

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JUNE 2-4, 1983

SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on June 2-4, 1983.

Law Revision Commission

Present:	David Rosenberg, Chairperson	Roslyn P. Chasan
	Debra S. Frank, Vice Chairperson	Bion M. Gregory
	Robert J. Berton	Beatrice P. Lawson
Absent:	Barry Keene, Member of Senate	James H. Davis
	Alister McAlister, Member of Assembly	John B. Emerson

Staff Members Present

John H. DeMouilly	Nathaniel Sterling
Robert J. Murphy III	Stan G. Ulrich

Consultant Present

Garrett H. Elmore, Property Law, Involuntary Dismissal for Lack of Prosecution

Other Persons Present

Edward Bordin, Alameda County Bar Association, Castro Valley (June 4)
Charles Collier, State Bar, Estate Planning, Trust and Probate Law Section, Los Angeles
Theodore Cranston, State Bar, Estate Planning, Trust and Probate Law Section, San Diego (June 4)
Kenneth M. Klug, State Bar, Estate Planning, Trust and Probate Law Section, Fresno

ADMINISTRATIVE MATTERS

MINUTES OF MAY 5-6, 1983, MEETING

The Minutes for the May 5-6, 1983, Meeting were approved as submitted.

SCHEDULE FOR FUTURE MEETINGS

The following schedule was adopted for future meetings:

September 1983

September 22 (Thursday)	- 7:00 p.m. - 10:00 p.m.	San Diego
September 23 (Friday)	- 9:00 a.m. - 5:00 p.m.	
September 24 (Saturday)	- 9:00 a.m. - 4:00 p.m.	

October 1983

No meeting

November 1983

November 4 (Friday) - 7:00 p.m. - 10:00 p.m. San Francisco
November 5 (Saturday) - 9:00 a.m. - 4:00 p.m.

December 1983

December 9 (Friday) - 7:00 p.m. - 10:00 p.m. Sacramento
December 10 (Saturday) - 9:00 a.m. - 12:00 noon

1983 LEGISLATIVE PROGRAM

The Executive Secretary made the following report concerning the 1983
Legislative Program:

Enacted

1983 Stats. ch. 6 (Assembly Bill 29) - Emancipated Minors
1983 Stats. ch. 17 (Assembly Bill 28) - Disclaimers
1983 Stats. ch. 18 (Assembly Bill 31) - Bonds and Undertakings
1983 Stats. ch. 52 (Assembly Bill 69) - Vacation of Streets, Highways, and
Public Service Easements
Assembly Concurrent Resolution No. 2 - Authority to Study Topics

Sent to Governor

Assembly Bill 27 - Limited Conservatorships
Assembly Bill 53 - Nonprobate Transfers

Sent to Floor in Second House

Assembly Bill 24 - Missing Persons
Assembly Bill 30 - Claims Against Public Entities

Sent to Fiscal Committee in Second House

Assembly Bill 99 - Creditors' Remedies

Set for hearing in Second House

Assembly Bill 835 - Support After Death of Support Obligor (set for hearing
June 28)
Assembly Bill 26 - Division of Marital Property (set for hearing on June 28)
Assembly Bill 25 - Wills and Intestate Succession and Related Matters
(Comprehensive Statute) (set for hearing on June 28)
Assembly Bill 68 - Wills, Intestate Succession, and Related Matters
(Conforming Revisions) (set for hearing on June 28)

Passed by First House

Senate Bill 762 - Durable Power of Attorney for Health Care

Two-Year Bill

Assembly Bill 1460 - Liability of Marital Property for Debts

The Commission designated Commissioners Rosenberg and Gregory as a subcommittee to consider any substantive amendments to Assembly Bill 25 and Assembly Bill 68.

CONSULTANT CONTRACTS

The Commission authorized the Executive Secretary to make a contract with Professor Russell D. Niles, Hastings College of the Law, renewing his expiring contract to provide expert advice and information to the Commission's staff and at Law Revision Commission meetings on the subject of probate law, including but not limited to trusts. The contract should provide for travel expenses in attending Commission meetings and legislative hearings when this subject is discussed and for \$50 per day when attending a Commission meeting or legislative hearing. Authorized expenditures under the contract are not to exceed \$2,000.00.

