

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Authority of Court Commissioner

March 2003

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 31, 2003.****

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would repeal obsolete provisions of Code of Civil Procedure Section 259, such as those relating to notarial functions, fees, and official seals, of court commissioners. The recommendation would also harmonize the language of Section 259 relating to appointment of a court commissioner as temporary judge with the controlling constitutional provision.

This recommendation was prepared pursuant to Government Code Section 8298.

## AUTHORITY OF COURT COMMISSIONER

1 Code of Civil Procedure Section 259 prescribes powers of court commissioners.  
2 Various provisions of Section 259 are either obsolete or inconsistent with  
3 governing law. The Commission recommends corrective legislation to modernize  
4 the statute.

### OBSOLETE PROVISIONS

6 Code of Civil Procedure Section 259 has an ancient lineage, dating from 1872. It  
7 still includes provisions that suggest that the position of court commissioner is a  
8 county rather than a court position and is funded out of county rather than court  
9 funds.<sup>1</sup> The statute also purports to require a court commissioner to maintain an  
10 official seal distinct from that of the court.<sup>2</sup> And it suggests that a court  
11 commissioner performs notarial acts,<sup>3</sup> despite the fact that court commissioners no  
12 longer perform those functions. Rather, a court commissioner acts as a subordinate  
13 judicial officer.<sup>4</sup>

14 The provisions of Section 259 highlighted below are obsolete (or duplicative of  
15 other statutes<sup>5</sup>) and should be repealed:

#### **Code Civ. Proc. § 259. Court commissioners**

17 259. Subject to the supervision of the court, every court commissioner shall  
18 have power to do all of the following:

19 (a) Hear and determine ex parte motions for orders and alternative writs and  
20 writs of habeas corpus in the superior court for which the court commissioner is  
21 appointed.

22 (b) Take proof and make and report findings thereon as to any matter of fact  
23 upon which information is required by the court. Any party to any contested  
24 proceeding may except to the report and the subsequent order of the court made  
25 thereon within five days after written notice of the court's action. A copy of the  
26 exceptions shall be filed and served upon opposing party or counsel within the  
27 five days. The party may argue any exceptions before the court on giving notice  
28 of motion for that purpose within 10 days from entry thereof. After a hearing

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1. See Code Civ. Proc. § 259(i) (deposit of fees in general fund of county).

2. The statute also refers to the seal as “engraved” and requires that the seal identify the county where the commissioner resides rather than the county where the commissioner performs duties. Code Civ. Proc. § 259(j).

3. See Code Civ. Proc. § 259(d), (i), (k).

4. See Cal. Const. art. VI, § 22 (subordinate judicial functions).

5. Other statutes provide independent authority for a court commissioner to administer oaths and affirmations and take affidavits and depositions. See Code Civ. Proc. § 2093(a) (“every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths and affirmations”); Civ. Code § 1181 (listing various officers authorized to take proof or acknowledgment of an instrument, including court clerks, court commissioners, judges, district attorneys, county counsels, etc.).

1 before the court on the exceptions, the court may sustain, or set aside, or modify  
2 its order.

3 (c) Take and approve any bonds and undertakings in actions or proceedings, and  
4 determine objections to the bonds and undertakings.

5 **(d) Administer oaths and affirmations, and take affidavits and depositions**  
6 **in any action or proceeding in any of the courts of this state, or in any matter**  
7 **or proceeding whatever, and take acknowledgments and proof of deeds,**  
8 **mortgages, and other instruments requiring proof or acknowledgment for**  
9 **any purpose under the laws of this or any other state or country.**

10 (e) Act as temporary judge when otherwise qualified so to act and when  
11 appointed for that purpose, or by written consent of an appearing party. While  
12 acting as temporary judge the commissioner shall receive no compensation  
13 therefor other than compensation as commissioner.

14 (f) Hear and report findings and conclusions to the court for approval, rejection,  
15 or change, all preliminary matters including motions or petitions for the custody  
16 and support of children, the allowance of temporary spousal support, costs and  
17 attorneys' fees, and issues of fact in contempt proceedings in proceedings for  
18 support, dissolution of marriage, nullity of marriage, or legal separation.

