certify
10 that the transcripts were correctly reported and transcribed, and
11 when directed by the court, file the transcripts with the clerk of the
12 court.

13 (b)

14 (c) In any case where a defendant is convicted of a felony, after a
15 trial on the merits, the record on appeal shall be prepared
16 immediately after the verdict or finding of guilt is announced
17 unless the court determines that it is likely that no appeal from the
18 decision will be made. The court's determination of a likelihood of
19 appeal shall be based upon standards and rules adopted by the
20 Judicial Council.

21 ~~(c) Any court, party, or person may request delivery of any~~
22 ~~transcript in a computer-readable form, except that an original~~
23 ~~transcript shall be on paper. A copy of the original transcript~~
24 ~~ordered within 120 days of the filing or delivery of the transcript by~~
25 ~~the official reporter shall be delivered in computer-readable form~~
26 ~~upon request if the proceedings were produced utilizing computer-~~
27 ~~aided transcription equipment. Except as modified by standards~~
28 ~~adopted by the Judicial Council, the computer-readable transcript~~
29 ~~shall be on disks in standard ASCII code unless otherwise agreed~~
30 ~~by the reporter and the court, party, or person requesting the~~
31 ~~transcript. Each disk shall be labeled with the case name and court~~
32 ~~number, the dates of proceedings contained on the disk, and the~~
33 ~~page and volume numbers of the data contained on the disk. Each~~
34 ~~disk as produced by the court reporter shall contain the identical~~
35 ~~volume divisions, pagination, line numbering, and text of the~~
36 ~~certified original paper transcript or any portion thereof. Each disk~~
37 ~~shall be sequentially numbered within the series of disks.~~

38 **Comment.** Subdivision (a) of Section 269 is amended to
39 continue former Section 274c without substantive change.

40 Subdivision (a) is also amended to substitute "arguments of the
41 attorneys" for "arguments of the prosecuting attorney," consistent
42 with standard practice. See, e.g., Gov't Code § 72194.5 ("arguments
43 of the attorneys").

44 Subdivision (a) is further amended to refer to official reporters
45 pro tempore, as well as official reporters. This is not a substantive

1 change. See Gov't Code § 69945 (official reporter pro tempore shall
2 perform same duties as official reporter).

3 Finally, subdivision (a) is amended to clarify that a felony
4 defendant, whether represented by counsel or in pro per, is entitled
5 to a court reporter on request by the defendant personally or by the
6 defendant's attorney (if any). This is not a substantive change. See
7 generally *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050,
8 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim
9 record "in felony proceedings by statute (Code Civ. Proc., § 269.)");
10 *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981)
11 (a "felony defendant is, as a matter of right, entitled to have 'taken
12 down,' all related testimony and oral proceedings") (emphasis in
13 original); *People v. Godeau*, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr.
14 424 (1970) ("In California felony proceedings a court reporter must
15 be present if requested by the defendant, the district attorney, or an
16 order of the court. (Code Civ. Proc., § 269.)").

17 Former subdivision (c) is continued in Section 271 without
18 substantive change.

19 Section 269 is also amended to make technical changes.

20 The staff should check the Penal Code to determine whether statutes
21 authorizing "the defendant" to take a procedural step extend such authority to
22 both the defendant and the defendant's attorney. The staff should also
23 investigate means of clarifying in Section 269 or elsewhere that any person is
24 entitled to request preparation of a transcript of a proceeding that is open to the
25 public, regardless of whether the person is a party to the proceeding. A
26 Comment should explain that this conforms to existing practice.

27 **Nonsubstantive Reform**

28 The draft should include an uncodified section explaining that the proposal is
29 a nonsubstantive reform and does not affect the use of court reporting in
30 California.

31 **Penal Code § 190.9. Record in death penalty cases**

32 The proposed amendment of Penal Code Section 190.9 should be revised to
33 reflect the recent addition of subdivision (b), relating to assignment of a court
34 reporter who uses computer-aided transcription equipment:

35 190.9. (a)(1) In any case in which a death sentence may be
36 imposed, all proceedings conducted in the municipal and superior
37 courts, including all conferences and proceedings, whether in open
38 court, in conference in the courtroom, or in chambers, shall be

1 conducted on the record with a court reporter present. The court
2 reporter shall prepare and certify a daily transcript of all
3 proceedings commencing with the preliminary hearing.
4 Proceedings prior to the preliminary hearing shall be reported but
5 need not be transcribed until the municipal or superior court
6 receives notice as prescribed in paragraph (2) of subdivision (a).