STUDY F-660 - AWARDING FAMILY HOME TO SPOUSE
HAVING CUSTODY OF CHILDREN

The Commission considered Memorandum 83-35 and the First Supplement thereto, analyzing comments received on the tentative recommendation relating to awarding the family home to the spouse having custody of the minor children. After reviewing the comments the Commission concluded that it is not advisable to create a presumption in favor of awarding use of the family home to the custodial spouse.

Instead, the Commission requested the staff to prepare for Commission review a tentative recommendation that would codify the discretion of the court to make such an award, without a presumption in favor of the award. The codification should list factors for the court to consider in exercising its discretion, including the time, if any, required by the children to get over the trauma of the marriage dissolution, the economic hardship to the noncustodial spouse, the potential problems in assuring payments on and maintenance of the home, the relative cost of the home as opposed to the cost of alternative housing, and other relevant factors.

In connection with this recommendation, the staff should attempt to codify a presumption of decreased need or other provision to deal with

the case of cohabitation of the custodial spouse in the family home with another person. This would overrule the Escamilla case (127 Cal. App.3d 963, 179 Cal. Rptr. 842 (1982)). The staff should also investigate the possibility of giving the noncustodial spouse a family support credit for the reasonable rental value of the spouse's interest in the family home.

STUDY H-402 - DORMANT MINERAL RIGHTS

The Commission considered Memorandum 83-33 and the attached staff draft of a revised tentative recommendation relating to dormant mineral rights. The Commission approved the revised tentative recommendation to distribute for comment, with the following changes:

§ 883.220. Dormancy

The property tax assessment requirement should include payment of property taxes as well.

§ 883.250. Compensation for mineral right

This section should be replaced by a provision that if a dormant mineral right has substantial value, the court has discretion to require compensation for the mineral right or to dismiss the action conditioned on the mineral right owner recording a notice of intent to preserve the interest, upon a determination that to do so would be equitable, taking into account all the circumstances of the case, including the comparative values of mineral rights and development rights. For the purposes of this determination there is a rebuttable presumption that a dormant mineral right has no substantial value. The staff should examine the good faith improver statute for possible language.

STUDY H-500 - QUIET TITLE

The Commission considered Memorandum 83-32 and the attached staff draft of a tentative recommendation relating to the effect of the judgment in a quiet title or partition action. The Commission approved the draft to be distributed for comment.

STUDY H-510 - JOINT TENANCY AND COMMUNITY PROPERTY

The Commission considered Memorandum 83-36 analyzing comments received on the tentative recommendation relating to joint tenancy and community property. The Commission approved the recommendation for submission to the Legislature, with the following changes:

§ 745.310. Severance of joint tenancy

Subdivision (a) of this section should be revised to make clear that severance of a joint tenancy may be made by one joint tenant alone without joinder of all joint tenants. Subdivision (b) should be broadened to provide that any severance of a recorded joint tenancy must likewise be recorded to be effective.

§ 5110.440. Legal incidents of community property with right of survivorship

The statute should be revised so that community property with right of survivorship is not proportionately owned but is treated as community property for all purposes except disposition at death. At dissolution of marriage separate property contributions would be subject to reimbursement. At death the property would pass by right of survivorship, which should be statutorily defined to mean there is no right of testamentary disposition. The Comments should make clear that the property is community property and passes as community property without testamentary disposition and therefore receives community property tax treatment.

§ 5110.490. Transitional provision

The new statute should apply prospectively to property acquired after the operative date. As to property acquired before the operative date, existing law should continue to apply for a period of one year, during which time the parties can make any desired adjustments. After one year, the new statute would apply. The transitional provision should address the problem of funds added to an existing asset during the one-year interim, perhaps by continuing to treat the property as a whole under existing law until expiration of the one-year period.

STUDY J-600 - DISMISSAL OF CIVIL ACTIONS
FOR LACK OF PROSECUTION

The Commission considered Memorandum 83-34 along with a letter from the State Bar Committee on Administration of Justice (distributed at the meeting--copy attached as Exhibit 1) relating to dismissal of civil actions for lack of prosecution. After reviewing the concerns people had with the original Commission recommendation, the Commission decided to print a revised recommendation that includes the following changes from the original recommendation:

§ 583.210. Time for service of summons

The revised recommendation should not extend the time for service from three years to four. The existing three-year period should be retained.

§§ 583.230 and 583.340. Extension of time

These sections should be revised to provide for extension by oral stipulation made in open court if entered in the minutes or a transcript is made.