19 (g) Hear actions to establish paternity and to establish or enforce child and  
20 spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

21 (h) Hear, report on, and determine all uncontested actions and proceedings  
22 subject to the requirements of subdivision (e).

23 **(i) Charge and collect the same fees for the performance of official acts as**  
24 **are allowed by law to notaries public in this state for like services. This**  
25 **subdivision does not apply to any services of the commissioner, the**  
26 **compensation for which is expressly fixed by law. The fees so collected shall**  
27 **be paid to the treasurer of the county, for deposit in the general fund of the**  
28 **county.**

29 **(j) Provide an official seal, upon which must be engraved the words "Court**  
30 **Commissioner" and the name of the county, or city and county, in which the**  
31 **commissioner resides.**

32 **(k) Authenticate with the official seal the commissioner's official acts.**

33 COURT COMMISSIONER AS TEMPORARY JUDGE

34 Subdivision (e) of Code of Civil Procedure Section 259 appears to authorize a  
35 court commissioner to act as a temporary judge on consent of a single party, in  
36 violation of the constitutional requirement of a stipulation of "the parties litigant."<sup>6</sup>

37 **California Constitution, Article VI, Section 21**

38 Article VI, Section 21, of the California Constitution provides for appointment  
39 of a temporary judge "on stipulation of the parties litigant." Cases applying the  
40 constitutional provision have approved appointment of a temporary judge without  
41 stipulation of any party. This has occurred where both parties are present in court,

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6. See Cal. Const. art. VI, § 21 ("On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.").

1 a temporary judge acts, and no one objects. In that circumstance there is an  
2 “implied” or “tantamount” stipulation.<sup>7</sup>

3 If only one party is before the court, the absent party may in some circumstances  
4 be presumed to have impliedly stipulated to a temporary judge.<sup>8</sup> This doctrine has  
5 its limits, however, and there are situations in which a temporary judge is not  
6 authorized to act without the stipulation of the absent party.<sup>9</sup>

7 **Code of Civil Procedure Section 259(e)**

8 Section 259(e) states that a court commissioner may act as a temporary judge  
9 “by written consent of an appearing party.” This provision appears to be consistent  
10 with the constitutional requirement that a temporary judge may be appointed “on  
11 stipulation of the parties litigant” — provided there is only one appearing party. If  
12 there is more than one appearing party, however, the language of Section 259(e)  
13 allowing a temporary judge on consent of “an” appearing party would appear to be  
14 inconsistent with the Constitution.

15 Until 1989, Section 259(e) was silent concerning the need for a stipulation to  
16 enable a court commissioner to act as a temporary judge. The matter was governed  
17 by the Constitution. In 1989 the provision was amended to provide explicitly that a  
18 court commissioner might:<sup>10</sup>

19 Act as a temporary judge when otherwise qualified so to act and when  
20 appointed for that purpose, or by written consent of the party appearing at the  
21 hearing where the action is either uncontested or the other party or parties are in  
22 default. While acting as temporary judge the commissioner shall receive no  
23 compensation therefor other than compensation as commissioner.

24 The 1989 language appears to have precisely captured the state of the law at the  
25 time. However, that language was believed to be defective because it was too  
26 narrowly drawn. Under it, a temporary judge could only be authorized where there  
27 was a hearing in open court at which a party gave written consent. This failed to

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7. See, e.g., *Walker v. San Francisco Housing Authority*, 100 Cal. App. 4th 685, 122 Cal. Rptr. 2d 758 (2002); *In re Brittany K.*, 96 Cal. App. 4th 805, 117 Cal. Rptr. 2d 813 (2002). A discussion of the implied stipulation doctrine appears in *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995).