7 (2) Upon receiving notification from the prosecution that the
8 death penalty is being sought, the superior court shall notify the
9 court in which the preliminary hearing took place. Upon this
10 notification, the court in which the preliminary hearing took place
11 shall order the transcription and preparation of the record of all
12 proceedings prior to and including the preliminary hearing in the
13 manner prescribed by the Judicial Council in the rules of court. The
14 record of all proceedings prior to and including the preliminary
15 hearing shall be certified by the court no later than 120 days
16 following notification by the superior court unless the superior
17 court grants an extension of time pursuant to rules of court adopted
18 by the Judicial Council. Upon certification, the court in which the
19 preliminary hearing took place shall forward the record to the
20 superior court for incorporation into the superior court record.

21 (b)(1) The court shall assign a court reporter who uses
22 computer-aided transcription equipment to report all proceedings
23 under this section.

24 (2) Failure to comply with the requirements of this section
25 relating to the assignment of court reporters who use computer-
26 aided transcription equipment shall not be a ground for reversal.

27 (c) Any computer-readable transcript produced by court
28 reporters pursuant to this section shall conform to the requirements
29 of ~~subdivision (c) of Section 269~~ Section 271 of the Code of Civil
30 Procedure.

31 **Comment.** Section 190.9 is amended to reflect relocation of
32 former Code of Civil Procedure Section 269(c) to Code of Civil
33 Procedure Section 271.

34 **Penal Code § 1240.1. Duties of counsel on appeal**

35 The proposed amendment of Penal Code Section 1240.1 should be deleted
36 from the proposal, because that provision no longer contains a cross-reference to
37 Code of Civil Procedure Section 269.

38 **Preliminary Part**

39 The preliminary part (narrative portion) of the proposal should be updated
40 and corrected as discussed at pages 4-5 of the First Supplement to Memorandum
41 2000-81. The preliminary part should also be revised to reflect the above

1 revisions of the proposed legislation. In particular, the preliminary part should
2 stress that the reform is not intended to alter existing law or affect the
3 development of the law regarding the use of court reporters.

4 STUDY J-1320 – CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION

5 The Commission considered Memorandum 2000-83, concerning the
6 recommendation on *Unnecessary Procedural Differences Between Limited and*
7 *Unlimited Civil Cases*. The Commission made the following decisions:

8 **Code Civ. Proc. § 631. Waiver of jury**

9 Code of Civil Procedure Section 631 should be amended along the lines
10 recommended in Memorandum 2000-83:

11 631. (a) Trial by jury may be waived by the several parties to an
12 issue of fact in any of the following ways:

13 (1) By failing to appear at the trial.

14 (2) By written consent filed with the clerk or judge.

15 (3) By oral consent, in open court, entered in the minutes or
16 docket.

17 (4) By failing to announce that a jury is required, at the time the
18 cause is first set for trial, if it is set upon notice or stipulation, or
19 within five days after notice of setting if it is set without notice or
20 stipulation.

21 (5) By failing to deposit with the clerk, or judge, advance jury
22 fees 25 days prior to the date set for trial, except in unlawful
23 detainer actions where the fees shall be deposited at least five days
24 prior to the date set for trial, or as provided by subdivision (b). An
25 advance jury fee deposited pursuant to this paragraph may not
26 exceed a total of one hundred fifty dollars (\$150).

27 (6) By failing to deposit with the clerk or judge, promptly after
28 the impanelment of the jury, a sum equal to the mileage or
29 transportation (if allowed by law) of the jury accrued up to that
30 time.

31 (7) By failing to deposit with the clerk or judge, at the beginning
32 of the second and each succeeding day's session a sum equal to one
33 day's fees of the jury, and the mileage or transportation, if any.