§ 583.250. Mandatory dismissal

The revised recommendation should include an express provision that the exceptions to the time periods provided by statute are exclusive. The commentary should explain that this express provision replaces the existing provision that the time periods are "jurisdictional." The "jurisdictional" language was only intended to preclude the courts from developing new exceptions.

§ 583.310. "Brought to trial" defined

The statute should not attempt to provide a procedure for or to define "brought to trial" for purposes of the dismissal statute. The matter should be left to case development.

§ 583.370. Extension where less than six months remains

The provision set out in Memorandum 83-34 relating to a six-month extension of the time to bring to trial where tolling has occurred within the last six months of the five-year period should be incorporated in the revised recommendation. The staff should continue to monitor pending cases and legislation relating to judicial arbitration and make any necessary adjustments.

§ 583.420. Time for discretionary dismissal

The recommendation should point out that one reason for extending the two-year discretionary statute to three years is the confusion the two-year statute has caused in conjunction with the three-year service statute.

STUDY L-640 - TRUSTS

The Commission concluded its consideration of the draft trust statute attached to Memorandum 83-17 and of the First Supplement to Memorandum 83-17. The Commission also considered Memorandum 83-37 relating to the duty to account and spendthrift trusts and Memorandum 83-43 relating to the scope and scheduling of the trusts study.

Scope of Trusts Study

The Commission concurred with the suggestion of the Commission's consultant, Professor Russell D. Niles, that the trusts study should involve a thorough review of areas such as spendthrift trusts, modification and termination of trusts, and liability for breach. The study should also include a careful examination of the old trust provisions in the Civil Code. Accordingly the overall revision of trust law will not be a part of the 1984 legislative program.

Spendthrift Trusts

The Commission approved, with revisions, the Tentative Recommendation Relating to Enforcement of Judgments Against Spendthrift Trusts that was attached to Memorandum 83-37. After the staff has revised this tentative recommendation to implement the Commission's decisions, it will be circulated for comment, and the comments received will be considered for the September meeting.

The Commission decided that payments to beneficiaries from any sort of trust should be subject to garnishment under a writ of execution. The trustee would be required to pay to the levying officer the same amount as would be withheld from earnings garnished under the Wage Garnishment Law. The creditor would be able to apply to the court under Code of Civil Procedure Section 709.010 to reach the remainder of the

beneficiary's interest in the case of a non-spendthrift trust. Payments to a beneficiary under a spendthrift trust would only be subject to the wage garnishment standard. The tentative recommendation should also make clear that the writ of execution would only reach payments in the form of cash or its equivalent.

Draft Statute

The Commission made the following decisions concerning the draft statute attached to Memorandum 83-17:

§ 4341. Duty to account annually to income beneficiary

The policy of requiring some sort of annual accounting was reaffirmed. The trustee would be able to satisfy this requirement by giving the income beneficiaries who have not waived the accounting either (1) a copy of income tax returns or (2) a statutory accounting.

The statutory accounting would be required to contain at least the following information: (1) A statement of receipts and disbursements of principal and income during the fiscal year of the trust, (2) an inventory of trust property at the end of the fiscal year of the trust, (3) the trustee's compensation for the fiscal year, (4) a statement of the right to petition for a court review of the accounting, and (5) the name and location of the appropriate court for filing a petition.

The statute should also make clear that a trustee who is also an income beneficiary has no duty to account to himself or herself. A beneficiary who receives an accounting that satisfies the statutory standard would still have the right to obtain further information under draft Section 4340. (See Exhibit 1, attached to the First Supplement to Memorandum 83-17.)

§ 4503. Repayment of trustee for expenses

This section should be redrafted to provide clearer and more comprehensive rules.

§ 4520. Personal liability of trustee on contracts

The provision protecting trustees from liability where the trustee reveals his or her representative capacity and identifies the trust was approved. It was suggested that trustees should be insulated in the same manner as corporate officers.

§ 4521. Personal liability of trustee arising from ownership or control of trust estate or for torts

The drafting of this section, derived from the UPC, should be improved.

§ 4524. Limitations on proceedings against trustees after accounting

This section should be revised to bar claims for breach one year after an interim or final accounting that fully discloses the subject of a claim. If a matter is not fully disclosed in an accounting, claims for breach would be barred one year after the beneficiary discovers the facts or reasonably should have discovered them. Subdivision (b) should be revised to substitute appropriate language for "disabled person."