8. See, e.g., *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 31 Cal. Rptr. 30 (1963) (defaulting party not a “litigant” within meaning of Constitution and therefore stipulation unnecessary); *Bill Benson Motors v. Macmorris Sales Corp.*, 238 Cal. App. 2d Supp. 937, 48 Cal. Rptr. 123 (1965) (party who had appeared in case but failed to appear for trial not a “litigant” within meaning of Constitution and therefore stipulation unnecessary).

9. See, e.g., *Yetenekian v. Superior Court*, 140 Cal. App. 3d 361, 189 Cal. Rptr. 458 (1983) (party who had appeared but refused to participate in trial for fear that participation would be construed as stipulation to temporary judge held to be a “party litigant” notwithstanding absence from courtroom); *Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194 (1984) (defaulting, nonappearing defendant who appears in post judgment proceeding may revoke implied stipulation to temporary judge for purpose of post judgment proceeding).

10. 1998 Cal. Stat. ch. 1105, § 5.

1 cover the case where there is written consent but no open court hearing because  
2 the matter is submitted by the parties in writing. By implication, a temporary judge  
3 could not act in that case.

4 The provision was further amended in 1990 to eliminate the court hearing  
5 requirement.<sup>11</sup> However, that amendment appears to state an overly broad  
6 standard:

7 (e) Act as a temporary judge when otherwise qualified so to act and when  
8 appointed for that purpose, or by written consent of ~~the party appearing at the~~  
9 ~~hearing where the action is either uncontested or the other party or parties are in~~  
10 ~~default~~ an appearing party. While acting as temporary judge the commissioner  
11 shall receive no compensation therefor other than compensation as commissioner.

12 In one sense, the overly broad statutory language is immaterial because it is the  
13 Constitution that controls. If two parties appear before the court and one does not  
14 give written consent to a temporary judge, the Constitution will preclude use of a  
15 temporary judge regardless of the language of Section 259(e) purporting to  
16 authorize a temporary judge on consent of “an” appearing party.

17 However, the statute on its face appears to restrict the traditional “implied  
18 consent” or “tantamount stipulation” doctrine of earlier cases. Moreover, the  
19 statute relies on a nebulous “appearing party” standard — it is not clear whether  
20 that language picks up prior case law giving a more expansive meaning to the term  
21 “party litigant.” Finally, the statute improperly suggests that the prescribed  
22 conditions under which a commissioner may act as a temporary judge are  
23 alternative rather than cumulative.

24 **Revision of Code of Civil Procedure Section 259(e)**

25 The Law Revision Commission recommends that the constitutional standard be  
26 substituted for the existing language of Section 259(e). The constitutional standard  
27 controls in any event, but a litigator should be able to find relevant controlling  
28 procedural detail in a logical place in the codes.

29 Section 259(e) would be amended to read:

30 **Code Civ. Proc. § 259 (amended). Court commissioners**

31 259. Subject to the supervision of the court, every court commissioner shall  
32 have power to do all of the following:

33 ...  
34 (e) Act as a temporary judge when otherwise qualified so to act and when  
35 appointed for that purpose, ~~or by written consent of an appearing party o n~~  
36 ~~stipulation of the parties litigant~~. While acting as temporary judge the  
37 commissioner shall receive no compensation therefor other than compensation as  
38 commissioner.

39 ...

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11. 1990 Cal. Stat. ch. 411, § 5.

1       **Comment.** Subdivision (e) of Section 259 is amended to replace the provision  
2 for appointment of a commissioner as temporary judge on written consent of an  
3 appearing party with the constitutional standard for appointment of a temporary  
4 judge. See Cal. Const. Art. VI, § 21. Under the Constitution, written consent is not  
5 required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re*  
6 *Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995).  
7 Under the Constitution, whether the stipulation of a party is required for  
8 designation of a temporary judge is determined by the party’s status as a  
9 “litigant,” not by whether the party is “an appearing party.” See, e.g., *Sarracino v.*  
10 *Superior Court*, 13 Cal. 3d 1, 529 P.2d 53, 111 Cal. Rptr. 21 (1974); *Barfield v.*  
11 *Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).