34 (b) ~~In a superior court action, other than a limited civil case, if~~
35 ~~a jury is demanded by either party in the memorandum to set the~~
36 ~~cause for trial a party and the party, prior to trial, by announcement~~
37 ~~or by operation of law, waives a trial by jury, then all adverse~~
38 ~~parties shall have five days following receipt of the notice of the~~
39 ~~waiver that party shall promptly notify all other parties of the~~
40 ~~waiver, in writing or in open court. Each party adverse to the party~~

1 who waived the trial by jury has five days after notice of the waiver
2 is given to file and serve a demand for a trial by jury and to deposit
3 any advance jury fees that are then due. If the party who waived a
4 trial by jury does not promptly notify all other parties of the
5 waiver, any other party, or the clerk or judge, may provide notice of
6 the waiver, but is not required to do so. Where more than one
7 notice of the same waiver is given to a party, the five-day period to
8 file and serve a demand for a trial by jury and to deposit advance
9 jury fees commences on giving of the first notice.

10 (c) When the party who has demanded trial by jury either (1)
11 waives the trial upon or after the assignment for trial to a specific
12 department of the court, or upon or after the commencement of the
13 trial, or (2) fails to deposit the fees as provided in paragraph (6) of
14 subdivision (a), trial by jury shall be waived by the other party by
15 either failing promptly to demand trial by jury before the judge in
16 whose department the waiver, other than for the failure to deposit
17 the fees, was made, or by failing promptly to deposit the fees
18 described in paragraph (6) of subdivision (a).

19 (d) The court may, in its discretion upon just terms, allow a trial
20 by jury although there may have been a waiver of a trial by jury.

21 **Comment.** Subdivision (b) of Section 631 is amended to apply to
22 both limited and unlimited civil cases. This codifies existing law.
23 See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 &
24 Comment. For unlimited civil cases, see Section 88. For waiver of a
25 jury in a criminal case, see Cal. Const. art. I, § 16.

26 Subdivision (b) is also amended to delete the reference to the
27 memorandum to set the cause for trial. The reference is
28 unnecessary and may also be obsolete because in many cases an at-
29 issue memorandum is no longer required. See R. Weil & I. Brown,
30 Jr., *California Practice Guide: Civil Procedure Before Trial, Case*
31 *Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

32 As amended, subdivision (b) also clarifies that the party who
33 waives a jury after demanding one is responsible for providing
34 notice of the waiver. If that party fails to provide notice of the
35 waiver as required, another party (or the clerk or judge) is
36 permitted but not required to provide the notice instead. Failure to
37 provide timely notice may be grounds for a continuance or other
38 remedial action. See *Leslie v. Roe*, 52 Cal. App. 3d 686, 688, 125 Cal.
39 Rptr. 157 (1975).

40 Where a party is given multiple notices of the same jury waiver,
41 the five-day period to demand a jury is triggered by the first notice.
42 Where more than one jury demand is made and later waived,
43 notice of each waiver is required. For example, suppose:

44 (1) Party A requests a jury trial but later waives that right.

1 (2) Party B requests a jury trial within five days after Party A
2 gives notice of Party A's jury waiver.

3 (3) Party C relies on Party B's jury demand.

4 (4) Party B ultimately decides to waive a jury.

5 Under Section 631(b), Party B must notify the other parties of Party
6 B's jury waiver and Party C has five days from the giving of that
7 notice within which to demand a jury trial. (For guidance on
8 whether Party A may request a jury despite Party A's previous jury
9 waiver, see Section 631(d); Taylor v. Union Pac. R.R. Corp., 16 Cal.
10 3d 893, 549 P.2d 855, 130 Cal. Rptr. 23 (1976); Simmons v.
11 Prudential Life Ins. Co., 123 Cal. App. 3d 833, 836, 177 Cal. Rptr. 37
12 (1981).)

13 Finally, the amendment provides that the time period for
14 demanding a jury trial and depositing jury fees runs from the date
15 of giving notice rather than from the date of receiving notice. This is
16 intended to facilitate proof of whether a jury demand is timely. For
17 extension of the five-day period where notice is given by mail or
18 Express Mail, see Section 1013.