§ 4525. Violations of trustee's duty

This section declaring violations of the trustee's duty to be fraud should be deleted. Its purpose is unclear. Remedies for breach of trust will be dealt with directly in the trust recommendation.

§ 4526. Presumption of undue influence and insufficiency of consideration

This section should make clear that it is a presumption affecting the burden of proof, unless cases under Civil Code Section 2235, from which draft Section 4526 was derived, consider it a conclusive presumption.

§ 4527. Mingling trust property

This section should be redrafted to provide a rule against commingling trust property.

§ 4528-4531. Measure of liability

The rules concerning the liability of trustees stated in these sections should be given additional study in cooperation with the consultant.

§ 4550. Certificate of appointment as trustee

This section should be revised to provide for certificates of incumbency under inter vivos trusts. As revised the section will recognize that a certificate is available only if the file shows the incumbency of the trustee applying for the certificate.

§ 4551. Trustee's bond

The provisions of existing law requiring a bond for a successor trustee not named in the trust should be continued. Subdivision (a)(2)

should be revised to make clear that a beneficiary may require a bond even if bond is waived in the trust.

§ 4552. Trustee's office not transferable

This section should be subject to an exception where the trust provides that the trustee's office is transferable.

§ 4560. Actions by cotrustees

The rule requiring cotrustees to act unanimously should be replaced by a rule that cotrustees may act by majority vote unless the trust provides otherwise. This will make the rule applicable to trusts the same as that provided for coexecutors under Probate Code 570.

§ 4570. Trustee's care and diligence in appointment of successor

As part of the study on modification of trusts, the staff should consider whether the trustee and beneficiaries should be able to select a successor trustee where the trust does not provide for a successor.

§ 4580-4585. Resignation and removal of trustees

This article should be reorganized in a more logical fashion. The revision of draft Section 4582, involving a new Section 4585, as set forth in the First Supplement to Memorandum 83-17, was approved. The redrafted article should restore language relating to removal of cotrustees which was inadvertently omitted from the draft statute.

§ 4602. Venue

In the case of testamentary trusts, venue should be located in the principal place of administration of the trust, and also in the court where the estate was administered.

§ 4603. Jurisdiction over parties

The language "in the proper county in any proceeding that is properly initiated" is unnecessary and should be deleted from both subdivisions of this section.

§ 4620. Grounds for petition

The determination of the validity of a trust provision should be added to the list of grounds for petitioning the court under this section. The introductory clause in subdivision (a) should be deleted to reflect the deletion of draft Section 4621.

§ 4621. Limitations in trust instrument

This section should be deleted since there is no convincing policy reason to permit the trustor to prevent interested persons from taking advantage of the special proceedings provided for determining issues relating to trusts and forcing them into a formal civil action.

§ 4622. Commencement of proceeding

The language "and under the terms of the trust" should be deleted from this section to reflect the deletion of draft Section 4621.

§ 4623. Dismissal of petition

Subdivision (b) relating to dismissal of proceedings to avoid disclosure of trust terms should be deleted.

§ 4624. Notice

The 30-day notice requirement should be shortened to 10 or 15 days to be consistent with other notice periods in the Probate Code. The hope was expressed that uniform notice periods could be provided in the Probate Code. Editorial suggestions were made respecting subdivision (a).

§ 4625. Orders and decrees

The word "property" should be "proper". It was also suggested that a better word than "proper" might exist.

§ 4626. Appeal

This section should include an appealable an order determining the validity of a trust provision.

§ 4627. Cumulative remedies

The Comment to this section should refer to formal civil actions as being an alternative to the proceedings under the article.

§ 4628. Legislative intent

This section should be deleted.

[§ 4629. Exception to filing fee for certain testamentary trusts]

The oral suggestion of a provision preserving the exception from the filing fee for formerly supervised testamentary trusts was disapproved.

§§ 4650, 4670. Application of chapter relating to transfer of trusts

The staff should research the meaning of subdivision (b) of draft Section 4650 and of draft Section 4670 with a view toward eliminating these provisions if they are unnecessary. These subdivisions preserve the law relating to transfer of trusts as it applied to trusts before the operative date of the statutes governing transfer.

§§ 4655, 4676. Notice

The notice periods in these sections should be standardized. The place to which notice is to be mailed should also be standardized, preferably in the general rules governing notice in trust proceedings. See draft Section 4072.