## PROPOSED LEGISLATION

1 **Code Civ. Proc. § 259 (amended). Court commissioners**

2 259. Subject to the supervision of the court, every court commissioner shall have  
3 power to do all of the following:

4 (a) Hear and determine *ex parte* motions for orders and alternative writs and  
5 writs of habeas corpus in the superior court for which the court commissioner is  
6 appointed.

7 (b) Take proof and make and report findings thereon as to any matter of fact  
8 upon which information is required by the court. Any party to any contested  
9 proceeding may except to the report and the subsequent order of the court made  
10 thereon within five days after written notice of the court's action. A copy of the  
11 exceptions shall be filed and served upon opposing party or counsel within the five  
12 days. The party may argue any exceptions before the court on giving notice of  
13 motion for that purpose within 10 days from entry thereof. After a hearing before  
14 the court on the exceptions, the court may sustain, or set aside, or modify its order.

15 (c) Take and approve any bonds and undertakings in actions or proceedings, and  
16 determine objections to the bonds and undertakings.

17 ~~(d) Administer oaths and affirmations, and take affidavits and depositions in any~~  
18 ~~action or proceeding in any of the courts of this state, or in any matter or~~  
19 ~~proceeding whatever, and take acknowledgments and proof of deeds, mortgages,~~  
20 ~~and other instruments requiring proof or acknowledgment for any purpose under~~  
21 ~~the laws of this or any other state or country.~~

22 (e) Act as a temporary judge when otherwise qualified so to act and when  
23 appointed for that purpose, ~~or by written consent of an appearing party o n~~  
24 ~~stipulation of the parties litigant.~~ While acting as temporary judge the  
25 commissioner shall receive no compensation therefor other than compensation as  
26 commissioner.

27 ~~(f)~~ (e) Hear and report findings and conclusions to the court for approval,  
28 rejection, or change, all preliminary matters including motions or petitions for the  
29 custody and support of children, the allowance of temporary spousal support, costs  
30 and attorneys' fees, and issues of fact in contempt proceedings in proceedings for  
31 support, dissolution of marriage, nullity of marriage, or legal separation.

32 (g) (f) Hear actions to establish paternity and to establish or enforce child and  
33 spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

34 (h) (g) Hear, report on, and determine all uncontested actions and proceedings  
35 subject to the requirements of subdivision (e).

36 (i) ~~Charge and collect the same fees for the performance of official acts as are~~  
37 ~~allowed by law to notaries public in this state for like services. This subdivision~~  
38 ~~does not apply to any services of the commissioner, the compensation for which is~~

1 expressly fixed by law. The fees so collected shall be paid to the treasurer of the  
2 county, for deposit in the general fund of the county.

3 (j) Provide an official seal, upon which must be engraved the words “Court  
4 Commissioner” and the name of the county, or city and county, in which the  
5 commissioner resides.

6 (k) Authenticate with the official seal the commissioner’s official acts.

7 **Comment.** Former subdivisions (d), (i), (j), and (k) of Section 259 are repealed as obsolete. It  
8 should be noted that repeal of these provisions does not preclude a court commissioner from  
9 administering an oath or affirmation, or from taking proof or acknowledgment of an instrument.  
10 See Code Civ. Proc. § 2093(a) (“every officer or person authorized to take testimony in any  
11 action or proceeding, or to decide upon evidence, has the power to administer oaths and  
12 affirmations”); Civ. Code § 1181 (listing officers authorized to take proof or acknowledgment of  
13 an instrument, including a court commissioner).

14 Former subdivision (e) is amended to replace the provision for appointment of a commissioner  
15 as temporary judge on written consent of an appearing party with the constitutional standard for  
16 appointment of a temporary judge. See Cal. Const. Art. VI, § 21. Under the Constitution, written  
17 consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re*  
18 *Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the  
19 Constitution, whether the stipulation of a party is required for designation of a temporary judge is  
20 determined by the party’s status as a “litigant,” not by whether the party is “an appearing party.”  
21 See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P.2d 53, 111 Cal. Rptr. 21 (1974);  
22 *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).