19 **Gov't Code § 72055. First filing fee in limited civil case**

20 Government Code Section 72055 should be amended along the lines
21 recommended in Memorandum 2000-83:

22 72055. (a) The total fee for filing of the first paper in a limited
23 civil case, case shall be ~~ninety dollars (\$90)~~, except that in cases
24 where the amount demanded, excluding attorney's fees and costs,
25 is ten thousand dollars (\$10,000) or less, the fee shall be ~~eighty-three~~
26 ~~dollars (\$83)~~. The amount of the demand shall be stated on the first
27 page of the paper immediately below the caption eighty-five dollars
28 (\$85).

29 (b) This section applies to the initial complaint, petition, or
30 application, and any papers transmitted from another court on the
31 transfer of a civil action or proceeding, but does not include
32 documents filed pursuant to Section 491.150, 704.750, or 708.160 of
33 the Code of Civil Procedure.

34 (c) The term "total fee" as used in this section and Section 72056
35 includes any amount allocated to the Judges' Retirement Fund
36 pursuant to Section 72056.1, any automation fee imposed pursuant
37 to Section 68090.7, any construction fee imposed pursuant to
38 Section 76238, and the law library fee established pursuant to
39 Article 2 (commencing with Section 6320) of Chapter 5 of Division 3
40 of the Business and Professions Code. The term "total fee" as used
41 in Section 72056 includes any dispute resolution fee imposed
42 pursuant to Section 470.3 of the Business and Professions Code. The
43 term "total fee" as used in this section also includes any dispute

1 resolution fee imposed pursuant to Section 470.3 of the Business
2 and Professions Code, but the board of supervisors of each county
3 may exclude any portion of this dispute resolution fee from the
4 term “total fee.”

5 (d) The fee shall be waived in any action for damages against a
6 defendant, based upon the defendant’s commission of a felony
7 offense, upon presentation to the clerk of the court of a certified
8 copy of the abstract of judgment of conviction of the defendant of
9 the felony giving rise to the claim for damages. If the plaintiff
10 would have been entitled to recover those fees from the defendant
11 had they been paid, the court may assess the amount of the waived
12 fees against the defendant and order the defendant to pay that sum
13 to the county.

14 **Comment.** For purposes of simplification, Section 72055 is
15 amended to establish a uniform filing fee for filing the first paper in
16 a limited civil case, regardless of the amount of the demand.
17 Formerly, the amount of the fee depended on whether the demand
18 exceeded \$10,000, or was \$10,000 or less. 1998 Cal. Stat. ch. 931, §
19 315; see also 1992 Cal. Stat. ch. 696, § 73; 1997 Cal. Stat. ch. 850, § 37.

20 Section 72055 is further amended to delete the requirement that
21 the amount of the demand be stated on the first page of the first
22 paper immediately below the caption. This requirement is no
23 longer necessary, because the amount of the demand no longer
24 affects the amount due under the statute. To permit differentiation
25 between limited and unlimited civil cases, however, a plaintiff in a
26 limited civil case is still required to state in the caption that the case
27 is a limited civil case. Code Civ. Proc. § 422.30 (caption).

28 Technical changes are also made for conformity with preferred
29 drafting style.

30 The intent is to achieve a revenue-neutral proposal. The staff should alert the
31 Commission if the Administrative Office of the Courts concludes that the
32 proposed \$85 uniform fee will not achieve that result.

33 **Preliminary Part**

34 At page 9, the staff draft recommendation attached to Memorandum 2000-83
35 refers to the Administrative Office of the Municipal Courts. The draft should be
36 revised to clarify that this is the Administrative Office of the Municipal Courts of
37 Contra Costa County.

38 At page 12 of the draft, the term “small claim” should not be used, because it
39 may create confusion. The intent is to refer to cases in which a small amount is
40 demanded, not to cases that are subject to small claims procedures.

1 **Coordination with Judicial Council**

2 It does not appear realistic to attempt to issue a joint report with the Judicial
3 Council on the proposal. Instead, the staff should (1) prepare a revised draft for
4 the Commission to review and probably finalize at the next meeting, and (2)
5 attempt to obtain a letter from the Judicial Council concurring in or otherwise
6 expressing support for the Commission's report.