§ 4677. Order accepting transfer and appointing trustee

The sentence in the Comment to this section relating to findings should be deleted.

STUDY L-703 - DURABLE POWER OF ATTORNEY FOR HEALTH CARE

The Commission considered Memorandum 83-38 and Senate Bill 762 as amended in the Senate on May 24, 1983. Each amendment shown in the reprinted bill was reviewed and the staff suggestions in Memorandum 83-38 were considered. The following actions were taken:

Section 2412.5. Subdivision (d)(1) of Section 2412.5 was revised to read in substance:

(1) The attorney in fact has violated or has failed to or is unfit to perform the duty under the durable power of attorney for health care to act consistent with the desires of the principal.

Section 2430. The staff should check to see if the term "community care facility" is defined in the Health and Safety Code or other statute and that the term is broad enough to cover rest homes and the like. Senate Bill 762 should be revised so that it is clear what the term "community care facility" means.

Section 2432. The language set out on pages 2 and 3 of Memorandum 83-38 as a replacement for subdivision (a)(2) of Section 2432 was approved as a replacement for that paragraph. The effect of this change is to require the witnesses or notary public to make a declaration under

penalty of perjury "that the principal signed or acknowledged this durable power of attorney in my presence and that the principal appears to be of sound mind and under no duress, fraud, or undue influence."

Section 2436. This section, which allows the attorney in fact to examine the medical records or a summary of the same, was revised to include a provision that such right may be limited or restricted in the durable power of attorney.

Section 2437. Subdivision (d) of this section was revised to delete the words "as a matter of law." This deletion merely deletes unnecessary words and was not considered a substantive change.

Section 2438. This section, which provides the health care provider with immunity, is to be revised to make clear that the immunity does not apply if the health care provider does not give the attorney in fact sufficient reliable information to permit the attorney in fact to give informed consent and that the immunity does not affect liability for malpractice.

Section 2440. This section was discussed at some length. The Commission considered that the section was satisfactory, but there were several suggestions that the introductory clause should be deleted and inserted at the end of the section. This would be merely clarifying and would make no substantive change in the section.

STUDY L-800 - PROBATE LAW (PROBATE ADMINISTRATION)

The Commission considered Memorandum 83-41, relating to issues involved in opening probate. The Commission made the following policy decisions in this area:

(1) Informal opening. The Commission decided the existing California system of a formal opening of probate is preferable to the Uniform Probate Code's informal opening. The Commission noted that the formal opening is relatively quick and inexpensive and provides useful protections in the form of review of proofs of service by a judicial officer. It also offers the opportunity for an in rem proceeding.

(2) Publication of notice. The notice of opening of probate should be published only once; the main purpose of the notice is to inform creditors and to give the proceedings in rem effect, and for these

purposes one publication is sufficient; a single publication will also expedite probate, and in this connection the provision of Section 327 that allows extension of the time for a probate hearing to 45 days should be repealed. The notice should be published in a newspaper of general circulation in the county, rather than the city, in which the decedent resided; this will expedite probate since many times the newspaper in the city is only published weekly; it will also help reduce probate costs by enabling competition among publishers; and it will help avoid jurisdictional problems caused by confusion over boundaries of adjacent suburban cities. The size of type to be used should not be specified by statute but should be left to the discretion of the publisher; this will encourage competition and will avoid jurisdictional problems where the wrong type size is inadvertently used. The staff should recommend to the Commission specific suggestions for reducing the length of the published notice; however, the notice should identify any will being probated and indicate that the will is available for examination in the court file.

(3) Bond. The Commission decided to keep the existing California procedure that a bond is required unless waived by the will or by all heirs. This decision recognizes that the bond does provide useful protection in some cases where a bond might not be requested by an heir. The staff was directed to write to surety companies, probate judges, and the State Bar Probate Section for their experience on the protection actually afforded by the bond, including claims made and amounts actually recovered. The staff should also seek information concerning the number of estates administered intestate as opposed to those administered testate, since this could affect the final decision on bond requirements.

(4) Finality of Court Order. The statute should provide that a will may not be probated after an order for final distribution of the decedent's estate, in order to effectuate the in rem character of the proceeding.

STUDY L-810 - PROBATE LAW AND PROCEDURE
(INDEPENDENT ADMINISTRATION OF ESTATES)

The Commission considered Memorandum 83-40 and the attached staff draft of a Tentative Recommendation Relating to Independent Administration of Estates. The Commission made the following decisions:

Probate Code § 591.5. Objection to proposed action

An alternative should be added to permit an interested person to object to proposed action by delivering or mailing written objection directly to the executor or administrator. The objection would have to be received by the executor or administrator, or the attorney for the executor or administrator, before the proposed action is taken, whether the objection is personally delivered or mailed. If the executor or administrator desires to consummate the proposed action notwithstanding the objection, he or she shall submit it to the court for approval.

The staff should consider whether Section 591.5 should be qualified to provide that advice of proposed action is not binding on minors or incompetent persons who are not represented by a guardian or conservator, and whether advice given to one person might bind others under the doctrine of virtual representation. Cf. Prob. Code § 1215.1 (trusts).

Narrative Justification

The narrative explaining and justifying the recommendation should place more emphasis on the cost savings to be achieved by eliminating court supervision of real property transactions, considering the cumbersome nature and disadvantages of the overbid procedure.

Approval to Send Out Tentative Recommendation for Comment

The Commission approved the Tentative Recommendation as revised to be sent out for comment.

STUDY L-826 - PROBATE LAW AND PROCEDURE (PASSAGE OR
COLLECTION OF PROPERTY WITHOUT ADMINISTRATION)

The Commission considered Memorandum 83-39 and the attached staff draft of a Tentative Recommendation Relating to Passage or Collection of Property Without Administration. The Commission made the following decisions:

Probate Code § 630. Collection of decedent's estate by affidavit

The limitation of existing law that the affidavit procedure may be used only if the decedent owns no real property in California should be restored to the section. The maximum estate value for use of the affidavit procedure should be \$50,000, not \$100,000 as in the staff draft. Account funds collected under Section 630.5 should not be deducted from the estate value to bring it below the \$50,000 maximum. The staff should consider whether language needs to be added to Section 630 to make clear that funds on deposit in a financial institution are collectible under the section.

Language should be added to subdivision (b) to make clear that a transfer agent who relies on the affidavit and changes the registered ownership securities is immune from liability in so doing.

The recommendation should note that the Commission is giving further study to whether the affidavit procedure might be used to collect real property interests of small value.

Probate Code § 630.5. Collection of funds from bank account

Section 630.5 should be restored and revised to delete the maximum estate value, to apply the section to all financial institutions, not just banks, to provide that a cumulative maximum of \$50,000 may be collected by the surviving spouse from all of the decedent's accounts, and to provide that the affidavit shall state that if the surviving spouse collects funds on deposit the surviving spouse will not have received more than a total of \$50,000.

Probate Code §§ 649.1-649.5. Property passing to surviving spouse

The staff should consider whether there should be added to the provisions for passage of property to the surviving spouse without administration (Prob. Code §§ 202-206, to be recodified by AB 68 as Prob. Code §§ 649.1-649.5) a provision for collection by affidavit and for non-liability of a person paying or delivering property to the surviving spouse in reliance on the affidavit. Cf. Prob. Code § 631.

Probate Code § 655. Court order

Paragraph (3) of subdivision (b) of Section 655 should require the court's order to describe the property which does not pass to the surviving spouse and is therefore subject to administration.

Approval to Send Out Tentative Recommendation for Comment

The Commission approved the Tentative Recommendation as revised to be sent out for comment.

STUDY M-100 - STATUTE OF LIMITATIONS FOR FELONIES

The Commission considered Memorandum 83-31, along with letters received from Professor Uelmen and from the California District Attorneys Association (copies of which are attached to these minutes as Exhibits 2 and 3), relating to the staff draft of the tentative recommendation of the statute of limitations for felonies. The Commission approved the draft to distribute for comment, after making the following decisions:

§ 799. No limitations period for capital crimes

The Commission took no action on the proposal of the California District Attorneys Association that there be no limitation period for offenses that carry penalties of life or life without parole. The staff was directed to solicit from the Association a statement of reasons for this proposal and a listing of the crimes that would be affected by it.

§ 800. Six-year limitation period for felonies

The Commission rejected the suggestion of the California District Attorneys Association that the statute of limitations should commence to run when the crime is discovered on those crimes currently subject to this provision. The whole concept of extending the limitation period from three years to six is to achieve simplicity and to avoid uncertainty and litigation over tolling. The tentative recommendation must make this trade-off clear.