7 **STUDY K-500 – EVIDENCE CODE CHANGES REQUIRED**
8 **BY ELECTRONIC COMMUNICATIONS**

9 The Commission considered Memorandum 2000-84, concerning revision of
10 the Evidence Code to address electronic communications. The Commission
11 directed the staff to provide further analysis of issues relating to the draft
12 proposal, including at least the following:

- 13 (1) Whether and how to define “electronic” in the Evidence Code.
- 14 (2) Whether the sentence in Evidence Code Section 952 on
15 communications by electronic means should be moved to Evidence
16 Code Section 917 (as in the draft attached to Memorandum 2000-
17 84) or should be placed elsewhere.
- 18 (3) Whether to rephrase the sentence on communications by electronic
19 means (e.g., by deleting the references to facsimile and cellular
20 telephone from the text and referring to them and to cordless
21 telephones and email in the Comment instead).
- 22 (4) Whether the proposal should address the work product doctrine,
23 as well as the privileges for confidential communications.

24 The Commission also decided that ethical issues relating to use of electronic
25 communications in privileged relationships are beyond the scope of this study
26 and should instead be considered by the State Bar.

27 **STUDY L-605 – RULES OF CONSTRUCTION FOR TRUSTS**

28 The Commission considered Memorandum 2000-87 and its First Supplement,
29 relating to the rules of construction for trusts and other estate planning
30 instruments. The Commission directed the staff to prepare a draft tentative
31 recommendation on the matter for its consideration at a future meeting. The
32 draft should incorporate both decisions made at the meeting and previous

1 decisions of the Commission on this matter. The following decisions were made
2 at the meeting:

3 **Prob. Code § 21102. Intention of transferor**

4 For purposes of drafting the tentative recommendation, subdivision (a) of
5 Section 21102 should be repealed and subdivision (b) amended as set out in the
6 memorandum:

7 ~~21102. (a) The intention of the transferor as expressed in the~~
8 ~~instrument controls the legal effect of the dispositions made in the~~
9 ~~instrument.~~

10 ~~(b) The rules of construction expressed in this part apply where~~
11 ~~the do not apply to the extent a contrary intention of the transferor~~
12 ~~is not indicated by expressed in the instrument or is otherwise~~
13 ~~determined by the court.~~

14 The Comment to this section should be expanded to include a discussion of
15 the “clear and convincing” standard for extrinsic evidence. A note should call
16 attention to the Commission’s particular concern for input on this proposal.

17 **Prob. Code § 21104. “Testamentary gift” defined**

18 The staff should do further work on this definition. One issue is whether it
19 does or should cover irrevocable as well as revocable trusts. This can only be
20 determined by reference to the substantive provisions in which it is used, such as
21 Section 21109 (survival required). That may be an argument for using a
22 substantive phrase, rather than a definition, since the substantive phrase can be
23 tailored to the circumstances in which it is used.

24 **Prob. Code § 21108. Common law Doctrine of Worthier Title abolished**

25 The obsolete transitional provision should be proposed for repeal in the
26 tentative recommendation.

27 **Prob. Code § 21110. Antilapse**

28 *Express requirement of survival*

29 Subdivision (b) of this section should be amended as follows:

30 (b) The issue of a deceased transferee do not take in the
31 transferee’s place if the instrument expresses a contrary intention or
32 a substitute disposition. ~~A requirement that the initial transferee~~
33 ~~survive for a specified period of time after the death of the~~
34 ~~transferor constitutes a contrary intention. A requirement that the~~
35 ~~initial transferee survive until a future time that is related to the~~

1 ~~probate of the transferor's will or administration of the estate of the~~
2 ~~transferor constitutes a contrary intention.~~

3 The Comment should explain that these deletions are being made to avoid the
4 negative implication they create. However, the Comment should recognize that
5 provisions of the type described may well indicate an intention that the antilapse
6 statute not apply. The Comment should also indicate that in the case of a
7 substitute gift, the antilapse statute may or may not apply to the substitute
8 beneficiary, depending on the circumstances. The Comment should be expanded
9 to note that, in determining intention, technical words are to be construed in
10 accordance with their technical meaning.

11 *Application of antilapse statute to future interests*

12 The Commission decided not to address by statute the question of application
13 of the antilapse statute to future interests. The matter should be left to case law
14 development.

15 **Prob. Code §§ 21133-21135. Ademption**

16 The Commission approved modernizing these provisions, consistent with the
17 Uniform Probate Code. In this connection, the staff should look at the new
18 Uniform Probate Code provision for a general presumption against ademption.