§ 801. One-year limitation period for misdemeanors and infractions

Subdivision (b), which provides for tolling when the defendant is not within the jurisdiction, was deleted. Instead, the statute of limitations should be satisfied when an arrest warrant that names the defendant is issued. See discussion of Section 803 (commencement of prosecution).

§ 802. Tolling of limitation period

With the change in Section 801 (misdemeanors and infractions), the introductory proviso of subdivision (a) should be limited to read, "Except as otherwise provided in subdivision (b)". Subdivision (b) should be revised to read:

(b) No time during which prosecution of the same person for the same conduct is pending in a court of this state is a part of a limitation of time prescribed in this chapter.

The Comment should note that prosecution in federal court does not toll the statute.

§ 803. Commencement of prosecution

Subdivision (a) should be phrased as one sentence rather than two.

The staff should revise subdivision (b) for consistency with the different procedural aspects of charging felonies and misdemeanors, taking into account the comments of Professor Uelman and of the California District Attorneys Association.

Subdivision (d) should be revised to delete the requirement that the arrest warrant be executed without unreasonable delay. Instead, the warrant must name the defendant. The staff was directed to develop language to cover the situation where the defendant has used aliases or where the name in the warrant identifies the defendant even though it is not literally accurate. The Comment should note that the statutory requirement is satisfied by an arrest warrant that names the defendant, but that constitutional protections may be applicable if the warrant is executed after an unreasonable delay.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

June 2-4, 1983



THE COMMITTEE ON
ADMINISTRATION
OF JUSTICE
OF THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 561-8220

June 2, 1983

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

ATTENTION: Mr. Nathaniel Sterling,
Assistant Executive Secretary

RE: Dismissal of Civil Actions for Lack of Prosecution

Gentlemen:

Mr. Sterling forwarded to the Committee on Administration of Justice your recommendation relating to dismissal of civil actions for lack of prosecution.

The Southern Section of the Committee discussed your recommendation at their meeting on May 31, 1983. The Northern Section has not as yet discussed the recommendation although it has been distributed to them and they have studied it. Accordingly, the comments in this letter of those of the Southern Section only. Time has not permitted us to submit these comments to the Board of Governors for their consideration; therefore, they are not the comments of the State Bar.

Section 583.210. The Southern Section is opposed to the extension of the three year service requirement to four years. It appears unnecessary to give reasons for their opposition as Mr. Sterling in his letter to me of March 14, 1983, said that the Commission has decided not to pursue this change.

Sections 583.230 and 583.340. These two sections deal, in different contexts, with the question of what type of documentation is necessary to prove a stipulation or agreement to extend the dismissal statutes. You propose in Section 583.230 that the parties may by written stipulation extend the time within which service must be made. The stipulation need not be filed, but if it is not filed the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

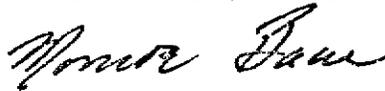
The Southern Section states that your proposal appears to eliminate the possibility of the parties actually appearing in court and agreeing on the record. They would like not to preclude this from happening. Accordingly, they recommend approving your two proposals regarding extensions, §§583.230 and 583.340, only if amended to encompass also an oral agreement between the parties made in open court and entered on the record.

Sections 583.250 and 583.360. These sections provide that the time limits are mandatory and not jurisdictional. The Southern Section noted the change and decided to make no comment on it.

Section 583.310. The Southern Section is opposed to your proposed new procedure by which an action may be "brought to trial" without swearing a witness or impaneling a jury. They believe that it would undermine the five year statute of CCP §583, and that it would give the court an easy way out of the situation. If enacted, they would expect the provision to be misused and abused by counsel. They feel that under the present statutes you are assured of being at the head of the list if you have a case with an expiring five year period. If your proposal were enacted, they believe one would no longer have assurance of being at the head of the list with a five year case. Under the present statutes, the court feels a responsibility to get the parties out to trial. Under your proposal, they believe there would be no pressure on the court to get such parties to trial.

If you have questions concerning the foregoing comments of the Southern Section of the Committee on Administration of Justice, I would be pleased to assist you.

Very truly yours,



Monroe Baer
Staff Attorney

MB:ec

cc: Patrick Hoolihan, Esq.
Jan Stevens, Esq.
Robert Holtzman, Esq.
Richard Mansfield, Esq.

**LOYOLA LAW SCHOOL**

May 27, 1983

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. DeMouilly:

I received Memorandum 83-31 and the tentative draft, and wanted to offer two brief comments for the Commission's consideration.

(1) I share your dissatisfaction with the potential for litigation posed by the concept of execution of an arrest warrant "without unreasonable delay." It may be preferable to simply permit commencement of prosecution for purpose of the statute of limitations by issuance of an arrest warrant, and leave any issues of the staleness of the warrant to be resolved as constitutional claims. See Jones v. Superior Court, 3 Ca.3d 734 (1970). The problem I foresee with that approach, though, is the potential for abusive use of "John Doe" warrants. Apparently, warrants can be, and with some frequency are, issued for persons whose identity is unknown, but matching a description provided by the victim. (5'10", 175 lbs., brown hair). To permit such a warrant to commence prosecution and stop the statute of limitations would defeat the whole purpose of the statute. Perhaps that problem could be avoided by providing that, in order to commence prosecution for the purpose of the statute of limitations, a warrant must name the defendant.

(2) I foresee a problem with the language of §803(b) of your draft. At present, the filing of a "complaint" commences the prosecution only for misdemeanors or unusual proceedings where the complaint is the accusatory pleading filed in superior court. The filing of a felony complaint in municipal court does not stop the statute. Your draft makes no distinction as to whether

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John H. DeMouilly
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the complaint is an accusatory pleading or not. The problem could be resolved by simply changing the language to: "(b) An accusatory pleading is filed." There is presently a definition of accusatory pleading in Penal Code §691(4).

The study which I completed for the Commission will be published in the October, 1983 issue of the Pacific Law Journal. Thank you for the suggestion.

Sincerely,



Gerald F. Uelmen
Professor of Law

GFU/eaf

HAND DELIVERED (6/3/83) via San Francisco DA's Office to
Bar Examiners Conference Room/State Bar Building - Site of
the meeting of the California Law Revision Commission.

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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916/443-2017

June 2, 1983



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STEVE WHITE

Nathaniel Sterling, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

Re: Study M-100: Statute of Limitations
for Felonies

We received only last week the tentative agenda for the June 2-4 meeting of the California Law Revision Commission. Given the limited time available we have found it impossible to adequately review the Statute of Limitations proposal and, in this regard, to communicate our views.

However, let me here express some preliminary thoughts:

1) It is our view that offenses which carry penalties of life or life without parole must be included with death as crimes for which no Statute of Limitations applies.

2) The "when discovered" triggering language should be retained in most or all offenses to which it currently applies.

3) The proposed Penal Code Section 803 deals with the definition of "Commencement of prosecution" as used in proposed Sections 799-805. The drafting of this Section appears to muddle some of the procedural aspects of charging. The terms used in this Section should be clarified to ensure proper application.

Whenever a Misdemeanor/Infraction Complaint has been filed, the prosecution of the misdemeanor/infraction has commenced. Therefore, the Section 803(b) reference to a complaint makes sense as to these offenses. However the subdivision should clarify the distinction between misdemeanor and felony complaints.

Whenever a Felony Complaint has been filed, the prosecution of the felony (and any transactionally related misdemeanors) has commenced. Does Section 803(b) encompass a Felony Complaint as well?

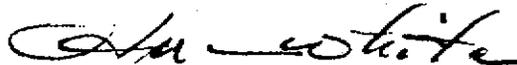
Section 803(b) also contains a reference to the Information. Since an Information cannot be filed unless preceded by the filing of a Felony Complaint, confusion may ensue as to whether "commencement" includes the Felony Complaint or only the filing of the Information after a preliminary hearing conducted upon the Felony Complaint. Since delay at the preliminary hearing stage could jeopardize the filing of the Information, it is important that the Felony Complaint commences the prosecution when filed.

Finally, we urge deletion of the "warrant be executed without unreasonable delay" requirement (subdivision (d)). As Memorandum 83-31, attached to the Commission Report, observes: "The staff is not satisfied with the concept of execution of an arrest warrant 'without unreasonable delay'. The concept will inject a litigation issue in every case in which an arrest is made beyond the Statute of Limitations".

We agree. The "without unreasonable delay" limitation should be deleted.

Thank you for the opportunity to express our views on this matter. If you or the Commission desire a further explication of these comments, please let me know.

Kindest regards,



STEVE WHITE
Executive Director

SW:mk

cc: Professor Gerald F. Uelman