19 **Commission Comments for Rules of Construction**

20 The Commission approved the concept of bringing the old Commission
21 comments on rules of construction up to date and transporting them into the new
22 rules of construction. However, the staff should determine an appropriate
23 manner of bringing the revised Comments before the Legislature, for example by
24 making technical changes in all sections or by repealing and reenacting the entire
25 construction chapter.

26 **STUDY L-4004 – HEALTH CARE DECISIONS LAW: TECHNICAL REVISIONS**

27 The Commission considered Memorandum 2000-86, its First Supplement,
28 which presented a staff draft Tentative Recommendation on the *Health Care*
29 *Decisions Law: Technical Revisions*. The Commission approved the tentative
30 recommendation to be distributed for comment, subject to the revisions noted
31 below. The tentative recommendation should be distributed promptly so that
32 comments can be reviewed at the next Commission meeting, with a view toward

1 introducing legislation in the 2001 legislative session. The staff will have a bill
2 prepared to meet legislative deadlines.

3 **Health & Safety Code § 7100. Right to control disposition of remains**

4 The Comment to the amendment of subdivision (a)(1), which would shield
5 health care agents from automatic liability for disposition of remains, should
6 make clear that the liability limitation applies only to the person when acting as
7 agent and not in situations where the statute imposes liability based on some
8 other relationship.

9 **Prob. Code § 4659. Limitations on who may act as agent or surrogate**

10 The exception to the prohibition on health care workers acting as agents or
11 surrogates that applies where the patient and the employee are related by blood,
12 marriage, or adoption should be expanded to apply to registered domestic
13 partners.

14 **Issues for Future Study**

15 The staff's initial review of the statute in the Health and Safety Code
16 governing disposition of human remains indicates that it is not consistent with
17 the Probate Code provisions governing liability for funeral expenses. When time
18 permits, the staff should review the relationship of these two statutes and present
19 possible reforms to the Commission. Another issue that should be reviewed is
20 the application of the disposition and liability rules to registered domestic
21 partners.

22 **STUDY M-200 – CRIMINAL SENTENCING STATUTES**

23 The Commission considered Memorandum 2000-85, relating to
24 reorganization of criminal sentencing statutes. The Commission approved
25 preparation of a draft tentative recommendation along the lines indicated in the
26 memorandum, and made the following decisions:

- 27 (1) The proposed legislation should reserve Penal Code Sections
28 17000-17999 for criminal sentencing provisions.
- 29 (2) Proposed Penal Code Section 17000(b) should read: "Sentence
30 enhancements relating to weapons or injuries shall be located in
31 this title."
- 32 (3) The Comment to proposed Penal Code Section 17005 should only
33 refer to Comment language that is used in the commentary as

1 presently drafted. If other terminology is used in later
2 commentary, the Comment can be revised to include an
3 explanation of the additional terminology.

- 4 (4) The staff will request that legal publishers relocate existing
5 annotations when an existing provision is repealed and continued
6 without substantive change in a new provision.
- 7 (5) Proposed Penal Code Section 17010 will be revised to more closely
8 conform to Penal Code Section 1170(b).
- 9 (6) Where a sentence enhancement provision is located near the
10 substantive offense that it enhances, and the sentence enhancement
11 is deleted and continued in a new provision, it should be replaced
12 with a cross-reference to the new provision.
- 13 (7) The proposed heading, "Article 2. Enhancement for Use of
14 Weapon" will be renumbered as Article 3.
- 15 (8) The staff will compile data on problems caused by confusion
16 under the existing organization of sentencing provisions. These
17 problems should be emphasized in the preliminary part of the
18 draft tentative recommendation.
- 19 (9) The staff will request that the Commission's consultants on this
20 study publish articles in appropriate publications, informing
21 judges, prosecutors, and defense attorneys of the Commission's
22 study.

23 STUDY N-306 – ADMINISTRATIVE RULEMAKING CLEANUP

24 The Commission considered Memorandum 2000-90 and its First Supplement,
25 relating to technical cleanup of recent legislation affecting administrative
26 rulemaking procedure. The Commission approved distribution of the proposed
27 tentative recommendation, with the modification recommended by staff in the
28 supplement.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary